No. 01-1447

United States Court of Appeals
for the
Sixth Circuit

BARBARA GRUTTER,
Plaintiff-Appellee,

v.

LEE BOLLINGER, et al.,
Defendants-Appellants,

and

KIMBERLY JAMES, et al.,
Intervening Defendants.

On Appeal from the United States District Court for the Eastern District of Michigan (Friedman, J.)

BRIEF OF AMICI CURIAE JUDITH AREEN, KATHARINE BARTLETT, ROBERT CLARK, MICHAEL FITTS, ANTHONY KRONMAN, DAVID LEEBRON, JOHN SEXTON, AND LEE TEITELBAUM (IN THEIR INDIVIDUAL CAPACITIES, AS DEANS OF, RESPECTIVELY, GEORGETOWN UNIVERSITY LAW CENTER, DUKE UNIVERSITY SCHOOL OF LAW, HARVARD LAW SCHOOL, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, YALE LAW SCHOOL, COLUMBIA LAW SCHOOL, NEW YORK UNIVERSITY SCHOOL OF LAW, AND CORNELL LAW SCHOOL) IN SUPPORT OF APPELLANTS' APPEAL FOR THE REVERSAL OF THE DISTRICT COURT'S ORDER

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

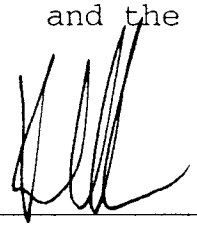
Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the Sixth Circuit Rules, Judith Areen, Katharine Bartlett, Robert Clark, Michael Fitts, Anthony Kronman, David Leebron, John Sexton, and Lee Teitelbaum make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No

   If the answer is YES, list the identity of such corporation and the nature of the financial interest: N/A



(Signature of Counsel

May 23, 2001
(Date)

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INTEREST OF AMICI CURIAE

Judith Areen, Katharine Bartlett, Robert Clark, Michael Fitts, Anthony Kronman, David Leebron, John Sexton, and Lee Teitelbaum are the Deans of, respectively, Georgetown Law Center, Duke Law School, Harvard Law School, University of Pennsylvania Law School, Yale Law School, Columbia Law School, New York University Law School, and Cornell Law School (collectively, "Law School Deans").

This brief is being submitted on behalf of the above-referenced law schools deans in their individual capacities, not by their law schools, which are listed for identification purposes only.[1] The Law School Deans want to explain why the ability to construct a diverse student body is a compelling interest and an essential part of the schools' academic freedom.

Each of the deans has firsthand experience of the benefits a diverse classroom setting can provide in the educational mission of a school. Although each school conducts its admissions process differently, the deans share a common belief in the importance of diversity: They all have seen that having a diverse student body benefits all students, of all races and backgrounds. For law schools especially, the deans think that racial and cultural diversity is crucial in order to prepare

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[1] The parties to this appeal have consented to the filing of this brief.

students to be effective and responsible lawyers and judges in an increasingly multi-racial and multi-ethnic world.

The Law School Deans have reached this determination about the value of diversity after substantial deliberation, and this view reflects their considered academic judgment. They ask this Court to respect their views as a matter of academic freedom. Just as the Law School Deans would oppose a court decision to force affirmative action on an unwilling law school as a matter of constitutional law, so too they oppose a decision (such as the one below) that forbids it. At stake in this case is the very freedom of an academic institution to act within reasonable bounds to further its educational mission.

Finally, the Law School Deans request the Court's consideration of their views because the district court's decision, if affirmed, may threaten directly the freedom of private colleges and universities that receive federal funds. Title VI of the 1964 Civil Rights Act prohibits schools that receive federal funds from impermissibly classifying on the basis of race. 42 U.S.C. § 2000d (1994). Because Title VI is generally interpreted symmetrically with the Fourteenth Amendment, see Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983), the ruling below about public law schools conceivably threatens the use of diversity by private institutions as well.

ARGUMENT

The Supreme Court -- from Brown to Bakke and Ambach to Adarand -- has recognized the uniqueness of education, and that recognition explains why it is constitutional for the University of Michigan Law School to consider racial diversity in its admissions process.[2]

I. DIVERSITY IS A COMPELLING GOVERNMENT INTEREST THAT UNIVERSITIES MAY CONSIDER IN THEIR ADMISSIONS PROCESSES.

The Law School Deans have reached the judgment that having a diverse student body fosters a particularly effective learning environment, contributes to the educational goals of their schools, and, ultimately, enhances the legal profession. In this judgment, they echo the conclusion reached by the American Association of Law Schools ("AALS"), a consortium of the nation's law schools:

> [Diversity creates] an educational community -- and ultimately a profession -- that incorporates the different perspectives necessary to a more comprehensive understanding of the law and its impact on society; and to assure vigorous intellectual interchanges essential for professional

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[2] See Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (describing education as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."); Ambach v. Norwick, 441 U.S. 68, 77 (1979) (quoting Brown, and describing "public schools as an 'assimilative force' by which diverse and conflicting elements in our society are brought together") (citation omitted)); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (same).

development. . . . In an increasingly multicultural nation with a global reach, a commitment to diversity . . . is economically necessary, morally imperative, and constitutionally legitimate.

AALS Statement on Diversity, Equal Opportunity, and Affirmative Action (1995).

A. BAKKE PERMITS LAW SCHOOLS TO CONSIDER RACE IN UNIVERSITY ADMISSIONS TO FURTHER DIVERSITY, AND ITS HOLDING HAS BEEN FOLLOWED BY COLLEGES, UNIVERSITIES, AND LAW SCHOOLS ACROSS THE NATION.

Justice Powell's opinion in Regents of University of California v. Bakke, 438 U.S. 265 (1978), makes clear that the district court's decision is wrong. In Bakke, four Justices (Brennan, Blackmun, Marshall, and White) found constitutional the special admission program used by University of California at Davis Medical School. Four Justices (Burger, Rehnquist, Stevens, and Stewart) found that the plan violated Title VI of the 1964 Civil Rights Act. And one Justice (Powell) held that the particular Davis plan at issue was unconstitutional, but that other affirmative action plans based on diversity were not. Five Justices -- the four led by Justice Brennan and Justice Powell -- signed on to Part V-C of Justice Powell's opinion, which in its entirety reads as follows:

> In enjoining [Davis] from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as

> enjoins [Davis] from any consideration of the race of any applicant must be reversed.

Id. at 320.

While, admittedly, this language is not a model of clarity, the district court below misread Bakke. First, the district court misread the positions of Justices Brennan and Marshall as unsupportive of the diversity argument developed in Justice Powell's opinion. Second, the court below ignored the Supreme Court's instruction in Marks v. United States, 430 U.S. 188 (1977), that the narrowest rationale among a fragmented Court serves as its holding. To understand why Justice Powell's conclusion is the narrower one, it is necessary to consider his opinion in detail.[3]

Justice Powell's opinion contains three important points, each of which bears on the instant case. First, he found that an affirmative action program based on diversity passes constitutional muster because it offers democratic and dialogic educational benefits to all students. Second, a university should not use a strict quota or a rigid set-aside in an attempt to enhance diversity; it must look instead to the whole person.[4]

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[3] See Akhil Amar & Neal Katyal, Bakke's Fate, 43 UCLA L. Rev. 1745 (1996).

[4] Justice Powell did not believe that diversity was a magical phrase that a university could incant to justify any admissions plan; indeed, Justice Powell voted to strike down the Davis program. The Justice wrote that the program's "fatal flaw" was

(continued . . .)

And, third, Justice Powell concluded that the Davis plan was unconstitutional because it ignored nonracial diversity: "No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, [non-minority students] are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats." Id. at 319.

Justice Powell's three arguments are tightly intermeshed. One reason that a university must not use a rigid quota is that doing so could lead the school to admit unqualified minorities, which would undermine the school's educational mission. Racial quotas could also hamper the university's ability to admit nonracially diverse students. And one reason that nonracial diversity is so important is to ensure that all students are exposed to people different from themselves, that is, to African-Americans who grew up in the inner-city, to Caucasian "farm boy[s] from Idaho," and to every permutation in between. Id. at 316.

The four Justices led by Justice Brennan, also supported the diversity rationale:

(continued . . .)
"its disregard of individual rights," because "[i]t tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class." Id. at 319, 320 (emphasis added).

> [T]he central meaning of today's opinions [is that] Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages . . . .
> . . .
> . . . Since we conclude that the affirmative admissions program at the Davis Medical School is constitutional, we would reverse the judgment below in all respects. [Justice Powell] agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.

Id. at 324-26 (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part & dissenting in part). These Justices then stated in a footnote: "We also agree with [Justice Powell] that a plan like the 'Harvard' plan is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." Id. at 326 n.1 (citation omitted).

In the final analysis, these four Justices affirmed in toto the broad Davis plan, whereas Justice Powell's approach did not. What these four Justices were arguing for was the far broader position that affirmative action was permissible when its "articulated purpose [was] remedying the effects of past societal discrimination." 438 U.S. at 362 (emphasis added). See Charles Fried, The Supreme Court, 1994 Term--Foreword: Revolutions?, 109 Harv. L. Rev. 13, 48 (1995).

Because the opinion signed by these four Justices announced a broader holding than the more narrow one of Justice Powell, Justice Powell's opinion serves as the holding of the Court. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks, 430 U.S. at 193 (quotation omitted). See also Reese v. City of Columbus, 71 F.3d 619, 625 (6th Cir. 1995).

Almost every court has read Justice Powell's opinion in Bakke to reflect the holding of the Court. See, e.g., Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 499 (10th Cir. 1998); Gratz v. Bollinger, 122 F. Supp. 2d 811, (E.D. Mich. 2000); Davis v. Halpern, 768 F. Supp. 968, (E.D.N.Y. 1991); DeRonde v. Regents of Univ. of Cal., 625 P.2d 220 (Cal. 1981); McDonald v. Hogness, 598 P.2d 707, 712-13 (Wash. 1979); cf. Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100, 103 (6th Cir. 1992); Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757, 763 (6th Cir. 1983).

Recently, the Ninth Circuit reiterated this conclusion. Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000). There, the district court had found that Justice Powell's opinion on diversity was "the holding of the Court," and upheld the Washington Law School's admissions plan. Id. at 1199. In

affirming the district court, the Ninth Circuit carefully applied the Marks analysis, and found that "Justice Powell's analysis is the narrowest footing," and that "virtually every point in Justice Brennan's opinion would establish broader grounds" for considering race. 233 F.3d at 1200.

In addition to numerous courts, the United States Department of Education has relied upon Justice Powell's opinion in Bakke in advising colleges and universities that admissions plans that foster diversity are not unconstitutional if they are narrowly tailored. See, e.g., Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756, 8762 n.11 (Dep't Education Feb. 23, 1994).

Literally hundreds of admissions plans (including those of amici) have been built around Justice Powell's opinion in Bakke. To declare, twenty-two years later, that these hundreds of colleges and universities -- which collectively have admitted hundreds of thousands of students since 1978 -- have been acting unconstitutionally would be a drastic change in the rules governing higher education admissions. It would plunge this Court into an area where practices are embedded and expectations have crystallized, and pose unforeseen risks and obstacles.

B. THE SUPREME COURT'S POST-BAKKE DECISIONS ESTABLISH THAT DIVERSITY IS A COMPELLING INTEREST IN UNIVERSITY ADMISSIONS.

Although the Supreme Court has not squarely addressed the diversity rationale in the admissions context since Bakke, its subsequent decisions make clear that this rationale supports a narrowly tailored admissions plan that considers diversity, including racial diversity.

1. The Supreme Court's Plurality Opinion and Justice O'Connor's Concurrence in Wygant Endorse the Diversity Rationale for Educational Institutions.

The Supreme Court's first major post-Bakke discussion of the diversity rationale occurred in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). In that case, the Court examined a school board's policy of retaining minority teachers over non-minority teachers in layoff decisions. Justice Powell, writing for a plurality, held that the plan violated the Equal Protection Clause, and that the role-model theory used to justify the plan had "no logical stopping point." Id. at 275. Unlike the educational diversity theory, the Court stated that role-modeling could apply in virtually every sector of life and seemed premised on segregationist, rather than integrationist, ideology. Id. at 267.

In a concurrence, Justice O'Connor sided with the Caucasian plaintiffs because the school had not relied on the "very different" and possibly winning rationale of promoting

diversity. Id. at 288 n.* (O'Connor, J., concurring). In doing so, she stated, citing Justice Powell's opinion in Bakke, that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." Id. at 286.

2. The Majority Opinion in Croson Does Not Limit Bakke.

Three years after Wygant, the Court reviewed a contracting set-aside in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The plan reserved for minority businesses thirty percent of the city's contracts for the installation of urinals and toilets in a city jail. Justice O'Connor's majority opinion found the plan unconstitutional because "perhaps the city's purpose was not, in fact, to remedy past discrimination," and because the program was not "narrowly tailored to remedy the effects of prior discrimination." Id. at 506, 508. Although she quoted different parts of Justice Powell's Bakke opinion, id. at 493-94, 497, 506, diversity simply was not an issue in the case.

Justice Stevens' opinion noted that Croson-like government contracts could be distinguished from Bakke-like educational benefits, stating that "the city makes no claim that the public interest in the efficient performance of

its construction contracts will be served" by the preference. Id. at 512 (Stevens, J., concurring in part & concurring in the judgment).[5]

3. The Court's Opinion in Metro Broadcasting Makes Clear that Racial Diversity Is a Constitutionally Permissible Goal, and Justice O'Connor's Dissent Was Confined to Government Contracts.

If there were any doubts about the constitutionality of a narrowly tailored diversity plan, the Court put them to rest in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). In that case, the Court considered the constitutionality of two programs adopted by the Federal Communications Commission ("FCC") that gave preferences to minority-owned firms. The Court's opinion, written by Justice Brennan, affirmed the programs and made two crucial points. First, it held that courts should defer to Congress because of Section 5 of the Fourteenth Amendment. Id. at 563. Second, it found the programs constitutional because racial preferences enhance diversity in broadcasting, just as they enhance diversity in education:

> Just as a "diverse student body" contributing to a " 'robust exchange of ideas" ' is a "constitutionally permissible goal" on which a race-conscious university admissions program may be predicated, Regents of

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[5] Then-Judge Ruth Bader Ginsburg, while on the D.C. Circuit, explicitly endorsed Justice Stevens' concurrence in Croson, and argued "that remedy for past wrong is not the exclusive basis upon which racial classification may be justified." O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring).

> University of California v. Bakke, 438 U.S. 265, 311-13 (1978) (opinion of Powell), the diversity of views and information on the airwaves serves important First Amendment values. Cf. Wygant v. Jackson Board of Education . . . The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience.

Id. at 567-68 (footnote omitted) (quotation omitted).[6]

A majority of the Court in Metro Broadcasting therefore affirmed what the Court held in Bakke -- i.e., that diversity, including racial diversity, is a constitutionally permitted goal.

On the facts of this contracting case, however, four Justices dissented. Justice O'Connor's dissent stated that "the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." Id. at 602 (O'Connor, J., dissenting). Read closely, however, it is clear that these broad words are confined to the contracting sphere.

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[6] Justice Stevens, concurring, found that the "public interest in broadcast diversity -- like the interest in an integrated police force, diversity in the composition of a public school faculty or diversity in the student body of a professional school -- is in my view unquestionably legitimate." Id. at 601-02 (Stevens, J., concurring) (footnotes omitted). He then added a footnote: "See Justice Powell's opinion announcing the judgment in Regents of University of California v. Bakke, 438 U.S. 265, 311-19 (1978)." Id. at 602 n.6.

Justice O'Connor's opinion discussed five troublesome features of affirmative action in the contracting case before her, none of which apply to educational diversity plans. First, she argued that the FCC's theory lacked a logical stopping point and appeared to call for strict racial proportional representation. Second, she noted that FCC licenses are "exceptionally valuable property," and that, "given the sums at stake, applicants have every incentive to structure their ownership arrangement to prevail in the comparative process" -- perhaps creating the possibility of fake figureheads. Id. at 630.

Third, Justice O'Connor emphasized that diversity of ownership may not provide diversity of programming. Explicitly invoking Justice Powell's opinion in Bakke, she argued that market forces shape programming so that station owners have limited control over content. Id. at 619. Fourth, she found the FCC licensing scheme problematic because it operated by "identifying what constitutes a 'black viewpoint,' . . . and then using that determination to mandate particular programming." Id. at 615.[7]

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[7] By contrast, a proper admissions plan does not assume that there is only one way to be "Black" or "Asian." An African-American follower of William Kristol or Colin Powell is no less authentically African-American than an adherent of Madeleine Albright or William Julius Wilson. Justice Powell's Bakke (continued . . .)

Fifth, Justice O'Connor attacked what she referred to as the FCC's "racial classifications." Id. at 617-18. These words reference her earlier excoriation of the FCC policy as a "direct[] equat[ion of] race with belief and behavior, for they establish race as a necessary and sufficient condition [for] securing the preference." Id. By using the terms "equation" and "sufficient," the Justice was taking issue with the crude view that race alone -- without consideration of the whole person -- is enough to presume that one has a certain set of beliefs. This type of wooden "racial classification" or stereotyping the FCC used, "may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit." Id. at 604.

Justice O'Connor's dissent is important for at least two additional reasons. First, she never repudiated Bakke. Indeed, in the course of explaining why Bakke cut against the FCC, she thrice explicitly cited with approval Justice Powell's Bakke opinion. Id. at 619, 621, 625.

Second, Justice O'Connor made clear, again citing Justice Powell's opinion in Bakke, that "race-conscious measures might

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(continued . . .)
Appendix pointedly quoted Harvard's recognition of the importance of intra- as well as inter-racial diversity. See Bakke, 438 U.S. at 324 (appendix to the opinion of Powell, J.).

be employed to further diversity only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body." 497 U.S. at 621; see also id. at 625 (citing Justice Powell in Bakke for the notion that government may not allocate benefits "simply on the basis of race" (emphasis added)).[8]

At bottom, Justice O'Connor's analysis tracks Justice Powell's approach in Bakke: When the government makes a decision based solely on race, that action violates equal protection. Specifically, her language attacked a program in which race was widely equated -- categorically or stereotypically -- with viewpoint, and sufficient, by itself, to win massive government largesse. But her language favors those plans that award preferences to applicants in the manner authorized by Bakke, that is, a manner that considers race as one factor among many and looks to the applicant as a whole person.

This distinction explains why, in Wygant, Justice O'Connor stated that "a state interest in the promotion of racial

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[8] Moreover, in her dissent, Justice O'Connor did not disavow or even qualify her statements in Wygant, and some of her most powerful language in Metro Broadcasting -- about "racial hostility" often engendered by nonremedial affirmative action -- came from the exact passage of her earlier Croson opinion, where she cited Justice Powell. See Croson, 488 U.S. at 493-94 (citing Bakke, 438 U.S. at 298 (Powell, J.)).

diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." Wygant, 476 U.S. at 286 (O'Connor, J., concurring) (citing Justice Powell's opinion in Bakke). Although the diversity rationale does not justify rigid set-asides, it is sufficiently compelling to uphold the use of race as a "consideration" or a "plus" in admissions. Justice O'Connor has pursued similar distinctions between classification by race and consideration of race in other cases.[9]

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[9] In a 1987 Title VII case, for example, Justice O'Connor approved an affirmative action plan in which gender was used only as a " 'plus' factor," and explicitly distinguished plans that select individuals "solely" on the basis of sex. Johnson v. Transp. Agency, 480 U.S. 616, 656 (1987) (O'Connor, J., concurring in the judgment).

Two years later, in her plurality opinion in Croson, Justice O'Connor used precise language in condemning Richmond's "rigid rule" denying Caucasians "the opportunity to compete for a fixed percentage of public contracts based solely upon their race." Croson, 488 U.S. at 493.

Similarly, in the 1993 voting rights case, Shaw v. Reno, 509 U.S. 630 (1993), Justice O'Connor, writing for a majority, declared it "antithetical to our system of representative democracy" when "a district obviously is created solely to effectuate the perceived common interests of one racial group." Id. at 648 (emphasis added). Yet her opinion for the Court noted the permissibility of taking race into consideration, stating that "the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors," and that "[t]hat sort of race consciousness does not lead inevitably to impermissible race discrimination." Id. at 646 (emphasis original). See also (continued . . .)

Justice O'Connor's distinction between classification and consideration defines the constitutional parameters for the government's use of race. Indeed, the Supreme Court's most recent voting rights case, Hunt v. Cromartie, 121 S. Ct. 1452 (2001), confirms this distinction. Several times in the opinion, the Court states that it is constitutional when race is "a motivation for the drawing of a majority minority district," so long as it is not "the 'predominant factor' motivating the legislature's districting decision." Id. at 1458 (quotations omitted) (emphasis added). The Court also recognized that because decision-makers are often aware of racial demographics, it would be unrealistic and unwise to force such decision-makers to try to disregard such information. Id. at 1464.

Similarly, university admissions officers often know the race of applicants. But they also have a host of other information about applicants, such as their academic achievements and geographic location. Forcing these decision-makers to ignore relevant racial information risks the loss of

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(continued . . .)
Miller v. Johnson, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring) (stating that majority opinion "does not throw into doubt the vast majority" of the districts because "States have drawn the boundaries in accordance with their customary districting principles. . . . even though race may well have been considered in the redistricting process").

diversity and other educational benefits for the entire student body.

4. Although Adarand Imposes Strict Scrutiny, It Leaves in Place the Diversity Rationale of Bakke and Its Progeny.

In the Court's most recent contracting case, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995), the Court overruled the first portion of its holding in Metro Broadcasting (which held that federal contracting should receive only intermediate scrutiny from the judiciary), and imposed a strict scrutiny test for these set-aside programs.

But adoption of the strict scrutiny analysis does not require race neutrality. Quite the contrary. The Adarand Court made clear that "strict scrutiny does take 'relevant differences' into account." Id. at 228 (emphasis original). It explicitly rejected the notion that strict scrutiny is "strict in theory, but fatal in fact." Id. at 237 (citation omitted). The Court noted that affirmative action may be justified by the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." Id. Thus, even under the Court's strict scrutiny analysis, judges could distinguish between a race-conscious "No

Trespassing" sign and a race-conscious "welcome mat." Id. at 229 (quotation omitted).[10]

Given the Court's appreciation of "relevant differences," it is not surprising that the Court did not overrule Bakke. Indeed, Justice Stevens' dissent pointed out -- in words unchallenged by the majority -- that the decision said nothing about "fostering diversity," because the issue was not even "remotely presented," and that he did "not take the Court's opinion to diminish that aspect of [the Court's] decision in Metro Broadcasting." Id. at 258 (Stevens, J., dissenting).[11]

* * *

The Supreme Court has never explicitly overruled Bakke, and, under well established general principles, it remains binding precedent for all lower courts, state and federal.[12] As

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[10] In fact, only two Justices, Thomas and Scalia, stated their belief in absolute color-blindness. Id. at 239 (Scalia, J., concurring in part & concurring in the judgment); id. at 240-41 (Thomas, J., concurring in part & concurring in the judgment).

[11] One court, however, has chosen to read Adarand so to require race neutrality, see Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), but this decision is simply wrong, see Hopwood v. Texas, 84 F.3d 720, 722 (5th Cir. 1996) (opinion of Politz, C.J., dissenting from denial of rehearing en banc).

[12] As this Court has stated, "While we understand that changes in Court personnel may alter the outcomes of Supreme Court cases, we do not sit as fortune tellers, attempting to discern the future by reading the tea leaves of Supreme Court alignments." Columbia Natural Resources v. Tatum, 58 F.3d 1101, 1107 n.3 (6th Cir. 1995). See also Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

this Court has observed, Bakke stands for the proposition that "affirmative action admission programs of educational institutions may take race into account, but racial quotas are prohibited." Oliver, 706 F.2d at 763.

5. Government Contracting and Law School Admissions are Inherently Different.

The differences between government contracting and law school admissions are numerous and profound -- and that is precisely why these two spheres have been treated differently by the Supreme Court. As an initial matter, government contracts are susceptible to fraud because contracts may be awarded to "minority" firms where minorities are not the true contractor or are present only as corporate fronts. By contrast, the opportunities for fraud in education are constrained by guidance counselors and parents, as well as by the law school itself. In addition, a wider range of people benefits from preferences in education than from contracting set-asides, which often help one particular firm, oftentimes the one well-off or well-connected. Also, contracts are awarded to people throughout their adult years and have "no logical stopping point." University education, however, typically occurs early in life and then ends. Law school education can be a ramp up to a level playing field -- with no further affirmative action -- for the rest of one's future.

But the most important difference remains diversity: Contracting set-asides mean that "minority firms" win some projects, and "Caucasian firms" do not, with the possible effect of balkanizing the races. Moreover, set-asides can be awarded to wholly non-integrated firms, and, thus would not help bring Americans together.

In sharp contrast, education unites people from different walks of life. And, integrated education advantages all students in a distinctive way, by bringing rich and poor, black and white, urban and rural, together to teach and learn from each other as democratic equals.

C. DIVERSITY IS A COMPELLING INTEREST IN LAW SCHOOL ADMISSIONS BECAUSE IT FURTHERS THE EDUCATIONAL MISSION AND BENEFITS ALL STUDENTS.

Justice Powell's opinion in Bakke struck the right balance: Considerable evidence supports the proposition that diversity is a compelling interest. The Association of American Universities, a consortium of 62 leading research universities, and the American Association of State Colleges and Universities have reached the same conclusion about the importance of racial diversity. See American Association of State Colleges and Universities, Policy on Racism and Campus Diversity (1989) ("fostering diversity and respect for difference is a fundamental goal of higher education and should be among the highest priorities of every university"); see also Association

of American Universities, On the Importance of Diversity in Higher Education (1997).

As the Supreme Court held almost half a century ago, education is "the very foundation of good citizenship," and "a principal instrument in awakening the [student] to cultural values," preparing her for participation as a political equal in a pluralist democracy. See Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). And, as to legal education, the United States Supreme Court stated a fundamental truth in Sweatt v. Painter:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

339 U.S. 629, 634 (1950) (quoted by Justice Powell in Bakke, 438 U.S. 314).[13]

What was true in Bakke about medical school applies with even greater force to the study of law, which is all about understanding different points of view and preparing students

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[13] And numerous studies show how diversity furthers the educational mission of law schools. E.g., Gary Orfield & Dean Whitla, The Civil Rights Project, Harvard University, Diversity and Legal Education (1999) (finding, after extensive analysis of Harvard and Michigan Law Schools, that diversity is important to the educational experience); Expert Report of Robert Webster at 4-5 (same); Gurin Expert Rep. at 15 (same); Expert Report of Derek Bok at 5-6 (stating that without consideration of race,

(continued . . .)

for citizenship in a national and global community. A school admits students, in large part, so that they will be teachers to other students. LSAT scores and grades are a proxy for a student's potential to teach other students, but, often, an applicant's background and life experience are essential components of this potential. Integrated legal education benefits students of all races and ethnicities, including Caucasian students, by providing a space for people of all races to grow together. See Anthony T. Kronman, Is Diversity a Value in American Higher Education?, 52 Fla. L. Rev. 861, 865 (2000). If a sprawling democratic republic as diverse and divided as 21st century America is to flourish, it must develop some common spaces where people from different segments of society can come together to learn how others live, how others think, and how others feel. Our nation's law schools are, and should continue to be, one such space.

II. THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE IT THREATENS ACADEMIC FREEDOM.

There is an additional, independent reason why the district court's opinion should be reversed: it threatens to replace the considered academic judgment of law school faculties and deans

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(continued . . .)
African-Americans would become an extremely small percentage of the student body at premier law schools).

with its own policy judgment, in direct contravention of the First Amendment. As the Supreme Court has observed,

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . .The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, rather than through any kind of authoritative selection."

Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (alteration omitted).

Academic freedom raises particular concerns when the freedom at issue is not the individual speech of a teacher, but the autonomy of educational institutions to set academic policy decisions. As this Court has recognized:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . [T]he autonomous decision making of the College must be considered when balancing the parties 'respective interests.'"

Bonnell v. Lorenzo, 241 F.3d 800, 822, 823 (6th Cir. 2001) (quoting Sweezy, 354 U.S. at 250, and Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985)). See also Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1188-89 (6th Cir. 1995); Parate v. Isibor, 868 F.2d 821, 826 (6th Cir. 1989) Doherty v. S. Coll. of Optometry, 862 F.2d 570 (6th Cir. 1988).

Academic freedom is a critical factor when reviewing university admission programs -- as Justice Powell's opinion in Bakke makes clear. In discussing the diversity rationale, Justice Powell built on Justice Frankfurter's invocation of the "'four essential freedoms that constitute academic freedom,'" one of which is "'who may be admitted to study.'" Bakke, 438 U.S. at 312 (quoting Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring in the result)). See also id. at 312 ("The freedom of a university to make its own judgments as to education includes the selection of its student body."). And Justice Powell explicitly stated that such an interest applied to legal education, citing Sweatt v. Painter for the proposition that "our tradition and experience lend support to the view that the contribution of diversity is substantial." Id., at 313.[14]

Academic freedom takes on an even greater significance in the context of this case because the people of the State of Michigan have enshrined the concept of institutional academic autonomy in their Constitution. See Mich. Const. art. VIII, § 5. Indeed, Michigan enacted the first constitutional

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[14] In Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985), the Court invoked Justice Powell's discussion of academic freedom in Bakke to explain that "autonomous decision-making by the academy itself" is necessary for such freedom to thrive.

provision for the separate government of its state university in its 1850 Constitution. Mich. Const. of 1850, art. XIII, §§ 6-8. Because the state university is constitutionally autonomous from the government, separation of powers principles prevent the state legislature from interfering with its autonomy, except in rare circumstances. "The Michigan courts have consistently construed the provision as a prohibition against all attempts by the legislature to interfere with the academic management of the university." J. Peter Byrne, Academic Freedom: A "Special Concern of The First Amendment", 99 Yale L.J. 251, 327 (1989).[15]

Federal court interference would be an even more drastic interference as it would pit the power of the federal judiciary against a state actor with special constitutional significance, the University of Michigan. The Supreme Court has warned that suits for equitable relief against state officials will fail when the relief "implicates special sovereignty interests." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997) (quotation omitted); see also MacDonald v. Vill. of Northport,

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[15] For example, Michigan courts have held unconstitutional legislative efforts to force appointments to faculty positions, People v. Regents of Univ. of Mich., 18 Mich. 469 (1869); People ex. rel. Drake v. Regents of Univ. of Mich., 4 Mich. 98 (1856); to control the placement of departments, Sterling v. Regents of Univ. of Mich., 68 N.W. 253 (Mich. 1896); to require divestiture of securities related to South Africa, Regents of Univ. of Mich. v. State, 419 N.W.2d 773 (Mich. Ct. App. 1988); and to tie (continued . . .)

164 F.3d 964, 971-73 (6th Cir. 1999) (same). As the Court has stated, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984). Indeed, the Supreme Court has often forced federal courts to abstain from rendering judgment when a state constitutional provision is implicated, preferring the state courts to decide the issues first. See, e.g., Reetz v. Bozanich, 397 U.S. 82, 87 (1970).

But the district court ignored these long-standing principles and substituted its generalist judgment for that of expert state university administrators,[16] and, in doing so,

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(continued . . .)
substantive conditions to specific appropriations, State Bd. of Agric. v. State Admin. Bd., 197 N.W. 160 (Mich. 1924).

[16] This is evidenced by the trial court's second-guessing of the University's belief that diversity benefits the educational mission, as well as its belief that "the connection between race and viewpoint is tenuous, at best." Slip op. at 25. As one scholar has explained, if the district court's view is affirmed, the judiciary "will not only be substituting its untested judgment for the classroom experience of teachers across the nation[, it] will also enmesh the courts in an impossible effort to disentangle the relationship between racial diversity and viewpoint diversity -- a relationship that, as recent voting rights decisions show, is best defined by the political process." Jeffrey Rosen, Without Merit, New Republic, May 14, 2001, at 20.

encroached upon protected academic freedoms.[17] Although intervention is appropriate when a school enacts a rigid race-based classification, it has no place when a school adopts an admissions policy that merely uses race as one factor, as approved in Bakke.[18] As one court succinctly stated, "Academic institutions are accorded great deference in their freedom to determine who may be admitted to study at the institution. As long as admissions standards remain within constitutionally permissible parameters, it is exclusively within the province of higher educational institutions to establish criteria for admissions." Martin v. Helstad, 578 F. Supp. 1473, 1482 (W.D. Wis. 1983) (citations omitted) (citing Bakke and Sweezy).

Although one cannot predict whether an affirmance of the decision below will cause educational institutions to increase

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[17] Of course, academic freedom is not absolute. In circumstances of clear and purposeful discrimination motivated by animus, or perhaps in situations where Congress has spoken clearly about the appropriateness of intervention into university affairs in a specific area, it may be appropriate for federal courts to substitute their judgment against academic administrators. See Washington v. Davis, 426 U.S. 229, 244-45 (1976); cf. Kathleen M. Sullivan, After Affirmative Action, 59 Ohio St. L.J. 1039 (1998).

[18] The Law School Deans, of course, do not mean to suggest that other forms of diversity are not appropriate as well. Had the court below enjoined law schools from preferring, as one factor among many, an applicant's religion, geography, undergraduate major, undergraduate institution, or other similar criteria from being considered in the admissions process, the Law School Deans would raise the same First Amendment concern.

or to decrease their reliance upon the limited quantitative standards of merit, it would be inappropriate for the courts to determine for these institutions the weight that should be accorded such standards during the admission process.[19] Allowing educational institutions to consider, as they deem appropriate, a broad range of relevant criteria is completely consistent with their educational mission and the principles of academic freedom.

Some institutions may decide to reduce or eliminate altogether their reliance on quantitative standards of merit, in order to achieve the educational benefits of diversity. Others, of course, may decide otherwise. But such choices should be left to universities, not to federal courts.

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[19] See Grutter v. Bollinger, et al., No. 97CV75928-DT, 2001 WL 293196, at *26 (E.D. Mich. Mar. 27, 2001) (criticizing appellants for not "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores, using a lottery system for all qualified applicants, or a system whereby a certain percentage of the top graduates from various colleges or universities are admitted"); id. at *43("One such solution may be to relax, or even eliminate, reliance on the LSAT."); id. at *44 ("Another solution may be for the law school to relax its reliance on undergraduate GPA.").

CONCLUSION

For these reasons, the Law School Deans respectfully request this Court to reverse the district court's decision below.

Respectfully submitted,

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May 23, 2001

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Pursuant to Rules 29 and 32 of the Federal Rules of Appellate Procedure and to Rule 32 of the Sixth Circuit Rules, the undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C).

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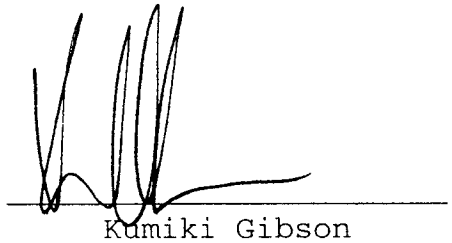

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I hereby certify that, on this 23rd day of May, 2001, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the Sixth Circuit Rules, I caused a copy of the foregoing Brief of Amici Curiae, Judith Areen, et al., In Support of Appellants' Appeal for the Reversal of the District Court's Order, to be filed with:

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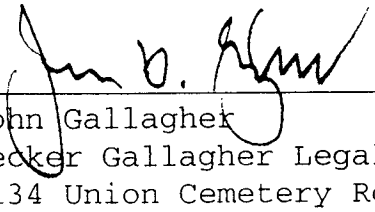

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