No. 02-241

In the Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, ET AL.,

Respondents.

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

BRIEF *AMICI CURIAE* OF THE COALITION FOR ECONOMIC EQUITY, THE SANTA CLARA UNIVERSITY SCHOOL OF LAW CENTER FOR SOCIAL JUSTICE AND PUBLIC SERVICE, THE JUSTICE COLLECTIVE, THE CHARLES HOUSTON BAR ASSOCIATION, And THE CALIFORNIA ASSOCIATION OF BLACK LAWYERS IN SUPPORT OF RESPONDENTS

ERIC K. YAMAMOTO
Counsel of Record
2515 DOLE STREET
HONOLULU, HI 96822
(808) 956-6548

EVA J. PATERSON
SUSAN K. SERRANO
131 STEUART STREET
SUITE 400
SAN FRANCISCO, CA 94105
(415) 543-9444

Counsel for Amici Curiae

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

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Coalition for Economic Equity, the Santa Clara University School of Law Center for Social Justice and Public Service, the Justice Collective, the Charles Houston Bar Association, and the California Association of Black Lawyers respectfully submit this brief *amici curiae* in support of Respondents.[1]

The Coalition for Economic Equity is an umbrella organization of numerous different minority- and women-owned business groups in San Francisco, which works to promote fairness and equity in the City's contracting system. The Coalition was first organized in 1982 to address the problem of low participation of minority- and women-owned businesses (MBEs and WBEs) in the City's contracting. Since that time, the Coalition has worked legislatively and administratively to strengthen efforts to combat discrimination in public contracting.

The Santa Clara University School of Law Center for Social Justice and Public Service provides a locus for public interest and social justice study and service. The Center builds a community for students, faculty, lawyers, and others who care about public interest and social justice. The Center supports faculty and student scholarship emphasizing the use of law and the legal system to improve the lives of marginalized, subordinated, and underrepresented members of society.

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[1] Pursuant to Supreme Court Rule 37.3, all parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

The Justice Collective is a multiracial organization whose mission is racial justice. Founded in 1998, the Collective translates critical theoretical and empirical research into practical legal and policy arguments for use in concrete controversies -- in the schools, courts, government agencies, legislatures, and workplaces. The Collective therefore seeks to combine critical legal analysis with political lawyering and community organizing to aid multiracial communities in their struggles to heal racial wounds and achieve social and economic justice.

The Charles Houston Bar Association (CHBA) is a legal organization comprised of African American lawyers committed to social justice in the State of California. CHBA is named after Charles Hamilton Houston, a pre-eminent lawyer whose efforts laid the legal foundation for *Brown v. Board of Education*. CHBA supports the affirmative action goals and commitments of law schools that seek to create diversity in American education.

The California Association of Black Lawyers (CABL) represents the interests of over 5000 African American judges, lawyers and law students in the State of California. Founded in 1977, the objectives and purpose of CABL include, "the stimulation of Black Lawyers in organized Bar activities, to seek out and eradicate the roots of racism, and to preserve the high standards of integrity, honor and courtesy in the legal profession."

SUMMARY OF ARGUMENT

Contrary to Petitioner's assertions, Michigan Law School's admissions policy is not a system of institutionalized racial "preferences." Nor is it a "fundamental departure" from the Constitution's guarantee of equality.

Petitioner's description of the admissions policy disregards history and current social conditions and distorts

the purpose of anti-discrimination law. It does so by advancing an impoverished view of constitutional colorblindness. This view of "pure colorblindness" treats all racial classifications as pernicious. It thus fails to distinguish between a governmental classification that perpetuates existing group disadvantage on the basis of race and one that addresses the adverse effects of long-standing racial exclusion.

This view of colorblindness is legally impoverished because it contradicts the historic purpose and original meaning of the Equal Protection Clause and civil rights laws -- to foster genuine equality for groups subordinated under law and by social practice. It also mistakenly presumes that race is an arbitrary concept that has no relevance to the allocation of burdens and benefits in a democratic society. Rather than advancing equality, Petitioner's position perpetuates stark inequalities and deepens social divisions.

Social science research supports this conclusion. Empirical studies suggest that the version of colorblindness advanced by Petitioner distorts the very idea of equality – it tends in fact to promote, rather than end, exclusion of minorities. The California and Texas experiences also offer stark evidence that ending race-as-a-factor admissions at selective law schools resegregates those institutions despite other commendable efforts to assure diversity.

Petitioner's position on constitutional colorblindness also is flawed because it implicates an equally impoverished conception of "gender-blindness." This conception of gender-blindness ignores the current effects of the long history of legalized subordination of women in America.

Most important, Petitioner's view of colorblindness has drastic constitutional consequences. It leads to a flawed contemporary application of the strict scrutiny standard of review by equating historically invidious racial classifications with those seeking to promote present-day equality in the face of discriminatory legacies. It thereby renders the strict

scrutiny standard "strict in theory" but automatically "fatal in fact" -- an approach to constitutional review explicitly rejected by this Court.

In contrast, constitutional colorblindness was never meant to be "purely colorblind." Its aim was, and remains, to treat race in a manner that promotes genuine equality. It does so in part through the application of the strict scrutiny standard by accounting for significant differences between programs that seek to fully end group-based exclusion and governmental classifications that maintain it. This contextualized version of constitutional colorblindness, like the appropriate version of gender-blindness, considers actual consequences for minorities and women. It focuses anti-discrimination law on the elimination of contemporary forms of exclusion and thereby affords greater judicial respect to those programs designed to achieve that purpose.

America's legal history supports this contextualized operation of anti-discrimination law. Congress enacted the Civil Rights Acts and the people of America adopted the Thirteenth, Fourteenth, and Fifteenth Amendments to uplift Blacks from two hundred years of systemic subordination. More specifically, the Equal Protection Clause sought not to embrace facial race-neutrality in law. It aimed instead to remove the barriers to equality for Blacks by taking express account of the social and political significance of race. Indeed, Justice Harlan's famous dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), framed the original version of constitutional colorblindness to account for the racial motivation and impact of government action. Rejecting Louisiana's argument that its separate-but-equal railway passenger law was neutral because it prohibited Whites from riding with Blacks just as it prohibited Blacks from riding with Whites, Justice Harlan's constitutional colorblindness aimed to stop the legalized exclusion of Blacks from the full benefits of civil society.

Finally, this Court's Equal Protection jurisprudence supports the more contextualized approach to anti-discrimination law. Indeed, as part of its concern about racial classifications, this Court has recently recognized what amounts to a more flexible strict scrutiny standard in reviewing government initiatives designed to promote equality. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995), this Court explicitly refuted the notion that the strict scrutiny standard is strict in theory, but fatal in fact. Historically, the Court strictly scrutinized only invidious classifications, and "automatically fatal in fact" reflected actual practice. Now, the Court often reviews ameliorative racial classifications, and its strict scrutiny analysis has been framed to take this into account. Thus, in *Adarand*, this Court stated that the strict scrutiny standard takes "relevant differences" into account "to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." *Id.* at 228.

This more flexible contemporary strict scrutiny approach, supported by the appropriate version of constitutional colorblindness, recognizes that not all racial classifications (or gender classifications) are the same. Some are designed to promote inclusion and remove historically-rooted group disadvantage; some are aimed at perpetuating it. When carefully conceived, classifications designed to promote inclusion by removing historical barriers are deserving of greater judicial respect, especially in the Court's assessment of whether the program is "narrowly tailored" to its purpose. This is particularly appropriate in education cases. In reviewing programs like Michigan Law School's, the more flexible strict scrutiny standard is strict in "theory" and sensitive to group histories, current conditions and practical consequences in "fact."

This Court should therefore embrace this more appropriate and dynamic view of constitutional colorblindness

and apply its own evolving approach to strict scrutiny to uphold Michigan Law School's admissions policy.

ARGUMENT

I PETITIONER'S EQUAL PROTECTION STRICT SCRUTINY ANALYSIS IS FLAWED BECAUSE IT IS GROUNDED ON AN IMPOVERISHED VERSION OF CONSTITUTIONAL "COLORBLINDNESS."

A. Petitioner's and *Amici*'s View of Constitutional "Colorblindness" Disregards Historical And Social Context and Would Render the Strict Scrutiny Standard Automatically "Fatal-In-Fact."

Petitioner and various *amici curiae* contend, in essence, that this Court should embrace a formalistic colorblind approach to Equal Protection jurisprudence. This approach treats all racial classifications as one in the same – without taking "relevant differences" in purpose into account. This approach looks only to formal "equality" while overlooking entrenched and systemic disadvantage to African Americans and other racial minorities.

In its opening paragraph, Petitioner invokes the words of the NAACP's Robert Carter in *Brown v. Board of Education*: "… no state has any authority under the equal protection clause … to use race as a factor in affording educational opportunities among its citizens." Brief for the Petitioner, *Grutter v. Bollinger* (No. 02-241), at 18. Petitioner contends that Barbara Grutter is once again "vindicat[ing] the same principle[,]" *id.*, of colorblindness. By so arguing, Petitioner completely distorts Carter's meaning. It does so by ignoring the "relevant difference"

between a classification that systematically excludes African Americans as a group (which Carter was opposing) and one that addresses the exclusionary effects of long-standing racial discrimination in education (which Carter was not then addressing, but would have supported). *See* Robert L. Carter, *A Reassessment of Brown v. Board in* DERRICK BELL, SHADES OF BROWN (1980).

Similarly, various *amici curiae* equate the Law School's modest race-as-a-factor admissions program with the past practices of educational institutions during the era of *de jure* segregation. For example, *amici* Center for Equal Opportunity likens the use of social science evidence in early desegregation cases to *support* segregation to Respondent's use of social science evidence to support diversity. Brief *Amici Curiae* of the Center for Equal Opportunity et al. in Support of Petitioner, *Grutter v. Bollinger*, at 22-24. *Amici* Center for New Black Leadership equates the "apologists for segregation" with the "advocates of racial preferences" and argues that Respondents' use of the term "diversity" is "discriminatory subterfuge." Brief of the Center for New Black Leadership as *Amicus Curiae* in Support of Petitioner, *Grutter v. Bollinger*, at 3. Finally, *amici* Center for Individual Freedom contends that "by furthering an asserted interest in racial and ethnic diversity, [the Law School's] affirmative action admissions programs 'simply replicate[] the very harm that the Fourteenth Amendment was designed to eliminate.'" Brief of *Amicus Curiae* Center for Individual Freedom in Support of Petitioner, *Grutter v. Bollinger*, at 8. *See also* Brief *Amicus Curiae* of Ward Connerly in Support of Petitioner, *Grutter v. Bollinger*, at 17 (equating race-as-a-factor admissions policies with pernicious "racial preferences" without regard to history or social context).

While superficially appealing, Petitioner's over-simplified approach turns Robert Carter's call for educational equality for Blacks on its head. By equating efforts to remedy

the continuing effects of group-based discrimination with efforts designed to further exclude traditionally subordinated racial groups, Petitioner wrongly aims to erase from legal consideration the continuing institutionalized disadvantage of African Americans and other racial minorities, particularly in education. *See Adarand*, 515 U.S. at 243 (Stevens, J., dissenting) ("[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."). As discussed below, Petitioner's view of pure colorblindness contradicts the original purpose of the Equal Protection Clause – to ensure meaningful equality for groups subordinated under law and by social practice. Most important, this view leads to a distorted application of the strict scrutiny standard of review -- effectively rendering strict scrutiny review automatically "fatal-in-fact."

B. Petitioner's Version Of Constitutional Colorblindness Is Impoverished Because It Contradicts The Historic Purpose And Original Meaning Of The Equal Protection Clause And Civil Rights Laws -- To Foster Genuine Equality For Groups Subordinated Under Law And By Social Practice.

Petitioner's call for a formalistic colorblind approach disregards the historic purpose and original meaning of the Equal Protection Clause and intent of civil rights laws, which took express account of the social and political significance of race. The Fourteenth Amendment, at the heart of this case, was conceived to rectify the immense burdens on African Americans who had just emerged from years of slavery and legalized oppression. *See Adarand*, 515 U.S. at 247

(Stevens, J., dissenting). Title VI[2] was also conceived to guarantee equal treatment for "Negro citizens." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 284-85 (1978) (opinion of Powell, J.).

1. The First Reconstruction

The denial of African American rights has long been part of America's social landscape. *See* Expert Report of Eric Foner, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.), *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), *reprinted in* 5 Mich. J. Race & L. 311, 312 (1999) [hereinafter Expert Report of Eric Foner]; *Bakke*, 438 U.S. at 388-89 (Marshall, J., dissenting); John Hope Franklin, *History of Racial Segregation in the United States*, *in Annals Am. Acad. Pol. & Soc. Sci.* 341 (Mar. 1956). The system of slavery, made explicit in the Constitution, deprived African Americans of all legal rights and prevented them as a group from becoming free and equal citizens. *Bakke*, 438 U.S. at 388, 391 (Marshall, J., dissenting).

The Civil Rights Acts and the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution were the centerpieces of a Reconstruction whose clear legislative and popular purpose was to uplift Blacks from two hundred years of subordination in America. The Equal Protection Clause, in particular, was enacted to remedy the long-standing systemic discrimination against African Americans. *Grutter v. Bollinger*, 288 F.3d 732, 765 (6th Cir. 2002) (Clay, J., concurring). Indeed, this Court long ago recognized that the "the evil to be remedied" by the Equal Protection Clause was the "'gross injustice and hardship' faced by the 'newly emancipated Negroes' as a class." *Id.*

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[2] 42 U.S.C. § 2000d et seq. (1994).

(citing *In re Slaughter-House Cases*, 16 Wall. 36, 81 (1873)). *See also* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754 (1985) (history "strongly suggests that the framers of the [fourteenth] amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups."); Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410, 2435 (1994) ("An important purpose of the Civil War Amendments was the attack on racial caste.").

2. The Second Reconstruction

Despite the passage of the Civil War Amendments, African Americans were systematically denied the rights those Amendments were meant to secure. Expert Report of Eric Foner, *supra*, at 312.

The Amendments' promise had been eviscerated by the "social rights" exclusion from anti-discrimination law and by ensuing states' Jim Crow laws covering voting, public accommodations, jobs, transportation, education, and housing. *See Bakke*, 438 U.S. at 391-94 (Marshall, J., dissenting); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION *1863-77* (1st ed. 1989). All three branches of government participated in the piece-by-piece dismantling of on-the-books civil rights protections for Blacks. Eric Yamamoto et al., *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 Cumb. L. Rev. 523, 537-38 (2000-01); Angela Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 Cal L. Rev. 1923 (2000). The demise of the First Reconstruction paved the way for a fully segregated American society, one that was separate and starkly unequal -- a society at profound dissonance with the nation's professed moral creed that "all are created equal."

The Second Reconstruction offered a renewed commitment to civil rights for Blacks and other subordinated communities of color. The massive social, legal, and political movement launched by antiracist activists, and the legal reforms of the 1950s and 1960s -- highlighted by *Brown v. Board of Education,* 347 U.S. 483 (1954) and culminating in the enactment of the Civil Rights Act of 1964[3] and Voting Rights Act of 1965[4] -- laid the foundation for the Second Reconstruction. Together with the resurrection of the Civil Rights Act of 1870[5] and the advent of affirmative action, these legal reforms collectively renewed the nation's commitment to equality and justice.

In outlawing state-mandated segregation, *Brown* offered the promise of equality for Blacks and compelled national acknowledgment of entrenched forms of racial discrimination. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); Carter, *A Reassessment of Brown*, *supra*, at 21-28. Rather than seeking "colorblindness" for its own sake, this Court in *Brown* looked to the *specific motivation* behind the legislation in striking down separate-but-equal educational facilities. Indeed, the fundamental teaching of *Brown* is not that "race is an irrelevant variable in most cases of government decision making, rather it is that racial classifications, when used for the *specific purpose* of subordinating individual members of a particular racial category, run counter to the equal

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[3] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-h (2001)).

[4] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§1971, 1973-1973bb (1994)).

[5] 16 Stat. 144 (1870).

protection guaranteed in the Constitution."[6] DERRICK BELL, RACE, RACISM AND AMERICAN LAW 147 (4th ed. 2000) (emphasis added).

The Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968[7] -- directed primarily at removing the barriers to equal opportunity for African Americans -- solidified America's commitment to federal protection for these targets of discrimination. Importantly, the legislation was not meant to be completely colorblind; it took express account of the social and political significance of race.[8] Of particular relevance, this Court has recognized that Title VI was not meant to be a "purely color-blind scheme," *Bakke*, 438 U.S. at 284; rather, its purpose was to address discrimination against African Americans. *See id.* at 285 (opinion of Powell, J).

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[6] Justice Harlan's famous dissent in *Plessy*, *supra*, also framed the original version of constitutional colorblindness to account for the racial motivation and impact of government action. Rejecting Louisiana's argument that its separate-but-equal railway passenger law was neutral because it prohibited Whites from riding with Blacks just as it prohibited Blacks from riding with Whites, Justice Harlan's constitutional colorblindness aimed to stop the legalized exclusion of Blacks from the full benefits of civil society. *See* BELL, RACE, RACISM AND AMERICAN LAW, *supra*, at 146.

[7] Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§3601-3631 (2001)).

[8] In passing the Civil Rights Act of 1964, Congress expressly recognized that the "most glaring" discrimination against any minority group was against "Negroes," who, "100 years after their formal emancipation," were "not accorded the rights, privileges, and opportunities which are considered to be, and must be the birthright of all citizens." H.R. Rep. No.88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2393.

Now, Petitioner seeks to use the Fourteenth Amendment and Title VI to dismantle Michigan Law School's moderate attempt to uplift African Americans and other racial minorities. In the face of evidence of continuing group-based social and economic disadvantages, Petitioner's approach not only ignores relevant history, it also disregards the profound impact that race and ethnicity continue to have on the allocation of burdens and benefits in America. *See* Expert Report of Eric Foner, *supra*, at 312 ("while the nation has made great progress in eradicating the 'color line,' the legacy of slavery and segregation remains alive in numerous aspects of American society."); *Adarand*, 515 U.S. at 273 (Ginsburg, J., dissenting) ("discrimination's lingering effects . . . , reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods.").

C. Petitioner's View Of Colorblindness Is Impoverished Because It Perpetuates Stark Inequalities And Deepens Social Divisions.

Petitioner's view of colorblindness is also impoverished because it perpetuates stark inequalities and deepens social divisions. At trial in *Grutter v. Bollinger*, historian John Hope Franklin testified about his lifelong research on Jim Crow and the educational inequalities endured by Blacks. *Grutter v. Bollinger*, 137 F.Supp. 2d 821, 860 (E.D. Mich. 2001). Professor Franklin concluded his testimony by noting that recent challenges to race-sensitive admissions programs were the latest in a long line of improvisational maneuvers in furtherance of segregation. John Hope Franklin Transcript, at 155 ¶¶ 4-11, in *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), http://www.umich.edu/~daap/trial-franklin.txt (Jan. 24, 2001). For the reasons discussed below, California and Texas offer stark evidence that, consistent with Professor Franklin's

observation, Petitioner's call for eradicating race-as-a-factor admissions programs at selective law schools inevitably resegregates such institutions despite other commendable efforts to employ facially race-neutral alternatives.

Petitioner argues that the Law School's race-sensitive admissions program is not narrowly tailored and chastises the Law School for not employing race-neutral alternatives. Brief of the Petitioner, *supra*, at 36-44. Likewise, the Solicitor General urges that the Law School's program should be held unconstitutional because ample facially race-neutral alternatives exist to produce comparable levels of racial/ethnic diversity. Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Grutter v. Bollinger*, at 13-22.

Conspicuously absent from these arguments is any mention of the actual impact of race-sensitive admissions bans at law schools most comparable to Michigan Law School. The reason Petitioner and various *amici curiae* ignore this elephant in the living room is simple: post-race-sensitive admissions programs in California and Texas law schools are not in fact race-neutral; they reveal staggering levels of racial exclusion and resulting resegregation. At the law schools at UC Berkeley (Boalt Hall), UCLA, and the University of Texas (UT) combined, African Americans comprised a mere two percent of enrollments in the five years since race-as-a-factor admissions programs were banned, down 69% from the four years prior to the ban. William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 Harv. BlackLetter L.J. 1 (forthcoming Spring 2003) (manuscript at 39-40, tbl. 4-5 & chart 7). In the five years since race-as-a-factor admissions programs were banned at Boalt and UCLA Law Schools, Latinos comprised only six and eight percent of the student bodies at these institutions respectively -- a drop of 47%. Kidder, *supra* (manuscript at 41-42, tbl. 6-7 & chart 8).

Dismantling race-as-a-factor admissions programs, which admit qualified applicants,[9] means turning back the clock on more than three decades of progress in legal education made possible by the Civil Rights Movement. Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. Rev. 1521, 1583-84 (2000) (1967-68 was the last time that so few Black and Latino students attended Boalt and UCLA); Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of* Sweatt v. Painter *and* Hopwood*,* 25 Law & Soc. Inquiry 507, 507 (2000) ("This year and for the two previous years, the percentage of African Americans in the entering class at [UT] School of Law has been lower than in the fall of 1950, the first year UT admitted African Americans to the law school."). The fact that selective public law schools in California and Texas became resegregated is also consistent with the findings of the Law School Admission Council's chief researcher, who conducted an empirical analysis of the national applicant pool and predicted that "race-blind" admissions at American law schools would likely cause African American enrollments to plummet to levels not seen since 1965. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 21 tbl.5, 28 (1997).

Such massive minority exclusion and resegregation is

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[9] WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (longitudinal study of graduates of select universities showing that race-sensitive admissions programs contributed to an increase of Black professionals who are now leaders in law, medicine, and business).

antithetical to this country's democratic ideals, it undermines the quality of learning in higher education, and it warrants repudiation by this Court. *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) ("the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples.") (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)); *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) ("The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts."); *Grutter*, 288 F.3d at 771 (Clay, J., concurring) ("on the record before us, any purportedly race-neutral policy could result in a *de facto* segregated law school, the deleterious results of which have long been known by society and rejected by the Court.") (citing *Sweatt*, 339 U.S. at 634-36).

Boalt, UCLA, and UT law schools undertook aggressive efforts to ameliorate the impact of *Hopwood* and Proposition 209 by increasing outreach to qualified students and by broadening admission criteria, including through the use of class-based race-sensitive admissions programs. Herma Hill Kay, *The Challenge to Diversity in Legal Education*, 34 Ind. L. Rev. 55, 74-78 (2000); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. Legal Educ. 472 (1997). While these steps to prevent racial exclusion and promote diversity may be laudable in their own right, the aforementioned statistics indicate that such measures are an ineffective substitute for race-as-a-factor admissions programs. *See also* Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. Legal Educ. 452 (1997); Wightman, *The Threat to Diversity,* 72 N.Y.U. L. Rev. at 40-45.

Thus, UC and UT law schools' experiences confirm that an oversimplified version of colorblindness maintains stark inequalities and deepens social divisions. As even a

critic of the Law School's program recalls, "During the academic year 1965-66, at the height of the civil rights movement, the University of Michigan Law School faculty looked around and saw not a single African-American student." Terrance Sandalow, *Minority Preferences Reconsidered*, 97 Mich. L. Rev. 1874, 1874 (1999). In the entire state of Michigan, there were only 250 African American attorneys according to the 1970 Census, which was prior to the time that race-sensitive admissions programs permitted the graduation of significant numbers of people of color from law schools across the country. Harry T. Edwards, *A New Role for the Black Law Graduate—A Reality or an Illusion?* 69 Mich. L. Rev. 1407, 1432 app.A (1971).

Petitioner's impoverished version of colorblindness effectively asks this Court to ignore what is visible to all and relevant to proper constitutional analysis: race continues to have a profound impact on the distribution of opportunity and justice in America. *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986) ("'114 years after the close of the War Between the States . . . racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole.'") (citation omitted).

The continued need for race-as-a-factor admissions programs to address these deep social divisions was amply demonstrated at trial in *Gratz* and *Grutter*. Professor Thomas Sugrue presented evidence on the overwhelming level of residential and educational segregation experienced by African Americans, especially in Michigan, and concluded, "There are unfortunately few places in American society where people of different backgrounds interact, learn from each other, and struggle to understand their differences and discover their commonality." Expert Report of Thomas J. Sugrue, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.), *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), *reprinted in* 5 Mich. J. Race & L. 261, 308-09 (1999). Professor

Albert Camarillo documented the long history of racial isolation and separation of Latinos in the U.S. Expert Report of Albert M. Camarillo, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.), *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), *reprinted in* 5 Mich. J. Race & L. 339 (1999). Professor Gary Orfield testified on this topic as well, and his most recent study with the Harvard Civil Rights Project confirms that the K-12 segregation of Black and Latino students is getting worse, not better. Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (last visited January 29, 2003).

D. Petitioner's Version of Colorblindness Leads To A Distorted Application of the Strict Scrutiny Standard of Review.

Most significant, Petitioner's impoverished version of colorblindness distorts the application of the strict scrutiny standard of review by creating practically insurmountable barriers. Petitioner suggests at the opening of its brief that the national-in-scope segregation laws in *Brown* are equivalent to Michigan Law School's effort to employ race as one factor among many to prevent the long-standing exclusion of African Americans and promote diversity. This equation fails in history, contemporary social context and good conscience. If the strict scrutiny standard treats the pernicious use of race in *Brown* (which all now agree was constitutionally repugnant) as equivalent to Michigan Law School's use of race to prevent classroom resegregation, then the standard, in practice, will be one that is always "strict in theory, but fatal in fact" -- an approach expressly rejected by this Court in *Adarand*. *See* 515 U.S. at 237. As discussed in Section II, a more flexible strict scrutiny standard of review initiated by this Court takes

salient differences into account.

E. Petitioner's View Of Colorblindness Is Impoverished Because It Implicates An Equally Narrow Conception Of Constitutional "Gender-Blindness."

Petitioner's view of constitutional colorblindness also supports a narrow conception of "gender-blindness". As in the race context, this view would treat all gender classifications as pernicious and invalidate them – whether a governmental classification sought to exclude on the basis of gender or address the exclusionary effects of long-standing gender discrimination.

In the same fashion, instead of focusing on an abstract notion of gender-blindness, Equal Protection analysis needs to focus on the way sexual discrimination actually impedes genuine gender equality. *See* David B. Cruz, *Disestablishing Sex And Gender*, 90 Cal. L. Rev. 997, 1026-27 (2002) (blanket refusal to "see" gender, "like refusal to 'see' race or religion, would amount to willful ignorance directly at odds with the aims of the Constitution to form a stronger union, to tame faction, and to limit the force of social divisions."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111 (1997) (laws that enforce gender- and color-blindness fail to disturb, and may actually reinforce, some forms of oppression); Frances Lee Ansley, *Stirring The Ashes: Race, Class And The Future Of Civil Rights Scholarship*, 74 Cornell L. Rev. 993, 1056 n.235 (1989) ("[T]he ironies of formal equality for blacks find a striking parallel in the effects of formal equality for women in the 'divorce revolution.'").

Women fought for the formal equality long denied

them in marriage laws, only to find themselves vastly disadvantaged by "fanciful presumptions of equality and gender-blindness in a world where the earning power and financial needs of divorcing wives are in most instances grossly disproportionate to those of husbands." *Id.*; *see also* Mary Ellen Gale, *Calling In The Girl Scouts: Feminist Legal Theory And Police Misconduct*, 34 Loy. L.A. L. Rev. 691, 703 (2001) (in order to remove barriers to substantive equality, law must take account of the "reality of women's lives"). Strictly outlawing race-as-a-factor programs would similarly undermine gender-based classifications, including those that have been and continue to be vital to overcoming historical group disadvantages in education and jobs. *See* Herma Hill Kay, *UC's Women Law Faculty,* 36 U.C. Davis L. Rev. 331, 377 (2003) (After California's "pure colorblind" Proposition 209, "the percent of women hired by the UC system declined sharply from 36 percent of all hires in academic year 1995-96 to 24 percent in academic year 1999-00."). Martha S. West, *Faculty Women's Struggle for Equality at the University of California Davis*, 10 UCLA Women's L.J. 259, 314-16 (2000).

II. CONSTITUTIONAL COLORBLINDNESS, APPROPRIATELY VIEWED, INFORMS A STRICT SCRUTINY STANDARD THAT CAREFULLY ASSESSES RACE-BASED CLASSIFICATIONS WHILE ACCORDING AN ADDED MEASURE OF JUDICIAL RESPECT FOR GOVERNMENT INITIATIVES DESIGNED TO REMOVE HISTORICALLY-ROOTED GROUP DISADVANTAGES.

A. Constitutional Colorblindness, Appropriately Viewed, Distinguishes Between Governmental Classifications Designed To Promote Inclusion From Those Aimed At Perpetuating Group Disadvantage.

Properly viewed, constitutional colorblindness promotes genuine equality by distinguishing race-as-a-factor programs that seek to fully end forms of historically legalized group-based exclusion from policies that perpetuate it. This contextualized version of constitutional colorblindness, like the appropriate version of gender-blindness, considers actual consequences for minorities and women. It focuses anti-discrimination law on the elimination of contemporary forms of exclusion and thereby affords greater judicial respect to those programs designed to achieve that purpose. *See* Kimberle Williams Crenshaw, *Race, Reform, And Retrenchment: Transformation And Legitimation In Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988). Indeed, it is because of the legacy of unequal treatment of minorities throughout the educational process that Michigan Law School's program considers race as one in many factors in admissions. *Grutter*, 288 F.3d at 768 (Clay, J., concurring) (the Law School needs to create a diverse environment "because the discrimination faced by African Americans and other minorities throughout the educational process has not produced a diverse student body in the normal course of things.").[10]

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[10] *See id.* (Clay, J., concurring) ("Diversity in education, at its base, is the desegregation of a historically segregated population and . . . [therefore], *Bakke* and *Brown* must 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

B. When Carefully Conceived, A Program Designed To Promote Inclusion By Removing Historical Barriers Is Deserving Of Greater Judicial Respect, Especially In The Court's Assessment Of Whether The Program Is "Narrowly Tailored" To Its Purpose.

This Court's Equal Protection jurisprudence supports a more contextualized view of constitutional colorblindness. As part of its concern about racial classifications, this Court has initiated what amounts to a more flexible strict scrutiny standard in reviewing government initiatives designed to promote equality.

In 1995, this Court explicitly refuted the lingering notion that the strict scrutiny standard is automatically "fatal in fact." *Adarand*, 515 U.S. at 237. Historically, the Court strictly scrutinized only invidious classifications, and "automatically fatal in fact" reflected actual practice. Now, the Court often reviews ameliorative racial classifications, and its strict scrutiny analysis has been framed to take this into account. Thus in *Adarand*, this Court stated that the strict scrutiny standard takes "relevant differences" into account "to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." *Id.* at 228.

This more "flexible" contemporary strict scrutiny approach, supported by the appropriate version of constitutional colorblindness, recognizes that not all racial classifications (or gender classifications) are the same. Some are designed to promote inclusion and remove historically-rooted group disadvantage (and further the purpose of anti-discrimination law); some are aimed at perpetuating group

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racial bias in the educational system.").

disadvantage (cutting against that purpose). *See Adarand*, 515 U.S. at 228 (the standard "does not 'trea[t] dissimilar race-based decisions as though they were equally objectionable.'") (citation omitted). Courts have recognized that the former type of legislation, unlike the latter, may serve compelling governmental interests. *See id.* at 236; *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1164-65 (10th Cir. 2000), *cert. granted*, 121 S.Ct. 1598, *cert. dismissed*, 122 S.Ct. 511 (2001).[11]

A minority of this Court seemingly has embraced a "purely colorblind" approach. *See Adarand*, 515 U.S. at 239 (Scalia, J., concurring) ("[i]n the eyes of government, we are just one race here."); *id.* at 240 (Thomas, J., concurring) ("the government may not make distinctions on the basis of race."). A majority, however, has articulated a more contextualized view. *See id.* at 228; *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (questioning appellants' invocation of Justice Harlan's "color-blind" constitutionalism and stating that "[t]his Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances.").

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[11] This flexible standard was initiated in *Adarand*, a contracting case. In education cases, application of a flexible strict scrutiny standard is even more appropriate because the social interest and academic freedom issues in promoting diversity are much greater than in contracting cases. *See Grutter*, 288 F.3d at 749 (recognizing that "the context of higher education differs materially from the government contracting context"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A] state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.") (citing *Bakke*, 438 U.S. at 311-315) (opinion of Powell, J.).

This Court has observed that "any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be." *Adarand*, 515 U.S. at 230 (citing *City of Richmond v J.A. Croson*, 488 U.S. 469, 493-494 (1989)) (other citations omitted). At the same time, it has clarified that this notion "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Id.* In carefully scrutinizing governmental motives, courts can, and indeed need to, make appropriate distinctions and apply the strict scrutiny standard flexibly to account for those distinctions. *See Adarand v. Slater*, 228 F.3d at 1155; *Smith v. University of Washington Law School*, 233 F.3d 1188, 1198 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); *Fullilove v. Klutznick,* 448 U.S. 448 (1980).

In dispelling the notion that strict scrutiny is "strict in theory, but fatal in fact," *Adarand*, 515 U.S. at 237, where no prejudicial motive has been identified, this Court thus signaled to the lower courts that a more flexible review would be in order to assess the means-ends fit.

Employing this flexible standard, lower federal courts have found strict scrutiny satisfied in various circumstances. *See, e.g.*, *Adarand v. Slater,* 228 F.3d at 1161 (opening with a discussion of the "Evolution of Strict Scrutiny Standards" and applying a more flexible strict scrutiny review). Generally described, programs that satisfy flexible strict scrutiny review tend to involve a legislatively authorized government actor attempting to address exclusion and inequality. In this situation, courts construe the two-part means-ends strict scrutiny test flexibly, closely examining motives for harmful prejudice and stereotypes while affording a greater degree of judicial respect to the judgment of government actors in their selection of mechanisms to affirmatively carry out constitutional and legislative equality mandates. *See Adarand v. Slater*, 228 F.3d at 1155; *Smith,*

233 F.3d at 1198.

1. The Strict Scrutiny Standard Originally Was Conceived To Protect Politically And Socially Vulnerable Groups.

This Court developed the strict scrutiny standard to protect members of groups that were denied full participation in our democratic political processes. John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5 (1978); BELL, RACE, RACISM AND AMERICAN LAW, *supra*, at 147 ("from *Brown* can be gleaned the principal rationale for the application of strict scrutiny, namely, the past and continuing racial subordination of the excluded group as a whole."). Members of these "minority" groups lacked access to political processes that could protect them from the will of intemperate majorities. The roots of strict scrutiny lie in *United States v. Carolene Products Co.*, where this Court explained the basis for the Constitution's special solicitude for "discrete and insular minorities." 304 U.S. 144, 153 n. 4 (1938).

This early strict scrutiny standard was applied to invalidate invidious discrimination by the states, for instance, anti-miscegenation laws. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967). In the face of these Jim Crow laws, the application of strict scrutiny was inevitably, and appropriately, "fatal in fact." In later years, however, those challenging race- and gender-as-a-factor policies used strict scrutiny as a weapon to strike down ameliorative government programs. Ironically, the strict scrutiny standard became automatically "fatal in fact" to those programs designed to protect "discrete and insular minorities." Strict scrutiny review thus faced increasing criticism because of its reflexive striking down of remedial legislation without careful analysis of context, purposes and effects. *See Croson,* 488 U.S. at

543-46 (Marshall, J., dissenting); *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 312 (1986) (Marshall, J., dissenting).[12]

2. This Court in *Adarand* Recognized a More Flexible Approach to Strict Scrutiny.

Since *Adarand*, the application of the strict scrutiny standard of review has evolved, particularly as an increasing number of federal equal protection challenges test the legality of programs designed to address the continuing effects of historically invidious discrimination. At issue in *Adarand* was whether the Subcontractor Compensation Clause (SCC) in federal contractor regulations violated the Equal Protection Clause under the Fifth Amendment because it provided additional compensation for the hiring of "disadvantaged" (presumably minority) subcontractors. 515 U.S. at 205-06. This Court observed that the purpose of strict scrutiny is to identify illegitimate uses of race underlying suspect classifications. *Id.* at 226. Strict scrutiny does this by assuring that the legislative body is pursuing a goal important enough to warrant use of a suspect tool and that the "means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.* at 226. (quoting *Croson*, 488 U.S. at 493).

This Court thus acknowledged that government programs designed to promote equality are different from those motivated by prejudice. *Id.* at 228. Justice Stevens emphasized the need for courts to differentiate between

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[12] *See also* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. Pa. L. Rev. 1, 3-4 (2000); K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 New. Eng. L. Rev. 397, 403 (1997).

invidious discrimination, which he characterized as an "engine of oppression", and "benign" legislation, which stems from a "desire to foster equality." *Id.* at 243 (Stevens, J., dissenting). While Justice Stevens wanted to apply strict scrutiny to the former and intermediate scrutiny to the latter, he acknowledged that the *Adarand* majority's "flexible approach" to strict scrutiny analysis in fact took those differences into account. *See id.* at 243 n.1.

Indeed, the *Adarand* majority expressly stated that "strict scrutiny *does* take 'relevant differences' into account" and that the point of strict scrutiny is to differentiate between permissible and impermissible governmental uses of race.[13] *Id.* at 228. Where searching inquiry does not reveal apparent illicit motivations, a greater degree of respect for government judgments about the need for the classification and the means chosen to implement it is appropriate. *See* James C. Rutten, *Elasticity in Constitutional Standards of Review:* Adarand Constructors, Inc. v. Pena *and Continuing Uncertainty in the Supreme Court's Equal Protection Jurisprudence,* 70 S. Cal. L. Rev. 591, 614 (1997).

The Tenth Circuit's recent decision on remand in *Adarand* illustrates the application of the more flexible strict scrutiny standard. There, the court held that the current federal SCC program was narrowly tailored to meet a compelling state interest. *Adarand v. Slater*, 228 F.3d at 1176, 1187. The government identified a compelling interest in the SCC's use of racial presumptions as "remedying the [past nationwide] effects of racial discrimination and opening

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[13] This Court further recognized: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand,* 515 U.S. at 237.

up federal contracting opportunities to members of previously excluded minority groups." *Id.* at 1164. The court considered a range of evidence in determining whether the asserted interest was indeed compelling, including post-enactment evidence introduced by the defendants as well as legislative history, *Id.* at 1166-67, and ultimately accepted Congress' judgment about the compelling need for the SCC program. In doing so, over the objections of Adarand that the government's evidence was conclusory, the court accepted broad congressional findings of discrimination in the nationwide construction contracting market. *Id.* at 1168-71.

The Court of Appeals also found the SCC program narrowly tailored to the compelling government interest of increasing minority participation. In so finding, the court accorded a measure of judicial respect to the government's selected mechanism for achieving the program's goals because past methods to address inequality had failed. It did so without requiring exhaustive or definitive proof of the absence of less restrictive alternatives. *Id.* at 1178, 1181. Significantly, the court also determined that even if the challenged mechanism incidentally burdened third parties, it was "necessary" to achieve the government's interests and therefore satisfied the "narrowly tailored" prong of the strict scrutiny test. *Id.* at 1183. *See also Hunter ex. rel. Brandt v. Regents of Univ. of California*, 190 F.3d 1061 (9th Cir. 1999) (use of race and ethnicity as factor in admissions was narrowly tailored to serve the state's compelling interest in operation of research-oriented elementary school dedicated to improving quality of education in urban public schools).

In sum, this Court has initiated a more flexible approach to strict scrutiny in certain situations. When carefully conceived and implemented, classifications designed to promote inclusion by removing historical barriers are deserving of greater judicial respect, especially in the Court's assessment of whether the program is "narrowly tailored" to

its purpose. This means that the Court need not make razor-fine judgments about competing approaches, as long as there is ample support for the government's choice of mechanism. This is particularly appropriate in education cases. In reviewing programs like Michigan Law School's, the more flexible strict scrutiny standard is thus strict in "theory" and sensitive to group histories, current conditions, and practical consequences in "fact."

CONCLUSION

For the foregoing reasons, Amici urge this Court to embrace a more appropriate and dynamic view of constitutional colorblindness and apply its own evolving approach to strict scrutiny to uphold Michigan Law School's admissions policy.

Respectfully submitted,

ERIC K. YAMAMOTO
Counsel of Record
2515 Dole Street
Honolulu, HI 96822
808-956-6548

EVA J. PATERSON
SUSAN K. SERRANO
131 Steuart Street
Suite 400
San Francisco, CA 94105
415-543-9444

Counsel for Amici Curiae