No. 02-241

In The

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the state has a compelling interest in discriminating against citizens on the basis of race in order to ensure racial "diversity" in the classroom.

2. Whether the Law School's current admissions program is narrowly tailored to serve any compelling governmental interest.

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been filed previously or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

authority in our national life," including the principle, at issue in this case, that the self-evident truth of equality articulated in the Declaration of Independence and now codified in the Constitution of the United States guarantees to every individual the right to the equal protection of the law, regardless of his or her race.

The Institute pursues its mission through academic research, publications, and scholarly conferences. Of particular relevance here, the Institute and its affiliated scholars have published a number of books and monographs about the Founders' views on equality and on the unconstitutionality of laws that categorize Americans on the basis of their race, including HARRY V. JAFFA, EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS (The Claremont Institute 1999) (1965), THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS AND JUSTICE IN THE ORIGINS OF AMERICA (1997), and Edward J. Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 NOTRE DAME J. L. ETHICS & Pub. POL'Y 15 (1997).

In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence, to help further the mission of the Claremont Institute through strategic litigation. The Center has previously participated as *amicus curiae* in this Court in such important cases as *Adarand Constructors v. Mineta*, 534 U.S. 103 (2001); *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), and *United States v. Morrison*, 529 U.S. 598 (2000).

SUMMARY OF ARGUMENT

The petition for *certiorari* in this case should be granted for at least three reasons:

- The Circuit Court erroneously interpreted *University of California v. Bakke*, 438 U.S. 265 (1978) when it held

that Justice Powell's separate opinion a) was the narrowest and therefore controlling opinion, and b) held that an admissions policy including racial classifications such as this one were Constitutional.

- The decision below conflicts with the Eleventh Circuit's decision in *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11th Cir. 2001) and the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). In light of this Court's recent dismissal of *Adarand Constructors v. Mineta* (No. 00-730), 534 U.S. 103 (2001), this Court should take this opportunity to address the Constitutional legitimacy of government policies which continue to classify and mete out benefits to Americans by race.

- The procedural posture of the case in the Court below, discussed at length in the dissent's procedural appendix and the concurring opinions, as well as the procedures followed in *Adarand Constructors* and other cases, demonstrate that this Court is facing the same recalcitrance among defenders of racial discrimination that this Court faced in the immediate wake of *Brown v. Board of Ed.*, 347 U.S. 483 (1954). Only a forceful statement by this Court, similar to those issued following *Brown*, will enforce the Constitutional demand that all Americans be treated equally, without regard to the color of their skin.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURT MISINTERPRETED AND MISAPPLIED THIS COURT'S PRECEDENT.

A. Justice Powell's Opinion in *Bakke* Did Not Uphold Racial Classifications Such As the One in this Case.

The fractured nature of the opinions in *Bakke* make it sometimes difficult to assess precisely what portions of that opinion constitute binding precedent. However, it is clear that Justice Powell's opinion squarely rejected the sort of racial favoritism which lies at the heart of the Law School's admission policy in this case. As the dissent below noted, the mere fact that the Law School's policy is less severe than the one which was struck down in *Bakke* does not mean that the Law School's policy is constitutional. *See Grutter v. Bollinger*, 288 F.3d 732, 777 (6th Cir. 2002) (Boggs, J., dissenting).

In his *Bakke* opinion, Justice Powell correctly denounced racial classifications as violations of America's Constitutional principles. Such "distinctions of any sort are inherently suspect," he wrote. 438 U.S., at 291. Thus, "[i]t is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.*, at 295. Justice Powell wrote that programs which aim to "remedy" past discrimination in general by creating new legal discriminations unjustly "forc[e] innocent persons in respondent's position to bear the burdens of redressing grievances not of their making." *Id.* at 298.

In these passages, Justice Powell was not joined by any member of the Court. However, four justices—Justices Stevens, Burger, Stewart, and then-Justice Rehnquist—held that it was unnecessary to address whether the Constitution itself prohibits the use of race in admissions to higher education, but still held that "the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program." *Id.*, at 417.

Although Justice Powell did write that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin," *id.*, at 320, his opinion does not in any way justify the program at issue in this case. Such a program must still be narrowly tailored to achieve a compelling government interest. *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). What purpose is served is not addressed by any majority in *Bakke*, and it and subsequent cases have made clear that only actual remediation of actual, documented incidents of past discrimination by government will permit such policies. The "diversity" rationale relied upon by the Court below has never been accepted by this Court. *See Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) ("In *Bakke*, the word 'diversity' is mentioned nowhere except in Justice Powell's single-Justice opinion…. Thus, only one Justice concluded that race could be used solely for the reason of obtaining a heterogenous student body"); E. CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 592 (1997).

The Law School's program does not remedy actual past discrimination by government. The Circuit Court held that mere racial "diversity" was a sufficiently compelling state interest to survive strict scrutiny. But picking and choosing students on racial grounds is not sufficient to satisfy *Bakke* or any other opinion by this Court.

B. The Circuit Court Erred in Holding That "Diversity" is a Compelling Government Interest.

This version of "diversity," in fact, is a plain violation of Constitutional principles. The fundamental creed upon which this nation was founded is that "all men are created equal." DECLARATION OF INDEPENDENCE ¶ 2. This principle is, in Abraham Lincoln's words, a "great truth, applicable to all men at all times." *Letter from Abraham Lincoln to*

H.L. Pierce (Apr. 6, 1859), *in* 3 COLLECTED WORKS 374, 376 (1953). "All men" meant all human beings—men as well as women, black as well as white. *See, e.g.*, James Otis, *Rights of the British Colonies Asserted and Proved* ("The colonists are by the law of nature freeborn, as indeed all men are, white or black"), *reprinted in* B. BAILYN, ED., PAMPHLETS OF THE AMERICAN REVOLUTION 439 (1965); *id.* ("Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?").

These sentiments were codified in the first State constitutions established after the American colonies declared their independence. The Virginia Declaration of Rights, for example, provided that "all men are by nature equally free and independent." Va. Dec. of Rights § 1 (1776), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 6 (P. Kurland & R. Lerner, eds., 1987). And the Massachusetts Declaration of Rights stated simply, "All men are born free and equal[.]" Mass. Dec. of Rights (1780), *reprinted in* 1 THE FOUNDERS' CONSTITUTION at 11. Even those founders who owned slaves recognized that slavery was inconsistent with the principle of equality articulated in the Declaration of Independence. "The mass of mankind has not been born with saddles upon their backs," wrote Thomas Jefferson, "nor a favored few, booted and spurred, ready to ride them legitimately, by the grace of God." *Letter to Roger C. Weightman* (June 24, 1826), *in* JEFFERSON: WRITINGS 1516, 1517 (M. Peterson, ed., 1984). This was true, according to Jefferson, even if people were not of equal capabilities. "Whatever be their degree of talent it is no measure of their rights," wrote Jefferson shortly before the end of his second term as President. "Because Sir Isaac Newton was superior to others in understanding, he was not therefore lord of the person or property of others." *Letter from to Henri Gregoire* (Feb. 25, 1809), in *id.* at 1202.

The Founders regularly exhibited an understanding of equality that is strikingly similar to what we today refer to

as equality of opportunity, not equality of result.[2] Indeed, James Madison described the "protection of different and unequal faculties" as "the first object of government." THE FEDERALIST No. 10, at 78 (Rossiter ed. 1961) (1788) (emphasis added). Alexander Hamilton agreed, writing that "[t]here are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. *The door ought to be equally open to all.*" THE FEDERALIST No. 36, at 217 (emphasis added).

With the eradication of slavery and the passage of the Fourteenth Amendment, the promise of legal equality was opened to all. Unfortunately, in *Plessy v. Ferguson*, 3 U.S. 537 (1896), this Court, in one of its darkest moments, held that legal policies which separated Americans by race were acceptable under the Constitution. Alone in dissent, Justice John Marshall Harlan eloquently penned the judicial equivalent of the Declaration's creed:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

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[2] The distinction can probably be traced to President Lyndon Johnson's speech at Howard University on June 4, 1965: "It is not enough just to open the gates of opportunity....We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result." Lyndon B. Johnson, *Commencement Address at Howard University: To Fulfill These Rights*, *in* 2 PUBLIC PAPERS OF THE PRESIDENTS 1965, at 635, 636 (1966).

Id. at 559 (Harlan, J., dissenting). Fifty-eight years later, in *Brown v. Board of Ed.*, 347 U.S. 483 (1954), and its progeny, this Court repudiated *Plessy's* separate but equal doctrine and ultimately renewed America's dedication to what Martin Luther King would later describe as his dream, "that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'" King, I Have A Dream (1963) *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 217, 219 (James Washington ed. 1986).

The evils of racial discrimination are not lessened because they are allegedly created to benefit previously excluded groups. After the Civil War, new racist laws, such as Black Codes and Jim Crow laws, were created in order to keep newly freed slaves from voting, earning a living, or owning property. But the paternalism of "benign" whites limited the freedom of blacks in many ways, too. The former slave Frederick Douglass addressed this problem when he wrote that "in regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested toward us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply justice." Frederick Douglass, *What The Black Man Wants* (Jan. 26, 1865), *reprinted in* 4 FREDERICK DOUGLASS PAPERS 59, 68-69 (Blassingame & McKivigan, eds. 1991). Douglass continued:

> Everybody has asked the question..."What shall we do with the Negro?" I have had but one answer from the beginning. Do nothing with us!.... All I ask is, give him a chance to stand on his own legs!…. If you will only untie his hands, and give him a chance, I think he will live.

Douglass understood that paternalistic programs such as this one "constitute badges of slavery and servitude." *Civil Rights Cases*, 109 U.S. 3, 36 (1882) (Harlan, J., dissenting). They are akin to legislation that once blocked women from entering a variety of professions, which was "apparently designed to benefit or protect women [but] could often, perversely, have the opposite effect." Ruth Bader Ginsburg, *Constitutional Adjudication in the United States As A Means of Advancing The Equal Statute of Men And Women Under The Law*, 26 HOFSTRA L. REV. 263, 269 (Winter, 1997). Such legislation was "ostensibly to shield or favor the sex regarded as fairer but weaker, and dependent-prone," *id*., but was in fact "premised on the notion that women could not cope with the world beyond hearth and home without a father, husband, or big brother to guide them." *Id*., at 270.

In exactly the same way, racial preferences, whether in hiring or contracting, the provision of government benefits, or, as here, in law school admissions, are ostensibly designed to shield minority group members, but in fact are premised on the notion that they are incapable of competing without a big brother—a white big brother—to guide them.[3]

As Justice Douglas wrote, "A [person] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis v. Odegaard* 416 U.S. 312, 337 (1974) (Douglas, J., dissenting); *see also Bakke*, 438 U.S. at 298 ("there is a measure of inequity in forcing innocent

[3] Unfortunately, the results of such "benign" discrimination have often been just as bad for their alleged beneficiaries as were the ills which gave rise to such programs. *See, e.g.*, T. SOWELL, THE ECONOMICS AND POLITICS OF RACE 200 (1983) (illustrating "counterproductive trends" caused by "beneficial" discrimination.)

persons in [Bakke's] position to bear the burdens of redressing grievances not of their making"); *id.*, at 290 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color").

C. The Court Erred In Holding That This Program Was Tailored to Achieve "Diversity."

Even if the Circuit Court's interpretation of *Bakke* were correct, the Circuit Court erred by holding—without any actual discussion—that the Law School's admissions policy actually serves the purpose of diversity. Strict Scrutiny requires that the policy be narrowly tailored to advance that purpose. *Bakke,* 438 U.S. at 294-295; *Adarand,* 515 U.S. at 227. "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (*quoting Fullilove v. Klutznick,* 448 U.S. 448 (1980) (Stevens, J., dissenting)).

The Court below held that the Law School's admissions policy is narrowly tailored because the Law School does not use a hard "quota" system for admissions, *Grutter*, 288 F.3d at 745-46, and because "the Law School considers more than an applicant's race and ethnicity," *id.*, at 747. The Circuit Court's determination is based on an erroneous reading of this Court's precedent, however. The Circuit Court held that "consideration of race-neutral means is necessary to satisfy the narrowly tailored component of strict scrutiny." *Id.* at 44. While this may be a *necessary* component of narrow tailoring, it is hardly *sufficient*. *See Johnson*, 263 F.3d at 1253-1254 ("the mere fact that race technically does not insulate a candidate from competition with other applicants does not, by itself, mean that the policy is narrowly tailored"). Narrow tailoring is not satisfied by a policy which is overinclusive or

underinclusive—a policy which will punish those not intended to come within the policy's boundaries, or which will unjustly reward those who are not within the government's asserted "compelling interest." In other words, if the Law School's desire to achieve a racially diverse student body is a sufficiently compelling interest—which it is not—that purpose is not served by creating preferences for blacks and Hispanics at the expense of, *e.g.*, Asian immigrants. As the dissent below noted, Chinese or Jewish immigrants have suffered a great deal of legal discrimination in American history, and their life experiences might be far richer than that of an upper class black or Hispanic student, yet the latter would benefit under the Law School's policy, at the expense of the former.

More importantly, however, the "diversity" rationale is inherently opposed to the principles of equality enunciated in the Declaration of Independence and the Fourteenth Amendment. This was made clear by one of the concurring opinions in the court below, which claimed that "a comparably-situated white applicant is a 'different person' from the black applicant [because] this black applicant may very well bring to the student body life experiences rich in the African-American traditions emulating the struggle the black race has endured in order for the black applicant even to have the opportunities and privileges to learn." *Grutter*, 288 F.3d, at 764 (Clay, J., concurring). In other words, an applicant's *race* is the determining factor in that applicant's character and quality as a student. According to this view, a black applicant is inherently different from—is *not equal* to—the white applicant, because the *content of the applicant's mind is thus determined by his race.* This is the very definition of racism. *See* AMERICAN HERITAGE DICTIONARY (4th Ed. 2000) ("Racism: the belief that race accounts for differences in human character or ability and that a particular race is superior to others.") It is fundamentally contrary to the principle of equality to

presume that a person's contributions to the classroom will be determined by the person's race.

Such discrimination is morally wrong because it "treats the accidental feature of race as an essential feature of the human persona [and thus violates the principles of human nature—those principles in The Declaration of Independence that are said to stem from the proposition that 'all men are created equal.'" Edward Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 NOTRE DAME J. L. ETHICS & PUB. POL'Y 15, 49 n. 132 (1997). As Charles Sumner, one of the principal authors of the Fourteenth Amendment's Equal Protection Clause, wrote:

> [The principle of equality] is the national heart, the national soul, the national will, the national voice, which must inspire our interpretation of the Constitution and enter into and diffuse itself through all the national legislation. Such are the commanding authorities which constitute 'Life, Liberty, and the Pursuit of Happiness,' and in more general words, 'the Rights of human Nature,' without distinction of race…as the basis of our national institutions. They need no additional support.

Charles Sumner, *The Barbarism of Slavery* (1860) *reprinted in* Against SLAVERY: AN ABOLITIONIST READER 313, 320 (Mason Lowance, ed. 2000).

The admissions policy is also not narrowly tailored in that it punishes innocent members of disfavored racial groups in order to "remedy" past discrimination. "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual." *Adarand*, 515 U.S., at 239 (Scalia, J., concurring in part and concurring in the judgment). In all,

"[t]he vice…[is] not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice…." *Anderson v. Martin*, 375 U.S. 399 (1964).

II. THE CIRCUIT COURT OPINION CONFLICTS WITH THE OPINIONS OF OTHER CIRCUIT COURTS.

In *Hopwood*, the Fifth Circuit Court of Appeals noted that this Court has never held racial diversity to be a sufficiently compelling purpose to allow government to discriminate based on race. According to *Hopwood*, "precedent shows that the diversity interest will not satisfy strict scrutiny." 78 F.3d at 944; *see also Hopwood v. Texas*, 236 F.3d 256, 275 (5th Cir. 2000) (noting that *Bakke* did not "approve student body diversity as a justification for a race-based admission criterion"). The Fifth Circuit's decision in *Hopwood* creates a clear conflict between the Circuits, which can only be resolved by this Court.

It is especially important to resolve this conflict because of the large number of cases currently in litigation, or recently decided, which challenge the legitimacy of discriminatory government programs. For example, in *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11th Cir. 2001), the Eleventh Circuit held that the University of Georgia could not use a racially discriminatory admissions policy. Although the *Johnson* court did not reach the question of whether the "diversity" rationale justified a racially discriminatory admissions policy, *id.* at 1244-1245, it did note in dicta that "a majority of the Supreme Court has never agreed that student body diversity is, or may be, a compelling interest sufficient to justify a university's consideration of race in making admissions decisions." The court was "unconvinced" that "Justice Powell's opinion 23 years ago in *Bakke*—which no other Justice joined—

constitutes binding precedent and requires the lower federal courts to treat that interest as compelling." *Id.*, at 1245. Similarly, the Fourth Circuit has held that racial preferences in school admissions are only permissible in remedying actual articulable cases of past discrimination. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied* 514 U.S. 1128 (1995).

This Court has held that "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). Yet such racially discriminatory impositions exist throughout the nation, and are becoming the subject of increasing numbers of court challenges. A resolution of this question—to what extent government my legally discriminate against some citizens for the benefit of others—is therefore becoming increasingly vital to millions of Americans.

III. THE PROCEDURES FOLLOWED BY THE COURT BELOW AND BY OTHER COURTS IN SIMILAR CASES DEMONSTRATE THAT THIS COURT FACE THE SAME OBSTACLES IN ENDING "BENIGN" RACISM THAT IT FACED IN THE *BROWN* ERA.

A. Racial Classifications Are Not Eradicated Easily.

Unfortunately, experience has shown that racism is not overcome easily, whether it be in segregated schools or in legal classifications like this racial set-aside program. This Court spent more than two decades fighting such classifications after the *Brown I* case. *See Griffin v. County Sch. Bd.*, 377 U.S. 430 (1968); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Brown v. Board of Ed.*, 349 U.S. 294 (1955) ("*Brown II*"); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Loving v. Virginia*, 388 U.S. 1 (1967); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979). Since then, America has

made remarkable progress. Today, Americans generally believe that race is an illegitimate factor for government classification. Across the country, Americans have rejected the notion of racial classifications, including supposedly "benign" ones. *See* Clint Bolick, *Blacks and Whites on Common Ground*, 10 STAN. L. & POL'Y REV 155, 158 (Spring 1999); T EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 164-165 (2d ed. 1997). States have begun to incorporate Justice Harlan's *Plessy* dissent into law. *See* Cal. Const. art. I, 31, cl. A (1996) (Proposition 209); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000) (noting that Proposition 209 "adopt[s] the original construction of the Civil Rights Act"); ARCW § 49.60.400 (1) (Washington Initiative 200).

"In a nearly unbroken line of recent decisions, federal courts in recent years consistently have struck down racial preference policies adopted by federal, state, and local governments." Clint Bolick, *Jurisprudence in Wonderland: Why Judge Henderson's Decision Was Wrong*, 2 TEX REV. LAW & POL. 60 (Fall, 1997); *see, e.g.*, *Hopwood, supra; Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072 (4th Cir. 1993); *Koski v. Gainer*, No. 92-C-3293, 1995 WL 599052 (N.D. Ill. Oct. 5, 1995) (mem. op.); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *but see Smith v. Univ. of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (May 29, 2001).

Yet today, defenders of racially discriminatory laws, as emphatic as their predecessors in the 1950s, are exhibiting the same determination to avoid the commands of the Equal Protection Clause. The time for government to cease treating individuals on the basis of their skin color rather than their merit is long overdue. As this Court held in *City of Richmond v. J.A. Croson Co.*, any discrimination on the basis of race must cease, except (perhaps) as a remedy for government's own prior or continuing discrimination on

the basis of race. 488 U.S. 469 (1989); *see also Adarand*, 515 U.S., at 239 (Scalia, J., concurring in part and concurring in the judgment) ("Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual"). "The time for mere 'deliberate speed' [to fully enforce this principle] has run out." *Griffin*, 377 U.S. at 234; *see also Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *cf. Brown II*, 349 U.S. at 301 (ordering that assignment of pupils to schools based on race be ended "with all deliberate speed").

B. Defenders of Racial Discrimination Are Refusing to Implement The Demands of The Equal Protection Clause.

For examples of the defiance demonstrated by today's defenders of racially discriminatory laws, consider some recent cases:

- *Grutter v. Bollinger*: As the procedural appendix in the dissent below notes, this case was the subject of a number of questionable procedures. The appeal was first assigned to a panel consisting of two judges who had heard an earlier interlocutory appeal in the case, and was filled out by the Chief Judge of the Circuit, who appointed himself rather than accepting a random assignment. The panel (or perhaps the Chief Judge alone) then waited to refer a motion for initial hearing en banc until after two Circuit Judges (both appointed by President Reagan) had taken senior status. While this Court should be reluctant to find that the Circuit was engaged in result-driven improprieties, these extremely unusual procedures at least raise the appearance

that the court below may have been stacked with judges sympathetic to the Law School.

- *Adarand Constructors v. Pena*, 515 U.S. 200 (1995): This Court held that federal "set-aside" programs were subject to strict scrutiny, and remanded the case to the Tenth Circuit, which sent the case back to the District Court. Using strict scrutiny, the District Court held the program unconstitutional. 965 F. Supp. 1556 (D. Co. 1997). While that decision was on appeal, the Circuit Court declared that the plaintiff, a white contractor, had been the victim of racial discrimination and was therefore a member of a disadvantaged minority. As a result, the court held, the plaintiff's case was moot. 169 F.3d 1292 (1999). This Court reversed this attempt to deprive the plaintiff of his day in court. 528 U.S. 216 (2000). The Circuit Court then, under the pretext of applying strict scrutiny, but in fact applying intermediate scrutiny, nevertheless upheld the racial classification. 228 F.3d 1147 (2000). This Court was again required to grant *certiorari*, but later dismissed the case for procedural reasons. 534 U.S. 103 (2001).

- *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997): *Wilson* involved a challenge to California's Proposition 209, which prohibited the state government from discriminating against or granting preferential treatment to any individual or group on the basis of race. In a clever version of "forum shopping," the plaintiffs persuaded a party to an unrelated case (*F.W. Spencer & Son, Inc. v. City and County of San Francisco*, C 95-4242 TEH) to amend its pleading to include a request for a ruling on the constitutionality of Prop. 209. Once this amendment was accepted by the court, the judge in that court was therefore empowered to take over the

Wilson case from the judge to whom it had originally been assigned. *See* Gail Heriot, *University of California Admissions under Proposition 209: Unheralded Gains Face An Uncertain Future,* 6 NEXUS: J OP. 163, 167, n 26 (2001); Carol Ness, *Prop. 209 Foes Win Effort to be Heard in S.F. Court,* SAN FRANCISCO EXAMINER Nov. 14, 1996 at A5; Doug Bandow, *No Justice for Proposition 209,* WASHINGTON TIMES Jan. 14, 1997 at A15. This judge then, coincidentally enough, ruled in favor of the plaintiffs. 946 F. Supp. 1480 (N.D. Ca. 1996). The Ninth Circuit later reversed.

Experience has shown that racial discrimination is not easily eradicated. Professor Lino Graglia points out the "intense resistance that can be expected from academics and the educational bureaucracy" in eliminating racial preferences. Despite California's state laws prohibiting such preferences, for instance, "the Governor and the Board of Regents have encountered the recalcitrance, not to say insubordination, of the President of the University System who is seeking to delay implementation of [a racially-neutral admissions policy] as long as possible." Lino Graglia, *"Affirmative Action," Past, Present, And Future*, 22 OHIO N.U.L. REV. 1207, 1219 (1996). The federal government's response to this Court's decision in *Adarand Constructors* parallels California's experience. As one commentator notes, despite *Adarand*'s holding, awards to racially preference contractors actually increased in the years following the decision. No honest attempt has been made to fix the problems with the program at issue in *Adarand*—instead, those who defend racially discriminatory laws have sought "to marginalize *Adarand*'s holdings by tinkering with the operation of set-aside programs, but by no means calling for their termination." R. Brad Malone, *Note: Marginalizing* Adarand*: Political Inertia and the*

SBA 8(A) Program, 5 TEX. WESLEYAN L. REV. 275, 298-299 (Spring 1999).

These facts reveal that the political opposition to the demands of the Equal Protection Clause is every bit as powerful as the opposition this Court faced in the years following *Brown*. What Martin Luther King said in 1964 is equally true today: "the announcement of the high court has been met with declarations of defiance. Once recovered from their initial outrage, these defenders of the status quo had seized the offensive to impose their own schedule of change." MARTIN LUTHER KING, WHY WE CAN'T WAIT 5-6 (1964). Only by insisting, as the post-*Brown* Court did, that racial discrimination is no longer tolerable, can this Court end racial classifications in the law.

C. The Time To End Racial Categorizations in The Law Is Now.

Barbara Grutter asks only for a fair chance at a legal education. Now, as this Court faces increasing recalcitrance against eliminating legal classifications in the law, it must speak with the same language it used in the post-*Brown II* cases. "The vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II*, 349 U.S. at 300.

It is also time to realize that the principles of the Declaration, codified at long last in the Constitution via the Fourteenth Amendment, will not countenance racial discrimination that purports to remedy past wrongs against individuals of one race by conferring benefits upon others who happen to share the same skin color, at the expense of those who do not. As Dr. King also noted that August day on the steps of the Lincoln Memorial, "In the process of gaining our rightful place [as beneficiaries of the Declaration's promise of equality,] we must not be guilty of wrongful deeds." *I Have A Dream*, *in* Washington, *supra* at

218. In short, "there has been entirely too much deliberation and not enough speed in enforcing the constitutional rights" of the Petitioner in this case. *Green*, 391 U.S. at 229. It is now for this Court to say, as it said in *Green*, this recalcitrance is unacceptable and that legal categorization by race must end "*now*." *Id.* at 439.

In the marble above the grand entrance to this Court are chiseled the words, "EQUAL JUSTICE UNDER LAW." The Court should grant *certiorari* in this case and reaffirm this principle by holding that legally dividing Americans by race is unconstitutional under any circumstances. It should embrace the doctrine of complete racial equality, and stand "for what is best in the American dream and for the most sacred values in our Judeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence." Martin Luther King, *Letter from Birmingham Jail, reprinted in* WHY WE CAN'T WAIT *supra* at 99.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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