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 THE CLINICAL LEGAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page(s)

Page(s)

TABLE OF CITED AUTHORITIES

Page(s)

Cases:

Rules:

Other Authorities:

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The Clinical Legal Education Association ("CLEA") is a nonprofit organization dedicated to expanding and improving clinical legal education; encouraging, promoting and supporting clinical legal research and scholarship; and fostering communication among clinical law professors. CLEA works cooperatively with other organizations interested in improving clinical and legal education, as well as the legal system itself. CLEA currently counts as members more than 600 clinical law professors nationwide, who teach at approximately 180 of the 186 law schools accredited by the American Bar Association ("ABA").

Personal experience, student feedback, and the academic analyses and writings of CLEA's members demonstrate that viewpoint diversity and racial diversity are critically important in training young lawyers to be effective advisors and advocates, both while studying in the legal clinics of America's law schools, and after graduation, when new lawyers enter the increasingly multi-cultural, multi-jurisdictional, and global practice of law.

CLEA believes that, should admissions practices such as the one adopted by The University of Michigan Law School (the "Law School") be forbidden, it would be extremely difficult, if not impossible, to achieve the necessary

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[1] This brief was not authored, in whole or in part, by any counsel for a party to this action. No person or entity, other than the *amicus curiae*, its members, or counsel contributed monetarily to the preparation or submission of this brief. Counsel for all parties have consented under Sup. Ct. R. 37.3(a) to the filing of all *amicus* briefs. *See* Dec. 20, 2002 letter to Court from Univ. of Michigan Respondents; Dec. 30, 2002 letter to Court from Petitioner.

diversity in the student bodies of our law schools. As this brief explains, diverse law school student bodies aid all law students, majority and minority alike, by enhancing their exposure to people from different backgrounds and perspectives. This exposure to different backgrounds and perspectives, in turn, better equips students to render competent, ethical representation to all of their clients.

SUMMARY OF THE ARGUMENT

The state has a compelling interest in enrolling a racially and ethnically diverse law school student body. The benefits of such diversity are widespread: "[D]iversity can enhance both the educational and legal product of clinical programs by generating additional viewpoints and ideas and expanding the sources of creativity, talent and experience." Margaret Martin Barry, *et al.*, *Clinical Education for this Millennium: The Third Wave*, 7 Clinical L. Rev. 1, 64 (Fall 2000). As such, diversity is not merely an end unto itself. Indeed, as Robert A. Oden, Jr., president of Carleton College, has written, it is "the fruit borne of diversity that we truly crave; it is in identifying, assessing, measuring, and bridging differences that we not only learn to better understand each other – we also better understand ourselves." Robert A. Oden, Jr., *Encountering Differences*, Carleton College Voice (Winter 2003), *at* http://webapps.acs.carleton.edu/voice/departments.php3?id=287.

Diversity in a law school student body benefits all law students. In preparing clinical law students ("student-lawyers") to navigate today's increasingly multi-cultural, diverse national practice and the growing complex global law practice, law schools in general, and law school clinics in particular, must teach student-lawyers the skills to under-

stand, embrace, and respond to differences in education, socio-economic background, culture, and opinion, whether in their future clients, fellow counsel, judges, witnesses, or jurors. These skills cannot be imparted without a diverse law school student body.

Student-lawyers often come to fully understand their own perspectives and beliefs – which have a profound impact on how they will practice law – only by experiencing myriad individual differences in others, especially law school classmates. Experiencing a wide variety of perspectives, which often reflect differing racial and ethnic backgrounds, allows each individual law student, whether majority or minority, to consider his or her own perspectives in a larger context, to gauge assumptions and presumptions, to evaluate possible biases, and to confront differences through dialogue.

Clinical law classes, moreover, are the gateway into students' actual practice of law – a practice, both in law school clinics and after graduation, that demands the very skills and understandings directly fostered by a racially and ethnically diverse law school student body. These skills and habits of mind, especially the ability to relate to and understand people of differing backgrounds and perspectives, cannot effectively be fostered in law school classes lacking a critical mass of minority students.

Indeed, in a more homogenous law school class, it would be all but impossible to expose students to the varied viewpoints realized through multi-racial social and cultural contacts; to effectively challenge students' beliefs and perspectives; or to develop students' understandings of clients and others whose experiences and views of society or the legal system may differ greatly from their own. A homoge-

neous law school class, in short, is antithetical to effective legal and clinical education.

Embracing diversity will yield both better-trained lawyers and a pluralistic population of lawyers that is likely to enhance public confidence in the legal system. Assuring a critical mass of otherwise underrepresented minority students, therefore, is a compelling state interest.

ARGUMENT

To be constitutional, the Law School's consideration of race in its admissions process must (1) be a narrowly tailored measure and (2) serve a compelling governmental interest. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995), *on remand, summary judgment granted by* 965 F. Supp. 1556 (D. Colo. 1997), *vacated sub nom. Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292 (10th Cir. 1999), *rev'd*, 528 U.S. 216 (2000). *See also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-309 (1978). This brief will address only the compelling state interests served by the Law School's policy as it affects law school clinics and their clients.

I. THE STATE HAS A COMPELLING INTEREST IN ENROLLING A DIVERSE LAW SCHOOL STUDENT BODY

A. All Law Students Benefit From Racially And Ethnically Diverse Student Bodies

All students, regardless of ethnic origin, benefit from a diverse law school student body because it provides exposure to people different from themselves. A diverse law school student body allows all students opportunities to learn

to work with people of different backgrounds – a critical skill as the practice of law becomes more multi-cultural. Indeed, some estimates predict that the percentage of persons of color in the United States population will roughly equal the percentage of Caucasians as early as the year 2030. Barry, *supra*, at 62. As a result of the demographic shift, the need for clinical educators to prepare law students to represent all clients and to understand their points of view fully will become increasingly important, "because that pluralism often introduces an extra layer of complexity to legal disputes and may create special challenges in representing diverse clients." Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 La Raza L.J. 140, 142 (1995).

Further, a diverse collection of law students creates opportunities for those students, in their clinical, classroom, journal, and social interactions, to confront their own stereotypes and prejudices, and gain the ability to better critically analyze their own views. These benefits are particularly important in the clinical setting, where student-lawyers see firsthand how their own stereotypes and assumptions may impede their obligation to render ethically competent representation to, and to communicate with, clients as required by ethics rules. *See, e.g.,* Model Rules of Prof'l Conduct R. 1.1 (2002) ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.") and R. 1.4 (2002) (requiring reasonable communication between the lawyer and the client).

B. The Focus Of Clinical Legal Education Is To Prepare Student-Lawyers To Enter Into A Multi-Cultural, Global Legal Profession

In explaining why diversity is so critical to clinical legal education, there first must be an assessment of the goal for which law schools in general and clinical educators, in particular, are preparing students. Clearly, that goal is to become highly skilled, effective, and responsible attorneys, whether in private practice, business, government, or in some other capacity. *See* ABA, *Standards for Approval of Law Schools*, Standard 301(a) ("A law school shall maintain an educational program that prepares its graduates for admission to the bar and to participate effectively and responsibly in the legal profession.").[2]

Since the United States is multi-cultural, and is becoming increasingly so, the practice of law must take this fact into account. As an objective and practical matter, the legal *profession* also is increasingly becoming global. Regardless of the context, lawyers are more and more faced with arrays of problems that involve multi-cultural considerations, from traditional constructs of contract or tort law, to providing assistance to individuals from different racial and ethnic backgrounds to enforce consumer rights or procure housing, to the criminal prosecution or defense of people of different racial backgrounds. As for private law firms, the multi-cultural practice is even more significant. "The question is not . . . whether or not diversity is 'good for business' but rather whether global law firms can successfully

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[2] All ABA-approved law schools are required to provide "live-client or other real-life practice experiences" as part of the educational program preparing students for the practice of law. *Id.* at Standard 302(c).

adapt to a competitive environment that will by any measure be more multicultural, multidisciplinary, and multidimensional than anything that these firms have ever faced before." David B. Wilkins, *Why Global Law Firms Should Care About Diversity: Five Lessons from the American Experience*, 2 Eur. J. L. Reform 415, 416 (2000). These changes have occurred "as law firms regularly expand across national boundaries, advising public and private clients on cross-border activities. . . . One consequence of the increasing meeting of legal systems is that lawyers trained in different national systems interact with greater frequency." Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 Fordham Int'l L.J. 1039, 1039 (2002).

As both society and the profession become more diverse, "[i]t will be incumbent upon lawyers to seek out and give voice to a range of viewpoints in stating legal problems and fashioning their solutions." Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 Clinical L. Rev. 65, 79 (Fall 1997). Proper clinical education must equip students to do just this in order to practice effectively, both as student-lawyers and as future lawyers. It is from this pragmatic clinical education goal that the need for diversity arises.

C. Clinical Law Professors Cannot Properly Train Student-Lawyers Without A Diverse Student Body

Clinical legal education, and "learning by doing," is a vital component of virtually every law school program throughout the country. As of May 2000, of the then 183 ABA-approved law schools, all but one afforded law students either a clinical or externship experience. Wendy Margolis, *et al.,* eds., *The 2002 Official Guide to ABA-Approved Law*

Schools (2001). In the Fall of 2000, nearly 29,000 law students enrolled in a clinical course or externship. *Id.* These clinical education programs "expose students not only to lawyering skills but also the essential values of the legal profession: provision of competent representation; promotion of justice, fairness, and morality; continuing improvement of the profession; and professional self-development." Barry, *supra*, at 13. Ultimately, "clinical programs meld legal theory with lawyering skills." *Id.* at 14.

The value of clinical education has been widely recognized. Justice O'Connor, for example, has observed:

> Every year, my law clerks tell me about the experiences they had in clinical programs in law school, and describe the thrill of being able to take the skills they are learning and to put them into practice in a way that makes a huge difference in someone's life. . . . Law students gain from clinical work in a more indirect sense as well, and again, we all gain as a result. Many students go through college and law school without any exposure to poverty, without any understanding of what it is like to be poor. Clinical programs fill this gap, and that's important, because these same law students will be our judges and government leaders in the future. We all benefit when our leaders have a sense of what life is like for *all* sectors of the population.

Justice Sandra Day O'Connor, *Good News and Bad News,* Address to the 1991 American Bar Association Annual Meeting, *Pro Bono* Awards Luncheon 8 (Aug. 12, 1991) (emphasis in original). Judge Richard Posner has argued, moreover, that "learning by doing – 'clinical education,' as it

is more commonly called . . . should play a larger role in legal education." Richard Posner, *Diary Entry 5*, *at* http://slate.msn.com/id/2060621 (Jan. 18, 2002).

1. Law School Clinics Serve a Predominantly Minority Client Base

American law school clinics generally represent underprivileged clients. Depending on the law school program, student-lawyers in law clinics may be expected to defend indigent criminal defendants, or to work on cases involving child advocacy, poverty law, low income housing, civil rights, and asylum and refugee law. The reality is that, in most instances, 60 percent or more of the underprivileged clients who use the services of law clinics consist of minorities with cultural and economic backgrounds, education levels, viewpoints, and sensibilities different from the student-lawyer. *See, e.g.,* Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client Centered Counseling,* 39 B.C. L. Rev. 841, 880 (1998) ("law school clinics are . . . primarily involved with poor clients"); Legal Services Corporation, *Serving the Civil Legal Needs of Low-Income Americans, A Special Report to Congress*, at 13-15 (Apr. 30, 2000) (Legal Services Corporation's ("LSC") client base closely matches that of law school clinics); U.S. Dep't of Justice, Bureau of Justice Statistics, *Indigent Defense Statistics* (1999) (77 percent of black inmates and 73 percent of Hispanic inmates had court-appointed, publicly-financed lawyers), *at* http://www.ojp.usdoj.gov/bjs/id.htm (last visited Feb. 16, 2003). This exposure to a largely minority client base is frequently the first step in preparing young lawyers to enter the multi-cultural national legal market and the growing global legal profession in which they may routinely be faced

with clients and problems that require a genuine ability to understand diverse cultural and racial sensibilities.

2. Student-Lawyers are Better Able to Provide Effective Client-Centered Counseling with Exposure to a Diverse Population of Law Students

(a) Client-Centered Counseling Demands Genuine Understanding of Each Client's Interests and Objectives

Over the last decade, the vast majority of law school clinical programs have concluded that the lawyer-client relationship requires a client-centered approach. *See* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 Ariz. L. Rev. 501 (1990).[3] A central tenet of this approach is for lawyers to communicate – and connect – with clients in a manner that elicits disclosure of complete and accurate information. Armed with this information, lawyers are better able to understand their clients' motives and best pursue their clients' true interests and objectives, not simply interests or objectives that lawyers may believe their clients have or should have. *See* David A. Binder, *et al*., *Lawyers as Counselors: A Client-Centered Approach* (1991); Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling and Negotiating: Skills for Effective Representation* (1990). *See also* Model Rules of Prof'l Conduct R. 1.2(a) (1983) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall

[3] Full-time practitioners in every aspect of the law engage in client-centered counseling. Skills learned in law school clinical programs thus have direct application in all aspects of law practice.

consult with the client as to the means by which they are to be pursued.").

(b) Viewpoint and Racial Diversity are Critical to Student-Lawyers' Self-Evaluation of Biases that Might Hinder Effective Client Representation

For client-centered counseling to be successful in a law school clinic setting, student-lawyers need fully and accurately to understand their clients' viewpoints within the clients' own contextual experiences. This understanding is essential for student-lawyers to formulate case strategies designed to achieve the goals that are most important to their clients.[4] Moreover, without such understanding, student-lawyers are unable to convey their clients' viewpoints and experiences accurately to opposing counsel and parties, as well as judges and juries. *See* Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345, 373 (Spring 1997) (hereinafter, *"The Missing Element"*).

The achievement of these objectives is almost necessarily predicated on the presence in the law school of a truly diverse student body. Student-lawyers working in the areas

[4] If a student-lawyer operates under her own assumed norms rather than an understanding of the client's cultural background or viewpoint, the student-lawyer, in the context of a tort action, for example, might focus on obtaining an award of monetary damages, while the client's real goal is to obtain a public apology from the alleged tortfeasor. In such a case, the client may well view a monetary award as failure in the representation while the student-lawyer believes she has obtained a victory.

of, for example, poverty law, welfare law, child advocacy, immigration, and refugee law meet many clients who have backgrounds and experiences totally foreign to, and often difficult even to comprehend by, many or most law students.

With backgrounds that fall all along the spectrum of privilege, many law students may also have subconscious biases regarding race, culture, social status, wealth and poverty.[5] To understand and communicate effectively with clients from backgrounds vastly different from their own, student-lawyers must first be able to identify their own biases. They must then attempt to set aside their biases and to consider the actions and objectives of their clients from the perspectives of their clients and in the context of their clients' racial, cultural, and socio-economic backgrounds.[6]

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[5] CLEA acknowledges that subconscious biases may exist in people from all walks of life. As discussed more fully later in this brief, CLEA believes that diversity also is necessary to address the subconscious biases of members of minority groups against members of majority groups or of other minority groups.

[6] Without intense evaluation of personal bias and consideration of clients' actions and viewpoints in such context, student-lawyers tend to fall back on stereotypes that lead to misunderstandings of their own clients and their clients' actions and attitudes. Inevitably, such misunderstandings undercut their clients' confidence and undermine their attorney-client relationships. In one case described in the academic literature, for example, a black client had missed an appointment with clinic students to discuss the client's case. The students assumed the client was merely being irresponsible, although nothing in the client's behavior up to that time should have led them to believe so. In fact, the client's car had broken down on the day of the appointment. The students' assumptions about the client resulted from their value judgments of the client based on his race. *The Missing Element*, 27 Golden Gate U. L. Rev. at 405-406.
(continued...)

For the student-lawyer, the process of self-identification and analysis often begins and progresses through discourse with a racially, culturally, and socio-economically diverse mix of fellow student-lawyers. It is through this discourse that students test their own perceptions about race, poverty, and culture against those of their peers. *See* Suellyn Scarnecchia, *Gender & Race Bias Against Lawyers: A Classroom Response*, 23 U. Mich. J.L. Reform 319, 331 (1990) (setting out student reactions to discussions of race or gender issues in law school classes); Mary Jo Eyster, *Analysis of Sexism in Legal Practice: A Clinical Approach*, 38 J. Legal Educ. 183 (1988) (discussion of confronting racism and sexism through clinical education). This discourse enables student-lawyers to understand how race and culture can form clients' (and their own) worldviews and influence clients' (and their own) actions and objectives.[7] Such a discourse also

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[6] (...continued)
This case was particularly problematic since the client had gone to the clinic because he allegedly had been given traffic citations by two white state troopers without apparent cause; and the client honestly believed the citations had been issued for no reason other than that the client was "driving while black." The client's belief that he had not been afforded equal dignity with white drivers was further aggravated by the manner in which he was treated by his own counsel. *Id.*

[7] Petitioner's *amici* have seized on the district court's statement that viewpoint diversity and racial diversity are not the same thing and that the "connection between race and viewpoint is tenuous, at best." *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, --- U.S. ---, 123 S. Ct. 617 (2002). *See* Br. of the Cato Institute as *Amicus Curiae* in Supp. of Pet'rs at 23; Br. of the Mich. Ass'n of Scholars in Supp. of Pet'rs at 13. While CLEA accepts the former conclusion, it disagrees strenuously with the latter. The experiences of CLEA's members confirm that, while by no (continued...)

enables student-lawyers to understand that there is no single, uniform minority viewpoint held generally by members of a minority group, just as there is no single "white" viewpoint. In essence, having a diversity of viewpoints teaches student-lawyers to recognize personal bias, eliminate reliance on stereotypes, and undertake an unencumbered evaluation of each client's background and problems to achieve each client's unique objective.

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[7] (...continued)
means wholly uniform, members of racial minorities tend frequently to have distinctly different reactions, responses and perspectives – and indeed "viewpoints" – with respect to given factual situations than do their majority peers. Thus, although minority students' views are by no means uniform, their views frequently diverge, in different ways, from views commonly expressed by their majority counterparts. Viewpoints, at a minimum, are informed by experience, and one's experiences, in turn, are often affected by race.

Studies have shown that members of minority groups often view a given set of facts differently than do non-minorities. *See, e.g.,* Paul R. Carr & Thomas R. Klassen, *Different Perceptions of Race in Education: Racial Minority and White Teachers,* 22 Can. J. Educ. 67 (1997) (analyzing perceptions of white and minority teachers on issues including antiracist education, employment equity, and treatment of minority teachers). Furthermore, race can even play a role in the way employees perceive feedback from their superiors. Deanna Geddes & Alison M. Konrad, *Demographic Differences and Perceptions of Performance Appraisal Practices* ("Asian, Black and Hispanic managers were all responded to more negatively than White managers following negative or unexpectedly low evaluations"), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304970 (last visited Feb. 16, 2003). *See also* Sandra E. Spataro, *Not All Differences are the Same: The Role of Informal Status in Predicting Reactions to Demographic Diversity in Organizations,* Yale School of Management Working Paper Series, No. OB-03, *at* http://papers.ssrn.com/abstract=297465 (Jan. 2002).

Clinical law professors believe it imperative for this discourse and self-identification to begin early in lawyers' training. Indeed, where student-lawyers enter into attorney-client relationships without being aware of their own cultural perspectives, whatever they might be, myriads of harm can result to clients. *See The Missing Element*, 27 Golden Gate U. L. Rev. at 363-374, 387-388 (discussing clinical case in which students' and advisors' failure to understand their own cultural biases led to demeaning and patronizing treatment of client and failure to achieve client's goal of obtaining judicial restoration of client's dignity after he allegedly had been treated with disrespect by police who patted him down and arrested him for disorderly conduct as he pumped gas). *See also* Peter Margulies, *The Mother With Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 Nw. U. L. Rev. 695, 706-711 (Winter 1994) (discussing two clinical cases in which students' and clinician's ingrained beliefs and attitudes resulted in failure to thoroughly understand clients' sensibilities and needs); Margaret E. Montoya, *Voicing Differences*, 4 Clinical L. Rev. 147 (Fall 1997) (cautioning lawyers to be mindful of potential for harming clients' larger interests even while prevailing in lawyering efforts).

Additionally, early exposure to diverse viewpoints and discourse enhances the abilities of student-lawyers to consider and resolve problems and teaches students to re-examine assumed solutions and develop creative approaches to clients' unique needs. The benefits conferred by a racially diverse law student body thus far outweigh the benefits of admitting only law students who, say, scored above 172 on the Law School Admissions Test ("LSAT"). *See* Law School Admission Council, *New Models to Assure Diversity, Fairness, and*

Appropriate Test Use in Law School Admissions, at 3 (Dec. 1999) ("there are many meritorious qualities that an individual may have that are not measured by the LSAT and [undergraduate grade point average]").

The consequences of failing to provide law students with a diverse student body, from a clinical law perspective, are real and immediate. When student-lawyers represent clients of different cultural backgrounds, and make judgments based on misinformation or inability to appreciate the clients' cultural norms, they run the risk of "misjudg[ing] a client or . . . provid[ing] differential representation based on stereotype or bias." Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering* at 7, *at* http://clrn.law.cuny.edu/clea/multiculture/index.html (last visited Feb. 16, 2003). Such representation may well carry serious consequences for the client, and result in something less than a full measure of justice. *Id.* at 7-8 (citing studies that African-American children are more likely to be removed from their families and placed in foster care for a longer period than white children, and that African-American youths received longer sentences than white youths).

3. Law Students Have Experienced the Benefits of Racial Diversity

The benefits of racial diversity in law schools have been recognized not only by clinical law professors and admissions deans, but by law students themselves. Law students – the intended beneficiaries of both legal education and law school diversity – report that exposure to racial diversity has enhanced their abilities to analyze problems and find solutions to legal issues. *See* Gary L. Orfield & Dean

Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools* (hereinafter, "Orfield & Whitla"), in *Diversity Challenged: Evidence on the Impact of Affirmative Action*, at 143 (Gary L. Orfield & Michael Kurlaender, eds., 2001) (hereinafter, "*Diversity Challenged"*). *See also* Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in *Diversity Challenged*, at 187. Furthermore, law students recognize that a diverse law school student body can prepare them for the multi-cultural practice they will enter upon graduation. For example, in a survey of students at The University of Michigan Law School and Harvard Law School, 72 percent of students at Michigan, and 67 percent of students at Harvard, agreed that having a racially diverse law school student body had enhanced their abilities to work more effectively and get along better with individuals of other racial backgrounds. Orfield & Whitla at 159. Of these students, 48 percent of Michigan law students, and 39 percent of Harvard law students, reported that such diversity had *greatly* enhanced these abilities. *Id*.

"[C]onfronting different opinions and taking ideas very seriously are hallmarks of a good education. This is all the more true for legal education, where students need to understand all sides of conflicts and how to argue difficult issues in contentious, high-stakes settings." *Id.* at 162.[8]

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[8] For this reason, the Cato Institute's argument on behalf of petitioner, that "diversity is most likely to impede group functioning," entirely misses the mark. Br. of the Cato Institute as *Amicus Curiae* in Supp. of Pet'rs at 26 n.22. To the contrary, a diverse student body is *essential* to effective legal, and especially clinical, education. Furthermore, taken to its logical conclusion, the Cato Institute's anti-diversity (continued...)

Again, 68 percent of Harvard law students and 75 percent of Michigan law students believe that conflicts because of racial differences challenged them to rethink their own values. *Id.* It is exactly this confrontation and re-evaluation of beliefs that is so critical to properly training student-lawyers and, ultimately, enhancing their ability to promote fairness and work equity in the legal system.[9]

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[8] (...continued)
argument actually encourages segregating students, which, of course, runs afoul of *Brown v. Board of Education*, 347 U.S. 483 (1954). Finally, the Cato Institute misreads and overstates the report it cites, which finds that diversity as to factors such as organizational and group tenure, educational and functional background, age, gender, and race/ethnicity, has a variety of effects. The literature reviewed in the report concerned "the effects of demography as it applies to management and organizations" – not law schools and law school clinics training new lawyers to enter into an increasingly multi-cultural profession. *See* Katherine Y. Williams & Charles A. O'Reilly, III, *Demography and Diversity in Organizations: A Review of 40 Years of Research,* in 20 Research in Organizational Behavior 77 (Barry M. Staw & L.L. Cummings, eds., 1998).

[9] Petitioner's *amici* also oppose the Law School's admissions policy because it supposedly "engenders racial tensions and hostility." Br. of the Mich. Ass'n of Scholars as *Amicus Curiae* in Supp. of Pet'rs at 21-22; *see also* Br. of the Nat'l Ass'n of Scholars as *Amicus Curiae* in Supp. of Pet'rs at 19-20. Petitioner's *amici* support this claim with a "study" entitled *The Stigma of Inclusion: Racial Paternalism/Separatism in Higher Education.* That "study," however, amounted to merely reading an undefined "sampling of the bulletins, course catalogs, publications and official websites of various public and private colleges and universities." Neither surveys of students or faculty, nor empirical data of any type, were presented. The authors fail to explain how the colleges, or any of the materials, were selected, and there is no basis to conclude that the methodology of the survey was rigorous, or that its conclusions are sound. In any event, as this brief and others establish, a diverse law school student body is essential to effective legal, and especially clinical, education.

D. Enrolling A Critical Mass Of Minority Law Students Requires Law Schools To Consider Applicants As Complete Individuals, And To Weigh The Contributions Each Student Can Make To The Law School As A Whole

Close to two centuries of overt discrimination – including criminal sanctions for educating minorities, and enforced segregation – against disfavored minority groups in this country have resulted in an elementary and secondary educational system whose well-documented shortcomings fall disproportionately on the very minority groups the Law School's policy seeks to help admit. As petitioner's own *amicus* admits, there is an "enormous academic gap" between minority and majority secondary students, and "most black and Hispanic students operate at a huge academic disadvantage" – to the extent they stay in school at all. Br. of the Ctr. for New Black Leadership as *Amicus Curiae* in Supp. of Pet'rs at 11. Indeed, President Bush himself has repeatedly decried the "soft bigotry of low expectations" that infects American education and further suppresses minority achievement. *See*, *e.g.*, Pres. George W. Bush, Remarks on Education Implementation, *at* http://www.whitehouse.gov/news/releases/2002/09/20020904-6.html (Sept. 4, 2002).

Saddled with these obstacles, it is little wonder that applicants from disfavored minority groups often score lower on standardized tests than majority students. *See*, *e.g.*, Laura C. Scanlan, Note, *Hopwood v. Texas: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. Rev. 1580, 1616-17 (1996) ("One reason that race-based methods are needed to satisfy diversity goals is that some minority groups tend to score lower on traditional criteria – such as the LSAT – used to make admissions decisions at institutions of higher

education."). Consequently, an admissions system based solely on LSAT numbers and undergraduate grade point averages ("UGPA") may not yield a student body with a critical mass of minority students. *See* Jeffrey Rosen, *Damage Control*, New Yorker, Feb. 23 & Mar. 2, 1998, at 62, *cited in* Vanessa G. Tanaka, Comment, *People Who Care v. Rockford Board of Education and the Spectrum of Race-Conscious Remedies*, 1999 Wis. L. Rev. 347, 371 n.158 ("Because the gap in scores is so wide, it's simply not possible to admit many African-Americans without taking race into account if the LSAT remains an important factor in the admissions process.").

To realize the benefits of diversity, law schools must be allowed to consider applicants as complete individuals – individuals who, among other things, come from particular racial and ethnic backgrounds and experiences. Law schools must not, as petitioner urges, be restricted to considering only such limited and incomplete data as LSAT scores and UGPA. Although petitioner's argument assumes that such cramped criteria "objectively" measure so-called "merit," that assumption, and the resulting argument, cannot withstand scrutiny. At best, such scores present a severely limited view of law school applicants, and the qualities each prospective student would bring to his law school studies, the student body, and the law school as a whole.[10]

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[10] Furthermore, petitioner's argument that lower test scores mean less qualified applicants assumes its conclusion. Even test administrators take pains to point out that LSAT scores are at best an incomplete measure of applicants' merit. Law School Admission Council, *New Models to Assure Diversity, Fairness, and Appropriate Test Use in Law School Admissions*, at 3 (Dec. 1999).

(continued...)

Petitioner assumes, without support, that barring law schools from considering individual applicants' racial and ethnic backgrounds, and the contributions such backgrounds make to legal education (especially clinical legal education), would allow for the enrollment of more qualified law students. While such a practice might result in higher average LSAT and UGPA numbers, however, higher numbers are *not* necessarily indicative of greater merit. Indeed, there is no suggestion, and no evidence, that minority students admitted as part of the Law School's critical mass approach are unqualified for the study or practice of law, or inadequate for admission to the Law School. On the contrary, the record below demonstrates that minority students perform well in law school, graduate, and go on to successful careers in the law.[11]

As a result, donning the blinders demanded by petitioner would not result in the matriculation of more qualified law students. In fact, such a limited view of applicants would actually compromise the legal education

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[10] (...continued)

Heedless of the warnings provided by the very people who draft and administer petitioner's preferred tests, petitioner urges the Court to declare a legal rule forbidding law schools from considering applicants' racial and ethnic backgrounds. Petitioner's assumption that "merit" can be reduced to a series of numbers makes all the more ironic her effort to seize the mantle of equal protection and individual opportunity.

[11] For example, a 1996 survey of the Law School's minority alumni shows that those alumni are in the mainstream of the legal profession, often earn large incomes, and positively contribute to the Law School in particular, and the legal profession in general. David L. Chambers, *et al.*, *Doing Well and Doing Good* (2003), *at* http://www.law.umich.edu/newsandinfo/lawsuit/survey.htm (last visited Feb. 16, 2003).

applicants seek, by depriving all law students, and especially clinical law students and their clients, of the essential leavening factor of diversity.

II. THE BENEFITS OF DIVERSITY CANNOT MATERIALIZE WITHOUT A CRITICAL MASS OF MINORITY STUDENTS

A. Critical Mass Is Not A Quota

Petitioner and her *amici* strain to equate the concept of "critical mass" with a quota system. *See, e.g.,* Br. for Pet'r at 40-42. Quotas, they argue, cannot withstand constitutional scrutiny because they have the purpose and effect of directly benefitting members of a preferred group at the expense of others outside the preferred group.[12]

These arguments mischaracterize the Law School's admissions practices. Critical mass is not a quota system.[13] As the Law School discusses in its own submission, there are no seats set aside for minorities, nor was the critical mass goal designed to act as a functional equivalent of a quota.[14]

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[12] *See Bakke*, 438 U.S. at 319-320; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989); *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757, 763 (6th Cir. 1983).

[13] Between 1986 and 1999, the composition of entering classes at the Law School ranged from 5.4 percent minorities (1998) to 19.2 percent minorities (1994). *Grutter*, 137 F. Supp. 2d at 842 n.27. This disparate range, on its face, demonstrates that the concept of "critical mass" is not and cannot be deemed a quota.

[14] As CLEA understands it, the Law School does not use race as the deciding factor for *any* of the 350 or so available spaces in an entering (continued...)

In any event, petitioner's "quota" argument does not square with what CLEA understands and believes to be the rationale behind the Law School's admissions program, and is certainly inapplicable to the rationale behind CLEA's interest in significant diversity: to attain a critical mass of diverse students for purposes of clinical training.

B. A Critical Mass Of Minority Students Is Necessary To Realize The Benefits Of Diversity

The Law School's admissions policy was adopted to aid the school in achieving its stated goal of attaining a diverse student body, a goal whose legitimacy was explicitly approved in *Bakke*. ("[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal of an institution of higher education." 438 U.S. at 311-312 (Powell, J.)). *See also* Br. of the United States as *Amicus Curiae* Supporting Pet'r at 8 ("Ensuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities is an important and entirely legitimate government objective.").

Witnesses testified in the district court that "racial diversity is part of the diversity of perspectives needed to enhance the 'classroom dynamic.'" *See Grutter,* 137 F. Supp. 2d at 835. They testified that a "critical mass" of minority students is required to achieve this diversity of perspectives because minority students need to "feel free to express their views, rather than to state 'expected views' or 'politically

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[14] (...continued)
Law School class. Instead, each applicant receives a "holistic," individualized review of his or her entire file.

correct views.'" *Id.* at 836. Indeed, they testified that "when a critical mass of minority students are present, racial stereotypes are dismantled because non-minority students see that there is no 'minority viewpoint.'" *Id.* Thus, based on the record below, it is apparent that the benefits to be obtained from a critical mass are by no means intended by the Law School to inure wholly to minority students. Rather, the concept of critical mass is designed to enhance the legal education of every student in the Law School.

From the perspective of CLEA, the benefit to minority students of having a critical mass of such students is no greater (and no less) than the benefit received by majority students. As explained above, a multiplicity of viewpoints helps each student to test his or her own viewpoints and perspectives by demonstrating both that minorities can and do have world views and experiences that are foreign to majority students, and vice versa, and that there is no single minority opinion or experience, just as there is no single majority view. The "robust exchange of ideas" brought about by diversity and exposure to diversity are particularly "central to clinical legal education which focuses on lawyering in an increasingly pluralistic and multi-cultural society and which usually entails small classes and interactive and collaborative educational experiences." Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 Hastings L.J. 445, 456 (2000).

The issue then becomes whether these benefits can exist without a critical mass of minority students. Both academic research and the experiences of clinical law professors tend to show that they cannot.

In a more formal – classroom or clinical – setting, in the absence of a critical mass of minority students, minority students often feel a lack of support in voicing an opinion and, as a result, suppress their opinions. *See*, *e.g.*, Kimberle Williams Crenshaw, *Foreword: Towards a Race-Conscious Pedagogy in Legal Education*, 11 Nat'l Black L. J. 1 (1989). Alternatively, minority students may be reluctant to speak out due to perceived pressure to represent the "minority viewpoint," despite the fact that no such consensus minority viewpoint may even exist. *Id.* *See also* Nancy McCarthy, *A Year as "The Only One" at Boalt*, Cal. Bar J. (Feb. 2003), (reporting on the experience of the single African-American law student admitted to Boalt Hall School of Law in 1997, who described feeling as if he were "in a fishbowl" and who put great pressure on himself "not to look stupid" to avoid giving "any fodder to those who would say, '[h]e didn't belong there in the first place'"), *at* http://www.calbar.ca.gov state/calbar/calbar_home.jsp. When this self-censoring takes place, the opportunity to hear, challenge and learn from differing perspectives is lost. The educational experiences of all students are made immeasurably poorer by such suppression of divergent opinions. *See* Orfield & Whitla at 160 (two-thirds of the law students at Harvard and Michigan reported that substantive classes such as constitutional law were better because of diversity because the makeup of the class affected the way topics were discussed in those classes); Roxanne Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College*, in *Diversity Challenged,* at 251 (faculty members report in study that issues concerning race and ethnicity are discussed more substantively in a diverse classroom, and stereotypes about social and political issues are more likely to be confronted, but where critical mass is not present, these educational benefits are reduced).

A "critical mass" of minority students is also essential in order for all students to be able to be exposed to differing perspectives in the various informal settings that are central to the educational process. A small number of minority students is simply insufficient to provide the opportunities for interaction with much larger numbers of non-minority students on a routine basis in unstructured, relaxed settings. Such settings often provide the opportunity for much more open, frank and intense discourses and learning than does a structured classroom (or even a clinical) setting, and in the views of many represents the paradigm of the university experience. *See* Orfield & Whitla at 159 (two-thirds of Harvard students and three-fourths of Michigan students stated that informal exchanges were enhanced by diversity at their schools). Informal interactions provide, perhaps, the best opportunity for law students to obtain the full benefits of diversity and to develop the understanding that will prove crucial to their development in clinics during law school and in practice after graduation. *See Bakke*, 438 U.S. at 312-13 n.48 (Powell, J., quoting Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)).

III. ENROLLING A CRITICAL MASS OF MINORITY LAW STUDENTS IS ESSENTIAL TO FOSTERING AND MAINTAINING PUBLIC CONFIDENCE IN AMERICA'S LEGAL SYSTEM

In a legal and political system, such as ours, that depends in large part on the consent of the governed, it is critically important to foster and maintain the public's sense that the law and the legal system are impartial, fair and legitimate. Indeed, the effectiveness of the legal system, and

legal service providers, depends on the trust, confidence, respect, and cooperation of this nation's citizens. Gaining that trust, confidence, respect, and cooperation, however, depends in large measure on building a legal system that includes judges, lawyers, jury members, and other participants of all races and backgrounds. *See*, *e.g.*, *Batson v. Kentucky,* 476 U.S. 79, 87, 99 (1986) (stating, "[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race," and noting that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community"). The long history of discrimination and oppression of minorities, however, has severely undermined the trust and confidence the legal system needs, especially in certain minority communities. *See generally Patterson v. McLean Credit Union,* 485 U.S. 617 (1988) (Stevens, J., dissenting).[15]

Attaining a diverse student body in the clinics of America's law schools can make important contributions in regaining trust and respect for the legal system among minorities. As explained *supra*, law school clinics tend to

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[15] For this reason, CLEA agrees with the argument of *amicus curiae* Society of American Law Teachers, which contends that the demonstrated history of segregation and discrimination in the State of Michigan's primary and secondary educational institutions, and elsewhere, makes attaining a diverse law school student body all the more important. *See generally* Br. of *Amicus Curiae* Society of American Law Teachers. "[I]t must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms . . . ." *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).

serve a predominantly poor and minority client base. Serving that client base effectively, with a racially and ethnically diverse group of student-lawyers who represent their clients through the client-centered approach utilized by many law school clinics, is important in rebuilding minority clients' confidence and trust in the legal system. In addition to the representation provided directly by law school clinics, the graduates of those clinics also continue to play a role in serving the legal needs of minorities and the poor. For example, Justice O'Connor has cited the experiences of her former clerks who participated in law school clinical programs. "As my former clerks describe it, once they are in private practice, they miss the feeling of personal connection they got out of their clinical work in school. They recapture that feeling by taking on a steady stream of pro bono clients, which in turn benefits all of us." Justice Sandra Day O'Connor, *Good News and Bad News,* Address to the 1991 American Bar Association Annual Meeting, *Pro Bono* Awards Luncheon, at 8 (Aug. 12, 1991).

Finally, it is axiomatic that to have a racially and ethnically diverse legal system, the law schools themselves – the only source of lawyers – must also reflect that diversity. Pluralism among federal and state judges, law professors, prosecutors, public defenders, lawyers for government agencies, corporate general counsel, and attorneys in private law firms necessarily depends on true diversity being achieved in America's law schools. It is equally true that for racial and ethnic diversity to seep into the highest, most prestigious positions in our legal system, minority law students must attain a critical mass at America's elite law schools, including The University of Michigan Law School, because the graduates of such law schools disproportionately occupy these positions. For these reasons, too, enrolling a

critical mass of minority law students is a compelling state interest.

CONCLUSION

"[A]lthough the law is a highly learned profession . . . it is an intensely practical one. 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." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). For decades, clinical educators have known that they and the student-lawyers they teach, cannot, as a practical matter, properly deliver legal services to their predominantly minority client base if student-lawyers have not learned to evaluate their own biases and engage in value-neutral communication with clients. These skills do not develop in a vacuum. Indeed, they can be instilled only when there is a genuine, critical mass of diversity in the law school class – the people with whom law students relate on a day-to-day basis.

In the interests of properly and rigorously training the next generation of lawyers, CLEA respectfully requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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