No. 02-241

In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF AMERICAN LAW DEANS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

The American Law Deans Association (ALDA) is a voluntary membership organization comprised of 171 persons who are currently deans of accredited law schools in the United States. The membership voted unanimously to authorize this brief.[1]

Each member of ALDA is a sitting dean responsible for the design and implementation of admission policy at his or her law school. This responsibility is typically exercised in conjunction with a faculty committee and a director of admissions, and at many schools the full faculty is consulted on major policy changes. Admission policy is of such great importance that at most schools the dean is personally and actively involved in its determination. ALDA members are acutely aware of the competing policy goals and diverse institutional missions that affect admission policy at each law school, and they have learned from experience and from trial and error what works in admissions and what does not work.

SUMMARY OF ARGUMENT

Law schools consider race and ethnicity in admissions for a web of interconnected reasons. They do not consider race to achieve racial balance; few if any law schools have minority enrollments that approach minority proportions in the population. Instead, the issue is the harm to legal education, to the schools as institutions, and to society, if disadvantaged minority groups are substantially excluded from legal education.

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[1] No attorney for any party drafted any part of this brief. No person or organization other than amicus and its counsel made any monetary contribution to the preparation or submission of this brief. Respondent Jeffrey Lehman is a member of the Association, and he has paid dues of $100 per year to support the general purposes of the Association. This brief is filed with consent of all parties.

Minority representation contributes importantly to diversity of experience and perspective within the student body. Racial diversity eliminates racial identifiability; racial identifiability is important evidence of segregation and discrimination, both in this Court's opinions and in public opinion. Considering race and ethnicity in admissions alleviates past and present inequalities and discrimination in public education at the elementary, secondary, and undergraduate levels. Diversity, desegregation, and past discrimination are doctrinally distinct, but factually, they are deeply interconnected.

Public law schools especially have a compelling interest in serving all the populations of their states. States with large minority populations have a compelling interest in educating a leadership class within those populations.

A crucial point in this brief is that explicit consideration of race protects the compelling interest in selective admission standards. The race-neutral methods suggested by the United States, such as percentage plans and other alteration of admission criteria, achieve far less diversity and do far more harm to academic standards. In a properly administered affirmative action plan, all applicants are evaluated on the academic criteria that best serve each school's academic mission, and race is considered only at the margin. The methods proposed by the United States require admission committees to disregard most of what they know about applicants, and to change admission criteria across the board and for the worse. Moreover, on Petitioner's theory of the case, these race-neutral substitutes are themselves unconstitutional. The logical consequence of Petitioner's position is that no government official can take any action for the conscious purpose of assisting disadvantaged racial minorities.

This brief focuses on the problems of law schools, but much of its analysis of the interests at stake, and especially its analysis of percentage plans, applies to *Gratz v. Bollinger* as well.

ARGUMENT

I. CONSIDERATION OF RACE IN LAW SCHOOL ADMISSIONS SERVES MULTIPLE COMPELLING INTERESTS.

Law schools consider race in admissions for a web of interconnected reasons. All these reasons relate to the harsh fact that if they could not consider race, they would have very few students from disadvantaged minority groups. Among the 75,549 persons who took the Law School Admission Test (LSAT) and applied to at least one law school in 2000-01, there were only 8,488 blacks, 2,986 Hispanics, and 563 Native Americans.[2]

The absence of disadvantaged minorities is far more severe at the highest levels of achievement. For example, at Michigan the median LSAT score is 166 and the median undergraduate grade point average (GPA) is 3.6.[3] The nearest national reporting category is LSAT scores at 165 and above and GPA at 3.5 and above. There were 3,724 such applicants in 2000-01, but only 53 Hispanics, 24 blacks, and 9 Native Americans – *in the nation.*[4]

In the face of such numbers, racial balance is an irrelevant impossibility. Law schools seek instead to avoid approaching "the inexorable zero." *Johnson v. Transp. Agency*, 480 U.S. 616, 657 (1987) (O'Connor, J., concurring), quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977). In 2000, the University of Washington Law School enrolled one black freshlaw; in 1999 and 2001, it enrolled two.[5] In 1997, the University of

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[2] Law School Admission Council (LSAC), *National Statistical Report 1996-97 Through 2000-01*, at A-5, D-13, E-13, H-13 (2002).

[3] Univ. of Michigan, *Admissions*, http://www.law.umich.edu/prospectivestudents/Admissions/index.htm.

[4] LSAC, *supra* note 2, at A-5, D-13, E-13, H-13.

[5] Univ. of Washington, *Aggregate Enrollment.xls*. To find this table, go to http://www.washington.edu/home/search.html. From there Search for "Aggregate Enrollment".

California at Berkeley enrolled one black freshlaw,[6] and the much larger University of Texas Law School enrolled four.[7] Petitioner's model of ignoring race and letting the chips fall where they may is very simple, but the resulting racial disparities would inflict serious and wide-ranging harms. Efforts to avoid those harms with race-neutral means inflict equally serious harm on academic standards.

A. The Interest in Avoiding Resegregation.

Respondents emphasize the compelling interest in diverse experiences and perspectives in the classroom. The deans of American law schools fully endorse the compelling weight of this interest, but we will not repeat the argument here.

Racial diversity also has independent significance under repeated decisions of this Court condemning "racial identifiability" as important evidence of segregation and discrimination. *See United States v. Fordice*, 505 U.S. 717, 728 (1992) (collecting cases). A school without racial diversity is racially identifiable.

Public systems of higher education in sixteen southern and border states – one-third of the country – are under continuing constitutional obligation to eliminate racial identifiability in their institutions, including their law schools. Most of these states have entered into consent decrees or negotiated agreements requiring affirmative action to achieve minority enrollment goals. Two decades of such negotiations and agreements in Texas are reviewed in *Hopwood v. Texas*, 861 F. Supp. 551, 554-57 (W.D. Tex. 1994), *rev'd on other grounds*, 78 F.3d 932 (5th Cir. 1996). "Assistant Secretary of Education Clarence Thomas

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[6] Univ. of California, *University of California's Law Schools*, http://www.ucop.edu/acadadv/datamgmt/lawmed/law-enrolls-eth.html.

[7] *See* Univ. of Texas, *Minority Enrollment for Entering First Year Classes at the University of Texas School of Law, 1983-2002*, http://www.lawutexas.edu/hopwood/minority.html.

informed Governor Clements that the Texas Plan was deficient because the numeric goals of black and Hispanic enrollment in graduate and professional programs were insufficient." *Id.* at 556. It was this round of negotiations that led to the Department's demand that Texas graduate and professional schools "admit black and Hispanic students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements." *Id.* Similar negotiations resulted in similar agreements in most southern and border states.

Independently of agreements and decrees in individual states, this Court has recognized a more general constitutional duty that is not satisfied by race-neutral admission policies:

> We do not agree . . . that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system.

Fordice, 505 U.S. at 729. This Court specifically identified more selective admission standards at historically white schools as a present policy that perpetuates segregation. *Id.* at 733-38. But highly selective admission standards are central to the mission of most law schools. Rising application rates after World War II and especially in the 1960s caused these admission standards to become much more selective just as the civil rights movement ended Jim Crow and increased minority application rates. These selective admission standards undeniably tend to exclude minority applicants and maintain or increase the racial identifiability of historically white law schools. Because these law schools have sound educational reasons for their admission standards, at least the schools in the southern and border states must take other steps to moderate the racial impact of these standards:

> [I]f the state shows that maintenance of certain remnants of its prior system is essential to accomplish its legitimate goals, then it still must

> prove that it has counteracted and minimized the segregative impact of such policies to the extent possible. Only by eliminating a remnant that unnecessarily continues to foster segregation *or by negating insofar as possible its segregative impact* can the State satisfy its constitutional obligation to dismantle the discriminatory system.

Id. at 744-45 (O'Connor, J., concurring) (emphasis added).

Affirmative action that considers race is the one successful method that has enabled selective schools to satisfy this standard. Each law school can apply the predictors of academic success that work best for it, and it can apply those standards across the board, to all applicants. Such schools can then consider race at the margin, giving special consideration to those minority applicants who have already demonstrated strong academic qualifications under the usual standards. This marginal consideration of race is essential to negate the segregative impact of highly selective admission standards.

Michigan and most other northern and western schools were never segregated *de jure* and are not subject to this Court's desegregation decisions. But they are held to the same standards in the court of public opinion. If admission standards that exclude minority applicants are evidence of discrimination and segregation at Texas, then similar admission standards with similar segregative effects appear to policy makers and ordinary citizens to be evidence of discrimination and segregation at Michigan.

This Court has long promulgated a standard in which the best evidence of desegregation and nondiscrimination is the visible presence of reasonable numbers of minority students.[8] The public has fully accepted that standard and

[8] In addition to *Fordice*, *see, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25-27 (1971); *Green v. County Sch. Bd.*, 391 U.S. 430, 442 (1967); *cf., e.g., Teamsters*, 431 U.S. at 339-40 (collecting cases that rely on serious underrepresentation of minorities as *prima facie* proof of discrimination).

applies it to all institutions of higher education, whether or not they were ever segregated *de jure*. Racially identifiable schools are perceived as discriminatory, no matter how neutral their admission processes. The process is private, hidden, and arcane; the results of that process are public, highly visible, and easily understood. Racially identifiable elementary and secondary schools can often be explained as the natural consequence of racially identifiable neighborhoods, but racially identifiable law schools and universities appear to the public as the result of discretionary choices by admission officers. The legacy of this Court's desegregation cases is an environment in which selective institutions lose their legitimacy if minority students are substantially excluded.

Southern and border-state schools have a compelling interest in complying with their desegregation obligations, and all law schools have a compelling interest in avoiding the appearance of deliberate racial exclusion.

B. The Interest in Selective Admission Standards.

Affirmative action protects admission standards; the end of affirmative action would create inexorable pressure to distort and reduce those standards.

Every law school receives applications from more students than it can admit; some receive several times more. In selecting from large numbers of applicants, law schools pursue multiple goals. Diversity is one important goal, but only one. Most obviously, law schools also pursue academic excellence. The balance between academic excellence and other goals varies from school to school, but nearly all law schools seek in part to admit the most academically talented students they can attract.

A combination of size and selectivity places severe pressure on racial diversity in law school enrollment. Law school admissions are far more selective than most undergraduate admissions, but law schools admit far more students from far larger applicant pools than most graduate schools, and thus necessarily rely more heavily on

objective predictors of academic success. At most law schools, undergraduate grades and LSAT scores – objective predictors that have been extensively studied – get substantial weight in admission decisions. Small differences in grades and scores predict little, but statistical studies and faculty experience show that substantial differences in these two measures predict substantial differences in law school performance.

Even so, no law school relies exclusively on undergraduate grades and LSAT scores. A recent study found that, nationwide, grades and LSAT scores explain about 70% of the variance in law school admission decisions for white applicants, and large but somewhat smaller fractions of the variance for minority applicants.[9] This analysis was conducted separately for each racial group, so the remaining variance has nothing to do with race. Instead, it derives from factors that are not subject to ready quantification, but which are familiar to all persons with experience in law school admissions. Most of the remaining variance is explained by subjective assessments of other academic predictors: quality of undergraduate institution, rigor of undergraduate curriculum, recommendations, essays and writing samples, other activities and accomplishments that show initiative, perseverance, creativity, or other skills, and the like. Some of the remaining variance is explained by considerations of socioeconomic and geographic diversity, some by other factors important to the missions of particular law schools.

Different law schools have quite varied institutional missions. They have national, regional, state, and local service areas. These are usually mixed to different degrees; for example, a school may draw 20% of its students from a national pool, and 80% from its own state. Public

[9] Linda Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models With Current Law School Data*, 53 J. Legal Educ. – (2003) (forthcoming). This article has been filed with the Brief of the Law School Admission Council; the data cited are from pp. 5-6.

law schools give substantial preference to in-state residents. This is not because qualified home-state applicants are scarce, but because service to their state is central to the mission of these law schools.

Some law schools, especially smaller law schools, pursue excellence in defined areas of emphasis or specialization, rather than trying to compete across the board with larger neighbors. Such specialized missions can then be a focal point in recruiting students, and these mission commitments will to some extent affect admission selections among applicants. A public health background might be a strong plus at a school with a center for law and public health, and just a strong major at most other schools.

It is not relevant to this case to choose a single best admission method, or to resolve debates over test scores and other predictors. Each law school uses the criteria that it judges most effective to predict academic success and to implement its mission. At most schools, academic predictors get very heavy but not exclusive weight.

This review of admission criteria is background to a central point: Admission criteria serve essential institutional purposes. Law schools have compelling interests in not abandoning the pursuit of academic excellence or other important components of their respective missions. Consideration of race has preserved these interests. In a properly functioning affirmative action plan, race and ethnicity are considered at the margin and in conjunction with the full range of criteria in use at each law school. The minority students offered admission are selected on the basis of the same predictors as the white students offered admission.

This is apparent even in the grids of which Petitioner makes so much. Pet. Br. 7. Grades and test scores are powerful predictors of minority admissions as well as of white admissions; as one moves from left to right or from bottom to top on the grids, the chances of admission steadily increase for all races. The correlation is imperfect because the more subjective predictors of academic

achievement influence admission decisions for all races, but are not reflected in the grids. Admission is extended to minority applicants with academic credentials equal to and slightly less than those of white applicants admitted in high percentages – *as measured by the same criteria*.

This primary reliance on standard academic admission criteria is also reflected in the shrinking magnitude of preferences. Petitioner emphasizes the odds of admission for applicants of different races at the border between high and low chances of admissibility. But this shows only that there is a preference, not that it is large. Even if race were used only as a literal tiebreaker among applicants with identical scores, Petitioner would be able to calculate a large ratio – possibly an infinite ratio – between the admission chances of minority and white applicants at the marginal score where ties were broken. The real measure of the preference is the difference between the marginal minority applicants admitted and the marginal white applicants rejected.[10]

This difference is small. LSAT scores range from 120 to 180, and undergraduate GPA generally ranges from 2.0 to 4.0. Petitioner shows 36 cells of 2 and 3 points on the LSAT and .25 points of GPA. She shows that race mattered in a much smaller number of cells in the middle of this portion of the grid. If she showed the whole grid in this way, it would be at least 176 cells: 8 cells tall and at least 22 cells wide. (The uncertainty results from Petitioner's irregular use of 2-point cells.) Michigan's preference for minority applicants is thus confined to a small part of the range of the principal academic predictors. The

[10] This measure focuses on the range where race operates as a plus factor. It avoids an important distortion in comparing all admitted applicants. Even in a purely color-blind system, the mean grades and test scores of disadvantaged minority groups would be significantly lower than those of other groups, because the minority students would be disproportionately in the lower ranges of the class. For illustrative data, see William G. Bowen & Derek Bok, *The Shape of the River* 37-38 (1998).

standard error of the LSAT is 2.6 points, meaning that if a student scores 160, there is a 68% chance that her "true score" is between 157.4 and 162.6, and a 95% chance that her "true score" is between 154.8 and 165.2.[11] So Michigan's plus factor is about the size of the statistical confidence belt around the test scores. What the trial judge found in the Texas case is equally true here: "the applicants selected for admission come from a relatively narrow band within the full range of scores." *Hopwood*, 861 F. Supp. at 563.

The data reported in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978), are not in the same form, but the preferences were almost certainly larger. The difference in mean grades and test scores between the "regular admittees" and the "special admittees" ranged from 35 to 54 percentiles on various components of the Medical College Admission Test, and .61 to .94 of a grade on various components of undergraduate GPA. *Id.* at 277-78 n.7 (Powell, J., announcing the judgment). The smaller preferences at Michigan and most other schools today reflect increased strength in the minority applicant pool and increased understanding among admission committees.

Primary reliance on each school's preferred selection criteria, applied to applicants of all races, serves compelling interests. It preserves high academic standards, it preserves the distinctive missions of different schools, and it preserves incentives to hard work and academic achievement on the part of potential applicants. Explicit consideration of race, confined to a narrow band as measured by established race-neutral selection criteria, preserves these criteria and the compelling interests they serve. As will be more fully explained in Part II, any race-neutral means of pursuing racial diversity would achieve much less diversity and would require far greater departures from other

[11] Law School Admission Council, *What Is a Score Band?* (1997).

academic and mission-specific selection criteria. Banning the consideration of race would do serious harm to the compelling interests served by all other selection criteria.

C. The Interest in Serving the Whole State.

The academic goals of excellence in teaching and research require law schools to be academically selective in their admission of students. At the same time, especially the public law schools are public institutions that must serve, and be seen to serve, all the communities of their respective states.

Because of this dual orientation, public universities have historically provided a principal path by which talented citizens of modest means join the elites of American society. These public universities have been an indispensable mechanism for successive waves of immigrants to enter the mainstream. Public education is central to the process by which skills and credentials are created; it cannot be simply a reward for pre-existing skills and credentials, many of them created at earlier stages of the public education system.

Higher education's integrative function is especially important in law schools, which train a disproportionate share of the future political leadership of the state and nation. Failure to educate a leadership class among disadvantaged minority populations would be a permanent threat to equality and social stability. In some states, this threat is imminent and large. Across the southern tier of the country, from California to Florida, historically disadvantaged minorities are now a majority or near-majority of the college-age population. The following table lists eight states, containing a third of the nation's population, where more than 40% of the college-age population comes from the three disadvantaged minority groups given a plus factor in the plans at issue in this case:

College-Age Population (18-24) 2000[12]

	Black	Hispanic	Native American	**Total**
Arizona	3.5%	34.8%	5.9%	**44.2%**
California	6.5%	42.6%	1.1%	**50.2%**
Florida	19.8%	21.9%	.4%	**42.1%**
Georgia	32.0%	10.3%	.3%	**42.6%**
Louisiana	37.1%	3.0%	.6%	**40.7%**
Mississippi	42.4%	2.1%	.5%	**45.0%**
New Mexico	2.3%	49.0%	11.5%	**62.9%**
Texas	12.1%	40.0%	.6%	**52.8%**

These states cannot and do not seek racial balance for its own sake in their law schools or in their other institutions of higher education. But neither can they be indifferent to gross underrepresentation of their "minority" populations. Half their future work force, half their future voters, half their future elected officials, are members of minority groups that have been historically disadvantaged. Unless they provide college, graduate, and professional education to some reasonable percentage of these "minority" populations, these states risk a Third-World future. Of course the law schools in these states define the education of some number of minority lawyers as an essential part of their mission.

There is no escaping the tension between exclusivity to preserve high academic standards and inclusivity to offer advancement and integration into American society. Affirmative action has been the one successful mechanism that allowed selective public institutions to pursue both commitments. Only affirmative action permits a school to admit the very best white students and also the very best

[12] In at least three other states – Maryland, New York, and South Carolina – these three minority groups totaled more than 38% of the college-age population in 2000 and may well be more than 40% today. All numbers calculated from data in *Census 2000 Summary File 2*, http://factfinder.census.gov/servlet/BasicFactsServlet.

minority students in more than token numbers. Achieving the twin aims of public higher education is a compelling state interest that justifies the appropriately limited use of racial classifications.

D. The Interest in Remedying Past and Present Discrimination in Public Education.

Average differences in academic skills and entering credentials have multiple and complicated causes, but the public education system is necessarily *one* of the causes. The overwhelming majority of minority children are educated in public schools. The persistent differences in academic skills that plague the law school admission process are thus largely the product of the public education system at lower levels.

Even *de jure* segregation persists. At the time of the 1994 trial in *Hopwood v. Texas*, desegregation litigation continued in more than forty Texas school districts, 861 F. Supp. at 554, and this segregation affected the law school applicant pool. *Id.* at 573. Children who entered kindergarten in a segregated public school in 1994 will be law school applicants in 2011 and later.

De facto segregation not only persists, but is actually increasing.[13] Nationwide, 72% of blacks and 76% of Hispanics attend schools where a majority of the students are from a minority group. About 37% of each group attends schools that are more than 90% minority, and 18% of blacks and 11% of Hispanics attend schools that are more than *99%* minority. These problems are not confined to the south or any other part of the country. By one important measure, Michigan has the most segregated public schools in the country, with 62.5% of its black children attending schools that are more than 90% minority.

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[13] All data in this paragraph are from Erica Frankenberg, Chungmei Lee, & Gary Orfield, *A Multiracial Society With Segregated Schools: Are We Losing the Dream?* Fig. 4 at 28, Table 16 at 50 (2003).

With or without segregation, our public schools educate minority students far less effectively than they educate white students. Racial gaps in educational achievement and attainment have slowly declined, but they remain serious at every level, from reading and math scores in elementary school, to rates of high school graduation, college attendance, and college graduation.[14]

The complexities of causation and of collective governmental motivation make it impossible to know how much of public school segregation is unconstitutional under this Court's standards, or how much of the racial and ethnic achievement gap is caused by differential neglect or other forms of discrimination. Law schools cannot prove how the credentials of their applicants would be distributed if there were no discrimination in public education. But difficulties of proof should not lead courts to draw the implausible inference that the states bear *no* responsibility for the racially uneven consequences of their elementary and secondary education systems, or the even more implausible inference that no state agency can *accept* any responsibility for those consequences. This is not a response to mere "societal" discrimination; law schools are parts of educational systems, each extending under state supervision, coordination, and funding from early childhood to young adulthood. Law schools cannot ignore the unequal output of the earlier stages of the systems of which they are a part.

Difficulties of proof create uncertainty, and uncertainty is a reason for courts to proceed cautiously. It is one thing to say that causation is so uncertain that courts will no longer order burdensome efforts to combat racial segregation in public schools. It is quite different to say

[14] *See* Nat'l Center for Educ. Statistics, *Educational Achievement and Black-White Inequality* (2001) (Pub. 2001-061); Nat'l Center for Educ. Statistics, *The Educational Progress of Hispanic Students* (1995) (Pub. 95-767), both available at http://nces.ed.gov/pubsearch.

that courts will forbid educational institutions from taking any cognizance of the problem, or any voluntary steps to alleviate it. Recognizing that the public educational system has poorly served many minority students in earlier years, public universities and law schools can lawfully attempt to reduce the damage by preferentially admitting those minority applicants who have achieved despite the system and who appear to be capable of academic success at the next level.

The private law schools may not bear the same responsibility, but they are equally dependent on the public educational systems for their applicant flow. They should not be required to passively accept whatever racial inequalities public schools send their way, or to render those inequalities more permanent by ignoring them. Law schools have a compelling interest in responding to the racial inequalities in public education that affect their applicant pool.

E. These Compelling Interests are Color Blind.

The interest in selective admission decisions is obviously color blind. The interests in diversity, in desegregation, in serving the whole state, and in alleviating the effects of past discrimination are also color blind in an important sense: It makes no difference which race is excluded or suffers from past discrimination. If in some state a turn of fortune or demography resulted in whites being substantially excluded from legal education, the state's interest in including them would be identical to the interests at stake here. The point is not just theoretical; historically black schools now recruit white students. The distinction between this case and *Sweatt v. Painter*, 339 U.S. 629 (1950), is not the irrelevant difference between burdening blacks and burdening whites. Rather, it is the critical difference between exclusion and inclusion. The University of Texas Law School in *Sweatt* sought to exclude a racial group from legal education; the University of Michigan Law School here seeks to ensure that *no* racial group is excluded from legal education.

II. NO RACE-NEUTRAL MEANS ARE AVAILABLE TO ACHIEVE THESE COMPELLING INTERESTS.

The United States appears to agree that there is a compelling interest in racial and ethnic diversity in higher education. "Ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." U.S. Br. at 13. "Nowhere is the importance of such openness more acute than in the context of higher education." *Id.* The United States claims that this interest can be achieved with race-neutral means. This claim is mistaken even as to diversity, and it wholly ignores the compelling interest in selective admission standards.

A. Direct Consideration of Race Achieves Diversity at the Least Cost to Academic Standards.

As more fully explained in Part I.B., explicit consideration of race preserves high academic standards and other mission-specific interests in law school admissions. Race is considered only at the margin and affects only a small number of offers of admission. These offers do little damage to the compelling interest in selective admission criteria, because they are so few and because the best minority applicants are selected on the same criteria as all the other applicants.

B. Race-Neutral Methods Inherently Achieve Less Diversity and at Far Greater Cost to Academic Standards.

The United States urges reliance on selection criteria chosen not for their contribution to academic excellence or any mission objective other than diversity, but principally for their presumed ability to increase minority enrollment. It especially recommends the percentage plans in California, Florida, and Texas, under which undergraduate admission is guaranteed on the basis of class rank in high

school. *Id.* at 14-17. It also urges admission on the basis of a laundry list of mostly subjective factors – soft academic measures such as interviews and activities, and socioeconomic factors with no apparent connection to academic achievement. *Id.* at 24-25. The trial judge urged similar alternatives, including even admission by lottery. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 853 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002).

Essentially the United States recommends that law schools identify proxies for race. Proxy selectors would be race-neutral admission criteria that benefit minority applicants disproportionately. Such proxy selectors avoid the explicit consideration of race, but that is their only virtue. In every other way, they are far inferior to the direct consideration of race. They achieve far less diversity and do far more damage to admission standards. This is for quite general reasons inherent in the basic approach.

For most of these proxies, the correlation with race is weak. This means that most offers of admission based on a proxy selector do not go to applicants from disadvantaged minority groups. It is therefore ineffective to use these weak proxies at the margin of a school's other selection criteria. Rather, to achieve substantial diversity through proxies, the proxies must be used across the board, displacing standard selection criteria. Inherently, therefore, they damage admission standards far more broadly than affirmative action does.

Many of the proxies suggested have no known correlation with race; they are not really proxies at all. The United States recommends admission on the basis of "communication skills" and "extracurricular activities," but there is no reason to believe that minority applicants generally outperform other applicants on these criteria. These are soft academic predictors that get some weight when they are present (or absent) to a marked degree; variations in the broad middle of the range have little predictive value.

The only reason for giving such predictors greater weight is the hunch that they would *not* correlate with

grades or test scores, the hard academic predictors that exclude minority applicants. That is, greater reliance on soft predictors is suggested for the *purpose* of displacing better academic predictors and thus eroding academic standards. The minority applicants selected in this way would on average be weaker than the minority applicants admitted under a system of properly weighted academic predictors with race considered at the margin. And the far more numerous white applicants admitted in this way would also on average be weaker than those admitted under a system of properly weighted academic predictors. Heavy reliance on criteria with weak predictive value is a disguised way of implementing the district court's suggestion that schools admit applicants by lottery.

To avoid these problems with weak proxies and non-proxies, the search for race-neutral means of achieving diversity requires strong proxies – selection criteria that correlate strongly with race and favor disadvantaged minority groups. There are few such strong proxies, and the ones that exist invite legal challenge. As discussed below, Petitioner's counsel believe that proxy criteria are unconstitutional, and the stronger a proxy's correlation with race, the more likely it is to be challenged as a sham.

Neither the United States nor any one else wants to be blamed for resegregating higher education. The desperate hope is that some magic bullet will enable selective schools to maintain diversity without considering race and without eroding academic standards. If there were such a magic bullet, many schools would have begun using it long ago, avoiding all the controversy and the risk and expense of litigation. This case should not be decided on false hopes of race-neutral selection criteria that achieve diversity without harming academic excellence.

C. Prominent Examples of Race-Neutral Approaches.

1. Percentage Plans.

Texas has guaranteed admission to its undergraduate programs to any student who graduates in the top ten

percent of his or her high school class. Tex. Educ. Code §51.803(a) (Supp. 2003). California and Florida have adopted similar programs administratively. These are commendable efforts to serve compelling interests without considering race, but they are far inferior to a combination of race and the best academic predictors.

Percentage plans help because many high schools are highly segregated. In heavily minority high schools, all or most of the top ten percent will be minority. Of course admission is equally guaranteed to the top ten percent of heavily white high schools. But when combined with aggressive recruiting, financial aid, and retention programs, all targeting students from minority high schools, these percentage plans ensure that some minority applicants can be admitted and retained.

The dependence on segregated high schools puts state policy at war with itself. Any measure that reduces segregation at the high school level becomes a bad thing, because it reduces the effectiveness of the percentage plan. Magnet schools are a problem because the students in the integrated magnet program tend to dominate the top ten percent, depriving neighborhood students in the same school of their perceived entitlement under the percentage plan. So Texas authorized magnet schools to declare (for this purpose only) that they are really two separate high schools in the same building, and thus to certify two top-ten-percent lists. Tex. Educ. Code §51.8045 (Supp. 2003). This option deprives many of the magnet students of *their* perceived entitlement under the percentage plan, and thus discourages attendance at the magnet programs.

The dependence on segregated high schools also means that percentage plans are useless for admission to law schools or other graduate and professional programs. Because college attendance is not based on residence, colleges are not nearly so segregated as high schools. Moreover, graduate and professional schools admit applicants to each program, not to the university as a whole. The percentage of college students admitted to law school or any other particular program is tiny compared to the

percentage of high school students admitted to college. No law school could workably guarantee admission to the top x percent of college graduates, no matter the level of x.[15]

Even at the undergraduate level, the very limited success of percentage plans has occurred only in states with very large and rapidly growing minority populations. Consider the following census data:

College-Age Population (18-24) 1990 and 2000[16]
Total of Black, Hispanic, and Native American

	1990	2000	**Increase**
California	43.4%	50.2%	**15.7%**
Florida	31.7%	42.1%	**32.8%**
Texas	43.6%	52.8%	**21.1%**

In the face of these extraordinary rates of growth in the disadvantaged minority population, to say that minority enrollment has dropped only slightly, or even that it

[15] That a Texas legislator has actually introduced a top-ten-percent bill for graduate and professional school admissions (Tex. H.B. 484, *available at Texas Legislature Online*, http://www.capitol.state.tx.us) is a measure of legislative desperation. The bill would require a lottery among all students eligible for the guarantee. Applicants not selected could re-enter the lottery, apparently forever or until they lost interest. Popular programs would soon have years worth of applicants competing in each annual lottery.

This bill would continue a series of Texas statutes distorting admission standards in response to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). Graduate and professional schools are forbidden to use standardized test scores unless they compare those scores "with those of other applicants from similar socioeconomic backgrounds." Tex. Educ. Code §51.822(b) (Supp. 2003). The legislature has also provided a laundry list of factors that "may" be considered in graduate and professional school admissions, §51.822(a), and a similar list that "shall" be considered for undergraduate applicants not in the top ten percent, §51.805(b). The fear that legislators will reduce academic standards to avoid resegregation is not speculative; it is already happening.

[16] Calculated from data in *Census 2000 Summary File 2*, and *1990 Summary Tape File 1*, both available at http://factfinder.census.gov/servlet/BasicFactsServlet.

has remained about the same, is to say nothing. The already serious underrepresentation of minority students in these states has gotten significantly worse. Superficially significant numbers in these states imply nothing about what percentage plans would achieve in states with smaller minority populations. And most of what has been achieved is attributable to minority outreach programs.

To make the percentage plan work, the flagship schools in Texas developed programs that target minority high schools.[17] The University of Texas selected these schools on the basis of low application rates and low parental income. In combination, these criteria are a strong proxy for identifying minority high schools. Texas A&M targeted a list of Dallas and Houston high schools.

To achieve these limited gains, percentage plans require gross distortion of academic admission standards. Class rank is one important predictor of academic achievement, but only one. The percentage plans require universities to ignore everything else they know about an applicant. Test scores, high school curriculum, recommendations, writing samples, and other activities and accomplishments all become irrelevant. No affirmative action plan that considers race would ignore all these predictors, and no affirmative action plan that considers race would give anyone a guarantee of admission no matter how weak the rest of the file. In addition to distorting selection criteria, the percentage plans distort incentives, encouraging high school students to transfer to less competitive high schools and to avoid challenging courses.

The Texas legislation provides that *after* a student is admitted, universities may then consider whether the student is "prepar[ed] for college-level work" or whether it must require and offer "additional preparation." Tex. Educ.

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[17] Univ. of Texas, *Longhorn Opportunity Scholarship: Participating Texas High Schools*, http://www.utexas.edu/student/finaid/scholarships/los_hschools.html; Texas A&M Univ., *Century Scholars Program*, http://www.tamu.edu/admissions/Undergrad/centschol/cschol.html.

Code §51.803(b) (Supp. 2003). The percentage plan could be modified to give greater weight to academic preparation and other predictors of academic success, but that would reduce its contribution to diversity. Percentage plans make no difference if they admit only students whose class rank is consistent with other predictors of academic success; their principal function is precisely to admit applicants who would be rejected if the full file were considered.

In *Fordice*, "the United States insist[ed] that the State's refusal to consider information which would better predict college performance than ACT scores alone is irrational." 505 U.S. at 737. It was irrational not to consider "high school grades and other indicators along with standardized test scores." *Id.* Yet the United States now urges this Court to rely on percentage plans that consider class rank alone and ignore all other information. The United States was right the first time. Whatever lone predictor is chosen, reliance on a single predictor to the exclusion of all others is irrational.

2. Lottery Admission and Its Equivalents.

The district judge suggested that Michigan admit by a lottery conducted among all qualified applicants. *Grutter*, 137 F. Supp. 2d at 853. This would achieve quite limited diversity and would be devastating to academic excellence. No school would adopt such a program, but the possibility is worth investigating because it models other suggestions that appear in the Brief of the United States.

Consider Michigan's 1995 admission data, set out at Pet. Br. 7. (For the omitted fourth line of the Asian grid, see Jt. App. 162.) In the part of the grid highlighted by Petitioner, there were 2,664 applications and 898 offers of admission; 33.7% of the applicants were offered admission. To model a lottery in this part of the grid, take the number of applications in each cell and divide by 3.

Changing to such a lottery would harm the compelling interest in diversity; admission offers to applicants from underrepresented minority groups would drop from 138 to about 82, or about 9% of offers. The effect on the

compelling interest in selective admissions would be vastly greater: a wholesale shift from the upper right to the lower left parts of the grid. Offers to applicants with LSATs at 170 and above and GPAs at 3.75 and above would drop from 127 to about 45; offers to applicants with LSATs between 148 and 150 and GPAs between 3.00 and 3.24 would rise from 2 to 16. Marginal consideration of race shifts a small number of offers slightly down and to the left; a lottery would shift large numbers of offers much further down and to the left. Two-thirds of the strongest applicants would be rejected, and one-third of the weakest applicants above some threshold would be admitted. There would be no rewards to undergraduate achievement above the threshold for entry into the lottery; if many schools went to lottery admissions, incentives to excel would be generally eroded.

But of course, all of this greatly understates the consequences. Today, with selective admissions and consideration of race, applicants in the lower-left corner of the grid have very small chances of admission. But in a lottery, they would have the same chance as everybody else. The increased applicant flow from weak students would further devastate the compelling interest in academic excellence.

The United States suggests deemphasizing grades and test scores and relying on other predictors with less relationship to academic success. U.S. Br. at 19-20. A law school that carried this suggestion to its logical conclusion would not use grades and test scores at all. It would rely exclusively on factors that have no correlation with grades and test scores, and consequently, little tendency either to exclude minority applicants or to predict academic success. Carried to this extreme, reliance on such criteria would be the equivalent of a lottery; it would admit on the basis of random factors. As with an explicit lottery, it would not achieve diversity and it would seriously harm selective admissions.

More conceivable programs that give somewhat less weight to grades and test scores would have less impact on academic excellence, but would also contribute much less

to diversity. Holistic or full-file admission programs in actual use are of this kind. Despite the widespread use of full-file admissions, grades and test scores still explain 70% of the variance in admissions. Wightman, *supra* n.9. Full-file admissions matter at the margin; they help bring in students who may contribute to experiential diversity, and they may bring in somewhat more minority students, although it is not apparent that many of these factors correlate with race. There is no reason to expect dramatic contributions to diversity from these procedures.

Nor would it achieve the law schools' compelling interests to give less weight to test scores and more to grades. Examining the top rows of Petitioner's grid shows only 24 applicants from disadvantaged minority groups with averages at 3.75 or above, compared to 614 white and Asian applicants. Pet. Br. 7. Grades as well as test scores tend to exclude minority applicants.

Thus, to the extent that alternative selection criteria are feasible, they make only marginal contributions to diversity. The more such criteria approach lottery admissions, the more diversity they create, and the more they harm academic standards. At the extreme, they achieve modest diversity and wreak havoc on academic standards. No point along this continuum serves both the compelling interests in diversity and the compelling interest in selective admissions.

3. Strong Proxies and Private Assistance.

Percentage plans are useless to law schools. Full-file admissions help only a little. Lotteries are unthinkable. Law schools forbidden to consider race have looked for strong proxies, and they have sought help from the private sector. Their successes have been both limited and risky.

The University of Texas Law School has publicized its efforts to rebuild minority enrollment in the wake of *Hopwood v. Texas*, but the rebound has been limited. With consideration of race from 1983 to 1995, black enrollment in the entering class ranged from 3.2% to 9.3%; without consideration of race after 1996, black enrollment has

ranged from 0.9% to 4.0%. With consideration of ethnicity, Mexican-American enrollment ranged from 9.7% to 14.3%; without consideration of ethnicity, Mexican-American enrollment has ranged from 5.6% to 8.0%.[18]

California experienced a similar drop when affirmative action ended.[19] From 1993 to 1996, combined black enrollment at the Berkeley, Davis, and UCLA Law Schools ranged from 6% to 11.5%; since 1996, it has ranged from 1.9% to 4.5%. From 1993 to 1996, Hispanic enrollment ranged from 12.3% to 14.5%; since 1996, it has ranged from 6.7% to 10.6%, exceeding 7.8% only once. These modest Texas and California numbers are from states where blacks and Hispanics make up a rapidly growing majority of the college-age population.

To accomplish this limited degree of diversity, Texas has engaged in intensive recruitment of potential minority students, using both law school personnel and volunteers from the private sector. A private association has raised substantial funds for privately administered minority scholarships. Before the recent difficulties in the airline industry, two alumni persuaded airlines to offer free trips to Austin for admitted minority applicants.[20]

Texas has also emphasized geographic diversity, taking advantage of the possibly unique circumstance of a vast region of the state with an overwhelmingly minority population. Along the Rio Grande from El Paso to Brownsville are cities and counties with huge Hispanic

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[18] Data in this paragraph are from *Minority Enrollment*, *supra* n.7. These data report Mexican-Americans; the Census Bureau reports data on Hispanics. Mexican-Americans are 76% of the Hispanic population in Texas. Calculated from *Table PCT11: Hispanic or Latino by Specific Origin*, available at http://factfinder.census.gov/BasicFactsServlet.

[19] Data in this paragraph are from Univ. of California, *University of California's Law Schools*, http://www.ucop.edu/acadadv/datamgmt/lawmed/law-enrolls-eth2.html.

[20] These efforts are described in *UT Law Leads Nation in Private Initiatives for Recruiting*, http://www.law.utexas.edu/hopwood/private.html.

populations: 78% in El Paso County, 84% in Cameron, 88% in Hidalgo, 97.5% in Starr, and similar numbers in less populated counties.[21] The Law School has funded and assisted pre-law programs at undergraduate schools in these counties, guaranteed offers of admission to graduates of these schools, and taken other steps to address the underrepresentation of these counties in the Law School.[22]

Few other states, maybe none, could duplicate this program. Geography is not so strong a proxy for Hispanics in other states; it may not be a proxy for blacks in any state, unless the geographic areas are confined to black neighborhoods and black suburbs. Even for Texas Hispanics, the effect has been limited. The combined effect of this very strong proxy, heavy recruiting, privately funded minority scholarships, and surging growth in the state's minority population has not restored Mexican-American enrollment to even the lowest level achieved in any year when ethnicity could be considered.

Florida and California have published less about their methods, but they have relied on similar elements of intensive minority recruitment, minority scholarships, and strong proxies. The Dean of the University of Florida Law School says that minority admissions there depend on "look[ing] hard at individual essays and life experiences," and that "good recruiting and the continuation of minority scholarships were crucial."[23] A system that retains minority scholarships has not yet experienced the full effects of color blindness. Public law schools in California have emphasized intense minority recruiting and reduced

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[21] Census Bureau, *State and County QuickFacts/Texas*, available at http://quickfacts.census.gov/qfd/states/48000.html.

[22] *UT Law Leads*, *supra* note 20; for the admission guarantees, see Ron Nissimov, *Detouring Toward Diversity*, Houston Chronicle, May 5, 2002, *available at* 2002 WL 3260919.

[23] Jon Mills, *Diversity in Law Schools: Where Are We Headed in the Twenty-First Century?*, 33 U. Toledo L. Rev. 119, 129 (2001).

emphasis on grades, test scores, and quality of undergraduate institutions.[24]

Hardships overcome and similar experiential criteria may be very weak or very strong proxies for race, depending on how they are administered. All articulate applicants can think of (or embroider, or invent) some interesting life experience and some challenge overcome. Some of these essays reveal special insights, strong writing skills, or unusual achievement in the face of serious obstacles. But in the broad middle of the distribution, there is no reason to believe that subjective assessment of such essays is either a good predictor of academic success or a measure on which minority applicants will outperform white applicants. Low income has some correlation with race, but the correlation is not strong in the pool of plausible applicants to selective law schools. Low-income applicants are themselves scarce and already receive special admission consideration at most schools; considering low income would not be a change that could replace consideration of race. By contrast, if admission committees were to give credit for any experience of racial discrimination, or for any race-based experience, they would have a proxy that nearly any minority applicant could trigger simply by writing the proper essay.

D. Petitioner's Objection to Race-Neutral Means.

Percentage plans and other race-neutral alternatives are the centerpiece of the United States' Brief, but they are barely mentioned in Petitioner's Brief. The reason for this divergence is that Petitioner's counsel believes that race-neutral means of increasing racial diversity are also unconstitutional. See, for example, the statement of the

[24] *See, e.g.*, Univ. of California, *News Release* (Aug. 17, 1998), available at http://www.berkeley.edu/news/media/releases.

Director of Legal and Public Affairs for the Center for Individual Rights (which represents Petitioner), condemning the Texas ten-percent plan for "using a race-based double standard to engineer a specific racial mix. Such an intent is unlawful under the U.S. Constitution and federal law."[25] If Petitioner wins this case, her lawyers will next challenge the alternatives urged by the United States.

Their argument is simply that any admission criterion adopted for its tendency to increase minority enrollment is adopted for a racial motive, and is therefore subject to the same strict scrutiny as express consideration of race. *See, e.g., Hunter v. Underwood*, 471 U.S. 222 (1985). The argument is potentially strongest against the strong proxies that actually help. But even a weak or ineffectual proxy might be unconstitutional if selected for racial motives. Certainly this Court would not permit law schools to gerrymander admission criteria for the purpose of *reducing* minority enrollment. Petitioner's insistence that there is no compelling reason to consider race in admissions ultimately leads to the conclusion that no government can take any step, however modest, for the conscious purpose of assisting disadvantaged racial minorities.

Unless this Court is to reach that same conclusion, it must eventually hold that some efforts to help disadvantaged minorities are justified by a compelling interest. It would be far better to uphold carefully limited consideration of race, which does most to address the exclusion of minority students at the least cost to other goals of fairness and meritocracy. It would be far worse to strike down explicit consideration of race and to rely on inefficient proxies that harm admission standards across the board.

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[25] Curt A. Levey, *Texas's 10 Percent Solution Isn't One*, Washington Post, Nov. 12, 2002, at A24, *available at* 2002 WL 102571267.

E. The Court Cannot Now Deprive Law Schools of the Only Means of Meeting Court-Imposed Expectations.

The central holding of *Bakke* was that institutions of higher education may consider race in admissions, but that they may not set aside fixed numbers of seats. A majority of this Court united in part V-C of Justice Powell's opinion to reverse an injunction substantially identical to that entered by the district court in this case. *Compare Bakke*, 438 U.S. at 320; *with Grutter*, 137 F. Supp. 2d at 872. For a quarter century, the nation's universities and law schools have relied on *Bakke*'s resolution of the issue.

Over an even longer period, the nation has accepted this Court's repeated judgments that gross underrepresentation of minorities is *prima facie* evidence of deliberate exclusion. This is not just a legal rule, but also a deeply ingrained perception of reality. This Court can change legal rules, but it would be vastly more difficult to change the public's perception of reality. The Court cannot now take away the one method that preserves selective admission standards while addressing Court-created expectations about avoiding racially identifiable enrollments. This would be a singularly inappropriate case in which to depart from precedent and abandon *Bakke*'s "central holding." *See Planned Parenthood v. Casey*, 505 U.S. 833, 855-56 (1992).

CONCLUSION

Inability to consider race would lead first to substantial resegregation in American higher education, and then to substantial erosion of academic standards to avoid resegregation. Different states might allocate the harm among these interests in different proportions, but both diversity and academic standards would be substantially reduced. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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