No. 02-0241

In the Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE CENTER FOR EQUAL OPPORTUNITY, THE INDEPENDENT WOMEN'S FORUM, AND THE AMERICAN CIVIL RIGHTS INSTITUTE IN SUPPORT OF PETITIONER

C. MARK PICKRELL
Counsel of Record
3200 WEST END AVENUE
SUITE 500
P.O. BOX 50478
NASHVILLE, TN 37205-0478
(615) 356-4978

ROGER CLEGG
CENTER FOR EQUAL
OPPORTUNITY
14 PIDGEON HILL DR.
SUITE 500
STERLING, VA 20165
(703) 421-5443

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Miscellaneous Materials

INTEREST OF AMICI CURIAE

This brief *amici curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court. Counsel for petitioner and respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

Amici are non-profit research, education, and public-advocacy organizations. Amici devote significant time and material resources to the study of the prevalence of racial, ethnic, religious, and gender discrimination by the federal government, the several States, and private entities. For instance, the Center for Equal Opportunity has obtained admissions data from public universities across the country and publishes a series of studies that document evidence of racial and ethnic discrimination at those institutions. Amici expend significant time and money to educate the American public about the prevalence of discrimination in American society. Amici publicly advocate the cessation of racial, ethnic, religious, and gender discrimination by the federal government, the several States, and private entities. No counsel for a party authored this brief in whole or part, and no person or entity other than amici curiae made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Amici support petitioner's argument that the court of appeals erred in rejecting petitioner's constitutional challenge to the University of Michigan Law School's use of racial and ethnic preferences in its admissions process. Amici submit this brief to make the Court aware of the confusion existing in the courts below on this issue, the prevalence of racial and ethnic discrimination by State institutions of higher education, and the need for the Court clearly to reject the diversity rationale used to justify racial and ethnic discrimination.

STATEMENT

Petitioner Barbara Grutter applied for admission to the University of Michigan Law School's 1997 entering class but was rejected. She filed suit against the petitioners, alleging that she had been discriminated against because of her race and ethnicity.

The United States District Court for the Eastern District of Michigan, Friedman, J., following a bench trial, found the following basic facts. In 1992, the faculty of the Law School adopted a new, written admissions policy. *Grutter v. Bollinger*, 137 F. Supp.2d 821, 825 (E.D. Mich. 2001). Under the 1992 policy, the Law School "clearly considers an applicant's race in making admissions decisions," and race is "an enormously important factor" in deciding whether an applicant is accepted or rejected. *Id*. at 839, 841. According to the Law School's expert witness, Dr. Stephen Rauderbusch, racial and ethnic preferences affected admissions to the Law School as follows:

Year	Minorities Admitted Using Preferences (%)	Minorities Admissible Without Preferences (%)
1995	26%	4%
1996	31%	8%
1997	33%	8%
1998	34%	9%
1999	37%	8%
2000	35%	10%

Id. at 839-42.

The Law School attempts to have an entering class containing a "critical mass" of minority students. *Id*. at 840. According to Professor Richard Lempert, the professor who chaired the committee that drafted the 1992 policy, a "critical mass" consists of at least 10 percent minority students in each entering class. *Id*. at 834, 840. To achieve the desired "critical

mass," the Law School's admissions office prepares a *daily* report of applicants, offers, and acceptances, broken down by race and ethnicity, which is used by admissions officers to ensure that the desired percentage of minority students in each entering class is achieved. *Id*. at 832, 842. Minority students constituted at least 11 percent of each entering class selected under the 1992 admissions policy. *Id*. at 834.

A disparity between the academic qualifications of minority students and other students has existed in each class selected under the 1992 admissions policy. *Id*. at 840. This disparity has fluctuated from year to year, yet the percentage of minority students in each class has remained constant. *Id*. at 841. Because the Law School's "critical mass" is a defined minimum percentage, and because the 1992 admissions policy resulted in the consistent achievement of that percentage, the district court determined that the 1992 admissions policy was "practically indistinguishable from a quota system." *Grutter,* 137 F. Supp.2d at 851. The district court accordingly held the 1992 policy to be unconstitutional.

In a 5-4 decision, however, the en banc U.S. Court of Appeals for the Sixth Circuit reversed, holding that the Law School's interest in student body diversity justified its racial and ethnic discrimination against petitioner and that the 1992 policy was not an impermissible quota system. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

SUMMARY OF REASONS FOR GRANTING THE WRIT

This Court should grant the petition for writ of certiorari. The courts of appeals are sharply divided over the fundamental legal issue presented in this case, and the use of race preferences in State higher-education admissions decisions is a national problem that is both wide and deep: Many schools discriminate, and the discrimination is often severe.

The courts of appeals are split over the constitutionality of State racial preferences. In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), this Court was divided, in multiple minority opinions, over the legality and constitutionality of State preferences in higher-education admissions for certain racial and ethnic minorities. In the wake of this Court's decision in *Bakke*, the courts of appeals have starkly diverged regarding the constitutionality of these State preferences. The Fifth Circuit has rejected the claim that *Bakke* establishes "diversity" as a compelling state interest justifying racial and ethnic discrimination, and the Eleventh Circuit has held that, in any event, the University of Georgia's higher-education racial preferences were unconstitutional because they were not narrowly tailored. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); *Johnson v. Board of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001). The Sixth and the Ninth Circuits, however, have determined that *Bakke* does permit racial and ethnic discrimination in order to achieve a "diverse" student body. *Grutter v. Bollinger,* 288 F.3d 732 (6th Cir. 2002); *Smith v. University of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

The existence of State discrimination in higher-education admissions is a significant national problem. Over fifty years ago, this Court held that State racial discrimination in law-school admissions violates the Equal Protection Clause of the Fourteenth Amendment. *Sweatt v. Painter*, 339 U.S. 629 (1950). In the wake of this Court's divided decision in *Bakke*, however, State discrimination in the form of race preferences now exists in many States—indeed, in every State in which it has been studied. The widespread nature of this discrimination has been documented in studies published by the Center for Equal Opportunity—relying on data supplied by the universities themselves—and conceded by a leading academic defense of such "race-sensitive" policies, *The Shape of the*

River by William G. Bowen and Derek Bok.

This Court should grant the petition to resolve the split in the circuits and make clear that greater student body diversity does not justify racial and ethnic discrimination. A decision by this Court that ruled only on the "narrow tailoring" prong of strict scrutiny, and failed to resolve whether the achievement of student body diversity is an interest so compelling as to justify racial and ethnic discrimination, is unlikely to alter the current discriminatory behavior of colleges and universities.

The Court has been reluctant to allow discrimination except as a remedial matter, and it would be extremely dangerous to create an exception to the Equal Protection Clause based on social science evidence. Such easily produced evidence is seldom dispositive and was cited, for instance, in favor of segregated schools. The political branches have written unambiguous law in this area—especially when Congress enacted Title VI of the Civil Rights Act of 1964—and the Court should not hesitate to follow those texts. While a remedial exception to the clear language of Title VI might barely be plausible, any nonremedial exception is not. Finally, disallowing preferential treatment in university admissions will not and has not closed the doors of higher education to African-Americans or Hispanics.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED.

The decision of the Sixth Circuit against petitioner further deepened a split in the courts of appeals over the constitutionality of State race preferences in higher-education admissions. In 1996, the Fifth Circuit squarely held that racial and ethnic discrimination cannot be justified by claims of greater student body diversity and that the University of Texas

law school's racial preferences in admissions were unconstitutional, violating the Equal Protection Clause of the Fourteenth Amendment. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). In 2001, the Eleventh Circuit likewise found the State of Georgia's system of racial preferences unconstitutional. *Johnson v. Board of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001). The Eleventh Circuit in *Johnson* did not rule upon the State's claim of a "compelling interest," determining that *Bakke* did not resolve the issue and that, in any event, the State of Georgia had failed to narrowly tailor its system of racial preferences to achieve its professed ends.

In this case, the Sixth Circuit squarely contradicted the decision of the Fifth Circuit in *Hopwood* and the Eleventh Circuit in *Johnson*. The Sixth Circuit held that the *Bakke* decision establishes that State race preferences in higher-education admissions serve a compelling State interest, conflicting directly with the Eleventh and the Fifth Circuits. Moreover, the Sixth Circuit held that the University of Michigan's system of race preferences at the Law School was narrowly tailored to achieve its ends, in further conflict with the Eleventh Circuit. The Sixth Circuit's decision has not been made moot by subsequent events. *Cf. Smith v. University of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (claim rendered moot in part by voter referendum).

The Sixth Circuit's decision is also in tension with court of appeals decisions rejecting the diversity rationale as insufficiently compelling in other contexts—*see Messer v. Meno*, 130 F.3d 131 (5th Cir. 1997); *Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); *see also Taxman v. Piscataway Board of Education*, 91 F.3d 1547 (3rd Cir. 1996), *cert. granted*, 521 U.S. 1117, *dismissed per stipulation*, 522 U.S. 1010 (1997)—and with still other court of appeals decisions finding racial and ethnic discrimination in primary

and secondary school admissions not to be narrowly tailored—*see Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999); *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000). *See also Podberesky v. Kirwan*, 956 F.2d 52, 55 (4th Cir. 1992) ("classifications based on race, understandably, must be reserved for remedial settings"); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991) ("only a purpose of remedying discrimination against minorities will [justify governmental discrimination]"). The divergence of opinion among the courts of appeals on this issue is stark, and it should be resolved by this Court.

II. RACIAL AND ETHNIC DISCRIMINATION IN STATE HIGHER-EDUCATION ADMISSIONS IS A MAJOR NATIONAL PROBLEM.

There is no doubt that, as a result of the confusion in the lower courts regarding the legality of racial and ethnic admission preferences, such discrimination is widespread in American colleges and universities.

The Shape of the River, a 1998 book by William G. Bowen (former president of Princeton University) and Derek Bok (former president of Harvard University), is frequently cited by those defending "race-sensitive" admission policies, but even it acknowledges studies estimating "a marked degree of racial preference" in 20 percent of all four-year institutions and a lesser degree of preference in another 20 percent of them. *Id.* at 15 & n.1. Because Bowen and Bok also assert there that "only about 20 to 30 percent" of colleges and universities are at all selective, they demonstrate that the only schools that don't discriminate on the basis of race and ethnicity are the ones that admit everyone.

Bowen and Bok also concede that the degree of preference in university admissions is often significant. Race is far from being a mere tiebreaker; "black applicants have had an appreciably greater chance than whites of being admitted," indeed, a "considerably greater" chance. "In the upper-middle ranges of SAT scores, in particular, the admission probability for black applicants was often three times higher than the corresponding probability for white applicants." *Id.* at 26. It is not surprising then that, as Bowen and Bok further concede, the difference in college grades is "very large." *Id.* at 72. "The average rank of black matriculants was at the 23d percentile of the class, the average Hispanic student ranked in the 36th percentile, and the average white student ranked in the 53d percentile." *Id*.

A series of studies conducted by the Center for Equal Opportunity indicates that Bowen and Bok actually understate the pervasiveness and severity of racial and ethnic discrimination in university admissions. To date, CEO has studied undergraduate admissions policies at 57 different schools in eight States across the nation (California, Colorado, Maryland, Michigan, Minnesota, North Carolina, Virginia, and Washington), as well as the service academies at West Point and Annapolis; six medical schools across the country (in Georgia, Maryland, Michigan, Oklahoma, New York, and Washington) ; and three Virginia law schools.[1] The data subjected to the studies' regression analyses were supplied by the schools themselves, pursuant to state freedom-of-information laws. Every state system studied shows significant amounts of discrimination, and only a relatively few individual schools show no evidence of discrimination.[2]

---

1 The studies are available on CEO's website, www.ceousa.org.

2 All the undergraduate schools except for Maryland's are discussed in Robert Lerner & Althea K. Nagai, *Pervasive Preferences* (2001). All the medical schools, again excepting Maryland, are discussed in *Preferences in*

CEO studies found that black-white gaps in SAT verbal and math scores of 100 points or more are common, as are large odds ratios favoring blacks and, to a lesser extent, Hispanics over whites. The studies have also found corresponding disparities in graduation rates among different groups. The diversity rationale is ubiquitous at colleges and universities. Racial and ethnic "diversity" is promoted in some fashion on the website of every state flagship institution.

III. THIS COURT SHOULD ADDRESS, AND REJECT, THE "DIVERSITY" JUSTIFICATION FOR RACIAL AND ETHNIC DISCRIMINATION.

A decision by this Court that ruled only on the "narrow tailoring" prong of strict scrutiny, and failed to resolve whether the achievement of student body diversity is a compelling interest justifying racial and ethnic discrimination, would be unlikely to change the behavior of colleges and universities

---

Medical Education (2001). Maryland undergraduate admissions are discussed in *Preferences in Maryland Higher Education* (2000); Maryland's state medical school is discussed in *Racial and Ethnic Preferences and Consequences at the University of Maryland School of Medicine* (2001). The three Virginia public law schools are discussed in *Racial and Ethnic Preferences at the Three Virginia Public Law Schools* (2002). In addition, the state undergraduate institutions in California, Colorado, Michigan, Minnesota, North Carolina, Virginia, and Washington were each the subject of one or more separate studies by CEO. All the studies were authored by Robert Lerner and Althea K. Nagai. Material from these studies appears in Robert Lerner & Althea K. Nagai, "Reverse Discrimination by the Numbers," *Academic Questions*, Summer 2000 at 71; Robert Lerner & Althea K. Nagai, "Preferences in Higher Education Admissions Policies: An Empirical Overview," Giftedness and Cultural Diversity (Diane Boothe & Julian Stanley eds.)(forthcoming).

currently engaged in such discrimination.[3] It would not change the current *de facto* legal regime. If schools are allowed to take race and ethnicity into account in deciding whom to admit, they likely will continue to do so, and simply hope that no one will sue them or, if they are sued, that they can obfuscate regarding how, and how heavily, race and ethnicity are weighed. For the discriminatory behavior of the schools to abate, they must be instructed unequivocally that diversity is not a compelling State interest.

The only justification that this Court has consistently found sufficiently compelling to justify racial and ethnic discrimination is remedying such discrimination.[4] There are, perhaps, other governmental interests that might be hypothesized as compelling enough to justify such racial and ethnic classifications by the government—such as national security (*see Korematsu v. United States* , 323 U.S. 214, 218 (1944); *Hirabayashi v. United States* , 320 U.S. 81, 100-02

---

3 The use of strict scrutiny has two distinct but overlapping justifications. Its use is sometimes justified as necessary to determine whether the purported nonracial justification for a policy really is nonracial; other times, the doctrine seems to be that even concededly racial classifications are permissible if the stakes are high enough. The diversity rationale cannot pass muster under either approach. There can be no doubt that what universities like respondent are really after is not a variety of "experiences, outlooks, and ideas," *Bakke* at 314 (opinion of Powell, J.), but "some specified percentage of a particular group merely because of its race or ethnic origin," *id*. at 307. *Cf. Metro*, 497 U.S. at 614 (O'Connor, J., dissenting). And, as discussed below, if the flimsy educational benefits put forward by respondents are a "compelling" justification, then anything is.

4 *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (race classifications must be "strictly reserved for remedial settings"); *id.* at 524-25 (Scalia, J., concurring). *See also Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination."); *id*. at 632 (Kennedy, J., dissenting) (criticizing "the use of racial classifications … untied to any goal of addressing the effects of past race discrimination").

(1943)), or preventing bloodshed in the aftermath of a prison race riot (*see Lee v. Washington*, 390 U.S. 333, 334 (1968) (concurring opinion of Black, Harlan, and Stewart, JJ.)—and it is probably impossible to adduce them all or even to state a formula by which they can be derived and limited. But the Court has been rightly reluctant to accept nonremedial justifications as compelling (*see, e.g., Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-77 (1986) (plurality opinion)), and it should be especially reluctant to accept a justification that is amorphously and subjectively grounded and threatens a permanent institutionalization of racial and ethnic discrimination. *See Wygant*, 476 U.S. at 276 ("ageless in [its] reach into the past, and timeless in [its] ability to affect the future"); *Metro Broadcasting*, 497 U.S. at 612, 614 (O'Connor, J., dissenting) (diversity rationale is "too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications" and "would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcasting spectrum continues to reflect that mixture").[5]

If education were impossible without racial classifications, then it might be fair to argue that States have a compelling reason to discriminate. But the claim here is merely that education is improved, to some uncertain and unquantifiable degree, by interracial conversations and comments that occur randomly, sometimes in classrooms and sometimes outside them. Whatever the meaning of "compelling" may be, this falls short. Nor is it plausible that

5 As the petition points out (pp. 28-29), the diversity rationale, if accepted for higher education, could also justify pervasive discrimination in other areas of public life, including primary and secondary education, employment, service on different public boards, jury selection, housing, and so forth.

what is taught by these random contacts is and can be taught in no other way and in no other place – not by reading, for instance, or by the popular culture, or in the workplace itself.

For an educational interest to be sufficiently compelling to justify race discrimination, it is also logical to require that the purported educational benefits outweigh the various costs to the institution and to the wider society. The value of anything must account for its liabilities. And the liabilities attendant to the use of racial and ethnic preferences are significant: It is personally unfair and sets a disturbing legal, political, and moral precedent to allow racial discrimination; it creates resentment;[6] it stigmatizes the so-called beneficiaries in the eyes of their classmates, teachers, and themselves;[7] it fosters a victim mindset, removes the incentive for academic excellence, and encourages separatism;[8] it compromises the academic mission of the university and lowers the overall academic quality of the student body; it creates pressure to discriminate in grading and graduation; it breeds hypocrisy within the school; it encourages a scofflaw attitude among

---

6 *See* Paul M. Sniderman & Thomas Piazza, *The Scar of Race* 8-9, 97-104, 109, 130, 133-34, 146-50, 176-77 (1993); and Paul M. Sniderman & Edward G. Carmines, *Reaching beyond Race* 15-58 (1997).

7 The principle of nondiscrimination serves all Americans, and the use of preferences harms not only those immediately discriminated against but also the supposed beneficiaries. The use of a double standard communicates in this context that some racial and ethnic groups are incapable of competing at the same intellectual level as others. *See Croson*, 488 U.S. at 493 (plurality) ("[c]lassifications based on race carry the danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility."); *Metro*, 497 U.S. at 636 (Kennedy, J., dissenting). On self-stigmatization, see Shelby Steele, *The Content of Our Character* 111-25 (1990).

8 *See* John H. McWhorter, *Losing the Race: Self-Sabotage in Black America* (2000)(e.g., pp. 235-38).

college officials; it mismatches students and institutions, guaranteeing failure for many of the former;[9] it papers over the real social problem of why so many African Americans and Hispanics are academically uncompetitive; and it gets state actors involved in unsavory activities like deciding which racial and ethnic minorities will be favored and which ones not, and how much blood is needed to establish authentic group membership.[10]

A. There Should Be No "Social Science" Exception to the Equal Protection Clause.

There are, in the abstract, a number of benefits that might be claimed for a diverse student body, but on analysis none can justify racial or ethnic discrimination. For instance, greater diversity might teach toleration, acceptance, and open-mindedness about other racial groups—but this lesson is likely to be undermined if there is a gap in the academic ability of the members of the different groups, as there is when admission preferences are used. Greater diversity might lead to exposure

9 *See* Stephan Thernstrom & Abigail Thernstrom, *America in Black and White* 405-11 (1997).

10 Powell's rationale in *Bakke* appears to hinge on an assumption that a prohibition on racial discrimination by a university would somehow trench upon the school's First Amendment rights. *Bakke* at 313 ("petitioner invokes a countervailing constitutional interest, that of the First Amendment"). This was dubious at the time, and remains so. *Cf. University of Pennsylvania v. EEOC*, 493 U.S. 184, 198-99 (1990); *Bob Jones University v. United States*, 461 U.S. 574, 603-05 (1983). It could justify policies of segregation as well as affirmative action (*see Runyon v. McCrary* , 427 U.S. 160, 175-77 (1976)) and could be used by many employers—for instance, newspapers—who could wrap themselves in the First Amendment. Nor is it clear how a prohibition of racially discriminatory student admission policies would "abridg[e] the freedom of speech" for anyone.

to people with different ideas or experiences, but it is very dubious to use race as a proxy for anticipating individuals' thoughts and experiences. There are few ideas or experiences that only members of a particular racial group can have, and fewer still that all members of that group will share. In sum, racial diversity cannot be equated with actual viewpoint diversity (and, indeed, universities show little interest in viewpoint diversity relative to melanin diversity).[11] Contradictorily, it might be argued that greater racial diversity is needed to teach the specific lesson that not all African Americans, for instance, think alike, but that is a rather obvious and narrow lesson, and it is difficult to see why it can be taught only by random interracial contacts.

Nonetheless, in this case the University of Michigan proferred social-science evidence to buttress its claim that its interest in a diverse student body is compelling. Such evidence should not be sufficient to justify State action as divisive, disturbing, and damaging as racial discrimination. After all,

---

11 The errors in this approach were convincingly explained by Justice O'Connor in her *Metro* dissent, 497 U.S. at 617-31: "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Id.* at 602. It makes more sense to select for the desired qualities rather than rely on increasingly dubious generalizations and stereotypes. *See id.* at 622 ("The FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity."). In sum, "Government may not use race and ethnicity as 'a "proxy for other, more germane bases of classification."' *Hogan*, 458 U.S., at 726, quoting *Craig* v. *Boren*, 429 U.S. 190, 198 (1976)." *See also Metro*, 497 U.S. at 632 (Kennedy, J., dissenting) (criticizing "the stereotypical assumption that the race of [station] owners is linked to broadcast content"); *United States v. Virginia*, 518 U.S. 515, 533 (1996)("Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications.").

claims of educational benefit arising from a particular teaching technique, or creating a particular school environment, are frequently made, but they are also frequently controversial and disputed.[12] That is certainly the case here. The evidence presented by Professor Patricia Gurin on behalf of the University has been strongly criticized in at least two studies cited to the court of appeals. *A Critique of the Expert Report of Patricia Gurin in* Gratz v. Bollinger, by Drs. Robert Lerner and Althea K. Nagai, concluded: "There are many design, measurement, sampling, and statistical flaws in this study. The statistical findings are inconsistent and trivially weak. No scientifically valid statistical evidence has been presented to show that racial and ethnic diversity in school benefits students." *Id.* at 1. Likewise, *Race and Higher Education*, by Drs. Thomas E. Wood and Malcolm J. Sherman, painstakingly reviews the data available and concludes: "The central

12 For instance, there is considerable controversy over whether bilingual education helps or hurts limited-English-proficient children. *See, e.g.,* Keith A. Baker & Adriana A. de Kanter, "Federal Policy and the Effectiveness of Bilingual Education," in *Bilingual Education* (Keith A. Baker & Adriana A. de Kanter eds. 1983); *The Failure of Bilingual Education* (Jorge Amselle ed. 1996).

All kinds of factors are said to correlate with improved educational performance. *See, e.g.,* Eugenia Costa-Giomi, "The Effects of Three Years of Piano Instruction on Children's Cognitive Development," 47 *J. Res. Music Educ.* 198 (Fall 1999); U.S. Dep't of Education, *The Class-Size Reduction Program: Boosting Student Achievement in Schools across the Nation* (Sept. 2000); Sheila G. Terry & Kimberly Kerry, *Classroom Breakfast: Helping Maryland Students Make the Grade* (2000 report for Maryland State Department of Education, Baltimore, available from Library of Congress); Julia Ellis et al., "Mentor-Supported Literacy Development in Elementary Schools," 44 *Alberta J. Educ. Res.* 149 (1998); Laverne Warner, "Classroom Basics: How Environments Affect Young Children," 25 *Tex. Child Care* 2 (Fall 2001) (highlighting the importance of classroom design and organization).

problem that Gurin faced in producing her Expert Report is that the national database on which she had to rely actually *disconfirms* the claim that she was asked by the University to defend." *Id.* at 79 (emphasis in original).

When racial segregation was challenged in the 1940s and 1950s, the improved-education argument was made by social-science experts on behalf of the proponents of segregation, as well as its opponents. In *Davis v. County School Board of Prince Edward County, Virginia*, a companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court brief by the State of Virginia attacked the social-science evidence presented by the plaintiffs, arguing that their witnesses "bas[ed] their opinion on a lack of knowledge of Virginia." Brief for Appellees at 24. And besides, "they were by no means the only experts who testified before the Court below." *Id.* To the contrary, the State "presented 4 educators, a psychiatrist and 2 psychologists" (*id*.), all "eminent men" (*id.* at 27) whose work is supported by "other outstanding scholars" (*id.* at 28) and who testified that "segregated education at the high school level is best for the individual students of both races" (*id.* at 29).

One college president concluded that, without segregation, "the general welfare will be definitely harmed" and "the progress of Negro education … would be set back at least half a century." (*Id.* at 25.) A child psychiatrist testified, "When the two groups are merged, the anxieties of one segment of the group are quite automatically increased and the pattern of the behavior of the group is that the level of group behavior drops." (*Id.* at 26.) And the chairman of the department of psychology at Columbia University also had no doubt that separate-but-equal education was superior (*id.* at 27):

> If a Negro child goes to a school as well-equipped as that of his white neighbor, if he had teachers of his own race and friends of his own

> race, it seems to me he is much less likely to develop tensions, animosities, and hostilities, than if you put him into a mixed school where, in Virginia, inevitably he will be a minority group. Now, not even an Act of Congress could change the fact that a Negro doesn't look like a white person; they are marked off, immediately, and I think, as I have said before, that at the adolescent level, children, being what they are, are stratifying themselves with respect to social and economic status, reflect the opinions of their parents, and the Negro would be much more likely to develop tensions, animosities, and hostilities in a mixed high school than in a separate school.

In *Brown*'s predecessor, *Sweatt v. Painter*, 339 U.S. 629 (1950), the State of Texas defended its segregated law schools, arguing that "there is ample evidence today to support the reasonableness of the furnishing of equal facilities to white and Negro students in separate schools." Brief for Respondents at 96. "After much study for the United States Government," continued the State,

> [Dr. Ambrose Caliver] found that a very large group of Northern Negroes came South to attend separate colleges, suggesting that the Negro does not secure as well-rounded a college life at a mixed college, and that the separate college offers him positive advantages; that there is a more normal social life for the Negro in a separate college; that there is a greater opportunity for full participation and for the development of leadership; that the Negro is inwardly more "secure" at a college of his own people.

Id. Texas also cited Dr. Charles William Eliot, "President of Harvard for forty years," who concluded after a tour of the South that "if in any Northern state the proportion of Negroes should become large, I should approve of separate schools for Negro children." *Id.* at 97.

It is by no means inconceivable that social scientists and educators can still be produced who will testify that a *lack* of diversity will facilitate education. They would testify that there are fewer distractions and more mutual support – indeed, single sex education has its advocates for these reasons, as do historically black colleges.[13]

The diversity rationale could equally be used to justify discrimination *against* formerly disadvantaged groups as well as in their favor. Asians and frequently Hispanics are victims of the preferences given to African Americans. If a State has an interest in having its university's student body approximate the demographic mix of the State, then logically the number of students from *any* group ought to be capped. For example, women, in the *Johnson v. Board of Regents of the University of Georgia, supra,* were discriminated against relative to men, apparently because women were thought to be "over-represented." And indeed the federal government has already acknowledged that the improved-education argument based on diversity can be used to justify discrimination against African Americans. Terry Eastland, Ending Affirmative Action 112-15 (1996)(discussing *Taxman*, *supra*).

In sum, the diversity rationale is simply too thin to justify as constitutional an action as abhorrent as governmental

13 *See* Dale Baker & Kathy Jacobs, "Winners and Losers in Single-Sex Science and Mathematics Classrooms" (paper presented at National Association for Research in Science Teaching Annual Meeting 1999, available at Library of Congress). *See also, e.g.*, *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)(unsuccessful arguments advanced by defendants); *United States v. Virginia*, 518 U.S. 515 (1996)(same).

discrimination based on a person's skin color or country of ancestry.

B. The Court Should Not Create a "Diversity" Exception to Title VI.

It might be objected that the decision whether to use racial and ethnic preferences ought to be left to the political branches. The first answer to this objection is that this is precisely the sort of discrimination that must not be left to politics, academic or otherwise. We have seen institutionalized discrimination in favor of whites be replaced with institutionalized discrimination against whites (and Asians) in less than a generation, because racial spoils will always be attractive to many politicians and other state actors. The Constitution itself makes clear that racial classifications are certainly not a subject to be left to the States. *See* U.S. Constitution, amend. XIV. The second answer is that the political system *has* spoken to this issue already. It guaranteed "the equal protection of the laws" in 1868 with the passage of the Fourteenth Amendment, and Congress forbade any recipient of federal money from engaging in racial or ethnic discrimination in 1964 with the passage of the Civil Rights Act. Congress also banned such discrimination in 1866, 1870, and 1991, with the various enactments of 42 U.S.C. § 1981. Congress can hardly make any of these laws, but especially the language in Title VI, clearer.

Either the diversity rationale is interpreted to allow discrimination against racial and ethnic minorities, or it means that Title VI denies equal protection, shielding some racial and ethnic groups from discrimination more than others. Neither choice is palatable, and so the diversity rationale must be rejected. An interpretation of Title VI that allows discrimination aimed at remedying discrimination is barely reconcilable with the statute's text; any other exception is not.

Moreover, it risks opening the door to other, antiminority exceptions.

C. Ending Preferential Treatment Does Not Deny Educational Opportunity.

The studies by Lerner and Nagai document that the elimination of racial and ethnic preferences would not lead to "whites only" State higher education, even if we are to pretend that Asians are not people of color. *See Preferences in Maryland Higher Education* 17-18 (2000); *Preferences in Virginia Higher Education* 12-14 (1999); *Preferences in Minnesota Higher Education* 11-14 (1999); *Preferences in North Carolina Higher Education* 12-14 (1998); *Racial Preferences in Michigan Higher Education* 13-16 (1998); *Racial Preferences in Colorado Higher Education* 12-18 (1997). Indeed, racial and ethnic preferences have been ended in California, Texas, Florida, and Washington, and these State higher-education systems have remained notably diverse in their racial and ethnic participation. Furthermore, the academic performance gaps that formerly existed at, for instance, the University of California at San Diego have disappeared. *See* Gail Heriot, "The Politics of Admissions in California," *Academic Questions*, Fall 2001, at 29, 33-34; Gail Heriot, "University of California Admissions under Proposition 209: Unheralded Gains Face an Uncertain Future," 6 *Nexus* 163 (2001). Finally, the end of preferential treatment has forced the States to focus on improving educational opportunities for disadvantaged students at the K-12 level. *See* James Traub, "The Class of Prop. 209," *N.Y. Times Mag.*, May 2, 1999, at 45.

CONCLUSION

For the foregoing reasons, as well as the reasons articulated by petitioner, the petition for writ of certiorari should be granted.

Respectfully submitted,

C. Mark Pickrell
Counsel of Record
3200 West End Avenue
Suite 500
P.O. Box 50478
Nashville, TN 37205-0478
(615) 356-4978

Roger Clegg
General Counsel
Center for Equal
Opportunity
14 Pidgeon Hill Dr.
Suite 500
Sterling, VA 20165
(703) 421-5443