No. 02-516

In the

Supreme Court of the United States

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JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN

Respondents.

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

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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CYNTHIA D. COOK
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN H. FINDLEY
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioners Jennifer Gratz and Patrick Hamacher. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California, for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated in numerous cases involving discrimination on the basis of race including *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); and *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). PLF considers this case to be of special significance in that it addresses a state's use of race classifications for objectives, such as diversity, that are non remedial in nature.

STATEMENT OF THE CASE

This Court granted certiorari to determine whether the University of Michigan's use of race as a factor for admissions to its undergraduate program violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981. Petitioners Jennifer Gratz and Patrick Hamacher allege that they were denied admission to the University of Michigan's College of Literature, Science & the

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[1] Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Arts (hereinafter University of Michigan or University) in the mid 1990's due in part to the University's policy of race-balancing admitted applicants by weighting the applications of targeted minorities. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 814-16 (2000). Each application was categorized by race and African-American, Hispanic, and American-Indian applicants were automatically granted a twenty point bonus[2] to their selection-index score. *Id.* at 827. This award of bonus points to target minority candidates was designed to ensure that a balanced number of minority students were admitted with each incoming freshman class.

The question before this Court is whether the University of Michigan had a compelling interest to enact and continue its race-conscious admissions program and, if so, whether these race-based preferences are narrowly tailored to serve that interest.

SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment prohibits states from benefitting or burdening individuals on the basis of race. Equality in the modern day does not suggest or require that "the less qualified be preferred over the better qualified simply because of minority origins." *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

The University of Michigan's undergraduate admissions policy grants preferences to members of some minority groups solely on the basis of their race. In implementing its race-based program, the University of Michigan failed to identify any specific or demonstrable discrimination which required a race-based remedy.

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[2] This twenty point bonus for minorities, on a scale of up to 150, is approximately 15% of an applicant's total score. Twenty points is also the difference in selection-index points awarded an applicant with a 4.0, or straight "A," grade point average in comparison with an applicant carrying a 3.0 grade point average.

Without such findings, the University of Michigan's goal to create a "diverse" student body amounts to an attempt to racially balance its admissions. This Court's jurisprudence rejects race-balancing as a compelling state interest. *See Bakke*, 438 U.S. at 307 (Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."). "Diversity," if sought by using race classifications, is simply a different term for the same objective and thus, fails to provide a compelling state interest. Absent a compelling state interest and due to the pliable and amorphous nature of a "diversity" goal, the University's plan also fails to be narrowly tailored to survive strict scrutiny. The University's admissions program considers race for no reason other than to include more target minority students. This is a program that the Constitution forbids.

INTRODUCTION

Twenty-five years after this Court's plurality decision in *Bakke*, high school students seeking entry to the highly competitive University of Michigan continue to be categorized by the color of their skin, and their probability for admission is largely determined by the University's racial classifications. The University's race-based admissions policy was enacted behind the screen of promoting "diversity" in the incoming class. This argument for "diversity" in an educational setting has been presented before in *Bakke* and, more recently in the lower courts, in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), and *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). Then, as it does now, the diversity rationale remains an attempt to distract attention from a state's ultimate goal of creating a racial balance.

The University's race-balancing policies, by any name, fail to survive strict scrutiny review because non remedial justifications for racial preferences do not provide a compelling state interest. The "diversity" rationale, standing alone, without evidence of continuing

effects of identified discrimination, fails under this Court's ruling in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). Justice O'Connor's opinion in *Croson* sets the standard: Race, as a suspect classification which triggers strict scrutiny, can only be used by states as part of a "narrowly tailored" plan to remedy identifiable effects of past or present discrimination. *Id.* at 498-500, 506. Objectives such as "diversity" or "disadvantage" are non remedial in nature and fail to provide a compelling state interest. The only constitutional rationale, under the Equal Protection Clause, for state-sponsored race classifications is to provide a remedy. Because the University of Michigan cannot pinpoint any discrimination that necessitates a race-based remedy, its admissions policy violates the rights of prospective students to be treated equitably under the law.

ARGUMENT

I

UNDER EXISTING CIVIL RIGHTS PRECEDENT, THE EQUAL PROTECTION CLAUSE PROHIBITS NON REMEDIAL USES OF RACE CLASSIFICATIONS

This Court's decisions regarding the Equal Protection Clause of the Fourteenth Amendment have been distilled over the decades to a clearly iterated standard of review for all race-based classifications. In *Croson*, a plurality of this Court ruled that race classifications are justified only when used to remedy the effects of racial discrimination. Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Kennedy, there held, 488 U.S. at 493:

> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.

Justice Scalia concurred in the judgment, arguing that racial classifications must be restricted even more narrowly:

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens . . . ."

Id. at 521 (citations omitted).

Because the University's purported interest in operating a racially diverse law school is neither remedial nor necessary to prevent imminent danger to life and limb, the Sixth Circuit holding contravenes *Croson*.

While the Court has acknowledged that certain, unique circumstances may call for the use of race as a classification, those circumstances must be limited to situations where past or current discrimination has been proven. *Id*. Only then may states engage in race-based preferences and, even then, such race-conscious actions must be "narrowly tailored" to remedy the present effects of past discrimination. *Id*. at 507. Forward-looking goals, such as those seeking racial balance in schools or a diverse employee pool, cannot provide a "compelling interest" or sufficiently show "narrow tailoring" to survive strict scrutiny. Richard Kahlenberg, *Race-Based Remedies: Rethinking the Process of Classification and Evaluation: Class-Based Affirmative Action*, 84 Calif. L. Rev. 1037, 1041 (1996).

A. Evolution of Equal Protection Law Has Established Strict Scrutiny as the Standard of Review for All Race-Based Classifications

This Court's jurisprudence regarding states' use of race classifications has run a twisted course. After struggling for decades with the level of review warranted by race-conscious state actions, the Court concluded in *Croson* that "state-sponsored benign racial classifications are presumptively invalid and . . . subject to strict scrutiny." Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 Geo. L.J. 2331, 2337-38 (2000). *See Croson*, 488 U.S. at 494. This standard of strict scrutiny was reiterated in *Adarand*, 515 U.S. at 222, where Justice O'Connor wrote to clarify that: "With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments."

Strict scrutiny requires the acting state or local government to provide a "compelling interest" that is "narrowly tailored" to meet the compelling interest it supposedly serves. *See generally Croson*, 488 U.S. 469 (1989). However, since the *Croson* decision, the Court has offered little guidance as to what constitutes a "compelling interest" and what programs are sufficiently "narrowly tailored" to survive the strictest scrutiny. Forde-Mazri, *Supra*, at 2339; Cass Sunstein, *Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting: Public Deliberation, Affirmative Action, and the Supreme Court*, 84 Calif. L. Rev. 1179, 1187 (1996). What can be derived from the existing case law is that non remedial, diversity-seeking programs will not provide a sufficiently compelling state interest to survive strict scrutiny.

B. The University of Michigan's Desire to Obtain a Racially Balanced and Diverse Student Body Fails to Provide a Compelling State Interest Under *Croson*

Justice O'Connor's carefully crafted opinion in *Croson* reviewed the decisions in *Bakke* and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and concluded that strict scrutiny

applies to all racial classifications, regardless of which race is being benefitted or burdened. *Croson*, 488 U.S. at 494. In *Croson*, this Court solidified a strict scrutiny standard of review and clarified that use of race classifications for non remedial purposes would fail any heightened review. *Id*. at 494, 505.

While Justice Powell's opinion in *Bakke* stated in dicta that the University's goal of "attainment of a diverse student body" might provide a compelling interest,[3] he did not garner a majority of the Court in that conclusion. *Hopwood*, 78 F.3d at 944. Indeed, Justice O'Connor, in *Croson*, used Justice Powell's opinion to highlight that non remedial uses of race amount to "'the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past'" *Croson*, 488 U.S. at 497. Justice Powell failed to observe that the "diversity" argument falls for the same reason as the "role model" argument in *Wygant*, 476 U.S. at 276 (plurality opinion of Powell, J.). State goals to eradicate societal discrimination, whether couched in terms like "diversity" or "role modeling," are insufficiently compelling to

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[3] While much has been made of Justice Powell's opinion in *Bakke* by the district court in this case, the Fifth Circuit Court of Appeals' recent decision appears to be in direct conflict.

> We refused to follow Justice Powell's single-Justice concurring opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), because his "argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case." (Citing *Hopwood*, 78 F.3d at 944.) Justice Powell's view that diversity represents a compelling state interest justifying racial preferences under the strict scrutiny test represented the view of "only one Justice." *Id*.

Encore Videos, Inc. v. City of San Antonio, 310 F.3d 812, 819 n.10 (5th Cir. Oct. 29, 2002).

survive strict scrutiny and equate to "'discrimination for its own sake,' [which is] forbidden by the Constitution." *Croson*, 488 U.S. at 496 (citing *Bakke*, 438 U.S. at 307).

The University of Michigan's use of race as a factor for admissions is based on the stated desire to obtain a "sufficiently diverse student body." *Gratz*, 122 F. Supp. 2d at 830. The University of Michigan seeks diversity of race and ethnicity in every incoming class. In pursuit of this goal, the University grants an extra twenty points to certain minority applicants[4] and "flags" minority applicants for further consideration. *Id*. at 827. This twenty point bonus is based only on race and does not consider socio-economic background or life experience. Indeed, the University offered expert testimony that use of race-neutral programs, such as those based on socio-economic factors, would be "ineffective as there 'are simply too few blacks and Latinos from poor families who have strong enough academic records to qualify for admission . . . .'" *Id*. at 830.

The University argues that its desire to produce a "diverse" student body rises to the level of fundamental, paramount, or overriding and, thus, demonstrates a compelling state interest. *Id*. at 817. However, the University never argues or provides evidence

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[4] The district court's opinion never addressed what races or ethnicities were considered to be "minorities" for the purposes of the University's admissions program. According to Petitioners' Petition for Writ of Certiorari, three racial groups were selected by the University as being worthy of preferences in admissions: African-American, Hispanic, and Native American. Pet'r Pet. for Writ. of Cert. at 5. The University has never articulated why these three racial groups contribute more to "diversity" in the educational atmosphere than groups like Korean Americans or students of Middle Eastern descent. The University's restricted definition of "diversity" to only mean "race," and then only certain racial groups, indicates an underlying desire to achieve a balancing of skin tones, not a cross-section of cultures, experiences, and philosophies.

that its race-based preferences are intended to remedy any "effects of past discrimination." *Id*. at 824. Rather, the University claims that "[i]f race were not taken into account, the probability of acceptance for minority applicants would be cut dramatically." *Id*. at 830.

These considerations only demonstrate that the University of Michigan is using racial preferences for the impermissible purpose of correcting conditions that result from perceived societal discrimination. By ignoring race-neutral socio-economic factors, *id.*, the University gives a boost to middle and upper class minority applicants because fewer minority applicants actually meet the standard criteria necessary for admissions. Thus, in order to admit a significant number of minority students and obtain a "diverse" or racially balanced student body, the University stops treating all applicants equally and grants a preference to those of a certain race. While the University of Michigan may desire to admit a more racially diverse class of students, absent any evidence of direct and proven past discrimination, the University lacks a compelling interest and its racial classifications cannot survive strict scrutiny.

In the *Croson* plurality opinion, Justice O'Connor concluded that seeking to address societal discrimination or achieve an arbitrary racial balance does not rise to the requisite compelling state interest. *Croson*, 488 U.S. at 496-97. Similar to the factual circumstances the Supreme Court faced in *Wygant*, the disparity between minority applicants that satisfy all standard admissions criteria to the University and the ideal number of minority students the University of Michigan hopes to admit has "no probative value in demonstrating the kind of prior discrimination . . . that would justify race-based relief." *Id.* at 497 (citing *Wygant*, 476 U.S. at 276). Without a finding of past discrimination that warrants a race-based remedy, the University's desire for "diversity" is a "mere recitation of a 'benign' or legitimate purpose for a racial classification [that] is entitled to little or no weight." *Id.* at 500.

The Fourth and Fifth Circuits in *Podberesky* and *Hopwood* demonstrate the course set by the Supreme Court in *Croson*. In *Podberesky*, the Fourth Circuit struck down the University of Maryland's race-based policy restricting eligibility for a scholarship program to African-American students. *Podberesky*, 38 F.3d at 151. The University attempted to justify the program by claiming that African-American students were underrepresented in the student body and that African American students had a lower retention and graduation rate. *Id*. at 152. In applying strict scrutiny to the race-based program, the Fourth Circuit determined that the state's interest is sufficiently compelling only where it has demonstrated a "strong basis in evidence for its conclusion that remedial action [is] necessary." *Id*. at 153. The Fifth Circuit held similarly in *Hopwood*, that: "The law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body." *Hopwood*, 78 F.3d at 934. These courts of appeals adhered to the purpose of strict scrutiny review and determined that "diversity," as a non remedial goal, fell short of a compelling interest. The University of Michigan's desire to "diversify" or racially balance its student body may be an understandable goal but it is one that fails to provide a compelling state interest for disparate treatment of applicants based on race.

C. The University's Race-Based Admissions Policy Fails to Be Narrowly Tailored Because "Diversity" Is a Broad Public Policy Objective Unsuited to a Race-Based Remedy

Similar to the circumstances this Court addressed in *Croson*, "it is impossible to assess whether the . . . [p]lan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 U.S. at 507. The University of Michigan never set forth any specific and proven

discrimination to support a claim that its race-based policy was remedial in nature. The University provides no evidence that qualified minority students have been denied admission, either recently or in the near past. Rather, the University relies on the fact that fewer minority students would be admitted, and its student body less ethnically diverse, if its policies were race-neutral. *Gratz*, 122 F. Supp. 2d at 830. That claim, standing alone, will not suffice to create a compelling state interest nor does it provide guidance to the courts in determining whether the program is narrowly tailored.

The University's pursuit of "diversity"is not a compelling interest from which a narrowly tailored and, thus, constitutional program can emerge. *See generally* Kahlenberg, *Supra*, at 1042. Without evidence of specific discrimination to provide a compelling interest, regardless of whether the University claims "disadvantage, diversity, or other grounds for favoring minorities." *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir. 1991), the University's race-based policies cannot be narrowly tailored. The University's twenty point bonus and "flagging" of minority applicants was created to achieve a racial balance in the student population. "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been *caused* by a constitutional violation." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (emphasis added).

Another fatal flaw in the University's "diversity" goal is that the goal has never been well-defined. As such an "amorphous" goal, the University's claim of "diversity" should wither under strict scrutiny. Even if "diversity" enhanced educational environments, this University has used race as a proxy for the greater goal of "diversity." The University's use of race, whereby only the race of African-American, Hispanic, and American Indian applicants are important for "diversity" purposes, robs applicants of full consideration of their merits and character. The University's program assumes that all African-American children have similar

experiences and will add to the University's goal of "diversity" in the same manner. The University's race-based preferences grant the son of an upper-class African-American Michigan law professor the same twenty point bonus as the daughter of a South African sharecropper. *Gratz*, 122 F. Supp. 2d at 830 (rejecting socio-economic considerations); *see, e.g.*, Thomas Sowell, *Civil Rights: Rhetoric or Reality* 77 (1984) (comparing cultural differences between black West Indians living in the United States, who have demonstrated economic success, and other black Americans, who have lagged behind). Justice O'Connor specifically rejected this manner of using race as a proxy for experiences or characteristics in her dissent in *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 602 (1990) (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting) stating: "Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."

Because the University uses race as a proxy for the ill-defined goal of "diversity," this program fails to demonstrate narrow tailoring suited to achieve a compelling state interest.

II

THE UNIVERSITY OF MICHIGAN'S RACE PREFERENCES, LIKE OTHER FORMS OF DISCRIMINATION, UNDERMINE THE ESSENCE OF THE EQUAL PROTECTION CLAUSE BY FOSTERING RACIAL STEREOTYPES AND SOCIAL STIGMAS

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." As this Court has noted in the past, the "rights created by the first section of the Fourteenth

> Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.

Croson, 488 U.S. at 493. The Equal Protection Clause does not provide for "group rights." Rather, "[t]he central purpose of the Equal Protection Clause 'is to prevent the States from purposefully discriminating between individuals on the basis of race.' " *Hopwood*, 78 F.3d at 939-40 (quoting *Shaw v. Reno*, 509 U.S. 630, 642(1993)). The Equal Protection Clause ultimately seeks to "render the issue of race irrelevant in governmental decisionmaking." *Id.* at 940.

However, states, in the name of affirmative action, continually step outside the boundaries of the Equal Protection Clause to bestow certain benefits and preferences on a group of individuals on the basis of their ethnicity or race. *See Podberesky*, 38 F.3d at 151; *Hopwood*, 78 F.3d at 934. Despite the "best of intentions" that states may have in enacting preferential or discriminatory policies to benefit minorities, a looming likelihood is that such government-sanctioned policies actually serve to promote stigmas and stereotypes that states should not be in the business of fostering. *See generally* Jim Chen, *Is Affirmative Action Fair? Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 Ohio St. L.J. 811, 899 (1998).

This Court has noted the dangerous potential of race-based programs, stating that: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hositility." *Croson*, 488 U.S. at 493 (citing *Bakke*, 438 U.S. at 289-90 (op. of Powell, J.)). A decade earlier, Justice Douglas, warned in his dissent in *DeFunis v. Odegaard*, that:

> A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom,

> and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved: that . . . [minorities] cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place . . . . All races can compete fairly at all professional levels. So far as race is concerned, any state-sponsored preference to one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.

DeFunis v. Odegaard, 416 U.S. 312, 342-44 (1974) (Douglas, J., dissenting). A plausible and harmful effect of the University of Michigan's race-based policy is that it brands the admitted minority students as underacheivers who need assistance in the form of preferences to gain entry to the University. *See Bakke*, 438 U.S. at 298 (op. of Powell, J.). Such a damaging stereotype can undermine the self-esteem of minority students and create questions as to their achievements and qualifications. The Fourth Circuit has stated that:

> Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims. While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome. . . . It thus remains our constitutional premise that race is an impermissible arbiter of human fortunes.

Podberesky, 38 F.3d at 152 (quoting *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993)). The Equal Protection Clause is intended to protect all individuals from harms that may result from racial classifications. "Race is immutable" and

States cannot be in the business of handing out race-based preferences that foster harmful stereotypes and social stigmas. Kahlenberg, *supra*, at 1062.

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CONCLUSION

"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." *Croson*, 488 U.S. at 494. The Fourteenth Amendment requires that states treat individuals equally under the color of the law. The University of Michigan's program of granting preferences to minority applicants fails to provide equitable treatment for all applicants, regardless of race. Furthermore, because no valid remedial purpose exists for the University of Michigan's program, any race-based classifications of applicants fails under a strict scrutiny review. For the reasons set forth herein, the decision of the District Court for the Eastern District of Michigan, Southern Division, before this Court pursuant to Rule 11, should be reversed.

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Respectfully submitted,

CYNTHIA D. COOK
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN H. FINDLEY
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae Pacific Legal Foundation