Nos. 02-241 & 02-516

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In the

# Supreme Court of the United States

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BARBARA GRUTTER,
*Petitioner,*

v.

LEE BOLLINGER, *et al.*,
*Respondents.*

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JENNIFER GRATZ, *et al.*,
*Petitioners,*

v.

LEE BOLLINGER, *et al.*,
*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 OF *AMICUS CURIAE* STATE OF NEW JERSEY IN SUPPORT OF RESPONDENTS**

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## INTEREST OF THE AMICUS

Over 37 years ago, in a decision grounded in provisions of the New Jersey Constitution, the Supreme Court of New Jersey squarely held in Booker v. Bd. of Educ., 212 A.2d 1 (N.J. 1965), that ensuring diversity of students in public educational institutions is a State interest of the highest order. The New Jersey Supreme Court found that "leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations," and stated that students "must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better" so that "firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs." Id., 212 A.2d at 6. While Booker involved elementary schools, the critical State interest discussed therein of ensuring the provision of public education in New Jersey in a "multi-racial and multi-cultural setting" has been recognized by the State to extend to institutions of higher education. See New Jersey Admin. Code, Executive Order No. 14 (1994) (noting the State interest in promoting student diversity in State colleges and universities in a restructuring of the State's higher education system).

Admissions practices of New Jersey institutions of higher education -- including Rutgers University (by far the largest State university, with over 50,000 students), the University of Medicine and Dentistry, The College of New Jersey and Richard Stockton College -- vary depending on each school's educational mission. What is common to these State schools, however, is the recognition of the educational value of providing education in a diverse environment. See Rutgers, The State University of New Jersey, Fact Book 2002-2003, Our Vision statement, available at http://oirap.rutgers.edu/instchar/factbook02.html., The College of New Jersey, Vision Statement, at http//www.tcnj.edu/about/history/vision.html., and Richard

Stockton College, Mission Statement, at http://www2.stockton.edu/stockton.html. (discussing the value to these schools resulting from student diversity). To ensure the educational benefits which result from a "multi-racial and multi-cultural" student body, race is one factor--among many other factors--considered as part of the admissions processes.

Thus, for example, Rutgers University School of Law-Newark, apart from grades and LSAT scores, considers race or ethnicity as an admissions factor, as part of a flexible, individualized review which also utilizes a myriad of non-racial factors such as extraordinary family and socio-economic circumstances, educational factors other than grades, extracurricular activities, community and volunteer services, employment history, and special achievements, for the purpose of selecting a diverse and vibrant student body. For its various undergraduate colleges, Rutgers--apart from high school grades, class rank, strength of the high school's academic program, SAT scores and the student's admission essay--considers race and ethnicity of applicants as part of a flexible review which also considers extracurricular activities, special talents, geographic location of applicants, participation in specialized academic programs, and achievement in the face of educational and economic disadvantage to foster a diverse student population. Similarly, The College of New Jersey and Richard Stockton College -- apart from SAT scores, high school grades and application essays--look at factors to foster a heterogeneous student body including race and ethnicity, but also including community activities, special talents and other factors apart from race by which students bring unique cultural perspectives. At the University of Medicine and Dentistry -- apart from test scores and college grades-–race is a consideration in admissions among multiple other factors such as the applicant's interview, work history, community service and overall life experiences, for the goal of admitting a diverse student body.

The utilization of race as a consideration, among a myriad of other factors, in the admissions systems of these New Jersey universities fully comports with Justice Powell's controlling opinion in University of California v. Bakke, 438 U.S. 265 (1978): no racial quotas whatsoever are utilized and there are no race-based separate admissions tracks.

New Jersey, thus, has a critical interest in preventing the outcome sought by Petitioners in both Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), cert. granted, 123 S.Ct. 617 (2002), and Gratz v. Bollinger, 122 F.Supp. 2d 811 (E.D. Mich. 2000), cert. granted, 123 S.Ct. 617 (2002): to overturn Justice Powell's controlling opinion in Bakke, which permits state universities to consider race in their admissions processes to promote the significant educational benefits which result from a heterogeneous student population. In the 24 years since Bakke, New Jersey universities, in their admissions systems, outreach efforts and otherwise, have carefully complied with the contours of Bakke, including its limitations on the use of race in admissions. Profound benefits resulting from student diversity--achieved without use of anything akin to racial quotas--have flowed to students of all races and ethnicities who have attended these New Jersey universities. Indeed, the State of New Jersey, with a population richly abundant in ethnic, racial and cultural diversity, has benefitted from these policies as well, as graduates of these schools have been well-prepared to make positive contributions in New Jersey's increasingly heterogeneous environment. The departure from the principles of Bakke which Petitioners seek would have a major, disruptive impact on New Jersey institutions of higher education, to the detriment of New Jersey students, the institutions themselves, and the State as a whole. It will promote a narrow-mindedness in students – a fear of difference – that is borne not necessarily of malice, but of ignorance of other perspectives and cultures.

## SUMMARY OF ARGUMENT

This Court's watershed opinion in Bakke in 1978 confirmed that states have a compelling interest in achieving the profound academic benefits that flow from racially and ethnically diverse student populations at institutions of higher education. Bakke established a framework for the constitutionally permissible, limited consideration of race, as one factor among many, in admissions policies. Relied upon by higher education institutions in New Jersey and elsewhere to attain richly heterogeneous academic communities that benefit the students, the institutions, and the states themselves, the principles of Bakke are now embedded in the practices of universities of New Jersey and of other states and have been followed as precedent by lower courts. Given Bakke's continued vitality, this Court should reject Petitioners' invitation to depart from this landmark case, and, under principles of stare decisis, should apply Bakke to these matters.

Apart from its stare decisis effect, Bakke's holding that student diversity is a compelling state interest remains sound. Numerous studies, and the experience of New Jersey's own institutions, have demonstrated the educational benefits derived therefrom. Moreover, the long-recognized First Amendment right of state and private universities to academic freedom further supports the conclusion that pursuit of student diversity by public universities to advance educational goals is a compelling state interest.

Admissions plans such as those at issue here, which operate in a manner similar to the "Harvard plan" endorsed in Bakke by not utilizing quotas or separate race-based admissions tracks and by considering race as only one among other admissions factors, represent a constitutionally permissible, narrowly tailored means of achieving this compelling state interest. The claim by Petitioners and their supporting amici that "percentage plans" are a more narrowly tailored alternative for achieving student diversity ignore that they are not

appropriate for every jurisdiction because they depend on the existence of, and could serve to promote, a racially segregated school system, not a viable option in New Jersey and other states committed to desegregating their public schools. Each state must be given leeway, within constitutional bounds, to respond to local law and conditions in devising a narrowly tailored means of achieving student diversity. The admissions plans at issue in Grutter and Gratz, while not identical to New Jersey's, present a narrowly tailored approach for achieving the compelling state interest in student diversity. Therefore, the decisions below should be affirmed.

## ARGUMENT

### I. BASED ON THE PRINCIPLES OF STARE DECISIS, THIS COURT SHOULD UPHOLD THE DECISION IN BAKKE AND REAFFIRM THAT STATES HAVE A COMPELLING STATE INTEREST IN ACHIEVING STUDENT DIVERSITY THAT CAN BE ACHIEVED BY A CAREFULLY TAILORED RACE-CONSCIOUS ADMISSIONS POLICY.

#### A. The Principles of Bakke are Embedded in the Operation of Institutions of Higher Education in New Jersey and Other States.

As this Court has recognized, "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992). Adherence to the principles of stare decisis is of particular importance where the Court's decision "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted

in the Constitution." Id. at 867. Bakke was decided in the context of a national debate concerning the propriety of race-conscious admissions programs at institutions of higher education. Like this Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), Bakke has had enormous impact on educational policies and practices in New Jersey and nationwide. Given the historical significance of Justice Powell's opinion in Bakke, and the fact that the standards enunciated in that case have become "embedded in routine...practice," Dickerson v. United States, 530 U.S. 428, 443 (2000), this Court should reject Petitioners' invitation to overturn the controlling principles of that decision.

When Bakke was decided 24 years ago, it provided a blueprint for development of constitutionally permissible admissions policies aimed at realizing the academic benefits resulting from student diversity at institutions of higher education. Justice Powell's decision was rightly viewed and reasonably relied upon as a guiding principle for educators striving to achieve the benefits of diversity at their institutions without infringing upon the constitutional rights of any applicants. In the ensuing years, many of the educational institutions of New Jersey crafted admissions policies modeled upon the "Harvard plan" approved by five Justices in Bakke.[1] These New Jersey admissions programs, in which race and ethnicity are taken into account along with a myriad of other factors, have been successful in achieving richly diverse student communities without the use of quotas or two-track race-based admissions programs condemned by Justice Powell. Now, nearly a quarter of a century after Bakke, its principles and standards have become embedded in these New Jersey institutions, and the resulting heterogeneity of their academic

[1]As observed in Akhil Amar Reed and Neal Katyal, Bakke's Fate, 43 U.C.L.A. L. Rev. 1745, 1769 (1996), "[a]n entire generation of Americans has been schooled under Bakke-style affirmative action, with the explicit blessing of -- indeed, following a how-to-do-it manual from -- U.S. Reports."

communities have become part of the identifying characteristics of these schools. Retreat from the principles of Bakke at this time would seriously disrupt the operations of New Jersey's institutions of higher education that have come to rely upon and benefit from the contributions of students from a wide variety of backgrounds and experiences.

### B. Under the Methodology Set Forth in Marks v. United States, Justice Powell's Opinion In Bakke Is the Controlling Opinion.

Given the divided nature of this Court's decision in Bakke, any analysis of its precedential effect must begin with a determination of the precise holding of the case. As the Sixth Circuit cogently and thoroughly demonstrated below, Justice Powell's opinion constituted the narrowest rationale for this Court's ultimate decision in Bakke, and, therefore, pursuant to the methodology announced in Marks v. United States, 430 U.S. 188 (1977), it must be treated as the holding of the Bakke Court. Grutter v. Bollinger, supra, 288 F.3d at 739-742.

The crucial issue in Bakke was the degree to which race could be taken into account in academic admissions programs. Of the two opinions (Justice Powell's and Justice Brennan's) that upheld the use of race to some degree, Justice Powell's rationale was clearly narrower. He applied a more stringent standard of review -- strict rather than intermediate scrutiny -– to such race-based classifications, Bakke, 438 U.S. at 305, and therefore permitted a more limited consideration of race. Moreover, Justice Powell rejected Justice Brennan's broad view that academic institutions could make race-based decisions to counter general societal discrimination, id. at 297, n.36, and held that race could be a factor only where there was prior institutional discrimination or where there was a need to safeguard academic freedom by ensuring a diverse student body. Id. at 310-312. Significantly, both Justice Brennan and Justice Powell endorsed use of admissions programs akin to the

"Harvard plan" appended to Justice Powell's opinion, id. at 321, which has become a benchmark for educators seeking to develop constitutionally permissible policies. Therefore, as the Ninth Circuit explained in concluding that Justice Powell's opinion constituted the holding of Bakke, despite the "mix" of opinions, the "result was still clear enough to permit educators to rely upon the opinion that gave the decision its life and meaning –- the opinion that avoided both polar possibilities." Smith v. University of Washington, Law School, 233 F.3d 1188, 1200 (9th Cir. 2000), cert. den. 532 U.S. 1051 (2001).

C. Bakke Is Entitled to Stare Decisis Effect.

None of the limited circumstances permitting departure from such controlling precedent apply here. In Casey, 505 U.S. at 854-855, this Court enunciated four factors to be considered when it reexamines a prior holding: 1) whether the prior rule has proven to be unworkable in practice; 2) whether the rule could be overturned "without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it," id. at 855; 3) whether development of the law in succeeding years has rendered the rule a "doctrinal anachronism discounted by society" ibid.; and 4) whether underlying factual premises have so changed as to render the rule obsolete or irrelevant. Application of these factors leads ineluctably to the conclusion that Bakke should be reaffirmed under the principles of stare decisis.

First, as New Jersey's experience demonstrates, the standards governing permissible race-conscious admissions programs enunciated in Bakke work. Guided by the "Harvard plan" endorsed by a majority of Justices in Bakke, the New Jersey institutions of higher education noted above have developed flexible admissions policies that consider all aspects of the individual applicant, including race, but also including characteristics such as special achievements, geographic factors, and extraordinary family and socio-economic circumstances. By crafting admissions policies that carefully

comport with the standards set forth in Bakke, New Jersey's colleges and universities have achieved immeasurable benefits from richly diverse student communities without the use of racial quotas or separate race-based admissions tracks.

Next, educators in New Jersey and elsewhere have widely viewed Justice Powell's opinion in Bakke as the governing law[2], and have relied upon the principles this Court set forth in constructing their admissions programs. These programs, in turn, by diversifying the student populations, have transformed the institutions. Thus, these schools of higher learning in New Jersey have come to depend upon and identify themselves with the educational benefits that inure from a heterogeneous student population. For example, Rutgers University promotes its "Committee to Advance Our Common Purposes," which is comprised of a "diverse representation of faculty, staff, students and community members" from three campuses. Goals of the committee include "foster[ing] inter-cultural dialogue and relations across diverse people, campuses and communities; promot[ing] the reduction of prejudice, hate and bias crimes; celebrat[ing] the distinctness of cultures and vast richness of diversity throughout Rutgers University; and enhanc[ing] the ties that bind 'our common purposes' between Rutgers University and community." The Committee sponsors a number of programs and administers grants designed to achieve these ends. See Rutgers, The State University of New Jersey, Office of the Vice President for Student Affairs, Committee to Advance Our Common Purposes, at http://studentaffairs.rutgers.edu/ctaocp.html. Similarly, integral to the mission of The College of New Jersey are the stated beliefs that "[t]he College's cultural, social, and intellectual life

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[2]See, e.g., Victor V. Wright, Note, Hopwood v. Texas: The Fifth Circuit Engages in Suspect Compelling Interest Analysis in Striking Down an Affirmative Action Admissions Program, 34 Houston Law Review 871, 891 (1997)(noting that "[f]ew would dispute that, before the Fifth Circuit's decision in Hopwood, Justice Powell's diversity rationale was widely accepted as the law of the land," and citations noted therein.)

are enriched and enlivened by diversity;" "[t]he College prepares its students to be successful, ethical and visionary leaders in a multi-cultural, highly technological, and increasingly global world;" and "[t]he College believes that an educated individual possesses an understanding of his or her own culture, an appreciation of other cultures, and the capacity to facilitate genuine cross-cultural interaction." The College of New Jersey, Core Beliefs, at http://www.tcnj.edu/about/history/beliefs.html. Plainly, having a heterogeneous student body is critical to the academic missions of many of New Jersey's higher educational institutions. If schools were no longer permitted to pursue diversity in the academic community through flexible admissions programs which take race into account among other factors, this change would affect not only admissions policies per se, but also the quality of the educational experience offered and the very nature and character of the institutions themselves. Therefore, retreat from the principles of Bakke would be disruptive to New Jersey and other states which have similarly followed Bakke in structuring higher education admissions programs.

With respect to the legal vitality of the Bakke decision, this Court has never repudiated its essential holding that the pursuit of a diverse student body is a compelling state interest in the higher education context. As Justice O'Connor noted in her concurring opinion in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986), "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." (O'Connor, J., concurring in part). Subsequent decisions of this Court focused on remedial affirmative action programs, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), and, while confirming Justice Powell's opinion in Bakke that strict scrutiny applies to all race-based classifications, they did not address the types of interests, apart from remediation, that could qualify as

compelling under a strict scrutiny analysis. Therefore, Croson and Adarand did nothing to erode Justice Powell's essential holding in Bakke that the academic benefits of student diversity serve a compelling state interest. This Court has never held that only remedial plans are constitutionally permissible; in fact, this Court acknowledged in Adarand that strict scrutiny would permit consideration of non-remedial purposes as compelling state interests. Adarand, 515 U.S. at 228. Petitioners' claim that remediation for past discrimination is the sole possible compelling state interest for race-conscious governmental action (Grutter Pet. bf. at 21, Gratz Pet. bf. at 40) is simply erroneous.

Further, as detailed in Part II B infra, the compelling state interest in student diversity firmly rests on a constitutional foundation not present in Croson and Adarand, the First Amendment right to academic freedom. See Bakke, 438 U.S. at 785-787. Thus, the contracting set-aside setting of Croson and Adarand is fundamentally distinct from the setting of Bakke (and here). Indeed, as explained in Bakke's Fate, supra, 43 U.C.L.A. L. Rev. at 1749:

> Contracting set-asides mean that "minority firms" win some projects and "white firms" do not; this can balkanize the races by encouraging their segregation. Education, in contrast, unites people from different walks of life. Instead of insular corporations performing various discrete contracts in isolation -- the "minority firm" adds the guardrail after the "white firm" lays the asphalt -- universities draw diverse people into spaces where they mingle with and learn from each other.... Integrated education... does not just benefit minorities--it advantages all students in a distinctive way, by bringing rich and poor, black and white, urban and rural, together to teach and learn from each other as democratic equals.

The First Amendment concerns present in Bakke's educational context, including the fundamental need to bring students of a variety of backgrounds together so that, through such interaction, students can develop into fully participatory members of our society, plainly distinguishes Bakke from Croson and Adarand, which involved rectifying past discriminatory treatment by, in effect, separating different racial groups through preferences for minorities.

Moreover, numerous lower courts have relied on Bakke in the context of the matters before this Court (unlike Croson and Adarand), analyzing challenges to programs at a variety of educational institutions. See, e.g., Tuttle v. Arlington County School Bd., 195 F. 3d 698 (4th Cir. 1999) cert. dism. 529 U.S. 1050 (2000) (assuming pursuant to Bakke that diversity may be a compelling state interest); Hampton v. Jefferson County Bd. of Educ., 102 F.Supp.2d 358 (W.D. Ky. 2000)(secondary school's interest in educational diversity could qualify as a compelling state interest); Davis v. Halpern, 768 F.Supp. 968 (E.D.N.Y. 1991)(applying Bakke's guidelines to challenge to law school's admissions policies); McDonald v. Hogness, 598 P.2d 707 (Wash. 1970), cert. den. 445 U.S. 962 (1980)(upholding challenged race conscious admissions program based on Bakke). Although some courts have refused to follow Bakke, see Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. den., 518 U.S. 1033 (1996), or questioned its precedential value, see Johnson v. Board of Regents, 263 F.3d 1234 (11th Cir. 2001), these decisions are in the minority. After 24 years, Justice Powell's decision in Bakke continues to have vitality as a defining legal principle and a guiding force for educators.

Finally, applying the last factor enunciated in Casey, it is clear that the factual assumptions underpinning Bakke remain unchanged today. As more fully developed in Part II, infra, educators continue to recognize that a heterogeneous student population is essential to a vibrant and successful academic experience. As the former Executive Director to the New

Jersey Commission on Higher Education explained, "A growing body of research demonstrates that a diverse campus community benefits all students - minority and non-minority alike. Students have a richer learning experience and leave college better prepared to live and work in racially and ethnically integrated communities." Dr. James E. Sulton, Jr., Executive Director, Mid-Year Report to the Commission on Higher Education, (December 17, 1999), at http://www.state.nj.us/highereducation/ed1299.html.

Therefore, the principles articulated in Bakke continue to shape educational policies today. As New Jersey's experience shows, carefully developed programs that consider race as a plus among numerous other factors are used successfully to produce a diverse student population that enhances the educational experience for all students. New Jersey's institutions, like others across the Nation, have flourished under the influence of a heterogeneous academic community, and thus have come to rely upon the admissions policies that make such diversity possible. Because Bakke has been such a positive force in the development of these academic institutions, and because its doctrinal underpinnings remain firm, this Court should not hesitate to continue to give vitality to this landmark case in deciding the matters presently before the Court.

## II. RACE AND ETHNICITY CAN BE CONSIDERED, ALONG WITH OTHER FACTORS, BY STATE UNIVERSITIES IN ADMISSIONS TO ACHIEVE THE EDUCATIONAL BENEFIT OF STUDENT DIVERSITY WHICH CONSTITUTES A COMPELLING STATE INTEREST.

### A. Student Diversity In Higher Education Is a Compelling State Interest.

Apart from Bakke's stare decisis effect, the evidence presented by the University of Michigan in Gratz and Grutter, a long line of published studies, and the experience of state universities themselves (including those in New Jersey) demonstrate that the educational value resulting from student diversity is a compelling state interest sufficient to satisfy the strict scrutiny standard.

In Bakke, Justice Powell's conclusion that student diversity promotes the "essential" atmosphere in higher education of "speculation, experiment and creation," Bakke, 438 U.S. at 312, relied on a 1977 essay by the President of one of New Jersey's leading private universities, Princeton.[3] Princeton President William Bowen wrote that "a great deal of learning occurs...through interactions among" students of "different races, religions and backgrounds...who are able to...learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." Bakke, 438 U.S. at 312, n. 48, quoting Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly, 7, 9 (September 26, 1977). In the 25 years since his essay, scholars have confirmed President Bowen's findings that the most effective way to educate is with a heterogeneous student body -- which includes racial and ethnic diversity -- whose mix of experiences brings multiple viewpoints.

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[3]Notably, while the focus of the matters before this Court pertain to state universities subject to the Equal Protection Clause, Petitioners also have raised claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq. Many private universities in New Jersey receive federal financial assistance and thus are subject to Title VI. As this Court generally has construed Title VI co-extensively with the Equal Protection Clause, Alexander v. Sandoval, 532 U.S. 275, 281 (2001), acceptance in these matters of Petitioners' claim that race-conscious admissions practices are unconstitutional (except to remedy past discrimination by the particular institution) potentially could detrimentally affect private universities in New Jersey which consider race among other factors in admissions to achieve a diverse student body.

For example, a 1993 study by Dr. Alexander W. Astin, a leading scholar and researcher in the area of higher education, involved a survey of 25,000 students in 217 four-year colleges and universities over four years. Dr. Alexander Astin, University and Multiculturalism on the Campus: How are Students Affected, 25 Change 44, 45 (Mar/Apr. 1993). Dr. Astin analyzed the manner in which students were affected by their institution's relative diversity, including racial diversity, comparing data on students from such differing schools when they entered college in 1985, with follow-up data from 1989. The research showed that students who interacted more with those of different backgrounds tended to be more successful in college. Student experiences with diversity, including socializing with members of other racial and ethnic groups and participating in activities designed to promote cultural awareness, were positively associated with many measures of academic development. The data presented a clear pattern: emphasizing diversity as a matter of institutional policy as well as providing students with curricular and extracurricular opportunities to confront racial and multicultural issues, have beneficial effects on a student's cognitive and affective development. Id. at 48. See also Association of American Universities, Diversity Statement: On the Importance of Diversity in University Admissions (Sept. 14, 1997) at http//www.aau.edu/issues/Diversity ("Our students benefit significantly from education that takes place in a diverse setting...[learning] from others who have background characteristics very different from their own").

Similar findings were made by the District Court in Gratz. The University of Michigan's expert, Professor Patricia Gurin, analyzed three sources of data: multi-institutional national data, the results of an extensive survey of students at the University of Michigan, and data drawn from a specific classroom program. She concluded that "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual

engagement and motivation, and growth in intellectual skills." Such students were also "better able to understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create and appreciate the common values and integrative forces that harness differences in pursuit of common ground." Gratz, 122 F.Supp. 2d at 822 (citations omitted).

With reference to law schools, the setting of Grutter, the increased presence of racial and ethnic minority students and faculty in the classroom has been shown to have had a very beneficial impact on legal education. See Darlene Goring, Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body Is A Permissible Exercise of Institutional Autonomy, 47 U. Kan. L. Rev. 591, 646-647 (1999) and articles and studies cited therein. Indeed, over 50 years ago in Sweatt v. Painter, 339 U.S. 629 (1950), in striking down de jure racial segregation at the University of Texas Law School, this Court observed:

> 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. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. [Id. at 634]

This passage in Sweatt has particular relevance in New Jersey, where Rutgers School of Law-Newark places great emphasis on its provision of legal education in clinical programs. See Rutgers School of Law-Newark, Public Service, at www.newark.rutgers.edu/law/main.html. For example, for a white student raised in a homogeneous environment, exposure to and interaction with fellow law students of different races and ethnicities would better enable such student to effectively participate in this important component of Rutgers Law School's educational program, as such clinics serve the

population of Newark, New Jersey, a city in which African-Americans and Hispanics constitute well over half the population. U.S. Census Bureau, Census 2000, Redistricting Data.

Therefore, a state university's ability to consider race and ethnicity in admissions to insure a diverse student population clearly promotes significant educational benefits, and constitutes a compelling state interest.

### B. First Amendment Protections Attached to University Academic Determinations Further Support the Conclusion that the Educational Value of Student Diversity is a Compelling State Interest.

While Petitioners assert that the only constitutional provision relevant to the matters before the Court is the Fourteenth Amendment (see Gratz Pet. bf. at 33-37), the First Amendment right to academic freedom is directly implicated as well. In Sweezy v. New Hampshire, 354 U.S. 234 (1957), this Court squarely held that the First Amendment protects a university's right to academic freedom, a principle further discussed in Justice Frankfurter's concurrence, which stated that "...who may be admitted to study" is an essential university freedom. Id., 354 U.S. at 263 (Frankfurter, J., concurring)(citation omitted). See also Griswold v. Connecticut, 381 U.S. 479, 482 (1965)(the First Amendment encompasses "freedom of inquiry, freedom of thought, and freedom to teach...indeed the freedom of the entire university"); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)("The Nation's future depends upon leaders trained through wide exposure to that which discovers truth 'out of a multitude of tongues...'"). Thus, Justice Powell's holding in Bakke that the First Amendment allows "a university to make its own judgments as to education includ[ing] the selection of its student body," Bakke, 438 U.S. at 312, and that a university has

the First Amendment "right to select those students who will contribute most to the 'robust exchange of ideas,'" id. at 313, was grounded in a long tradition of American jurisprudence. Bakke's authorization of race being utilized as a factor in admissions to insure student diversity, but its prohibition against racial quotas and separate race-based university admissions tracks, thus constitutes an appropriate and necessary balancing of the two constitutional provisions implicated in the setting of the matters before this Court.

And more recent decisions of this Court have expanded on these First Amendment principles to emphasize the deference which should be given to academic judgments of universities. In Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985), this Court held that "great respect for the faculty's professional judgment" should be given by courts in reviewing academic decision-making, id. at 225; and that federal courts are ill-suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions--decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial...decision-making'" Id. at 226, quoting Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 89-90 (1978). Under the principles of Ewing and Horowitz, the determination by university officials (including those in New Jersey) that a diverse student body produces significant educational benefits is clearly entitled to deference. See also Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 16 (1971) ("[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy," and could devise integration plans "in order to prepare students to live in a pluralistic society..."). So long as Fourteenth Amendment-based rights of non-minority applicants are not violated by their being "foreclosed from all consideration" due to their race as a result of quotas or separate race-based admissions tracks, Bakke, 438 U.S. at 318, the "good faith" of state universities which, in their academic

judgment, use race as one admissions factor among many to achieve diversity should "be presumed." Id. at 319.

## III. UNIVERSITY ADMISSIONS SYSTEMS WHICH CONSIDER RACE AMONG OTHER FACTORS IN ORDER TO OBTAIN THE EDUCATIONAL BENEFITS OF STUDENT DIVERSITY AND WHICH OPERATE IN A MANNER SIMILAR TO THE HARVARD PLAN ENDORSED IN BAKKE ARE NARROWLY TAILORED FOR PURPOSES OF EQUAL PROTECTION CLAUSE ANALYSIS.

In order to satisfy the strict scrutiny standard, the compelling state interest in student diversity must be achieved by narrowly tailored means. Adarand, 515 U.S. at 227; Bakke, 438 U.S. at 315. Plans which closely resemble the "Harvard plan" expressly endorsed by Justice Powell in Bakke (and by Justice Brennan in his partial dissent) -- such as those used by New Jersey institutions of higher education and those, as found by the Sixth Circuit in Grutter and the District Court in Gratz below, used by the University of Michigan Law School and the Michigan College of Literature, Science and the Arts ("LSA") -- meet the "narrowly tailored" test.

As a threshold matter, as proven by the University of Michigan Law School, Grutter, 288 F.3d at 750, the LSA, Gratz, 122 F.Supp. 2d at 830, and as demonstrated by numerous studies and articles, purely race-neutral criteria will not achieve student diversity at selective universities. For example, reliance on test scores is an ineffective means to achieve heterogeneity because "there are significant disparities in the test scores of different racial and ethnic groups, a fact that may be linked to differences in educational opportunities,

overrepresentation in low-performing schools, and in some cases the difficulties presented for students whose primary language is not English." U.S. Comm'n on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education, Ch.3, "Admissions Standards and Success Predictors" (Nov. 2002) at http://www.usccr.gov/pubs/percent2.htm.

Implicitly recognizing this problem and also acknowledging the academic benefits of student diversity, the amicus briefs of the United States and the State of Florida in support of Petitioners proffer "percentage plans" as an allegedly race-neutral alternative for achieving student diversity, which purportedly demonstrate why the Michigan systems at issue are not "narrowly tailored." These plans, in use in California, Florida and Texas, guarantee admission to state institutions to students graduating within a certain top percentage of their high school classes. Specifically, Texas's Top 10 Percent Law, enacted in response to the Hopwood decision, guarantees students graduating in the top 10 percent of their high school class admission to a Texas public college or university. The Florida plan guarantees admission to one of Florida's 11 public institutions for students graduating in the top 20 percent of their high school classes, and the California law admits students with high school rankings in the top 4 percent to its state institutions.

Experience has shown that percentage plans are not a panacea, however. First, such plans have no applicability whatsoever in the context of selective graduate school admissions, the setting of Grutter. As a rule, graduate schools do not consider high school class standing in admission decisions, and, in any event, they draw from a national pool of undergraduate institutions, so they simply could not guarantee admission to any certain percentage of high-ranking high school graduates. Consequently, in states where race-conscious admissions plans have been replaced by percentage plans, there has been a "devastating" decrease in minority enrollment in the states' graduate schools. U.S. Comm'n on Civil Rights,

Toward an Understanding of Percentage Plans in Higher Education: Are they Effective Substitutes for Affirmative Action? (April 2000) at http://www.usecr.gov/percent/stmnt.htm.

Moreover, there is strong evidence that rather than promoting diversity, percentage plans have had a negative effect on the admissions of certain minority groups to selective undergraduate institutions. In Florida, "black and Hispanic students remain underrepresented in two of Florida's most selective universities compared with their proportions among high school graduates." Beyond Percentage Plans, supra, Ch.6, "The Road to Diversity: Percentage Plans Plus." Similarly, in Texas, four years after implementation of the percentage plan, enrollment of black and Hispanic students at the University of Texas-Austin decreased, most notably among black students, with similarly disappointing results at the State's selective law and medical schools. Ibid. As the Commission on Civil Rights concluded, "Analysis of admissions in these states reveals that no significant improvement has been made in the rates of minority enrollment at undergraduate or graduate/professional levels, and in many cases, rates have declined." Ibid. See also Eugene Garcia, The Elimination of Affirmative Action: California's Degraded Educational System, 12 La Raza Law Journal 373 (Fall 200l); John F. Kain and Daniel M. O'Brien, Hopwood and the Top l0 Percent Law; How They Have Affected the College Enrollment Decisions of Texas High School Graduates, (Nov. 2001) at http://www.utdallas.edu/research/greenctr; Marta Tiendaetal, Closing the Gap: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action (Jan. 2003) at http://www.texastop10.princeton.edu/publications/tienda012103.pdf.

Even if percentage plans were successful in achieving diversity at state colleges and universities, these plans, which, as explained below, are premised upon a feeder school system

that is segregated, simply will not work in every locality. For example, because New Jersey has been steadfast in its efforts to eliminate segregation in its public schools, percentage plans would not be appropriate here. Therefore, each state must have the flexibility, within constitutionally permissible parameters, to develop approaches for achieving diversity in higher education that are suited to the unique character of the state.

It is widely recognized that the efficacy, if any, of percentage plans depends on the existence of racially segregated school systems. As the United States Commission on Civil Rights noted with respect to the "One Florida Plan," "[t]he Plan is an unprovoked stealth acknowledgment –- and acceptance –- that the existing school and housing segregation will never change and that longstanding efforts to remedy race discrimination that was legal in Florida have been abandoned." U.S. Comm'n on Civil Rights, Toward an Understanding of Percentage Plans, supra. See also, Michelle Adams, Isn't It Ironic? The Central Paradox at the Heart of 'Percentage Plans', 62 Ohio State Law Journal 1729 (2001).

Use of a plan that is inextricably dependent upon the existence of a segregated public school system would be an anathema to New Jersey, which has labored intensely for the past century to desegregate its primary and secondary schools. As the New Jersey Supreme Court declared, "[t]he history and vigor of our State's policy in favor of a thorough and efficient public school system are matched in its policy against racial discrimination and segregation in the public schools." Jenkins v. Twp. of Morris School District, 279 A.2d 619, 626 (N.J. 1971). New Jersey's courts have emphasized the State's strong public interest in eradicating school segregation. See, e.g., Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Educ., 788 A.2d 729, 744 (N.J. 2002)(reaffirming responsibility of Commissioner and State Board of Education to take appropriate action to remedy racial imbalance at high school); Jenkins, supra, 279 A.2d at 629 (same). Thus, percentage plans premised on racial imbalance at the secondary schools are not

a feasible or desirable option for New Jersey. Nor, contrary to the arguments of Petitioners and the above-noted amici, should they be the only constitutionally permissible method for the University of Michigan Law School and the LSA to achieve the compelling state interest in student diversity.

While sharing the essential characteristics of taking race and ethnicity into account in admissions but not utilizing quotas or separate race-based admissions tracks, the admissions systems of the New Jersey schools described in this brief also are not identical to those used by LSA or by Michigan Law School. Most notably, the identified New Jersey schools, unlike the LSA, do not assign any "points" or any other specified weight based on an applicant being a member of an underrepresented minority group (though they have the essential similarity of using race and ethnicity as but one of a myriad of factors, without quotas and separate race-based tracks).

But the critical point of noting the differences between New Jersey's admissions systems and those of the States of Florida, Texas and California on the one hand, and the University of Michigan on the other, is not that New Jersey's systems are inherently superior. Rather, in matters as crucial to a state as the functioning of its higher educational institutions, a state must have leeway to shape such systems in response to local conditions and to state law. Although some states have experimented with percentage plans, they are not the only constitutionally permissible alternative to a quota-like race-based admissions program. Narrow tailoring does not mean "one size fits all." See Bush v. Vera, 517 U.S. 952, 977 (1996), in which Justice O'Connor, in her plurality opinion, stated that "the 'narrow tailoring' requirement of strict scrutiny allows the states a limited degree of leeway in furthering...[compelling] interests". That education is a quintessential area for according states "a limited degree of leeway" is evident from this Court's decision in San Antonio Dist. v. Rodriguez, 411 U.S. 1 (1973), which, in rejecting an

Equal Protection Clause challenge to Texas' school funding system, recognized the need for state and local latitude in educational decision-making, holding that "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education." Id. at 50. In the higher education context, what would be a narrowly tailored means of achieving the compelling interest in diversity may not necessarily be identical for each state, as the analysis must take into account such localized factors as the nature of the applicant pool, the selectivity of the institution, and the school's goals and priorities.

Moreover, granting the states latitude in devising narrowly tailored means of achieving the compelling state interest in student diversity is further warranted under the long line of this Court's recent federalism cases, which emphasize that embedded in the Constitution is the "presupposition . . . that each State is a sovereign entity in our federal system." Alden v. Maine, 527 U.S. 706, 729 (1999), quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996). See also U.S. v. Lopez, 514 U.S. 549, 581 (1995)(Kennedy, J., concurring)(under "our federalism," in the area of such "traditional concern" to a state as education, a state must have the flexibility to devise its own "solutions where the best solution is far from clear"); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000). Such "sovereign entities" should have the ability -- within the parameters of the Equal Protection Clause, as balanced by the First Amendment rights of universities to academic freedom -- to devise narrowly tailored admissions plans that are appropriate to the individual circumstances present in each state.

In Bakke, Justice Powell held that the University of California's two-track admissions system was not narrowly tailored, but that a system such as the "Harvard plan" would be deemed to be narrowly tailored. Bakke, 438 U.S. at 317. As detailed on pp. 1-2 supra, the admissions systems in the New Jersey institutions of higher education noted above are fully

consonant with the Harvard plan and thus are narrowly tailored, in that race is considered as only one of a number of factors in an individualized assessment of each applicant. And, while differing from New Jersey's systems in certain respects, the University of Michigan plans at issue in these matters also are consistent with the guidelines set forth in Bakke.[4] The Sixth Circuit in Grutter expressly found "that the University of Michigan Law School's consideration of race and ethnicity is virtually indistinguishable from the Harvard Plan Justice Powell approved in Bakke", Grutter, 288 F.3d at 747; and the District Court in Gratz found that the LSA's post-1998 admissions system was narrowly tailored insofar as it closely resembled the type of plan endorsed by Justice Powell, Gratz, 122 F.Supp.2d at 827-831. Such admissions plans, which avoid separate admissions tracking and quotas and which consider race or ethnicity only as one among many factors, fall squarely within the parameters established in Bakke of permissible means of achieving student diversity, and should be deemed to be narrowly tailored.

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[4]Petitioners also argue in their briefs (Grutter Pet. bf. at 42, Gratz Pet. bf. at 28) that the plans of both Michigan Law School and the LSA are not narrowly tailored since the consideration of race and ethnicity to achieve diversity has no termination date. However, as aptly explained by the District Court in Gratz, "diversity in higher education, by its very nature" is not a "remedy" but rather is an "ongoing interest" of universities, given the educational benefits derived therefrom. Gratz, 122 F.Supp. 2d at 823-824. And if progress is made in improving educational opportunities for minorities in earlier school years, there readily could be natural temporal limits to race-conscious means of achieving diversity. See Grutter, 288 F.3d at 792.

## CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals in Grutter v. Bollinger and the judgment of the District Court in Gratz v. Bollinger should be affirmed.

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