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 *AMICI CURIAE* LAW PROFESSORS LARRY ALEXANDER, ROBERT A. ANTHONY, KINGSLEY R. BROWNE, JIM CHEN, GEORGE W. DENT, JR., STEPHEN G. GILLES, ROBERT H. HEIDT, GAIL HERIOT, MICHAEL I. KRAUSS, GARY LAWSON, MARK R. LEE, NELSON LUND, JOHN McGINNIS, GEOFFREY MILLER, DALE A. NANCE, MICHAEL STOKES PAULSEN, STEPHEN B. PRESSER, MICHAEL RAPPAPORT, MAIMON SCHWARZSCHILD, BERNARD H. SIEGAN, AND CHRISTOPHER T. WONNELL IN SUPPORT OF PETITIONER

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Dated: January 16, 2003

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Other Authorities

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors with a professional interest in promoting learning environments free from the taint of racial discrimination. *Amici* are committed to the principles of equality under law embodied in the Constitution, and oppose invidious racial discrimination of any kind. In particular, *amici* oppose as unconstitutional the race-based admissions policies employed by the University of Michigan School of Law and many other institutions of higher learning. A list of the *amici* and their institutional affiliations is provided as an appendix to this brief. The institutional affilia-

[1] This brief is filed with the written consent of all parties. Blanket consent letters are on file with the Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

tions are for identification purposes only. The views expressed in this brief are those of the individual *amici* and do not necessarily reflect the views of the institutions at which they teach.

SUMMARY OF ARGUMENT

This Court should hold that "diversity" is not a compelling state interest sufficient to justify race-based discrimination. First, "diversity" is employed by universities as a shorthand term for discrimination on the basis of race, is indistinguishable from the use of quotas, and is not a remedial interest. Second, racial "diversity" in the classroom does not constitute academic diversity; to the contrary, it is based on racial stereotyping and fosters stigmatization and hostility. Furthermore, even stereotypically assuming it resulted in a greater diversity of views and information, such a result is not a compelling interest that would outweigh constitutional rights in this or other contexts. Finally, "diversity" is a race-balancing interest that would, by its own terms, require race discrimination for eternity.

ARGUMENT

The Court has held repeatedly that racial classifications are "*presumptively invalid* and can be upheld only upon an extraordinary justification." *Shaw* v. *Reno*, 509 U.S. 630, 643-44 (1993) (quotation and citation omitted) (emphasis added). Race-based classifications can survive strict scrutiny only if they are narrowly tailored to serve a compelling state interest. *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 226 (1995); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion).

The University of Michigan School of Law ("Michigan") employs race-based classifications in its admissions policies, and race often is the deciding factor between the admission of

one applicant and the rejection of another with equal or better qualifications. *See Grutter* v. *Bollinger*, 137 F. Supp.2d 821, 832 n. 10 (E.D. Mich. 2001) (quoting Michigan's former admission's director for the proposition that race "'generally' explains the difference in admissions rates between minority and non-minority groups"). The questions for this Court, therefore, are whether Michigan's asserted interest is constitutionally "compelling" and whether its admissions program is narrowly tailored to serve that interest.

Regarding the interest offered in support of its racial classifications, Michigan contends, *inter alia*, that "certain educational benefits flow from a racially diverse student body." *Id.* at 840. The court below held that such racial "diversity" is a sufficiently compelling state interest to legitimize Michigan's practice of racial discrimination, relying almost exclusively on Justice Powell's observation that "the attainment of a diverse student body * * * clearly is a constitutionally permissible goal for an institution of higher education." *See Grutter* v. *Bollinger*, 288 F.3d 732, 739 (CA6 2002) (quoting *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 311-12 (1978) (opinion of Powell, J.)). That conclusion was flawed and should be rejected by this Court.

Amici respectfully submit that this Court should state in words so clear that they cannot be misunderstood by university administrators that the use of racial preferences, classifications, or "pluses" for the purpose of achieving a racially diverse student body is prohibited by the Fourteenth Amendment. The failure of the Court to address the "diversity" question head-on could have devastating consequences for the rights of individuals of all races who participate in the admissions process. Since *Bakke*, the "diversity" principle in practice has been used to create a loophole through which universities continue to discriminate broadly and openly on the basis of race.

I. MICHIGAN'S DIRECT PURSUIT OF RACIAL DIVERSITY NECESSARILY ENTAILS RACIAL CLASSIFICATIONS.

The pursuit of "diversity" in general is a broad and potentially varied exercise that can turn on any number of characteristics or traits. Universities can seek geographic diversity, intellectual diversity, athletic and artistic diversity, and even socio-economic diversity. Those qualities are directly relevant to the educational mission and are not themselves constitutionally suspect. But the direct pursuit of *racial* diversity as an end unto itself, and as a supposed means of creating other types of diversity, is quite different. That pursuit involves taking a single characteristic – race – that the Constitution and this Court have declared unrelated to legitimate bases for distinguishing among individuals, and relying upon it not withstanding such admonitions.

A. Pursuit of "Diversity" Is a Euphemism for Race-Based Decisionmaking.

Making disingenuous use of Justice Powell's lone dictum regarding "diversity," 438 U.S. at 311-12, universities such as Michigan have adopted the seemingly benign language of pursuing diversity in general as a misleading euphemism for decision-making processes and goals based overtly on race. It is the view and experience of *amici* here that whatever nods of the head universities make toward more general notions of diversity, their affirmative action programs, such as the one in this case, remain targeted at a narrow vision of *racial* diversity *regardless* of the consequences of such programs for other types of diversity.

Numerous experienced law professors, including even those who support racial preferences in admissions, have recognized and acknowledged that the language of educational diversity in the admissions context is generally used as a cover for direct racial decision-making. Such professors speak not merely as academics who have studied the issue, but as first-hand observers within law school communities

and administrations, and often as direct participants of the very admissions processes they describe.

Professor Alan Dershowitz of Harvard has been forthright about the deceptive use of the "diversity" label in connection with race-driven admissions programs:

> The *raison d'être* for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of "diversity" demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals. In recent years, it has been invoked—especially by professional schools—as a clever post facto justification for increasing the number of minority group students in the student body.

Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L. REV. 379, 407 (1979); *see also id.* at 404 ("The concept of 'diversity' is so vague that it lends itself to a myriad of widely divergent and ever-changing definitions capable of masking the criteria actually at work").[2]

Professor Samuel Issacharoff, of Columbia and formerly of Texas, makes a similar point. One of the attorneys who defended the University of Texas School of Law's race-driven admissions policy, *see Hopwood* v. *Texas*, 78 F.3d 932 (CA5) (striking down the UT's admissions policy), *cert. denied*, 518 U.S. 1033 (1996), he nonetheless has acknowledged that "diversity" is the current jargon for racial discrimination: "[O]ne of the clear legacies of *Bakke* has been to enshrine the term 'diversity' within the legal lexicon to cover everything from curricular enrichments to thinly-veiled set-asides." Samuel Issacharoff, Bakke *in the Admissions Office and the*

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[2] Professor Dershowitz' co-author, Ms. Hanft was then a student at Harvard Law School and was a college admissions officer elsewhere.

Courts: Can Affirmative Action Be Defended?, 59 OHIO ST. L.J. 669, 677-78 (1998).

Other experienced law professors with diverse views of the affirmative action issue in general have recognized the same truth. *See, e.g.*, Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 34 (2002) (Yale) ("many of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds").

Professor Jed Rubenfeld of Yale, who defends "affirmative action" on non-diversity grounds not advanced by Michigan in this case, notes the disingenuousness of the claim that race-driven admissions advance true "diversity" measured by any criteria *other than* race. "[T]he pro-affirmative action crowd needs to own up to the weaknesses of 'diversity' as a defense of most affirmative action plans. Everyone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued. (Why no preferences for fundamentalist Christians or for neo-Nazis?)" Jed Rubenfeld, *Essay: Affirmative Action*, 107 YALE L.J. 427, 471 (1997).

In the end, even the proponents of affirmative action, if they are being candid, recognize that the "diversity" pursued by programs such as Michigan's is directly race-based in both its means and its ends, favoring or disfavoring particular races for their own sake without concern for diversity of qualities other than race. While such programs may pay lip-service to intellectual or experiential qualities other than race, they invariably collapse back to using race for its own sake, or as a proxy for other, pertinent, qualities without regard to whether such racial stereotyping is true or permissible.

B. Direct Pursuit of Racial Diversity Is Functionally Indistinguishable from Racial Quotas.

"Diversity"-based admissions policies such as the one at Michigan necessarily begin and end with some perceived

level of optimal diversity among the characteristics – in this case race – that they use to classify candidates. In order to achieve its claimed interest in diversity, Michigan must have at least some sense of what constitutes the proper representation of each race before it can decide that certain racial groups are "under-represented" and the student body thereby insufficiently diverse. Professor Issacharoff candidly acknowledges the point:

> The problem with diversity as a justification for a challenged affirmative action program is that it is an almost incoherent concept to operationalize, unless diversity means a predetermined number of admittees from a desired group. * * * [S]elective institutions must approach the applicant pool with predetermined notions of what an appropriately balanced incoming class should look like.

Issacharoff, 59 OHIO ST. L.J. at 678; *see also*, Schuck, 20 YALE L. & POL'Y REV. at 40 ("diversity admissions can mean little more than color-coding and color-counting in service of a pre-determined color-targeting").

The only way to ensure adequate "representation" among the races at the end of the admissions process is to begin with an institutional definition of "diversity" that necessarily produces the desired proportions of racial representation in a class of admitted students. Michigan's "diversity" policy is symbolic of the numbers game that has become synonymous with admissions policies that employ racial preferences. For example, members of Michigan's admissions staff receive "daily reports," which track applicants by race. *See Grutter*, 137 F. Supp.2d at 832-33. Dennis Shields, the former director of admissions at Michigan, has acknowledged that "as an admissions season progressed, he would consult the daily reports more and more frequently in order to keep track of the racial and ethnic composition of the class." *Id.* at 832. Mr. Shields said that he did this to ensure that a "critical mass" of minority students were enrolled. *See id.* "Diversity in educa-

tion" through race-driven admissions is meaningless without quotas or something constituting the functional equivalent of a quota system.

The district court, *id.* at 850, and Judge Gilman in his Sixth Circuit dissent, 288 F.3d at 816, determined after careful consideration of all of the facts that the "critical mass" concept is functionally equivalent to a quota system. The district court explained:

> [O]ver the years, [critical mass] has meant in practice that the law school attempts to enroll an entering class 10% to 17% of which consists of underrepresented minority students. The 10% figure, as a target, has historical roots going back to the late 1960s. Beginning in the 1970s, the law school documents begin referring to 10-12% as the desired percentage. Professor Lempert testified that critical mass lies in the range of 11-17%. Indeed this percentage range appeared in a draft of the 1992 admissions policy, and it was omitted from the final version despite Professor Regan's suggestion that it remain for the sake of "candor."[3]

Grutter, 137 F. Supp.2d at 840; *see also Hopwood*, 78 F.3d at 966 (Wiener, J., concurring) (University of Texas School of Law's admissions program "closely resembles a set-aside or quota system for * * * two disadvantaged minorities"); Robert H. Heidt, *Bar lowered way too far for minorities at law school*, Indianapolis Star, Dec. 27, 2002, *available at* www.indystar.com/print/articles/9/011344-5419-023.html (as "at [Michigan], we at [Indiana] enforce a de facto quota of the

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[3] Professor Lempert chaired the faculty admissions committee that drafted Michigan's 1992 admissions policy. Professor Regan served as a member of the faculty admissions committee that drafted Michigan's 1992 admissions policy.

minimum number of blacks and other minorities we are determined to enroll in each first-year law school class").[4]

"Diversity" policies must be described as what they are – means of implementing racial quotas. That such quotas might be informal or hidden under a cloak of rhetoric does not change that essential fact. Although the meaning of *Bakke* is the subject of much debate, it is undisputed that *Bakke* stands for the proposition that admissions policies that employ quotas for minority admissions are strictly prohibited by either statute or the Fourteenth Amendment. *See Bakke*, 438 U.S. at 319-20 (Powell, J.) (explaining that an admissions system that reserves a fixed number of places specifically for minority students violates the Fourteenth Amendment's Equal Protection Clause); *id.* at 414-15 (Stevens, J., for four Justices) (describing legislative history of statutory prohibition against racial discrimination relative to fears that it would result in quotas). And wholly apart from *Bakke*'s treatment of racial quotas, they are a particularly pointed affront to values of the Equal Protection Clause and should not be tolerated in the service of the constitutionally thin interests asserted in this case.

C. "Diversity" Is Not a Remedial Interest.

Thus far, the only constitutionally compelling interest recognized by this Court as satisfying strict scrutiny for racial classifications is the remediation of the effects of past race discrimination. *See Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employ-

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[4] Professor Heidt, one of the *amici* here, teaches at Indiana University School of Law and served on Indiana's admissions committee.

ing racial classifications."), *overruled by Adarand*, 515 U.S. at 227 (overruling *Metro Broadcasting* to apply strict scrutiny and discussing remediation as a compelling interest); *see also Croson*, 488 U.S. at 493 (unless racial classifications are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"); *Wygant*, 476 U.S. at 275 (discussing remediation).

Michigan's "diversity" policy is not, and does not purport to be, remedial. *See Grutter*, 288 F.3d at 795 n. 17 (Boggs, J., dissenting) (the "Law School administration is the sole creator of the admissions policy at issue here and we can rely on its assurance * * * that such remediation [of past discrimination] is not the purpose of its admissions policy"). The question for this Court then is whether "diversity" should be added as a "compelling," not merely valid or permissible, state interest that can be used to justify direct and intentional racial discrimination.

Because the Court has "strictly" limited the use of racial classifications to the remedial context, *Croson*, 488 U.S. at 493, respondents must demonstrate that there is something so special, so *compelling*, about marginal differences in the educational experiences of post-secondary students that universities, alone among our government-sponsored institutions, should be allowed to practice what the Constitution, Title VI, and Section 1981 all prohibit – naked race discrimination. Although the question properly posed seems to answer itself, an examination of the realities of "diversity" in the classroom also leads to the conclusion that this so-called justification for discrimination does not pass constitutional muster.

II. RACIAL "DIVERSITY" IS NOT A COMPELLING INTEREST.

Because the pursuit of racial diversity for its own sake is an affront to the Fourteenth Amendment, the defenders of

"diversity" ultimately resort to some version of the argument that bringing together persons of different "backgrounds" – as defined by their skin color or national origin – will "enhance" the educational experience of students by creating academic or viewpoint diversity. *See Grutter*, 137 F. Supp.2d at 840 (detailing Michigan's defense of race-driven admissions on the ground that "certain educational benefits flow from a racially diverse student body"); Resp. Br. Opp. Cert. at 4 n. 2 (noting the benefit to majority students that allegedly results from a "critical mass" of minority representation in the classroom). But Michigan's admissions policy, and other "diversity" policies like it, cannot be defended on the ground that racial diversity promotes academic diversity. The defense of "diversity" programs on the ground that they expose people of different races to one another, thereby facilitating learning, respect and appreciation among the races, does not relate to a true "interest in intellectual diversity – diversity of 'experiences, outlooks and ideas' that would otherwise be left out – but specifically in racial and ethnic diversity as such." Volokh, 43 UCLA L. REV. at 2076 (quoting *Bakke*, 438 U.S. at 307, 315) (opinion of Powell, J.)). As even Justice Powell, the wellspring of the diversity rationale, recognized, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307.

A. Interests In "Diversity" that Assume Stereotyping Cannot Have Compelling Weight.

The "diversity" rationale suggests that it is permissible to use race as a proxy for experiences, outlooks or ideas, *see* Volokh, 43 UCLA L. REV. at 2061, and that the use of race as a proxy will ensure that different viewpoints are brought to the classroom. But however desirable a diversity of *ideas* may be, there is no basis for categorizing it as "compelling," rather than merely acceptable or substantial for purposes of analyses *other than* strict scrutiny. The abhorrent essential predicate to the interest – governmental stereotyping of different races as

to their views – also assures that the interest in racial diversity for its secondary viewpoint effects cannot count as compelling. As Justice O'Connor has recognized, "the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior." *Metro Broad.*, 497 U.S. at 615 (O'Connor, J., dissenting). Justice Kennedy has likewise been critical of such a "demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens." *Id.* at 636 (Kennedy, J., dissenting).

Common sense and classroom experiences demonstrate that "viewpoint diversity" and "academic diversity" in the classroom are not affected by the racial composition of a student body. Several of *amici's* colleagues, including the former Dean and long-time professor at Michigan, Professor Terrance Sandalow, have concurred that racial diversity does not contribute to viewpoint diversity in the classroom. Dean Sandalow, who is intimately familiar with Michigan's education environment, wrote in the Michigan Law Review:

> "My own experience and that of colleagues with whom I have discussed the question, experience that concededly is limited to the classroom setting, is that racial diversity is not responsible for generating ideas unfamiliar to some members of the class. Students do, of course, quite frequently express and develop ideas that others in the class have not previously encountered, but even though the subjects I teach deal extensively with racial issues, I cannot recall an instance in which, for example, ideas were expressed by a black student that have not also been expressed by white students. Black students do, at times, call attention to the racial implications of issues that are not facially concerned with race, but white and Asian-American students are in my experience no less likely to do so."

Grutter, 137 F. Supp.2d at 850 n. 38 (quoting Terrance Sandalow, *Identity and Equality: Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874, 1906-07 (1999)); *see also* Schuck, 20 YALE L. & POL'Y REV. at 43-44.

Racial diversity is not required to foster a full discussion of issues and viewpoints in the classroom. If a white applicant and a black applicant each have the same view on an issue, and their respective race is ignored as it must be under the Constitution, there is no true "intellectual" or "academic" reason for admitting one of the students over the other.

If the theory that viewpoint diversity is achieved through racial diversity were to be adopted, it would "prove impossible to distinguish naked preferences for members of particular races" in university admissions on the sole basis of race. *Metro Broad.*, 497 U.S. at 615 (O'Connor, J., dissenting). To justify racial preferences in admissions, an institution of higher learning always "will be able to claim that it has favored certain persons for their ability, stemming from race, to contribute distinctive views or perspectives." *Id.* at 616. Accordingly, and justly, the notion that viewpoint diversity legitimizes racial classification of applicants has been rejected. *Id.* at 602 (the Constitution "provides that the Government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think"). Any "diversity" policy that is premised on the notion that people of different races bring particular viewpoints to the classroom solely because of their race should be struck down. If schools truly think that viewpoint diversity enhances education, they can pursue it directly rather than using race as a proxy.

Apparently realizing the difficulty of defending its admissions policy on the ground that race defines viewpoint, Michigan attempts an alternative claim that racial diversity in the classroom is required to *dismantle* stereotypes. Michigan argues that:

> the presence of a critical mass of minority students is essential to *dismantling* such stereotypes. When there are more than a token number of minority students, everybody in the class starts looking at people as individuals in their views and experiences, instead of as races and sees that there is a diversity of views and experiences among the minority students, just as there is among white students.

Resp. Br. Opp. Cert. at 4 n. 2 (internal quotation and citation omitted).

Michigan argues in essence that, because it assumes individuals generally believe that members of a "minority" race all share the same viewpoint on all issues, the educational experiences of members of the benighted majority will be "enhanced" by interaction with a "critical mass" of minority students. This argument merely shifts the stereotyped assumptions over to the majority racial group, but is no less offensive therefore. *See Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and in the judgment) (citing the Declaration of Independence); *id.* at 241 ("[G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.") (footnote omitted).

Moreover, Michigan hardly needs racial preferences to teach the obvious – that not all members of any given minority think alike. If, miraculously, something more were needed to make this point to students, surely a sufficiently diverse *reading list* would suffice. Michigan's self-contradictory treatment of individuals as members of groups, purportedly in order to demonstrate that individuals are *not* members of groups, is closer to being incredible than it is to being compelling. In *Wygant*, the Court rejected the asserted compelling interest in "providing minority role models for [a public school system's] minority students, as an attempt to alleviate the effects of societal discrimination" because

"[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." 476 U.S. at 274, 276. Michigan's similar use of preferred minority students to serve as examples or representatives of their race in the classroom rather than as individuals also is unconstitutional.

B. Discrimination Resulting From Racial Stereotyping Results In Stigmatization and Hostility.

Even if one were to hypothesize that a compelled increase in racial diversity would increase educationally valuable viewpoint diversity to some degree, it would also generate educationally detrimental stigma and hostility based on precisely the same type of stereotyping regarding race employed by the University. As several Justices have recognized, racial preferences that result from such stereotyping "may impose stigma on its supposed beneficiaries, and foster intolerance and antagonism against the entire membership of the favored classes." *Metro Broad.*, 497 U.S. at 635-36 (Kennedy, J., dissenting) (internal quotations and citations omitted); *id.* at 604 (O'Connor, J., dissenting) ("Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit.").[5] Indeed, policies that seek diversity through race are a "statement by government that certain persons identified by race are in fact being placed in posi-

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[5] *See also Fullilove* v. *Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) ("remedial" race legislation "is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race"); *Bakke*, 438 U.S. at 298 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.").

tions they may be presumed not likely to hold but for their race." William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 787 n. 38 (1979).

"Diversity" admissions programs, such as Michigan's, foster rather than minimize the focus on race. The policy treats preferred minorities as a group, rather than as individuals. Although Michigan purports to consider other types of diversity – such as unusual employment experiences and extracurricular activities – race is the most identifiable diversity factor that separates one applicant from another. *Grutter*, 137 F. Supp.2d at 832 n. 10 (race "'generally' explains the difference in admissions rates between minority and non-minority groups" at Michigan). That Michigan considers other factors as between certain students is simply irrelevant to the stigma and hostility that results from using race as a factor at all.

Amici's collective experiences support the conclusion that both students who are admitted, and those who are not admitted, recognize that race indisputably plays an important role in admissions. Applicants from races that do not benefit from Michigan's preferences, who have high LSAT scores and GPAs, but who nonetheless are denied admission, will likely conclude that race determined their fate in the admissions process. Similarly, members of all races who gain admission may believe that their minority classmates would not be their classmates but for their race. Because of the lowered expectations that accompany racial preferences in admissions, members of minority groups are and will be stigmatized—sometimes self-stigmatized—as inferior.

The racial hostility and stigmatization that is bred in universities as a result of racial preferences is felt both in our classrooms and throughout all of society. If not stopped now, the hostility and scarring that can result from racial preferences based on "diversity" could take generations to heal. At a minimum, however, such consequences cut against any claimed benefits and render Michigan's asserted interest in

the educational benefits of racial diversity necessarily less than compelling.

C. Government-Defined Viewpoint Diversity Is Not a Compelling Interest.

Regardless whether racial classifications generate viewpoint diversity and accepting that viewpoint diversity is, in general, a valuable thing in an educational environment, that does not even remotely satisfy the requirement that it must be a "compelling" interest sufficient to justify otherwise unconstitutional conduct. The difficulty in too-easy a transition from merely desirable to constitutionally compelling seems apparent: We would not authorize state universities to violate students' right to free speech or free exercise of religion on the ground that doing so would, in the view of academics, create a better educational environment or a greater "diversity" of views. Rather, this Court has specifically rejected such government efforts to compel an increase in the supposed diversity of viewpoints. *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (striking down an editorial right-of-reply requirement despite claims that it increased the flow of information and the diversity of views presented); *see also First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 791 n. 30 (1978) (rejecting the "unsettling" logic that the "State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to 'enhance the relative voices' of smaller and less influential members").

But if it is a compelling interest to discriminate on the basis of race in order to promote an educational atmosphere with a supposedly more diverse set of student views, then it is unavoidably a compelling interest for all other constitutional purposes. The notion that the government might impose a

myriad of speech restrictions and compulsions in the name of "diversity" demonstrates the absurd premise that marginal differences in educational diversity rise to the level of "compelling" state interests.

D. The "Diversity" Rationale Is Limitless

"Diversity" also fails as a "compelling interest" because it has no logical stopping point. The Court has repeatedly rejected alleged "compelling interests" that extend indefinitely into the future. *See, e.g.*, *Croson*, 488 U.S. at 498. As Justice O'Connor has explained:

> In *Wygant*, [the Court] rejected the asserted interest in "providing minority role models for [a public school system's] minority students, * * * [because such an interest is] too amorphous a basis for imposing a racially classified remedy" and would allow "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."

Metro Broad., 497 U.S. at 613-14 (O'Connor, J., dissenting) (internal citations omitted) (quoting *Wygant*, 476 U.S. at 274, 276).

Because "diversity" programs such as Michigan's are by their very nature "timeless in their ability to affect the future," *Wygant*, 476 U.S. at 276, and "would support indefinite use of racial classifications," *Metro Broad.*, 497 U.S. at 614 (O'Connor, J., dissenting), they cannot justify a university's consideration of race in making admissions decisions. By definition, a "diversity" interest supports indefinite discrimination on the basis of race in university admissions because there will always be a need to engage in race-based decision-making to ensure a "properly diverse" student body. "Diversity"—with its concomitant quotas and careful monitoring of racial admissions—indeed would *require* unending use of race in admissions.

For this reason, and for all of the other reasons set forth above, "diversity" does not constitute an extraordinary justifi-

cation sufficient to overcome the presumptive invalidity of government-sponsored race discrimination.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully Submitted,

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APPENDIX

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