No. 02-241

IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, *et al.*
Respondents,
and
KIMBERLY JAMES, *et al.*
Respondents.

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

RESPONSE TO THE PETITION FOR CERTIORARI BY RESPONDENTS KIMBERLY JAMES, *ET AL.*

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QUESTION PRESENTED

1. Whether the University of Michigan Law School's consideration of race as a factor in admissions is valid under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and 42 U.S.C. § 1981).

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STATEMENT OF THE CASE

Affirmative action has enabled universities to achieve a measure of racial integration and diversity and has offset the white privilege and racial inequality that would otherwise permeate the process of admissions in higher education. This case challenges that incontestable and precious progress. Like most challenges, it is also an opportunity.

The case provides occasion for the Court to resolve questions of acute and fundamental importance: whether we will continue to stand on the promise of continuing progress

toward racial integration and equality, the promise of *Brown v. Board of Education*; whether we will acknowledge the impact of ongoing racial discrimination, bias, and inequality on all aspects of education, particularly the standardized test scores and grades that are held up by opponents of affirmative action as race-neutral measures of merit; and whether we will recognize the difference between racism and policies designed to offset it—that is, whether the law will encompass the truth of this society.

The inequalities that permeate the United States can be interpreted as immutable expressions of nature, beyond the proper reach of social policy. Or they can be seen as the product of social choices, past and present, intentional and unwitting, which stand to be corrected and which, if corrected, can elevate American democracy. Affirmative action programs like the one at issue here, and the political struggles that brought them into being, have acted on the latter understanding.

Affirmative action plans in higher education have also acted on the understanding that the continuing significance of race in shaping experience and viewpoint means that there can be no meaningful diversity that does not include racial diversity. Diversity matters with respect to meaningful axes of social differentiation and experience, and in our country—as opposed to a hypothetical land in which race might be merely a question of skin color, or not a question at all—there is no more significant axis than that of race.

The tension between our democratic aspirations and our maintenance of a modified caste system has defined our political culture and history. Consequently, conflicts over racial inequality in America have given rise to conflicts over other inequalities, and movement toward racial integration and equality has led to gains in other areas. It is no happenstance, for example, that the movement for women's suffrage was led by veterans of the abolitionist movement. The

moments when we have stood together as one people for progress in matters of race have been our proudest and most defining.

The Court has played a critical role in those moments. In education, where integration matters most, the Court has at various points decided for democracy. While this role has met with controversy and will surely continue to do so, decisions for progress have been vindicated. In 1954, *Brown* was met not only with controversy but with "massive resistance," but it is now the most revered of Supreme Court decisions and the greatest source of the Court's authority. This case raises the question whether the principle championed in *Brown* will continue to have practical meaning or whether it will instead become a stale, dead platitude, one of those principles honored only in the breach.

For these reasons, to correct erroneous appellate decisions striking down efforts at integration and fairness in education, and to rebuff decisively this extreme and dangerous attack on our best and hardest-gained achievements, the student defendants urge the Court to grant certiorari.

I. FACTUAL BACKGROUND

A. The Student Defendants

The student defendants are 41 black, Latino, Asian Pacific American, Arab-American, other minority, and white students and three coalitions: United for Equality and Affirmative Action (UEAA), the Coalition to Defend Affirmative Action and Integration and Fight for Equality By Any Means Necessary (BAMN), and Law Students for Affirmative Action (LSAA). They intervened in this action in order to present defenses of affirmative action on the basis of the diversity rationale established in *Regents of the University of California v. Bakke*, 438 US 265 (1978) and on the basis of the compelling need to achieve equality and integration.

B. The faculty adopts affirmative action to end the segregation at the School.

Prior to adopting affirmative action, the Law School admitted students based on a rigid system in which LSAT scores and grades were applied equally across racial lines. The result was an essentially all-white student body: between 1960 and 1968, the Law School graduated 2687 white students, four black students, and no Latino or Native American students. (JA 4857, 5064).[1]

Sensing the injustice of this system—and under increasing pressure from the burgeoning civil rights and student movements—in 1966, the Law School faculty took action against this de facto segregation. The faculty authorized a departure from the rigid use of the numerical credentials for a small part of the class—with particular emphasis on black and disadvantaged students. (JA 4854, 4857).

In 1969, that class graduated with five black members—the same number of black graduates as for the entire preceding decade. In succeeding years, the faculty repeatedly debated and revised its admission policies, with faculty members recognizing very early on that numerical credentials discriminated against black and other minority applicants, "caus[ing] [their] actual potential . . . to be underestimated, especially when gauged by standard testing procedures…thought to be 'culturally biased.'" (JA 4856, 4866-4869, 4872-4873).

In 1973, the Law School graduated 41 black students and its first Latino student. In 1975, it graduated its first two Asian-Americans, followed by its first Native American in 1976. The increasing number of black and other minority students cleared the way for the admission of increasing numbers of women of all races. (JA 3139, 5065).

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[1] Citations herein, unless otherwise indicated, are to documents and transcripts contained in the Joint Appendix ("JA") filed in the Sixth Circuit or to the Appendix ("App.") filed with the Petition.

After *Bakke* was decided in June 1978, the Law School faculty formulated a policy to comply with the decision and reaffirmed its recognition that it could not achieve an integrated student body if it returned to a rigid use of numerical criteria. For fourteen years, that policy—and the *Bakke* decision—remained unchallenged and unchanged. The numbers and the percentages of minority students fluctuated broadly from year to year, but the essential integration of the Law School continued.

In 1992, the faculty adopted the plan that has been in effect since then. The plan emphasizes the importance of student body diversity as a whole and of enrolling a critical mass of black, Latino, and Native American students, and it makes clear that LSAT scores and grades, while important, should not be used in a rigid, mechanical way for any applicant.

C. Race and diversity.

From the beginning the Law School faculty recognized that all students would benefit from the integration of the School. A decade before Justice Powell's opinion in *Bakke*, the faculty expressed the hope that the new plan would "introduce more heterogeneity in our student body, hopefully adding to the variety of attitudes and views expressed in the classroom." (JA 4854). It understood that under American conditions, meaningful diversity demanded the admission of a significant number of black and other minority students.

As described by Professor Eric Foner of Columbia University, one of the nation's leading historians, race has been the central determining factor of American society from slavery to the Civil War and Reconstruction and from segregation to the civil rights movement. As numerous witnesses testified, race continues to shape a person's relation to healthcare, housing, criminal justice, political participation and representation, and education. (*See, e.g.,* JA 7834-7836; 7857-7867; 8032-8033; 8413-8419).

Consequently, black and white students generally have different attitudes toward the federal government, local authorities, the police, the courts, educational institutions, foreign and domestic policy, American and world history—and thus to every fundamental question about the law. As Professor Foner testified, black and white students have different views of freedom itself:

> [M]ost white people in America think freedom is something they have. Sometimes they're afraid that someone is trying to take it away from them, whether it's the federal government, or terrorists, or conspirators, or big corporations. Most African Americans think freedom is something they are still striving to achieve. It's something that lies in the future. It's not a given, it's a struggle. It's an aspiration. And since freedom is such a central value in our society . . . that basic difference in outlook percolates out into many, many other areas.

(JA 8418-8419).

D. The elimination of affirmative action would mean the resegregation of the Law School.

In ruling for the plaintiff, the district court recognized that the elimination of the affirmative action plan at the Law School would result in an immediate reduction in underrepresented minority enrollment of over 73 percent. (App. 223a). But this would only be the start: the end of affirmative action at selective colleges would dramatically reduce the pool of minority applicants to the Law School, resulting in further drops in enrollment. (JA 7916).

The effects of what the petitioner proposes are shown not only by testimony and by statistics at Michigan, but by the actual experience of California and Texas—the two largest states and two of the states with the largest minority populations.

In 1997, a ban on affirmative action announced by the University of California (UC) Board of Regents went into effect. One black student enrolled at the UC Berkeley School of Law (Boalt Hall) and the minority enrollment at the UCLA School of Law declined precipitously. (JA 5127).

The UC faculty and administrations opposed the ban and sought to undo its effects. At Berkeley, the school downplayed the importance of grades and test scores; at UCLA, the school attempted to substitute the consideration of socioeconomic status for the consideration of race. Without affirmative action, both schools found it impossible to enroll a class including more than token numbers of black and other minority students. (JA 7897-7898, 7917).

Similar events unfolded in Texas. After the Fifth Circuit's 1996 decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), prevented the University of Texas School of Law from consciously considering race in admissions, black enrollment fell from an average of 35 students in the first year class to four students in 1997. The number of Latino students fell to six percent, approximately half of the 1990-1996 average and far less than the 31% percent of the population of Texas that is Latino. (JA 5125).

The first three post-*Hopwood* classes were 1.4 percent black—a percentage lower than that in 1950, when Heman Sweatt and five other black students enrolled at the School as a result of this Court's historic decision in *Sweatt v. Painter*, 339 U.S. 629 (1950). Thomas Russell, *The Shape of the Michigan River as Viewed from the Land of Sweatt v. Painter and Hopwood*, 25 Law & Social Inquiry 507, 507-8 (2000).

The ban on affirmative action at the University of California has created two racially separate and unequal tracks in the nation's largest public university, as black, Latino, and Native American students are forced from the flagship campuses to the less selective campuses of the UC system. The large

majority of black, Latino, and Native American students will soon be forced off those campuses as well, as the state population continues to grow, increasing the competition for admission to every campus in the UC system. (JA 8406-8411). Despite the 2001 reversal of the Regents' ban and a resulting renewal of race-conscious recruitment and admissions efforts, the UC system has not been able to recover.

The few black and other minority students who remain enrolled on California's most selective campuses face increased racism caused by the elimination of affirmative action. (JA 8143-8144, 8187-8188).

E. Racially biased admissions criteria.

The resegregation of legal education in California and Texas results in part from the discrimination that the Michigan Law School faculty correctly recognized as inherent in LSAT scores and undergraduate grades.

1. *LSAT scores*

The record below is undisputed: the LSAT predicts little and discriminates a great deal against black, Latino, and Native American law school applicants.

In its 1992 policy, the University of Michigan Law School recognized that the scores predicted little for anyone. (JA 4232). In a later and unrefuted study, Professor Richard Lempert, a member of the committee that drafted the policy, established that an applicant's LSAT score did not correlate with later success as a lawyer, measured by income, stated satisfaction, or political and community leadership. (JA 6201).

There is an average gap of 9.2 points on the LSAT between white and black students from the same college with identical undergraduate grade point averages in the same major. For Latino students, the average gap is 6.8 points, and for Native

American students, it is 4.0 points. As 9.2 points is a completely decisive gap in the national applicant pool, the rigid use of LSAT scores would force minorities with academic achievements equal to those of their white classmates out of not just the most selective schools—but out of all law schools. (JA 8553).

Part of the gap in test scores between whites and minorities is related to social class, but race is a much greater factor. White students from working-class families outscore black students from the wealthiest backgrounds. (JA 6186).

LSAT scores for blacks, whites, Latinos and Native Americans fall within bell curves that have nearly identical shapes—but the centers of the curves shift much lower for each of the racial minorities than for whites. There is therefore no racially neutral means of admitting a significant number of black or other minority applicants in admissions systems that use the LSAT in any important way. (JA 6057-6058).

The sources of the test score gap make this even clearer.

Faced with scientific testimony that the test score gap had nothing to do with genetics, biology, or "native intelligence," the petitioner disavowed any such claim.

The most obvious and superficial component cause of the test score gap is that for reasons of cost and connections, black and other minority students are less able to take the test preparation courses that substantially boost LSAT scores. (App. 283a-284a).

Further, extensive research has shown that racial stereotypes affect individual performance on standardized tests. In particular, the persistent notion that black people and other members of minority groups are intellectually inferior—an idea still so embedded in our culture that it distorts the perceptions of minorities and egalitarian whites as well as conscious racists—depresses minorities' scores on tests thought

to measure intellectual ability. Because a black LSAT-taker is conscious that his performance will confirm or disconfirm an intense stereotype about his race, his level of distraction, anxiety, and unfruitful second-guessing is higher than it would be if he did not face the stereotype, i.e., if he were white. In a psychology laboratory, the standardized test score gap between white and black test-takers can be made to vanish if the test is presented as a problem-solving exercise rather than a test of ability. In real-world administrations of high-stakes tests like the LSAT, however, the cultural assumption that the tests measure innate ability, while formally discounted even by the testmakers, is too deep to be disarmed by such presentations. The consequence is artificially depressed scores for black and other minority test-takers. (JA 3481-3486, 7043-7044, 7068-7069).

Furthermore, the content of the LSAT, like that of other such tests, is the product of test construction procedures that continually reproduce the internal bias the test has had since it was developed decades ago. The test content is arbitrary; it was not honed in relation to prediction of success in law school, much less success as a lawyer. Further, it bears a subtle, pervasive mark of cultural and racial bias. Most questions that are obviously biased have been eliminated—but because each new question on the test is statistically normed in relation to prior results, they have been replaced with questions that produce the same statistical outcomes in the pre-testing process. The consequence is that questions on which black students outscore white students during trial runs are rejected for use in scored sections of the test. In contrast, questions that statistically match up with the generally better performance of white test-takers during pre-testing are subsequently used in scored sections. Of course, the generally better performance of white students is itself partly a product of these same question selection procedures. The process is circular, self-referential, and racialized. (JA 8058-8074, 8093-8102).

Finally, there is the disadvantage on standardized tests of students who do not grow up in households in which academic English is spoken—overwhelmingly upper-middle-class white households—because bilingualism reduces test scores regardless of a student's current fluency in English generally and academic English in particular. (JA 8397-8399).

These factors add up to very sharp undeserved disadvantage for minority LSAT-takers and a very sharp unearned advantage for white LSAT-takers.

2. *Undergraduate grades*

While the racial gap on the other major admissions criterion—undergraduate grade point averages—is much smaller than the LSAT gap, the gap is still significant when admissions are very competitive, as they are at the Law School. (App. 275a-276a). As discussed in the next section, part of this gap reflects the effect of racial segregation upon the K-12 education of blacks, Latinos and Native Americans. But part of it reflects conditions for minority students on undergraduate campuses.

Most white students and faculty are well-intentioned but display toward minority students varying degrees of unfamiliarity, ignorance and prejudice. As Professor Walter Allen of UCLA testified, in addition to unconscious prejudice in the grading process itself, minority students face a daily run of slights and profiling. These include but are not limited to the following: professors who cannot distinguish among them; teaching assistants who make accusations of cheating when a minority student scores well on a test; white students who ask all black men students what sport they play; library employees who search Latino students' book bags with particular regularity; and campus police who require predominantly black parties to use the back doors of campus buildings. In countless ways, the message sent is that

minority students do not belong on mostly white campuses—a message inextricably bound up with the racist stigma of intellectual inferiority faced by black and other minority students. (JA 8144-8146, 8229-8230, 8239-8240, 8243-8250, 8258-8263, 8269-8273).

These incidents have a pernicious and encumbering effect. Black students report higher levels of isolation, despair, disengagement, and alienation; more often consider dropping out; and have more difficulty relating to faculty than white students of similar socioeconomic background and with similar GPAs. They thus face an even greater challenge in achieving satisfactory grades than do white students of a similar economic background. (JA 8230-8234).

The district court acknowledged the reality that racial prejudice depresses the grades of minority applicants to Law Schools. (App. 276a-277a, 283a-284a). Judging the grades equally across racial lines thus would mean another unearned advantage for white applicants and another undeserved disadvantage for minorities.

F. Segregation and inequality in K-12 education.

Two-thirds of black students and 70 percent of Latino students attend segregated elementary and secondary schools today. The most intense segregation is no longer in the South; it is in the schools of the major industrial states of the Northeast and Midwest. Michigan is one of four "absolute center[s] of segregation," with 83 percent of black students attending segregated schools. (JA 7856-7861, 7866-7867, 7881-7882).

Latinos face similar segregation by race and ethnicity. They also face segregation by language; for instance, in California, the state with the largest Latino population, 50 percent of Latinos speak Spanish at home. (JA 8393). Many Native Americans are still relegated to underfunded and segregated government-run reservation and boarding schools,

while others attend schools in the poorest sections of the major cities. (JA 5882, 6053, 6054, 7856-7861, 7866-7867, 7881-7882).

Segregation and poverty act together to degrade the education of black, Latino and Native American students. Poor white students are more residentially dispersed than poor black students and thus are far more likely to enroll in schools that benefit from having a substantial number of middle-class students. Ninety percent of heavily segregated schools have a majority of students eligible for free or reduced-cost school lunches; in schools that are less than 10 percent black or Latino, only 7.7 percent have a majority of students poor enough to be eligible. (JA 6055, 7867-7870).

Even for black students from middle- and upper-middle-class families, substantial disadvantage remains. For equivalent incomes, black families have less wealth, less education, and fewer relatives who can provide financial and other assistance in times of trouble. (JA 7872-7874). Very few white middle-class children attend inner city schools; many middle-class black and Latino children attend those schools. (JA 7887, 7890-7893).

Black and Latino families who migrate to nearby suburbs do not escape the effects of segregation. Many of those suburbs are, or quickly become, segregated. As the white middle class leaves, the tax base declines, trained teachers retire or leave rather than adapt, and the school systems quickly decline. (JA 7872-7877). Even for the very few black families who move to stable white, upper-middle-class suburbs with good school systems, there remains racial isolation, stereotyping, tracking, and stigma. (JA 7874-7876).

Professor Gary Orfield of the Harvard University School of Education summarized the impact of segregation:

> There never was a separate but equal school system. That's because of many things. It's because the poverty

> levels in segregated schools are much higher. . . . [T]here are fewer minorities in teacher training. There are many fewer teachers who choose to go to work in schools of this sort. Most teachers who start in segregated schools leave faster. The curriculum that is offered is more limited. The probability that the teacher will be trained in their field is much more limited. The level of competition is less. The respect for the institution in the outside world is less. The connections to colleges are less. There are more children with health problems...The population is much more unstable. . . . The kids don't have books. . . . There [are] no facilities. . . . [I]t is like a different planet, a different society.

(JA 7862-7863).

Two of the student defendants, Erika Dowdell and Connie Escobar, provided the court with vivid personal descriptions of the conditions Professor Orfield had outlined. Ms. Dowdell, a black resident of Detroit and the daughter of a single mother who works as a nursing aide, was a junior at the University of Michigan when she testified. Ms. Escobar, a Latina and Native American resident of Chicago and the daughter of a factory worker, was a first-year student at the Law School.

The American educational system thus renders the large majority of black, Latino, and Native American students unable to attend college, much less a selective professional school like the Law School. Without affirmative action, the discriminatory effects of the LSAT and grades would bar admission to those few black, Latino, and Native American students who reach the threshold of the Law School or any school like it.

II. THE PROCEEDINGS BELOW

A. The District Court's Opinion.

In March 2001, having held a 14-day trial beginning in January, the district court issued its opinion. The court held that Justice Powell's opinion in *Bakke* was not binding precedent. (App. 241a). Having ruled out testimony on the educational value of diversity, the district court offered its own opinion that while racial diversity provides "educational and social benefits" that are "important and laudable," those benefits are not sufficient to state a compelling state interest that could survive strict scrutiny. (App. 246a).

Offering a plethora of criticisms of the University's admissions system—as well as a number of suggestions as to how that system could be run—the district court held that even if diversity were a compelling state interest, the Law School's plan was unlawful because it was not narrowly tailored to further that interest. (App. 246a-252a). The district court concluded that the Law School's goals were both too "amorphous" and so fixed that the program was "practically indistinguishable from a quota system."[2] (App. 247a-249a).

The district court accepted in part some key factual contentions of the student defendants by recognizing that the LSAT and UGPA were not neutral measures of merit but incorporated varying forms and amounts of bias. (App. 276a-277a, 283a-284a). After acknowledging these facts, however, the district court held that the University could take no account of them because it was not possible to quantify the effect that discrimination had on an individual or a group. (App. 299a). The district court then dismissed the students' arguments by miscasting them as a defense of affirmative action as a remedy for general societal discrimination. (App. 285a-286a).

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[2] The district court reached the latter conclusion in part by averaging highly disparate enrollment figures over quite lengthy periods.

In sum, the district court concluded that despite the importance of racial diversity, the racially skewed character of academic entry credentials, and the desirability of avoiding the resegregation of the Law School, the University could not implement the plan that decades of debate and experience had shown was the only plan that could achieve a diverse and integrated student body.

B. The Court of Appeals Opinion.

The Sixth Circuit heard the case *en banc* on December 6, 2001, having previously granted plaintiff's motion for initial *en banc* review. In its opinion by Chief Judge Martin, the Sixth Circuit reversed the district court, finding that Justice Powell's opinion in Bakke was the holding of the Court and that racial diversity was therefore a compelling state interest. (App. 12a-17a).

On the question whether the Law School's plan was narrowly tailored, the Sixth Circuit also reversed the finding below, determining that the plan was carefully modeled on the Harvard Plan approved by Justice Powell in *Bakke* and rejecting the view that the plan's pursuit of a "critical mass" of minority students made it the functional equivalent of a quota. (App. 29a-32a). After questioning the district court's use of narrow tailoring inquiries loosely drawn from cases in other areas of the law, the majority opinion concluded that the average differences by race in test scores and grades did not render the plan unconstitutional; that the Law School had adequately considered race-neutral alternatives; that the plan's focus on black, Latino, and Native American students was amply justified; and that the plan was appropriately limited in time because it provided that race would only be considered in admissions as long as it was necessary to do so to achieve diversity at the Law School. (App. 32a-38a).

In a concurrence joined by three other judges, Judge Clay agreed that Justice Powell's opinion in *Bakke* was controlling

law and declared further that substantial empirical evidence supported the finding that racial diversity is a compelling state interest. (App. 54a-63a). The four judges found that affirmative action "serves to promote our nation's deep commitment to educational equality, provides benefits to all students—minorities and non-minorities alike—and does so using a system [that departs from rigid adherence to numerical credentials] which is not foreign to the admissions practice, but which allows for the benefit of all and not just some." (App. 63a). The concurring judges emphasized the continuing importance of race separate and apart from socioeconomic status in shaping experience and worldview, and the indivisibility of the social problem of racism and individual rights: "The law school's goal of creating a diverse student body, which has not existed previously and would not otherwise exist without its admissions policy, rests in the very heart of the Equal Protection Clause." (App. 67a).

The four concurring judges thus accepted the students' contention that diversity is inseparably linked to integration: "Diversity in education, at its base, is the desegregation of a historically segregated population and, as the intervenors essentially argue, *Brown* and *Bakke* must therefore be read together so as to allow a school to consider race or ethnicity in its admissions for many reasons, including to remedy past discrimination or present racial bias in the educational system." (App. 72a-73a). The concurrence also endorsed the students' evidence on the racial bias of the LSAT and found that it supported the use of race as a criterion. (App. 78a-79a).

Judge Moore wrote a separate concurrence, focusing on the procedure used by the Sixth Circuit. Judge Boggs, joined in whole by Judge Batchelder and in part by Judge Siler, dissented, arguing that the district court should be upheld. Judge Gilman wrote a separate dissent, finding diversity a compelling interest but declaring that the Law School plan was not narrowly tailored to further that interest.

REASONS FOR GRANTING THE WRIT

Ordinarily, a party prevailing in a Court of Appeals does not ask the Supreme Court to grant a writ of certiorari. For Erika Dowdell, Connie Escobar, and the other student defendants, preserving the Sixth Circuit's ruling adhering to the *Bakke* decision and upholding the Law School's affirmative action policies could not be more precious.

Prior to the adoption of affirmative action at Michigan, the daughters of black and Latino hospital and factory workers would never have had the opportunity to attend the University. Affirmative action programs threw open the doors of opportunity for Ms. Dowdell, Ms. Escobar, and countless other minority and women students. For many white students and some minorities, the Law School's affirmative action program has provided a first opportunity for direct, sustained and meaningful contact with people of other races—a first experience of integration and diversity. Finally, the Sixth Circuit's ruling protects every university within its jurisdiction against costly and divisive law suits. Universities can now commit their resources to improving education rather than defending against the attempts of a lone disgruntled applicant to deny an entire campus community the benefits of integration.

The students understand that requesting review runs the risk that these gains for the citizens of the Sixth Circuit will be lost. Nevertheless, their rights and the rights of the millions of minority and pro-integrationist white people whose interests they represent cannot be protected without a definitive ruling by the Court upholding the constitutionality of affirmative action programs in higher education.

I. THE COURT SHOULD GRANT THE WRIT TO REVERSE THE DRAMATIC HARM ALREADY DONE BY THE ATTACK ON AFFIRMATIVE ACTION.

A. Texas and the South.

The actual ban on affirmative action by the Fifth Circuit in *Hopwood* and the effective ban on affirmative action by the Eleventh Circuit in *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001) have denied equal educational opportunity to millions of black, Latino, and other minority students, especially to those living in those two Southern circuits. We live in a single nation, and the denial of rights to minorities in any part of it constricts and reshapes the rights of minorities nationwide. Further, the elimination of affirmative action in much of the old de jure segregationist South has a particular impact on national prospects for equality, democracy and justice.[3]

The states comprised by the Fifth and the Eleventh Circuits were once the strongholds of Jim Crow segregation. The demise of Jim Crow segregation, however, barely cracked open the door of higher education to black people and other minorities: it was the adoption of affirmative action plans in those states that allowed for more meaningful and less token integration to begin in the South. The University of Texas School of Law, for example, was forced to end its practice of de jure segregation in 1950 in *Sweatt*. However, only tiny numbers of black and Mexican American students were ad-

[3] The impact of these holdings has combined with other anti-affirmative action developments to extremely deleterious effect. For example, in the state of Florida, where affirmative action has been eliminated by executive order, plans are already being pursued to resurrect the old separate and unequal black law school at Florida A&M University and to create a new separate and unequal Latino law school at Florida International University.

mitted to the Law School prior to the institution of affirmative action measures, because those measures were necessary to counter residual discriminatory admissions practices. (Russell, *The Shape of the Michigan River*, *supra*, at 597). As elsewhere, race-conscious admission policies provided the only successful method for achieving a measure of equality and integration in legal education in Texas. *Hopwood v. Texas*, 861 F.Supp 551, 574 (W.D. Tex. 1994), *rev'd. Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

The Fifth Circuit's decision in *Hopwood* was tantamount to ordering the effective resegregation of the University of Texas School of Law—a flagship school in a state with a 42% minority population. In 1995, for example, the year before affirmative action was banned, black students constituted 7.4% of the entering class and Mexican-American students constituted 12.5% of the entering class. In 1997, the first year after it was banned, black students constituted only 0.9% of the entering class and Mexican-American students constituted just 5.6% of the entering class.[4] (University of Texas School of Law Admissions Office, http://www.law.utexas.edu/hopwood/minority.html).

Sixty years ago, black and other minority students were denied admission to the University of Texas School of Law under the doctrine of separate but equal. Today, under the doctrine of "color-blind" constitutionalism, the Fifth Circuit has reinstituted separate and unequal educational opportunity, irreparably setting back the modest gains made toward integration of the University of Texas Law School. This reversal of the progress toward equality initiated by *Sweatt* and *Brown* and significantly advanced through the institution of affirmative action must not be allowed to persist. The student defendants ask the Court to grant review in order to

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[4] The 1996 entering first-year class was selected partly before and partly after the ban.

reaffirm the constitutionality of affirmative action in all sections of the nation and to stop the backdoor reinstitution of separate and unequal educational opportunity.

B. California and de facto segregation.

The quick reversion to segregated education in the South with the elimination of affirmative action programs is mirrored in the experience of California. In 1995 the UC Board of Regents banned the use of affirmative action admissions in the UC system. Minority student enrollment at the two flagship undergraduate campuses, UC Berkeley and UCLA, immediately and dramatically decreased. Latino and black students began "cascading" out of the more selective institutions and into the second-tier ones. A two-track educational system had been created in which underrepresented minorities were virtually excluded from the state's premier public universities and were instead relegated to less elite institutions.

California's black and Latino high school students, a large majority of whom are educated in inferior, segregated primary and secondary schools quickly got the message that no matter how hard they worked, their opportunity to receive a top-rate education in the state's public university system had been effectively extinguished. The first year the ban was enforced, 800 black and Latino high school graduates with high school GPAs of 4.0 were denied admission to UC Berkeley and UCLA. ("UC Berkeley Struggles to Live With Race-Blind Admissions Policy," *San Francisco Chronicle*, April 6, 1998).

In 2001, the UC Regents bowed to the growing pressure of a new youth-led civil rights movement and voted unanimously to reverse their ban on affirmative action. Since the reversal of the ban, and despite the intervening passage of a statewide ballot initiative, Proposition 209, which prohibits affirmative action through the California constitution, new

race-conscious, affirmative action outreach and admissions programs have been implemented and have resulted in somewhat increased minority student enrollment at some of the UC campuses. Minority student enrollment at UC Berkeley, however, remains unchanged, and at UCLA the number of minority students is still well below the pre-ban levels. (http://www.ucop.edu/news/factsheets/2002/admissions_campus.pdf; "UC Regents' symbolic step to spur change in admissions," *San Jose Mercury News*, May 16, 2001, p. 1).

The loss of affirmative action in the UC system has had an indirect effect on the University of Michigan School of Law. UC Berkeley is one of the top feeder schools to Michigan Law. The decrease in opportunity for black, Latino and Native American students means that UC Berkeley is producing fewer minority graduates, decreasing the pool of underrepresented minority students eligible for admission to Michigan and other highly regarded law schools. Minority opportunity at the level of professional education is being severely limited by the loss of affirmative action in undergraduate programs.

The impact of the Regents' decision on UC legal education was even sharper than it was on undergraduate campuses. The ban on affirmative action at the UC Law Schools led to a dramatic decline in minority student enrollment at UC Berkeley School of Law (Boalt Hall) and UCLA School of Law. It also created an openly hostile racist environment within the two law schools. The numbers of underrepresented minority students have recently recovered slightly because of the reinstitution of race-conscious admissions policies.

The experience of the UC system makes it clear that the preservation of affirmative action programs is as necessary in the North as in the South. De facto segregation can only be overcome through affirmative action. A decision by this Court upholding the Sixth Circuit will protect other Northern jurisdictions from attacks like the one in this case, which

would have the same effect on minority enrollment as the original Regents' ban.

II. THE COURT SHOULD GRANT THE WRIT TO CONFIRM AND CLARIFY *BAKKE*.

The student defendants ask the Court to grant the writ in order to bring the legal basis for the *Bakke* decision in line with its social aims. Affirmative action programs, including the Law School's, have served two inseparable and intertwined purposes.

First, they have desegregated the premier university, graduate, and professional programs of this nation. Well-intentioned talk on integration led to actual results when university administrators acknowledged the significance of race in America and implemented positive race-conscious admissions polices to break down the wall of de facto segregation. Modest integration of higher education has been gained through this process.

Second and inseparably, the quality of education at these institutions has been vastly improved and utterly changed based on the achievement of an integrated student body. Intellectual diversity is the second great gain of affirmative action. Justice Powell's opinion in *Bakke* presumes that both interests will be advanced through the maintenance of affirmative action programs and that both are of the utmost importance:

> It is not too much to say that our nation's future depends on leaders trained with wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.

Bakke, 438 U.S. at 313 (Powell, J.)(citing *Keyishian v. Board of Regents*, 389 U.S. 589, 603 (1967).

However, Justice Powell's decision only specifically holds that diversity is a compelling state interest under the

First Amendment. Placing the defense of affirmative action policies in higher education on that ground has had three consequences.

First, it limited the constitutional scope of desegregationist affirmative action measures used to integrate higher education to that setting. First Amendment protections for academic freedom could not be used, for example, to justify affirmative action programs in contracting or hiring.

Second, it gave Justice Powell the ability to strictly proscribe the scope of affirmative action measures and to confine the programs within strict boundaries. According to *Bakke*, clear, hard, and measurable goals that would give minority students and civil rights advocates the ability to track and enforce real progress are not a permissible use of race in admissions decisions. Instead, University administrations were charged by Justice Powell with creating diverse and integrated student bodies within highly limited and constrained parameters.

At the same time, *Bakke* acknowledges that affirmative action programs, to be minimally effective, must extend beyond tokenism. The acknowledgement of race as a defining characteristic in American society prompted recognition of a need for real minority representation on university campuses. Justice Powell realized that achieving a critical mass of minority students was necessary to prevent black and other minority students from being silenced or nearly driven off of white campuses by intolerable levels of racism. *Bakke*, 438 U.S. at 323 (Appendix to Opinion of Powell, J.). Professor John Hope Franklin, who was a student at Harvard University in the pre-affirmative action era, and Chrystal James, one of two black law students in her UCLA Law class while the ban on affirmative action was being enforced, both gave vivid accounts at trial of the racist mistreatment encountered by black students deprived of a critical mass of cohorts. (JA 7960, 8144).

Finally, Justice Powell wrote his opinion in *Bakke* at a moment when white opposition to the desegregation of northern education expressed itself as mob violence, as in the Boston busing crisis. The decision is carefully crafted to balance between protecting the rights of black people and attempting to find a justification for the continuation of affirmative action that might prove to white people that they too benefited from integration. The diversity rationale seemed to serve this function. For these reasons the opinion of Justice Powell in *Bakke* is restrained, limited and fundamentally conservative.

The balance Justice Powell struck has had ironic consequences. Ardent support for affirmative action in education among white people is most easily garnered when it can be shown that affirmative action measures are needed to extend equal opportunity, combat the continuing effects of segregation, and promote integration. The gains of the civil rights movement are actively supported by the majority of white people. Only a fringe minority endorse their reversal.

In the period following the *Bakke* decision, the vast majority of Americans have understood diversity to mean integration and have supported it for that reason. Only the courts draw an artificial line between integration and diversity. The student defendants ask the Court to grant this writ in order to clarify what *Bakke* left vague: that integration of higher education is a compelling state interest which can and must be recognized under the Fourteenth Amendment, and that diversity cannot be maintained without integration.

III. THE COURT SHOULD GRANT THE WRIT TO MAKE CLEAR THAT THE PEOPLE OF THE VARIOUS STATES HAVE BROAD DISCRETION TO DETERMINE THE MEANS USED TO CONTINUE THE DESEGREGATION OF THEIR UNIVERSITIES.

Racial inequality is the most profound and long-lasting blight on American democracy. Because of the special role of schools at all levels in preparing young people for democratic citizenship, this Court has long recognized that the states have the right to implement racially-conscious measures to assure the integration of the public schools, even if those measures could not be compelled by federal courts acting under the authority of the Fourteenth Amendment. *See, e.g., Swann v. Charlotte Mecklenberg Bd of Educ*, 402 U.S. 1, 15-16 (1971). Many courts have recognized that right in a variety of contexts. *See, e.g., Brewer v. West Irondequoit Central School District*, 212 F.3d 738 (2nd Cir. 2000); *Johnson v. Board of Education*, 604 F.2d 504, 514-515 (7th Cir. 1979), *rev'd on other grounds* 449 U.S. 915 (1980); *School Committee of Springfield v. Board of Education*, 362 Mass. 417 (1972).

Recently, however, several courts, including the district court in this case and the Fifth Circuit in *Hopwood,* have turned that recognition on its head and declared that the Fourteenth Amendment—the great charter of freedom for the newly freed slaves—now serves as a mandate for the federal courts to prevent local authorities from taking racially-conscious steps to ensure that their schools are not again segregated. *See, e.g., Eisenberg v. Montgomery County Public Schools,* 197 F.3d 123 (4th Cir 1999).

The petitioner seeks to extend these decisions nationwide by asking the Court to ban all racially conscious measures to achieve the integration of public universities. Failing that, the petitioner seeks to achieve the same result indirectly by suggesting that the Court should invalidate the Law School's

very moderate plan, crafted through years of study and debate by the Law School faculty, on the specious grounds that it uses race "too much" or that there are racially neutral measures to achieve integration that have escaped the notice of the nation's foremost experts and of the faculties at the University of Michigan, California, and Texas.

In the past, this Court has warned of the "the grave harm resulting from governmental intrusion into the intellectual life of a university. . ." *Sweezy v. New Hampshire*, 354 U.S. 234, 261 (1957) (Frankfurter, J., concurring). More broadly, when the Court itself struck down state measures to ameliorate the effects of the Great Depression, Justice Brandeis, in a warning later heeded by the Court as a whole, declared that within broad limits the states should be free to experiment and that the Court must "ever be on our guard, lest we erect our prejudices into legal principles." *New State Ice Co v. Liebman*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting).

The people of Michigan have repeatedly chosen Regents who support affirmative action to ensure the desegregation of the University of Michigan. This Court should make clear that the people of every state have the right to choose to use racially-conscious measures to ensure that all citizens have equal access to state universities.

IV. THE COURT SHOULD GRANT THE WRIT TO UPHOLD THE COMPELLING STATE INTEREST IN OFFSETTING THE RACIAL BIAS AND DISCRIMINATION INHERING IN ACADEMIC ADMISSIONS CRITERIA.

The Law School has a compelling interest in offsetting the bias and discrimination that inhere in academic admissions credentials and that would, absent affirmative action, guarantee the admission of entirely or almost entirely segregated classes.

Neither test scores nor grades functions as a race-neutral measure of merit; rather, each numerical credential captures and in some senses intensifies racial inequality. This functions through various and overlapping causes. For grades, these include hostile undergraduate campus environments; inequalities in preparation that are the result of increasingly segregated K-12 schools within and without Michigan; and unconscious stereotyping and prejudice by those assigning grades. For test scores, they include additional factors such as stereotype threat and statistical norming procedures guaranteeing the use of questions that reproduce bias. Some of these factors interact with socioeconomic factors, but in many cases the bias and inequality are discernibly the product of race and racism apart from class.

Absent affirmative action, the admissions program at Michigan or at any other law school would function as a rigidly unfair double standard, downgrading the achievements and promise of black, Latino, and Native American applicants, and giving the applications of white students a boost produced by unearned racial privilege.

The Law School has recognized since it first adopted affirmative action that rigid use of numerical admissions criteria was incompatible with integration. Moreover, since the two criteria *together* explain only a modest part of a given class's distribution of first-year grades, and since they have no ability whatsoever to predict what matters most to the Law School—leadership and success in the practice of law—there is no arguable educational basis for rigidly applying the criteria.

In *Bakke*, Justice Powell recognized the significance of evidence of bias and unfairness in entry credentials, observing without prompting by the parties that such evidence had not been presented by the University of California but could well provide a basis for upholding affirmative action plans. *Bakke,* 438 U.S. at 306 n43 (Powell, J.). The Sixth Circuit

panel which heard the student defendants' appeal of the district court's decision denying their motion to intervene observed the same, and granted intervention on that basis. *Grutter v. Bollinger,* 188 F.3d 394, 401 (6th Cir. 1999). Finally, Judge Clay and the three Sixth Circuit judges who joined his concurrence found that LSAT scores are neither race-neutral nor gender-neutral measures of merit. (App. 78a).

The bias and discrimination inhering in test scores and grades make it impossible for the Law School to assess individual applications fairly without reference to race. Flexible consideration of such criteria has always been a critical part of affirmative action in higher education. It is a step toward even-handed review of applications and a step away from the continuing baseless stigma of intellectual inequality that the *Brown* Court sought to eradicate.

For plaintiff to maintain that these average differences by race in grades and test scores proves discrimination turns the truth upside down; on the contrary, the failure to recognize the discrimination that the criteria capture, reflect, and reproduce would artificially and arbitrarily downgrade the potential of minority law school applicants. For plaintiff to maintain that the Fourteenth Amendment requires rigid use of these criteria when their discriminatory impact has been shown turns the Fourteenth Amendment itself upside down. The Law School, in choosing to integrate, admits black, Latino, and Native American students who are in every respect "the peers and the equals" of their white counterparts. (Trial testimony of Dean Lehman). Plaintiff would have the school resegregate on the basis of numerical credentials that create no entitlement for any applicant and that are essentially conceded to discriminate. The Court should reject that view and permit the Law School to continue to exercise its educational judgment and expertise in assembling diverse and

integrated classes "to advance full development of the talent and capacities of our Nation's people." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

CONCLUSION

As Professor John Hope Franklin testified, while the struggle to end racism is far from over, in the course of his lifetime—the course of the twentieth century—we have made "miraculous" progress. The students are committed to defending and advancing that progress and ask the Court to join them.

Respectfully submitted,

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