No. 02-241

In The Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents,

and

KIMBERLY JAMES, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

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

2. Should an appellate court required to apply strict scrutiny to governmental race-based preferences review *de novo* the district court's findings because the fact issues are "constitutional"?

PARTIES TO THE PROCEEDING

Petitioner is Barbara Grutter. She was the plaintiff in the district court and an appellee in the court of appeals. She brings this action on her own behalf and on behalf of a certified class of similarly situated persons.

Respondents are Lee Bollinger, Jeffrey Lehman, Dennis Shields, and the Board of Regents of the University of Michigan. They were defendants in the district court and appellants in the Court of Appeals.

The following additional respondents were defendant-intervenors in the district court and appellants in the court of appeals:

> Kimberly James, Farah Mongeau, Jeanette Haslett, Raymond Michael Whitlow, Shabatayah Andrich, Dena Fernandez, Shalamarel Kevin Killough, Diego Bernal, Julie Fry, Jessica Curtin, James Huang, Heather Bergman, Ashwana Carlisle, Ronald Cruz, Nora Cecelia Melendez, Irami Osei-Frimpong, Gerald Ramos, Arturo Vasquez, Edward Vasquez, Vincent Kukua, Hoku Jeffrey, Karlita Stephens, by her Next Friend Karla Stephens-Dawson, Yolanda Gibson, by her Next Friend Mary Gibson, Erika Dowdell, by her Next Friend Herbert Dowdell, Jr., Agnes Aleobua, by her Next Friend Paul Aleobua, Cassandra Young, by her Next Friend Yolanda J. King, Jaasi Munanka, Jodi-Marie Masley, Shannon Ewing, Julie Kerouac, Kevin Pimental, Bernard Cooper, Norberto Salinas, Scott Rowekamp, Russ Abrutyn, Jasmine Abdel-Khalik, Meera Deo, Winifred Kao, Melisa Resch, Oscar De La Torre,

PARTIES TO THE PROCEEDING – Continued

Carol Scarlett, United for Equality and Affirmative Action, The Coalition to Defend Affirmative Action by Any Means Necessary, and Law Students for Affirmative Action.

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The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-176a)[1] is reported at 288 F.3d 732. The opinion of the United States District Court for the Eastern District of Michigan (Pet. App. 189a-294a) is reported at 137 F. Supp. 2d 821.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner filed a petition for certiorari on August 9, 2002. The Court granted the petition on December 2, 2002.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

2. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

3. 42 U.S.C. § 1981 states in pertinent part:

> **(a) Statement of equal rights**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by petitioner in this case.

laws and proceedings for the security of person and property as is enjoyed by white citizens. . . .

. . . .

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

I. Plaintiff/Petitioner.

Barbara Grutter is a white resident of the state of Michigan who applied in December 1996 for admission into the fall 1997 first-year class of the University of Michigan Law School (hereinafter "Law School"). App. 30, 33.[2] At the time of her application, Ms. Grutter was 43 years old and had graduated from college 18 years earlier. Record 95, Cir. App. 277.[3] She applied with a 3.8 undergraduate grade point average and an LSAT score of 161, representing the 86th percentile nationally. *Id*. By letter dated April 18, 1997, the Law School notified Ms. Grutter that it had placed her application on a "waiting list for further consideration should space become available." App. 105. The Law School subsequently sent a letter dated June 25, 1997, informing Ms. Grutter that it was unable to offer her a position in the class. *Id*. at 108. Ms. Grutter has not subsequently enrolled in law school elsewhere, and she still desires to attend respondents' Law School.

II. The Law School's Admissions Policies and Practices.

The Law School, which is a recipient of federal funds, admits that it uses race as a factor in making admissions

[2] "App." refers to the Joint Appendix filed with petitioner's brief on the merits.

[3] "Cir. App." refers to the Joint Appendix filed by the parties in the Sixth Circuit in this case.

decisions. It justifies this use of race on one ground only: that it serves a "compelling interest in achieving diversity among its student body." Record 95, Cir. App. 305-06. As the district court found, after a 15-day bench trial, the Law School's use of race has meant that it effectively reserves a portion of the class each year (an approximate minimum of 10% and a range of 11-17%) for members of specified racial or ethnic minorities. Pet. App. 225a, 248a. As the district court also found, race is an "enormously important" and "extremely strong factor" in the admissions process, *id*. at 227a, and the Law School has placed no time limits on its use, *id*. at 247a-48a.

A formal written admissions policy (hereinafter "Policy") was adopted by the Law School faculty in the spring of 1992. App. 109-23. It has remained in effect, unchanged since that date. Among other things, the Policy states that it was intended "as much to ratify what has been done and to reaffirm our goals as it is to announce new policies." *Id*. at 121. The consideration of race in admissions was one of the practices of the past that the Policy continued or "ratified." Prior to adoption of the Policy, the Law School had an explicitly named "special admissions program" to ensure adequate representation in the class from members of designated "underrepresented minority groups," namely African Americans, Mexican Americans, and Native Americans. Record 346, Cir. App. 4922-23.

Generally, grades and test scores are important factors in the Law School's admissions process. Record 331, Cir. App. 7231. Applicants from the "underrepresented" minority groups have historically scored lower on average on those criteria than students from other racial and ethnic groups. *Id*. at Cir. App. 7206-07. Accordingly, the "special admissions program" was intended to permit the Law School to admit and enroll its desired level of "underrepresented" minority students by placing less emphasis on their LSAT scores and undergraduate grades relative to students from other racial and ethnic groups. *Id*. at Cir. App. 7201-11. Pursuant to resolutions adopted by the faculty, the Law School had, prior to 1992, a written

goal of enrolling at least 10-12% of its students from these minority racial groups. Record 346, Cir. App. 4866, 4869, 4872, 4877, 4881, 4884, 4895, 4898-4900, 4903; Record 331, Cir. App. 7207-08.

The 1992 Policy abandoned use of the term "special admissions program." It continued, however, the Law School's reliance on the importance of grades and test scores (measured by a composite known as a "selection index") and the Law School's explicit consideration of race in the admissions process. With respect to the consideration of race, the Policy states that the Law School has a "commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics, and Native Americans, who without this commitment might not be represented in [its] student body in meaningful numbers." App. 120. Elsewhere on the same page, the Policy references the importance of enrolling a "critical mass" of minority students. *Id*. The Policy also identifies the Law School's reason for its commitment to enrolling "meaningful numbers" of students from the designated groups: It believes that students from these racial and ethnic groups "are particularly likely to have experiences and perspectives of special importance to [the Law School's] mission." *Id.*

According to the chairman of the committee that drafted the 1992 Policy, "critical mass" lies in the range of 11-17%. Pet. App. 212a, 225a. This range appeared in a draft of the Policy, but was omitted from the final version despite the suggestion of one committee member that it remain for the sake of "candor." *Id.* at 225a; Record 346, Tr.Exh. 34, Cir. App. 4802, 4818. The director of admissions at the time Ms. Grutter applied, respondent Shields, doubted that 5% would be "critical mass," but thought that 10% might suffice. Pet. App. 206a-07a; Record 334, 4 Tr. 209. The dean of the Law School, respondent Lehman, also doubted that 5% would constitute "critical mass," Pet. App. 211a, but testified that once the Law School reaches 10%, "critical mass" is beginning to be achieved. Record 335, 5 Tr. 187-88. Both Shields and Lehman acknowledged that

the actual numbers of enrolled students from these groups have been at least 11% in every entering class since 1992. Pet. App. 207a-08a, 211a. *See also* Record 346, Tr.Exh. 189, Cir. App. 6047.

The Policy references and appends ("Figure 1") a "grid" of admissions decisions plotted by different combinations of undergraduate grades and test scores. App. 123. It notes that the highest combinations of grades and test scores, as found in the upper right portion of the grid, characterize these credentials for the "overwhelming bulk of students admitted." *Id*. at 115. The Policy lists reasons, however, that the Law School had, and should continue, to admit students "despite index scores that place them *relatively far* from the upper right corner of the grid." *Id*. at 116 (emphasis added). One of these reasons is to "help achieve diversity" in the student body, including "one particular type of diversity" – racial and ethnic diversity. *Id*. at 118, 120.

Extensive evidence was introduced at trial concerning the manner and extent to which the Law School considers race in the admissions process. This included testimony from Law School faculty and administrators. It also included actual admissions data for a six year period – 1995-2000. The data are voluminous and were presented in a number of different forms. For example, plaintiff's statistical expert, Kinley Larntz, Professor Emeritus of Applied Statistics at the University of Minnesota, reported median LSAT scores and undergraduate grade point averages for different racial groups. Pet. App. 306a-311a. He also plotted on grids – in a manner similar to Figure 1 appended to the Policy – admissions decisions characterized according to different combinations of LSAT scores and undergraduate grades of applicants, and also by racial group. The Law School had produced such a grid for the first-year class that enrolled in the fall of 1995. App. 127-55. Using the Law School's database, Professor Larntz

replicated the grid for 1995 and created similar grids for years 1996-2000.[4] App. 156-203.

Excerpts from the grids constructed from the Law School's database illustrate the way in which the Law School's policy of considering race in the process is reflected in admissions outcomes (Applications ("Apps") versus Admissions ("Adm")). The following chart reproduces the data from the grids for 1995 for students whose undergraduate grade point averages and LSAT scores are at least 3.0 and 148, respectively. App. 149, 142, 145. The admissions outcomes can be easily compared among the following racial groups for which the Law School maintains data: (1) Selected Minority Students (African Americans, Mexican Americans, and Native Americans); (2) Caucasian Americans; and (3) Asian/Pacific Island Americans:

[4] Professor Larntz used the racial and ethnic categories employed by the Law School for its 1995 grids. These groups are "African Americans," "Native Americans," "Mexican Americans," "Caucasian Americans," "Asian Pacific Island Americans," "Puerto Ricans" "Other Hispanic Americans," "Foreign Applicants," and "Unknown Ethnicity." In addition, the Law School plotted its 1995 grids with a category for "Selected Minorities," which combines "African Americans, Mexican Americans, and Native Americans." App. 149.

1995 - Final LSAT & GPA Admission Grid
Selected Minorities
(African Americans, Native Americans, Mexican Americans)

	148-150 Apps Adm	151-153 Apps Adm	154-155 Apps Adm	156-158 Apps Adm	159-160 Apps Adm	161-163 Apps Adm	164-166 Apps Adm	167-169 Apps Adm	170-Above Apps Adm
3.75 & Above	2 0	4 1	2 1	5 3	3 2	3 3	3 3	1 1	1 1
3.50 - 3.74	7 0	10 5	9 5	9 8	10 8	14 13	3 2	0 0	1 1
3.25 - 3.49	8 2	7 3	12 7	18 15	5 3	7 7	3 3	4 4	0 0
3.00 - 3.24	28 2	16 2	8 2	14 8	7 6	11 10	3 3	2 2	2 2

Caucasian Americans

3.75 & Above	8 0	11 0	12 0	47 4	45 0	93 8	108 46	96 86	121 114
3.50 - 3.74	19 0	23 0	32 3	57 2	65 2	161 14	163 62	130 96	95 89
3.25 - 3.49	16 0	24 0	21 0	51 1	61 1	126 5	92 11	78 38	74 55
3.00 - 3.24	17 0	13 0	15 0	26 0	19 1	42 2	37 3	19 4	17 8

Asian/Pacific Island Americans

3.75 & Above	1 0	7 0	3 0	8 0	8 0	13 3	12 8	9 8	12 12
3.50 - 3.74	3 0	5 0	6 0	13 0	20 1	31 2	29 11	19 17	17 17
3.25 - 3.49	3 1	7 0	10 0	14 0	22 0	20 2	15 2	13 5	17 16

In addition to displaying the data in the same descriptive format used by the Law School, Professor Larntz used standard statistical methodologies to measure the size of the racial preference employed by the Law School. One such method assessed the probabilities of admission for various racial groups compared to Caucasian Americans based on selection index. For example, in 1995 a selection index value of 3.0 corresponds to a probability of acceptance for Caucasian Americans between 5% to 10%, while the same selection index corresponds to a probability of acceptance between 90% and 95% for African Americans. Pet. App. 313a; Record 332, 2 Tr. 100. In all years (1995-2000), the probability of acceptance versus selection index-graphs show large preferences for African Americans, Mexican Americans, Native Americans, and Puerto Ricans. Record 346, Tr.Exh. 137, 139, 141, Cir. App. 5172-203, 5377-84, 5453-60.

Professor Larntz also computed for the years 1995-2000 the "relative odds"[5] of admission for different racial groups, controlling for undergraduate grades, LSAT scores and other factors. Record 346, Tr.Exh. 137, 139, 141, Cir. App. 5156-60, 5373, 5449. This is another standard statistical measure used in science, medicine, and discrimination cases. Record 332, 2 Tr. 66-69. It compares the odds of two events or outcomes, with the comparison, if there is a difference,[6] stated in terms of an odds ratio, or relative

[5] Odds are derived by dividing the number of times an event occurs by the number of times that it does not. For example, if an event has a "fifty-fifty" chance of occurring, the odds are 50/50 or 1. Record 332, 2 Tr. 22. In the context of this case, if there are ten applications in one group, with one student admitted, the odds in favor of admission can be stated as 1/9. If another group consists of 10 applicants, of which 9 students are admitted, the odds in favor of admission are 9/1, or 9. The odds ratio (relative odds) favoring the second group is 81, which is derived by dividing 9/1 by 1/9. Record 332, 2 Tr. 61-62; Record 346, Tr.Exh.143, Cir. App. 8952. More than 95% of admittees come from these cells with comparative information. Pet. App. 228a.

[6] Relative odds cannot be computed where there are no differences between groups, such as where all students from two compared groups are admitted, or where all are denied admission. Record 342, 12 Tr. 25-26. Across all six years for which Dr. Larntz analyzed data, the percentage of applicants whose grade point averages and test scores placed them in a cell with comparative information ranged between 84% to 88% of the total applicant pool. Record 342, 12 Tr. 32-33.

odds. Professor Larntz again used the Law School's own method of reporting racial and ethnic categories and LSAT and undergraduate grade point combinations. He held the odds of admission for Caucasian Americans constant at 1, as a baseline, and computed relative odds for other racial and ethnic categories, controlling for grades, test scores, and several other factors. These other factors, for which information was again available from the Law School's database, included Michigan residency[7], waiver of the Law School application fee, and differences in grade point average and LSAT test scores within the cell combinations organized by the Law School. The reported relative odds and standard deviations[8] for 1995 were as follows:

Factor/Ethnic Group	estimated relative odds	standard deviations
Michigan Residency	6.59	10.67
Female	1.91	5.40
Fee Waiver	1.07	0.28
Within Cell GPA (per 0.1 point)	1.25	2.89
Within Cell LSAT	1.32	5.13
Native American	116.98	7.93
African American	513.29	14.92
Caucasian American	1.00	–
Mexican American	183.81	13.03
Other Hispanic American	1.39	0.70
Asian/Pacific Island American	1.56	2.33
Puerto Rican	73.26	5.63
Foreign	0.65	-0.88
Unknown Ethnicity	1.23	1.26

Record 346, Tr.Exh. 137, Cir. App. 5156.

[7] The Law School Policy explicitly calls for some preference to be given to Michigan residents. App. 111.

[8] In statistics, 2 standard deviations generally correspond to an event that is described as "statistically significant," *i.e.*, the event has less than a 5% probability of occurring by chance. Standard deviations greater than 2 indicate an even higher level of satatistical significance. Record 332, 2 Tr. 27-28.

As can be seen, the relative odds of admission for the students from the African American, Mexican American, Native American, and Puerto Rican racial or ethnic groups are very large. As one would expect, based on the explicit Policy preference granted for Michigan residents, those applicants have significantly increased odds of admission relative to non-residents. These odds, however, are dwarfed by the odds favoring students from the racial or ethnic minority groups identified above. A review of the data for all the years at issue (whether controlling for grades and test scores only, or in addition to the other factors) shows that although there are variations from year to year, the odds favoring students from African American, Mexican American, Native American, and Puerto Rican groups are always "enormously" large[9] relative to Caucasian Americans, and other groups such as Asian Americans, other Hispanics, foreign students and students from unknown ethnicities. Record 332, 2 Tr. 71-72; Record 346, Tr.Exh. 137, 139, 141, Cir. App. 5157-59, 5373-74, 5449.

III. Proceedings Below.

A. The District Court.

Plaintiff commenced this action in December 1997. In January 1999, the district court certified a class under Federal Rule of Civil Procedure 23(b)(2), and it also bifurcated liability and damages, with liability to be determined first. Following cross-motions for summary judgment heard on December 22, 2000, the district court ruled that it would decide as a matter of law whether diversity was a compelling interest, and that it would conduct a bench trial on (1) the extent to which race was considered in the Law School's admissions policies;

[9] In medical and scientific research, relative odds of 2 (representing a doubling of odds) are very large. Record 332, 2 Tr. 69. Here, the odds favoring students from the specified racial and ethnic minority groups are many times greater, with the odds often dozens or even *hundreds* of times greater than for Caucasians and Asian Americans.

(2) whether the Law School imposed a race-based double standard in admissions; and (3) whether (as intervenors argued) race should be considered in the Law School's admissions process in order to create a "level playing field." Record 290, Cir. App. 7181.

Trial commenced on January 16, 2001. The district court issued its Findings of Fact and Conclusions of Law and Order on March 27, 2001. Pet. App. 189a-294a. Among the district court's findings of fact were the following:

1. The Law School gives a preference based on race to applicants from certain racial groups – African Americans, Mexican Americans, Native Americans, and mainland Puerto Ricans – which it considers to be underrepresented in the Law School. *Id.* at 224a.

2. The Law School's stated reason for giving the racial preference to these groups is that it desires a racially diverse student body, and the average LSAT test scores and undergraduate grades of applicants from the underrepresented minority groups are lower than the scores of students from other racial and ethnic groups, *e.g.*, Caucasians and Asians, so that few from the underrepresented minority groups would be admitted in a system "based on the numbers." *Id.*

3. The Law School places a "very heavy emphasis" on an applicant's race in the admissions process. Race is an "enormously important" and "extremely strong" factor in the admissions process. *Id*. at 225a-27a.

4. The Law School seeks to enroll what it calls a "critical mass" of underrepresented minority students. In practice, this has meant that the Law School attempts to enroll an entering class consisting of 10-17% underrepresented minority students. *Id*. at 225a.

5. The Law School also seeks to ensure that each year's entering class consists of a *minimum* of 10-12% underrepresented minority students. This has meant that each year, the Law School "effectively reserve[s]" 10% of the entering class for students from the underrepresented minority groups, and those numbers of seats are "insulated from competition." *Id*. at 248a-49a.

6. There is no time limit on the Law School's use of race as a factor in the admissions process. *Id*. at 247a-48a.

The district court considered expert statistical evidence in resolving the parties' factual dispute about the "extent" to which race is a factor in the admissions process. The district court "adopt[ed]" the expert statistical analysis of plaintiff's expert, Professor Larntz. *Id*. at 227a. It rejected criticisms of Professor Larntz's analysis by the Law School's expert witness, Dr. Stephen Raudenbush, a professor at the University of Michigan. *Id*. at 227a-28a.

The district court concluded as a matter of law that the Law School's stated interest in achieving diversity in the student body was not a compelling interest that could justify its racial preferences in admissions. *Id*. at 243a. It also found that even if diversity were compelling, the Law School's racial preferences were not narrowly tailored to achieve that interest. *Id*. at 246a-52a. The district court also rejected the alternative arguments of intervenors. *Id*. at 257a-92a. Accordingly, the district court enjoined the Law School's use of race in the admissions process. *Id*. at 293a.[10]

Defendants moved in the district court on March 28, 2001, for a stay of the district court's injunction, pending appeal. Defendants also filed an Emergency Motion for Stay in the Sixth Circuit. The district court denied the defendants' motion for stay on April 3, 2001. The decision is reported at 137 F. Supp. 2d 874 and is included in the Petition Appendix at 295a-305a. In the order denying the stay, the district court noted, among other things, that there was "overwhelming evidence" that the Law School's

[10] The district court also ruled that (1) the individual defendants were entitled to "qualified immunity" and summary judgment in their favor on the claims asserted against them under Title 42 U.S.C. § 1983 for damages in their individual capacities, and (2) that the Board of Regents of the University of Michigan was not entitled to Eleventh Amendment immunity from plaintiff's claim for damages arising from Title VI violations. Pet. App. 252a-57a. The parties did not appeal the district court's interlocutory rulings on these issues.

admissions process was not narrowly tailored to achieve an interest in a diverse student body. *Id*. at 301a. The district court also made clear the scope of the injunction: "This court's injunction should not be understood as prohibiting '*any and all* use of racial preferences,' . . . but only the uses presented and argued by defendants and the intervenors in this case – namely, in order to assemble a racially diverse class or to remedy the effects of societal discrimination." *Id*. at 300a-301a. A motions panel of the Sixth Circuit nonetheless granted the stay on April 5, 2001. The decision is reported at 247 F.3d 631 and is included in the Petition Appendix at 185a-188a.

B. The Court of Appeals.

On October 19, 2001, the court of appeals issued an order granting the petition for initial hearing *en banc* filed by plaintiff in this case and in *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *cert. granted*, 123 U.S. 602 (2002). The decision is reported at 277 F.3d 803 and is included in the Petition Appendix at 1a-176a. The cases were heard on December 6, 2001. On May 14, 2002, the Sixth Circuit issued a 5-4 decision in this case, reversing the judgment of the district court. It did so based on a *de novo* review of the district court's findings. Pet. App. 9a. The court, in a majority opinion authored by Chief Judge Martin, held that Justice Powell's opinion in *Regents of the University of California v. Baake*, 438 U.S. 265 (1978), constituted binding precedent establishing "diversity" as a compelling governmental interest sufficient under strict scrutiny review to justify the use of racial preferences in admissions. Pet. App. 16a-17a. According to the court, Justice Powell's lone opinion with respect to diversity constituted the rationale for the holding of this Court by application of the analysis approved by the Court in *Marks v. United States*, 430 U.S. 188, 193 (1977), for interpreting decisions of the Court with fragmented opinions. Pet. App. 12a-17a.[11]

[11] The Sixth Circuit majority declined to address whether the separate remedial interests proffered by intervenors were sufficiently compelling to satisfy strict-scrutiny review. Pet. App. 12a n.4.

The Sixth Circuit also reversed the district court's determination that the Law School's racial preferences were unconstitutional because they were not narrowly tailored. *Id*. at 25a-38a. It held that the Law School's stated objective of enrolling a "critical mass" of "underrepresented" minority students was achieved through considering race as a "plus" factor in the manner approved by Justice Powell in *Bakke* and described in the "Harvard Plan" referenced in Justice Powell's opinion. Finding that the Law School had no "fixed goal or target" for minority admissions, the court rejected the district court's finding that the Law School's "critical mass" was the functional equivalent of a quota. *Id*. at 29a. The last part of the Sixth Circuit's narrow-tailoring analysis was a rejection of the district court's findings and conclusion that the Law School's racial preferences could not be considered narrowly tailored under the factors identified by this Court in *United States v. Paradise*, 480 U.S. 149, 171 (1987). Pet. App. 32a-38a.

Judge Clay wrote a concurring opinion that was joined by Judges Moore, Cole, and Daughtrey. *Id*. at 51a-83a. The concurring judges agreed with Chief Judge Martin's conclusion that Justice Powell's opinion respecting diversity was binding precedent. The concurrence went further than the majority opinion, however, by justifying the diversity rationale on the basis of empirical evidence and even on remedial grounds relating to the entire educational system. *Id*. at 72a-73a.

The four dissenting judges found the Law School's preferences to be unlawful. Judge Boggs authored a dissent, joined by Judge Batchelder and in part (all except the Procedural Appendix) by Judge Siler, which reached the conclusions (1) that diversity was not a compelling interest that could justify racial preferences in admissions and (2) that the Law School's preferences were not in any event narrowly tailored to achieve an interest in diversity. *Id*. at 83a-169a.

On the first point, the dissenters explained why a *Marks* analysis could not yield a conclusion that Justice Powell's diversity rationale was narrower than Justice Brennan's remedial rationale, and hence why it could not be considered a rationale for the holding of this Court. *Id*. at 94a-112a. Finding that subsequent opinions of this Court had not directly confronted whether diversity in student admissions was a compelling interest, *id*. at 112a-114a, the dissenters conducted an assessment on the merits of the diversity rationale articulated by the Law School and concluded that it could not constitute a compelling interest.

On narrow tailoring, the dissenters found the size of the Law School's preferences to be "staggering," *id*. at 89a, and concluded that the Law School effectively maintained a "two-track" admissions system, *id*. at 135a, that was "functionally, and even nominally, indistinguishable from a quota system," *id*. at 144a. They also concluded that genuine experiential or academic diversity could be achieved with race-neutral means, and that the Law School's preferences were designed to promote an "*interest in race itself,*" *id*. at 156a, rather than an interest in educational diversity.

In a separate dissent, Judge Gilman concluded that it was unnecessary to decide whether diversity was a compelling interest because, like the other dissenters, he believed that the Law School's preferences, and its concept of "critical mass," were "functionally indistinguishable from a quota." *Id*. at 173a.

SUMMARY OF THE ARGUMENT

In granting a strong preference in admissions to applicants from a select group of racial and ethnic minorities, the Law School invokes an interest that the Court has never accepted as a compelling justification for racial preferences, which it must be to pass the settled requirements of strict scrutiny. Unlike the one interest – identified discrimination – that the Court's precedents have

recognized as sufficiently compelling to support narrowly-tailored remedies, the Law School's asserted interest in diversity is incapable of being measured with reference to past injury, or to anything other than the ill-defined nature of the diversity interest itself. It is an interest with as many potential definitions as there are races and ethnicities or educational institutions to promote it as a justification for treating applicants differently on the basis of race or ethnicity.

The Law School's preferences at issue in this case illustrate why it would be an extraordinary departure from modern equal protection analysis to recognize an interest in diversity as a compelling interest. The preferences rest on crude stereotypes: The Law School assumes that students are particularly likely to have experiences or perspectives important to the Law School's mission merely because of their membership in a particular racial or ethnic group. In this case, the stereotypes are applied to members of racial and ethnic groups that the Law School has identified as "historically discriminated against," which shows how indistinguishable such a preference can be from a remedy for the effects of societal discrimination.

Although Justice Powell concluded in *Bakke* that an interest in diversity, as he defined it, was a compelling one that universities could pursue in considering race and ethnicity as a factor in admissions, no other Justice in *Bakke* concurred in his rationale. The Court's subsequent cases, while not directly addressing whether diversity is a compelling interest, have articulated standards on compelling-interest analysis. These standards logically and rightly exclude a nebulous interest in diversity, tied so closely to stereotypes and a remedy for societal discrimination, from qualifying as a compelling justification for racial preferences in university admissions.

An interest in diversity is no more suitable for employment of narrowly-tailored measures than the interest of an educational institution in providing role models to minority school children or a state's interest in remedying the lingering effects of societal discrimination. The Court's

precedents demonstrate that an interest is not a compelling justification for racial preferences merely because it is asserted to accomplish some good or achieve some benefit. Like the role model theory (which can certainly be assumed to provide educational benefits) or a remedy for the effects of general, societal discrimination, the interest in diversity is simply too indefinite, ill-defined, and lacking in objective, ascertainable standards to be fitted to narrowly-tailored measures.

Even if the diversity interest could pass constitutional standards, the Law School's preferences could not possibly be considered narrowly tailored. They do not pass muster under the analysis employed by Justice Powell in *Bakke* or under the factors that this Court has considered important to the narrow-tailoring inquiry. The preferences, with their focus on enrolling "meaningful numbers" (or a "critical mass") of the specified minority students, amount to the functional equivalent of a quota. This is certainly so even if there is not a "fixed" number that the Law School seeks to enroll. The fact that the attainment or loss of "critical mass" can be measured with respect to numbers is a clear indication that a quota system is in use. Moreover, the enormous size of the preference is what creates the "two-track" or "dual" admissions system that enables the Law School to achieve its quota. It is a quota that cannot be said to be narrowly tailored to any objective other than achieving the kind of racial balance that the Law School desires. It is a quota that has no end in sight, unless this Court puts an end to it.

The district court heard the evidence and made the findings that support the legal conclusions establishing the Law School's violations of the constitutional and statutory rights at issue. The court of appeals erred in reviewing the factual findings under a *de novo* standard, instead of the proper clearly-erroneous standard, and it reached the wrong legal conclusions in reversing the district court's conclusions of law.

ARGUMENT

> We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no state has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.[12]

Fifty years after petitioners in another case addressed this Court with the foregoing argument, petitioner Barbara Grutter asks the Court to again vindicate the same principle. No value is more central to the principles of the Nation's founding[13] than the one that was incorporated into the Constitution through the Equal Protection Clause of the Fourteenth Amendment, the "core purpose" of which is "to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). To be sure, the solemn promise of equality held out by the Fourteenth Amendment is one that has not always been honored.[14] But just as assuredly, there is today a

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[12] Opening argument of Robert L. Carter, attorney for petitioners in *Brown v. Board of Education*, 347 U.S. 483 (1954) (December 9, 1952 oral argument), *quoted in* 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT 281 (Philip B. Kurland & Gerhard Casper eds. 1975).

[13] *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("We hold these Truths to be self-evident – that all Men are created equal . . . "). *See also* Abraham Lincoln, letter dated April 6, 1859, *in* III THE COLLECTED WORKS OF ABRAHAM LINCOLN [hereinafter "COLLECTED WORKS"] 376 (Rutgers Univ. 1953) (referring to the principle of equality in the Declaration of Independence as "an abstract truth, applicable to all men and all times . . . to-day, and in all coming days . . . a rebuke and a stumbling-block to the very harbingers of re-appearing tyranny and oppression").

[14] *See* Abraham Lincoln, letter dated April 6, 1859, *in* III COLLECTED WORKS 375 ("The principles of Jefferson are the definitions and axioms of free society. And yet they are denied, and evaded, with no small show of success."). Abraham Lincoln, Seventh "Lincoln-Douglas" Debate, October 15, 1858, *in* III COLLECTED WORKS 301 (signers of Declaration of Independence "meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for society, which should be familiar to all; constantly looked to, constantly

consensus that the Nation's greatness can be measured in substantial part by the steps it has taken towards enforcing the promise of equality, while the most lamentable episodes and eras in our history are just so precisely because they mark denials of that promise.

The Law School's use of race and ethnicity to classify and prefer individuals one over another based on those characteristics is a fundamental departure from the guarantee of governmental nondiscrimination. The justification put forth by the Law School for this unequal treatment is, moreover, not one based on ensuring equality through temporary measures taken to remedy past or present identified violations of the guarantee. Instead, the Law School stakes out as a reason to tolerate its racial preferences an expansive and indeterminate interest in student-body "diversity," for which the *sine qua non* is the consideration of race by itself as a reason for the different treatment of applicants in the admissions process. It is an interest with no temporal limits and with at least as many varied possibilities and standards of application as there are institutions to define it or racial and ethnic identities with which to achieve it. Its acceptance as a compelling interest would fundamentally and forever change the meaning of equality under the law in our Nation.

I. The Law School's Use of Racial Preferences in Student Admissions Violates the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 2000d (Title VI), and 42 U.S.C. § 1981.

A. The Law School's Racial Preferences Must be Subjected to "Strict Scrutiny."

Because state-sponsored racial classifications are antithetical to the Fourteenth Amendment, all such classifications are "suspect" and must be subjected to

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labored for, and even though never perfectly attained, constantly approximated, and therefore constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere").

"strict scrutiny." That is, the racial classification must be motivated by a "compelling governmental interest," and the means employed must be "narrowly tailored" to achieve that interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-511 (1989). The Law School has a "heavy burden" of justification for its racial preferences. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282 n.10 (1986) (plurality opinion). The Court has held that the prohibitions of Title VI, 42 U.S.C. § 2000d, are co-extensive with those of the Equal Protection Clause, *see, e.g., Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001), so the same strict-scrutiny analysis applies to those claims.

It is now firmly established that the standard of review under the Constitution does not vary based on the race of the group benefited by the classification or on a determination that the classification at issue is "benign." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); *J.A. Croson Co.*, 488 U.S. at 494 ("We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.") (opinion of O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.); *id.* at 520 (opinion of Scalia, J., concurring in the judgment).

Accordingly, the Law School's explicit use of race as a factor in making student admissions decisions is constitutionally suspect. For the reasons discussed below, the Law School's racial preferences are neither supported by a compelling interest nor narrowly tailored to achieve such an interest and therefore violate the Fourteenth Amendment and Title VI.

B. The Law School's Racial Preferences Are Not Supported by a Compelling Governmental Interest.

1. The Law School's Racial Preferences Cannot Be Justified by Interests in "Academic Freedom" or "Diversity."

a. This Court has thus far endorsed only one sufficiently compelling justification for racial classifications: remedying the effects of past or present identified discrimination. *J.A. Croson Co.*, 488 U.S. at 493 ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.") (opinion of O'Connor, J., joined by Rehnquist, C.J., and White, Kennedy, JJ.); *id.* at 526 ("Nothing prevents [City of Richmond] from according a contracting preference to identified victims of discrimination.") (opinion of Scalia, J., concurring in the judgment).

The Court has made explicit that there must be a "strong basis in the evidence for [the government's] conclusion that remedial action" is necessary. *J.A. Croson Co.*, 488 U.S. at 510 (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)). It has rejected as compelling asserted interests that are "too amorphous" and "ill-defined," and that are "essentially limitless in scope and duration," with "no logical stopping point." *Id.* at 497-98 (quoting *Wygant*, 476 U.S. at 275-76).

The Law School does not justify its use of race as a factor in admissions on the basis of any past or present identified discrimination. To the contrary, it claims a long history of nondiscrimination: "The School, which has never excluded students on the grounds of race, admitted its first African American student . . . in 1868. . . . By 1894, the Law School had enrolled its first Mexican American students." App. 89. Instead, its only stated objective for the consideration of race is the achievement of "diversity" in

the student body. It argues that such an interest is constitutionally legitimate based on the lone opinion of Justice Powell in *Bakke*, together with a separate opinion in that case authored by Justice Brennan, which was joined by Justices White, Marshall, and Blackmun. A review of the various opinions in *Bakke* reveals, however, that no Justice other than Justice Powell accepted diversity as a legitimate rationale for justifying racial classifications.

In no case before or since *Bakke* has the Court held diversity to be a compelling interest sufficient to justify racial preferences. For the same or similar reasons that the Court has rejected other purposes as compelling, the diversity interest relied upon by the Law School is inherently unsuited to be a compelling interest. An interest in diversity is simply too indeterminate, open-ended, and unbounded by ascertainable standards. Its acceptance as a compelling interest would mark a sharp and lamentable departure from this Court's precedents by authorizing an interest that would – precisely because its attainment is not measured with respect to whether an identified "injury" has been "remedied" – become the Nation's first *permanent* justification for government-sponsored racial classifications.

b. The University of California at Davis' "special admissions program" reserved 16% of the spaces in the entering medical school class for educationally or economically disadvantaged students from members of four specified racial minority groups: "Blacks," "Chicanos," "Asians," and "American Indians." *Bakke*, 438 U.S. at 275. The reserved spaces were available only to academically "qualified" students, and most minority applicants considered under the program were rejected. *Id*. at 288 n.26. The program was "flexible" insofar as there was no "floor" or "ceiling" on the total number of minority applicants to be admitted. *Id.*

Five Justices, including Justice Powell, voted to strike down the Davis "special admissions program." Four of those Justices did not reach the constitutional issue, as they concluded that the admissions policy violated the

prohibitions contained in 42 U.S.C. § 2000d (Title VI). *Id*. at 421 (opinion of Stevens, J., joined by Burger, C.J., Stewart, and Rehnquist, JJ.). Justice Powell concluded that the Davis program violated the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 320 (opinion of Powell, J.).

Another group of five Justices, also including Justice Powell, reversed the judgment of the California Supreme Court, which had enjoined Davis from using race as a factor in admissions under any circumstances. *Id*.; *id*. at 326 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.). No common theory, though, explained why the injunction should be vacated.

Justice Powell applied strict scrutiny in analyzing the Davis program. *Id*. at 290-91 (opinion of Powell, J.). He then considered four objectives offered by Davis in justification of the program. He rejected the first three as insufficient to justify the racial preferences.[15] *Id*. at 306-311. The fourth asserted objective – "attainment of a diverse student body" – is the one that Justice Powell did accept as constitutionally permissible. *Id*. at 311-12. Justice Powell's acceptance of the diversity interest as a compelling one was derived from his conclusions about the First Amendment right of "academic freedom" possessed by institutions of higher education, including the "freedom of a university to make its own judgments as to . . . the selection of its student body." *Id*. at 312. Justice Powell concluded that in arguing that universities had the right to "select those students who will contribute the most to the 'robust exchange of ideas,'" Davis had invoked a "countervailing constitutional interest, that of the First Amendment." *Id*. at 313 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

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[15] These were (1) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (2) countering the effects of societal discrimination; and (3) increasing the number of physicians who will practice in underserved communities. *Bakke*, 438 U.S. at 306 (opinion of Powell, J.).

Justice Powell voted to invalidate the Davis program, despite his acceptance of diversity as a compelling state interest. In this portion of his opinion (Part V-A and Part V-B), he prescribes his framework for the proper consideration of race, including limitations on its use. *Id*. at 315-20. In seeking to define the diversity interest that he considered a compelling state interest, Justice Powell distinguished it from something else: "It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students." *Id*. at 315. He concluded that the Davis program, "focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Id*. at 315. Nor could it be saved by replacing the "two-track" system with even more tracks for additional categories of students. *Id.*

Instead, Justice Powell pointed favorably to the example offered by the "Harvard College program," in which "the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on the farm may tip the balance in other candidates' cases." *Id*. at 316 (quoting from description of Harvard College program contained in Brief *Amicus Curiae* of Harvard University, *et al.*). He described the Harvard admissions program as one in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id*. at 317. In the system envisioned by Justice Powell, qualifications among applicants would be "weighed fairly and competitively." *Id.* at 318.

Justice Brennan and the Justices who joined his opinion in *Bakke* seemingly rejected "strict scrutiny" as the appropriate standard of review for considering the lawfulness of the Davis program. *Id*. at 357 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.) (noting that "whites as a class [do not have] any of the 'traditional indicia of suspectness' "); *id*. at 357-58 (purposes of the Davis program do not stigmatize). Instead,

they borrowed a scrutiny level from gender-discrimination cases that they characterized as "strict and searching." *Id*. at 362. Under this standard, "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Id*. at 359.

Justice Brennan found that Davis' "articulated purpose of remedying the effects of past societal discrimination" was "sufficiently important to justify the use of race conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school." *Id*. at 362. He also concluded that the means employed by Davis were appropriate:

> [T]he Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program. . . . [S]pecific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great.

Id. at 377-78. *See also id.* at 275 n.4 (opinion of Powell, J.) (noting the admissions chairman would confirm "disadvantage" of individual applicants).

In defending the Davis program against some of the arguments contained in Justice Powell's opinion, Justice Brennan also explained why there was no meaningful or constitutional difference between a program that "set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of

disadvantaged minority applicants." *Id*. at 378 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.); *id.* ("There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admission rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.").

c. It is readily apparent from a review of the various opinions in *Bakke* that Justice Powell's articulation of the "academic freedom" or "diversity" interests as compelling state interests did not constitute a rationale for the holding of the Court. Among the five Justices who reached the constitutional question and reversed the state court injunction forbidding "any consideration" of race in the admissions process, *id*. at 320 (opinion of Powell, J.), *only* Justice Powell identified academic freedom and the achievement of diversity as purposes that could constitutionally justify the use of race as a factor in admissions. Justice Brennan and those Justices who joined his opinion (and who also wrote separate opinions) did not adopt or endorse the academic freedom or diversity rationales. Indeed, their only reference to the "Harvard program" discussed in Justice Powell's opinion is in a context that identifies only the very different remedial rationale approved in Justice Brennan's opinion: "We also agree with Mr. Justice Powell that a plan like the 'Harvard' plan . . . is constitutional under our approach, *at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination*." *Id*. at 326 n.1 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.) (emphasis added).[16]

[16] The Sixth Circuit's reading of the quoted language to render it essentially meaningless, *see* Pet App. 18a-19a & n.8, is illogical and unpersuasive for the reasons stated in Judge Boggs' dissent. *Id*. at 100a n.6 (Boggs, J., dissenting). *See also Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1248 (11th Cir. 2001) (citing the same quoted language as indicating a remedial limitation on Justice Brennan's support

Justice Brennan did seek to characterize the "central meaning" of the decisions in *Bakke,* but his synthesis of his opinion and Justice Powell's said nothing about "diversity":

> Government may take race into account when it acts not to demean or insult any racial group, but to *remedy disadvantages* cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Id. at 325 (emphasis added). Thus, whether or not viewed as having "implicitly rejected" Justice Powell's diversity rationale, *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), Justice Brennan's opinion contains no affirmative indication of support for the proposition that diversity is a compelling interest. *See* Pet. App. 100a-01a & n.6 (Boggs, J., dissenting); *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1247-48 (11th Cir. 2001).

In the lower courts, the Law School has repeatedly seized on the point that Part V-C of Justice Powell's opinion was joined by Justices Brennan, White, Marshall, and Blackmun. But, Part V-C of Justice Powell's opinion says nothing about justifying racial preferences on grounds of diversity or academic freedom, or for that matter, on any ground. In stating that a constitutional admissions program must be "properly devised," *Bakke*, 438 U.S. at 320 (opinion of Powell, J.), this part of the opinion states a mere tautology; it avoids stating for what *purposes* a university may consider race in the admissions process. That unanswered question is, of course, a critical one because the government must have a compelling purpose to engage in any use of racial preferences. Moreover, the language in Part V-C about the "competitive consideration" of race is addressed only to *means.* If

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of the "Harvard plan"). If Justice Brennan had wanted to endorse the "Harvard plan" touted by Justice Powell, he could have done so easily by ending the quoted sentence with the word "approach."

competitiveness were a sufficient basis for considering race in admissions, it could be so in a system designed to remedy the lingering effects of societal discrimination, to provide role models to minority students, or to meet an endless list of other objectives having nothing to do with diversity. Accordingly, this argument of the Law School is plainly incapable of demonstrating that Justice Powell's articulation of the academic freedom and diversity rationales constituted a rationale for the holding of the Court.

The Sixth Circuit's determination, *see* Pet. App. 12a-17a, that diversity is a compelling interest on the basis of application of the analytical framework approved in *Marks v. United States*, 430 U.S. 188 (1977), is untenable. *See* Pet. App. 94a-108a (Boggs, J., dissenting) (rejecting on several grounds the majority's analysis under *Marks*); *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d at 1247-49 (also rejecting argument that Justice Powell's diversity rationale is narrower than Justice Brennan's, and therefore controlling under *Marks*). The characterization of Justice Powell's "strict scrutiny" standard of review as "narrower" than the "intermediate" standard approved by Justice Brennan, *id*. at 15a-16a, answers nothing about the *purposes* for which race may be considered in admissions; an invalid purpose will not survive review even under the lesser standard of review. *See* Pet. App. 97a-98a (Boggs, J., dissenting).

All the members of this Court have acknowledged the fractured nature of the *Bakke* opinions. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 218 (1995) ("*Bakke* did not produce an opinion for the Court."); *Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001) (Stevens, J., dissenting, joined by Souter, Breyer, and Ginsburg, JJ.). Ultimately, given the very different nature of the diversity and remedial rationales and the disagreement and division in the lower courts as to how to interpret the conflicting opinions, what the Court said in another case concerning *Marks* is just as true here:

> We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts

> that have considered it. This degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision.

Nichols v. United States, 511 U.S. 738, 745-46 (1994) (discussing Court's prior decision and various opinions in *Baldasar v. Illinois*, 446 U.S. 222 (1980)).

d. The Sixth Circuit's majority opinion upheld diversity as a compelling interest solely based on its determination that it was "bound" by Justice Powell's opinion with respect to that issue. Pet. App. 17a. But because the opinions in *Bakke* leave unanswered the question of whether interests in academic freedom or diversity are compelling state interests justifying racial preferences in admissions, resolution of the issue must lie elsewhere. The Court has not before or since *Bakke* directly addressed whether these interests are compelling. But the Court's precedents have established a helpful framework within which to judge whether any interest is sufficiently compelling to support the use of racial classifications. These cases and the modes of analyses they develop demonstrate that the interests asserted by the Law School in support of its racial preferences are not compelling grounds for departing from the Constitution's guarantee against governmental discrimination on the invidious basis of race and ethnicity.

Although Justice Powell derived his lone analysis for the compelling nature of diversity from First Amendment principles, the Court has never recognized academic freedom specifically, or First Amendment principles generally, as justifications for government-sponsored race discrimination. The Court has declined to find a "right" to practice race discrimination based in the First Amendment. In *Runyon v. McCrary*, 427 U.S. 160 (1976), a private school that promoted the desirability of racial segregation asserted parental First Amendment rights of freedom of association to justify the school's racially discriminatory admissions practices. Holding that the school had violated one of the same federal civil rights statutes at issue in this case, 42 U.S.C. § 1981, the Court

rejected the argument that the school had a First Amendment right to discriminate. *Runyon*, 427 U.S. at 176 (noting that although "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, . . . it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle").

It would be a surprising and anomalous turn of events if practices of private parties which are not protected by the First Amendment are now to be permitted on First Amendment grounds to state actors, to which the Fourteenth Amendment's powerful command of nondiscrimination is expressly directed. Such a distinction cannot plausibly be based on a difference in kind of First Amendment rights asserted. Whatever status "academic freedom" has under the First Amendment, neither the Court's precedents nor history supports a conclusion that it is a right with greater or more paramount scope than other First Amendment rights.

Unhinged from any purported constitutional foundation, the Law School's assertion that diversity is a compelling state interest falls away readily in light of the Court's other precedents. This becomes apparent by comparing the Law School's articulated diversity interest to the one interest that the Court has held to be compelling – remedying past or present identified statutory or constitutional violations of the guarantee of equality. The nature of the two interests is very different, and these differences prove decisively the wisdom of rejecting diversity as a compelling interest. A remedy for identified instances of discrimination is inextricably tethered to the purposes of the nondiscrimination guarantee; it seeks to repair the injury and restore the promise of equality broken by the effects of the violation. In its invocation and use, the "deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *J.A. Croson Co.*, 488 U.S. at 510. Precisely because such an interest is based on *injury* to the equality principle, identified with *specificity*, this kind of

remedial interest is one suited to withstanding "the detailed judicial inquiry" to which all racial classifications must be subjected. *Adarand Constructors, Inc.*, 515 U.S. at 227. Such a clearly identified remedial goal permits guidance in determining the "precise scope of the injury" and the "extent of the remedy necessary to cure its effects." *J.A. Croson Co.*, 488 U.S. at 498, 510. Absent these attributes, an interest could be used to "justify a preference of any size or duration." *Id*. at 505. Without adherence to these standards, moreover, there is a "danger" that racial classifications will be "merely the product of unthinking stereotypes or a form of racial politics." *Id*. at 510.

An interest could hardly be less suited to the standards laid down by the Court than the diversity interest articulated by the Law School. The concept of "diversity" is itself notoriously ill-defined,[17] and the Law School's defense in this case only illustrates the point. It defines the diversity that it seeks as enrollment of a "critical mass" of students from racial and ethnic groups that have been "historically discriminated against," including the groups specified in the Policy. App. 120. The "mass" reaches the stage of "critical" when it produces the educational benefits claimed by the Law School to flow from it. The point at which this "critical mass" is reached can best be described as a matter for mystical and metaphysical inquiry. On the one hand, the Law School vehemently denies that "critical mass" can be defined with reference to a number or range of numbers of enrolled students, while on the other hand it contends that "critical mass" means the *same thing* as "meaningful numbers" of enrolled students from the specified racial and ethnic minority groups. *Id.*; Pet. Opp. 3. A rare point of clarity, though, is that however defined, the Law

[17] *See*, *e.g.*, *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 356 (D.C. Cir. 1998) (noting "just how much burden the term 'diversity' has been asked to bear in the latter part of the 20th century in the United States"; "[i]t appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ('affirmative action' has only a temporary remedial connotation) and as a synonym for proportional representation itself").

School claims for itself and other educational institutions the unique ability (and hence the right) to determine which particular racial and ethnic minorities are necessary for achievement of "critical mass," and at what point that "critical mass" is reached. The complete absence of objective, ascertainable standards means that "critical mass," *i.e.*, "diversity," can mean as many different things as there are racial and ethnic groups and institutions of higher education in this country.

The Law School has chosen its preferred groups on the basis that they have been "historically discriminated against." App. 120. If recognized as a compelling interest, the diversity that another school pursues might well be based on some other reason for the racial or ethnic classifications, or on a different identification of "historically discriminated against" groups. To recognize such a basis as sufficient for justifying racial classifications would "open the door to competing claims" for "every disadvantaged group." *J.A. Croson Co.*, 488 U.S. at 505; *id.* at 511 ("[O]ur history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members.") (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting)). The Law School's commitment with "special reference," App. 120, to members from the "historically discriminated against" groups also shows how transparently the diversity interest can substitute for one based on remedying the effects of societal discrimination.

To hold that diversity constitutes a compelling interest justifying racial preferences would bring to pass something in the higher education community similar to what Justice Powell warned of generally with respect to preferences designed to remedy societal discrimination. It would "convert a remedy heretofore reserved for violations of legal rights into a privilege" that all educational institutions "throughout the Nation could grant at their pleasure to whatever groups are perceived" to contribute to the diversity of the student body. *Bakke*, 438 U.S. at 310 (opinion of Powell, J.). It will have "loosed a potentially

far-reaching principle disturbingly at odds with our traditional equal protection doctrine." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 613 (1990) (O'Connor, J., dissenting). *See also* Pet. App. 128a-29a (Boggs, J., dissenting) ("There is no limiting principle preventing the Law School from employing ethnic or religious preferences to arrange its student body by critical mass. In short, the compelling state interest of developing a diverse student body would justify an infinite amount of engineering with respect to every racial, ethnic, and religious class.").

Accordingly, an interest in diversity is as "ill-defined" and "amorphous" as a goal of remedying societal discrimination or providing role models to minority children. *J.A. Croson Co.*, 488 U.S. at 498; *id*. at 497 (opinion of O'Connor, J.) (quoting *Wygant*, 476 U.S. at 276 (plurality opinion)). Having "no relation to some basis for believing a constitutional or statutory violation ha[s] occurred," the diversity rationale could be used to justify race-based decisionmaking "essentially limitless in scope and duration." *Id*. Because the nature of the interest is one in which success in achieving it is measured not by remedying past identified injury, but instead by ensuring against "underrepresentation" going forward, it is an interest that could justify preferences "timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276 (plurality opinion). Its adoption as a compelling interest would give the Nation its first *permanent* justification for racial preferences, and one that is indistinguishable from simple racial balancing.

e. Judge Clay's concurring opinion cited to empirical evidence in support of its conclusion that diversity was a compelling interest. Pet. App. 54a-63a. As an initial matter, the district court did not try the issue of whether diversity was a compelling interest because it concluded that the issue was one of law (as the parties also contended). The principal evidence relied upon by the concurrence is the report of the Law School's expert witness, Patricia Gurin, who did not testify at trial; her report was received by the Court only in the course of motions for summary judgment. There are many reasons why Gurin's report and opinions are wholly deficient to support a

conclusion that diversity is a compelling interest. These reasons were argued to the district court, and a number of them are explained in Judge Boggs' dissenting opinion. Pet. App. 146a-49a (Boggs, J., dissenting). Among other things, Gurin's studies did not measure how much diversity is required to yield the claimed educational benefits, or what marginal benefits accrue from relative levels of diversity. *Id*. at 147a-49a. Astoundingly, Gurin did not even attempt to correlate the racial and ethnic diversity with the claimed educational benefits. *Id*. at 148a. The study is indeed one with "profound empirical and methodological defects." *Id*. at 147a.

Moreover, whether diversity actually produces educational benefits is a question entirely distinct from whether it is a *compelling interest* sufficient to support racial preferences in admissions. Few would gainsay that remedying the lingering effects of societal discrimination or providing role models to school children would produce positive benefits. Indeed, the role model theory in particular is designed to produce *educational benefits* for children. But as important and valuable as those interests are, they cannot be, for reasons explained by the Court, *compelling interests* justifying state-sponsored racial preferences. Because similar reasoning applies to the amorphous, boundless diversity rationale, it is a *non sequitur* for the Law School to argue that mere evidence of some educational benefit makes the interest a compelling one.

Moreover, if strict scrutiny is to have meaning, it should be incumbent on the Law School to demonstrate that it has a "strong basis in evidence," *J.A. Croson Co.*, 488 U.S. at 510 (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)), for concluding that racial preferences are necessary to achieve the interest considered compelling. At a minimum, this should mean that there is a firm basis for concluding that the "*marginal* benefits gained from employing the racial classification over the next efficacious race-neutral alternative are *themselves* compelling." Pet. App. 153a (Boggs, J., dissenting). It should also require a demonstration that the benefits produced substantially outweigh the harms that racial preferences necessarily

entail, including the fostering of stereotypes, stigma, and injury to the personal rights of innocent individuals displaced by the preferences. The Law School has not attempted, much less succeeded, in making such showings.

2. The Interests Proffered by the Intervenors Cannot Justify the Law School's Racial Preferences.

The intervenors have sought to justify the Law School's racial preferences on the additional grounds that they are necessary to achieve "integration" in higher education and to "offset" what the intervenors perceive to be racial bias and discrimination in academic criteria, particularly grades and standardized test scores. Pet. Res. 23-30. Although the court of appeals' majority found it unnecessary to address these arguments because of its holding with respect to the diversity rationale, they should be rejected for the reasons contained in the district court's opinion. *See* Pet. App. 257a-92a.

A sufficient reason for dismissing the intervenors' contentions is that the district court correctly found that the Law School indisputably was not motivated by the intervenors' asserted interests in adopting the racial preferences. *Id.* at 292a. Accordingly, under settled precedents of this Court, the intervenors' proposed interests cannot constitute compelling interests justifying racial preferences. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). *Cf. Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 & n.16 (1982) (gender discrimination); *United States v. Virginia*, 518 U.S. 515, 535-36 (1996) (gender discrimination).

On their merits, intervenors' proposed justifications are at war with the Court's precedents. They are thinly disguised (or undisguised) substitutes for rationales based on remedying the lingering effects of societal discrimination. Thus, the intervenors' characterization of an interest in "integration" should not be confused with an interest in remedying the effects of identified, intentional discrimination, of which there is no evidence in this case. Intervenors

submitted no evidence that the Law School used grades or test scores, for example, *because* of their adverse effect on minorities or in any other way *intentionally* discriminated against minorities. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (rules or practices with disproportionate impact are unconstitutional only if they can be traced to an unconstitutional purpose).

It is such discrimination, and not the use of any criteria with a disparate impact, that constitutes past, identified discrimination, the lingering effects of which can be remedied in extreme cases with the judicious use of a racial preference. *J.A. Croson Co.*, 488 U.S. at 509 (opinion of O'Connor, J.) ("In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 534 (7th Cir. 1997) (Posner, J.) (provision calling for certain percentage of hired teachers to be black or Hispanic could not be justified by statistical disparities or underrepresentation; "there is no finding that the school district has ever discriminated (by which we mean discriminated intentionally – the only kind of discrimination that violates the equal protection clause)"). In fact, intervenors' goal is nothing more than the promotion of outright racial balancing, which the Court has not countenanced. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a *constitutional* violation.") (emphasis added). *See also J.A. Croson Co.*, 488 U.S. at 507 (rejecting a means tied to "outright racial balancing").

C. The Law School's Preferences Are Not Narrowly Tailored.

Because an interest in diversity is inherently unsuited to "narrowly-tailored" means, it should hardly be surprising that the Law School's racial preferences, which it justifies solely on diversity grounds, are anything but

narrowly tailored. Even, however, if one operates from Justice Powell's premises about the viability of a "compelling" status for the diversity interest, the Law School's blunt use of race cannot remotely be considered narrowly tailored. This can be seen first by viewing the Law School's preferences in light of the opinions in *Bakke*, and second by considering the Law School's preferences under the traditional principles the Court has approved for narrow-tailoring analysis.

1.a. The race-based admissions program struck down in *Bakke* was at least limited to granting a preference to applicants who were also "economically and/or educationally disadvantaged." *Bakke,* 438 U.S. at 274-75 & n.6 (opinion of Powell, J.). The Davis program, moreover, did not "simply equate minority status with disadvantage." *Id*. at 374 & n.58 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.). *See also* discussion *supra* at 25. The Law School's racial preferences, however, are not even facially restricted to those individuals who demonstrate disadvantage of any kind, whether or not arising from discrimination. Because "*race matters*" in the judgment of the Law School, race *by itself* is a sufficient basis for a student to receive a preference if one belongs to a race that has been "historically discriminated against."[18] S*ee* Pet. Opp. 3. To the Law School, at least, it is "obvious that 'students from groups which have been historically discriminated against' have experiences that are integral to this mission, *regardless of whether they are rich or poor or 'victims' of discrimination." Id.* (quoting Law School Policy, App. 120) (emphasis added). This is a stark use of race, more so than was employed by the program that was *struck down* in *Bakke*. Indeed, the Law School's preferences do not pass muster under *any* of the rationales articulated in the various *Bakke* opinions. The irrelevance of individual disadvantage due to discrimination in the

[18] This point was illustrated by the admission of the Law School's counsel during oral argument in the Sixth Circuit that Ms. Grutter probably would have been admitted had she only been African American. Pet. App. 87a.

Law School's award of preferences is incompatible with the remedial interest approved in Justice Brennan's opinion. The unalloyed racial and ethnic character of the preferences is also equivalent to "[p]referring members of any one group for no other reason than race or ethnic origin" which Justice Powell condemned as "discrimination for its own sake." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

The way in which the Law School defines its interest in diversity proves how it is tied to crude stereotypes. It deems that *mere membership* in one of the specified racial or ethnic groups will make it "particularly likely" that students will have had "experiences and perspectives of special importance" to the Law School's "mission." App. 120. Thus, the Law School "impermissibly value[es] individuals because [it] presume[s] that persons think in a manner associated with their race." *Metro Broadcasting, Inc.*, 497 U.S. at 618 (O'Connor, J., dissenting). The "corollary to this notion is plain: Individuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity." *Id.* at 619.

b. In no meaningful sense can the Law School be said to "weigh fairly and competitively" the consideration of race and ethnicity in the admissions process. *Bakke*, 438 U.S. at 318 (opinion of Powell, J.). Applicants from the disfavored races certainly do not compete on the "same footing" as applicants from the preferred racial and ethnic groups. *Id.* at 317; Pet. App. 133a-34a (Boggs, J., dissenting) ("Far from receiving 'competitive consideration,' majority applicants are all but summarily rejected with credentials, but not ethnicity, identical to their under-represented minority 'competitors' who are virtually guaranteed admission."). These failings in the Law School's preferences are fatal under Justice Powell's analysis and are shown with abundance in the trial record. The court of appeals, however, did not evaluate the district court's findings and the statistical evidence on the size of the racial preference.

The Law School's own admissions data and witnesses demonstrate the "staggering magnitude" of its racial

preferences. *Id.* at 89a (Boggs, J., dissenting). Formal statistical evidence, such as that provided by Professor Larntz, is helpful. But the importance of race and ethnicity in the admissions process can be grasped with a glance at comparisons of admissions outcomes across racial lines for students applying with comparable undergraduate grades and LSAT scores. The "grids," such as those produced by the Law School itself in 1995, which Dr. Larntz replicated for all the years at issue, paint a devastating picture. *See* discussion *supra* at 5-7; App. 127-203. In cell after cell, and year after year, one can actually "see" the colossal importance of race in admissions decisionmaking. The usefulness of gauging the size of the preference by looking to the grids was admitted by respondent and former Law School Admissions Dean, Dennis Shields. He was asked, for example, about the 1995 grids comparing African American to Caucasian applicants:

> Q. Would it be fair to assume . . . the average here, the difference in terms of decisionmaking with respect to African Americans in these cells and Caucasians can generally be explained by the extent to which race is taken into account in the admissions process?
>
> A. Generally, yes.

Record 334, 4 Tr. 213-15. The same inference can be drawn from a review of the grids for all years, which demonstrates that disadvantage on the basis of race works not only against Caucasian Americans, but also against other groups, including minority groups historically discriminated against, especially Asian Americans. The massive size of the preference can also be observed by comparing median grade point averages and test scores across racial and ethnic lines, Pet. App. 312a-11a; the probability rates of admission as a function of race and "selection index," *see* discussion *supra* at 8; Pet. App. 312a-19a; and the often astronomically different relative odds of admission among the different races and ethnicities when controlling for grades, test scores, plus other factors. *See* discussion *supra* at 8-10. *See also* Pet. App. 131a-40a (Boggs, J., dissenting) (discussing the "magnitude" of the Law School's racial

preferences). Statistical evidence serves a useful purpose in discrimination cases. *See*, *e.g.*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The statistical evidence presented in this case is certainly sufficient under the case law to support the district court's finding of discrimination. *See*, *e.g.*, *id.*; *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977).

The grids and statistics merely confirm that the Law School has implemented its written admissions policy of placing great importance on grades and test scores generally, while pursuing a "commitment to racial and ethnic diversity" that entails admitting students from the specified racial and ethnic minority groups whose grades and test scores ("selection index") are "relatively far" from those of the "overwhelming bulk of students admitted." App. 115-16, 118. It is a commitment to a race-based double standard in admissions. The point was made effectively by Dean Shields:

> Q. And in order to achieve that critical mass of minority students the practice was and the policy called for, a willingness to admit minority students from generally lower academic qualifications [than] majority students, isn't that a fair statement?
>
> A. I think that's a fair statement.

Record 334, 4 Tr. 206. *See also* Pet. App. 135a (Boggs, J., dissenting) (Law School's "two steep cliffs in the admissions rate, one for under-represented minority applicants and one for majority applicants, demonstrate that the Law School maintains a 'two-track,' indeed separated, system for admissions.") *id*. at 173a-74a (Gilman, J., dissenting) ("I believe that the Law School's pursuit of a critical mass of minority students has led to the creation of a two-track admissions system, not only in the sense that a minimum percentage of seats is set aside for under-represented minorities, but also because the Law School gives grossly disproportionate weight to race and ethnicity in order to achieve this critical mass.").

c. The Law School's "critical mass," a concept it reserves for students from the "historically discriminated

against" racial and ethnic groups is, as the district court found, "practically indistinguishable from a quota system." *Id*. at 248a-49a. The fact that it does not set aside each year a "fixed" number of spaces in the class does not make it any less a quota-based system. Pet. App. 130a (Boggs, J., dissenting) ("For the majority, the inquiry into narrow tailoring begins and ends with a determination that the Law School neither 'sets aside' an exact number of seats for racial or ethnic minorities nor admits minorities with a specific quota of admittees in mind."). Justice Powell made clear that a university could not constitutionally maintain the "functional equivalent of a quota." *Bakke*, 438 U.S. at 318 (opinion of Powell, J.). As Judge Boggs noted, the fact that the quota is a "range rather than one specific number certainly does not insulate a program from constitutional scrutiny," and it is implausible that the Davis program would have survived if only it had reserved a *range* of seats rather than a specified number. Pet. App. 143a (Boggs, J., dissenting). *See also DeFunis v. Odegaard*, 416 U.S. 312, 332-33 (1974) (Douglas, J., dissenting) (where law school had target of 15% to 20% minority applicants, "[w]ithout becoming embroiled in a semantic debate over whether this practice constitutes a 'quota,' it is clear that, given the limitation on the total number of applicants that could be accepted, this policy did reduce the total number of places for which DeFunis could compete – solely on account of his race").

Here, the district court found that the Law School's conception of "critical mass" was to ensure enrollment of a minimum of 10-12% of the class from the specified minority groups, with a range of enrollment between 10-17%. Pet. App. 225a, 248a. The finding has ample support in the record. First, although evasive, the Law School does acknowledge that "critical mass" means the same thing as "meaningful numbers" of students from the preferred minority groups. It reports that it has been able to achieve critical mass with its Policy, so that by looking at the admissions data, one can observe what numbers define critical mass. Even with some variations, the numbers demonstrate a remarkable stability, at least as stable as

the numbers for enrollment of all students across the years. Pet. App. 141a-44a (Boggs, J., dissenting). The range as shown by the data is also consistent with the testimony of the chairman of the committee that adopted the Policy, who defined critical mass as a range between 11-17%. *See* discussion *supra* at 4-5. The district court's findings on the issue certainly cannot be said to be clearly erroneous. *See* Pet. App. 144a (Boggs, J., dissenting) ("The combination of the Law School's thinly veiled references to such a target, its 'critical mass,' and relatively consistent results in achieving a particular enrollment percentage, should convince us that the Law School's admissions scheme is functionally, and even nominally, indistinguishable from a quota system."); *id.* at 173a (Gilman, J., dissenting) (noting that "the 'critical mass' of minority students that [the Law School] seeks to enroll is functionally indistinguishable from a quota").

2. The traditional factors cited by this Court for conducting a narrow-tailoring analysis yield the same conclusion that the Law School's racial preferences cannot plausibly be considered to pass the test. *See, e.g.*, *United States v. Paradise*, 480 U.S. 149, 183, 185 (1987). First, the preference regime is, as noted above, inherently a permanent one; the Law School has placed no durational limits on its use of the preferences. Pet. App. 247a-48a. This conflicts with the importance that the Court has placed on the temporary nature of such preferences. *See, e.g., Adarand Constructors, Inc*., 515 U.S. at 238; *J.A. Croson Co.*, 488 U.S. at 510. Indeed, in the intervening years since *Bakke* was decided, it has become abundantly clear that a program of racial and ethnic preferences designed to achieve "diversity" certainly does not contain "the seed of its own termination." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 595 (1990). The preferences, like the interest on which they are founded, are "permanent and ongoing" and live on "perpetually." *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 823-24 (E.D. Mich. 2000), *cert. granted*, 123 U.S. 602 (2002).

Second, the relationship of means to ends is a poor one if the Law School's genuine interest is either intellectual

or even racial and ethnic diversity. As the district court noted, "there is no logical basis" for the Law School's choice of the "particular racial groups which receive special attention under the current admissions policy." Pet. App. 249a. Thus, the preferences extend to Puerto Ricans born on the United States mainland, but not those born in Puerto Rico. *Id*. at 249a-50a. The Law School's bulletin singles out Mexican Americans rather than other Hispanics as receiving "special attention" in the admissions process, and the admissions data confirms the differences in treatment for those two groups. *Id*. Caucasian Americans and Asian Americans are treated as undifferentiated masses, receiving no preference for race or ethnicity, even though one could easily identify dozens of separate racial or ethnic groups contained in those broad categories. The Law School's daily tracking of the race and ethnicity of its applicants entirely omits many racial and ethnic groups, including, for example, Arab Americans, who receive no preferential treatment. Pet. App. 250a; Record 346, Tr.Exhs. 10-12, Cir. App. 4605-46.

It is no answer to the haphazard manner of conferring preferences that the Law School has singled out groups that have been "historically discriminated against." App. 120. The preferences are both overinclusive and underinclusive, and hence there is no close "fit" of means to ends. *J.A. Croson Co.*, 488 U.S. at 493 (opinion of O'Connor, J.). As discussed above, *see supra* at 37-38, the preferences to the specified groups are given without regard to whether a student is "rich" or "poor" or the victim of discrimination. Pet. Opp. 3. At the same time, students who have actually been subject to discrimination, but who belong to racial and ethnic groups not preferred by the Law School, receive no preference for their race or ethnicity. Pet. App. 250a. The preferences are also the product of impermissible stereotyping, since the Law School simply assumes (indeed, believes it to be "obvious," Pet. Opp. 3) that membership in a particular racial or ethnic group will make it likely that a student will bring with him or her the experiences that the Law School associates with that group and that it considers "essential to its mission." App. 120. "The

chosen means, resting as they do on stereotyping and so indirectly furthering the asserted end, could not plausibly be deemed narrowly tailored." *Metro Broadcasting, Inc.,* 497 U.S. at 617 (opinion of O'Connor, J., dissenting).

Third, the Law School's quota, or "critical mass," is one that "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *J.A. Croson Co.*, 488 U.S. at 507; Pet. App. 151a (Boggs, J., dissenting) (noting that "some measure of rough proportionality inevitably creeps in as the measure of what is the 'critical mass' "). This follows from the arbitrariness both of the choice of minority groups for inclusion and the numerical range shown to represent what the Law School means by "meaningful numbers."

Finally, less restrictive means are surely available to achieve the kind of educational benefits that the Law School associates with racial and ethnic diversity, including race-neutral alternatives. If the outlooks and experiences of students from the designated minority groups are indeed what the Law School seeks to bring to the learning process, then the logical and narrowly-tailored means of achieving the end would be to actually look for such "academic" or "experiential" diversity in the admissions process, rather than using race and ethnicity as a proxy. Pet. App. 155a-56a (Boggs, J., dissenting) (noting that "it is more likely that the Law School's preference for certain races is an *interest in race itself*") (emphasis in original). Instead, as the district court correctly found, the Law School failed to consider race-neutral alternatives prior to implementing its racial preferences, and this failure "militates against a finding of narrow tailoring." Pet. App. 251a. *See also J.A. Croson Co.*, 488 U.S. at 507.

D. The Law School's Preferences Violate 42 U.S.C. § 1981.

Petitioner's proof that the Law School has engaged in intentional discrimination also establishes a violation of 42 U.S.C. § 1981. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 383-91 (1982). Although its

text, written in the aftermath of the Civil War, suggests that only non-whites are its intended beneficiaries, the Court has held that the statute prohibits discrimination against whites to the same extent as others. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96 (1976). Under § 1981(c), the statute's substantive rights are protected from impairment under color of state authority.

A contract for educational services is a "contract" for purposes of § 1981. *Runyon v. McCrary*, 427 U.S. 160, 172 (1976). The racial discrimination practiced by the Law School in admissions is a "classic violation of § 1981." *Id*. The Law School does not offer admission on an "equal basis" to members of all races. *Id*. On the contrary, as the district court found and the foregoing discussion elaborates, the Law School applies different standards in admission based on race and ethnicity.

Section 1981 contains no exceptions to its rule of nondiscrimination. It does not provide, for example, that claimed interests in "diversity" or "academic freedom" excuse unequal treatment on the basis of race under the statute. Indeed, the Court has specifically rejected a number of asserted defenses to the statute based on the exercise of constitutional rights. *Id.* at 175-79 (rejecting defenses based on the First Amendment rights of freedom of association, parental rights under the Due Process Clause of the Fourteenth Amendment, and the right of privacy). *See also* discussion *supra* at 29-30.

II. The Court of Appeals Should Have Reviewed and Affirmed the District Court's Findings Under the "Clearly Erroneous" Standard of Review and Should Not Have Reviewed the Findings *De Novo*.

The Sixth Circuit reviewed all findings of fact of the lower court *de novo*. Pet. App. 9a. Federal Rule of Civil Procedure 52(a) provides, however, that "[f]indings of fact shall not be set aside unless clearly erroneous." Under this standard, the court of appeals' review should be limited to

determining whether there were "two permissible views of the evidence," in which case "the factfinder's choice between them cannot be clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985)). It is extraordinary that the court of appeals disregarded this rule and substituted its fact findings for those of the district court. It did so with little explanation, simply citing to two of its own precedents for the proposition that the "appellate court should conduct an independent review of the record when constitutional facts are at issue." Pet. App. 9a (citing *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir. 1997), and *Johnson v. Economic Dev. Corp.*, 241 F.3d 501, 509 (6th Cir. 2001)).

The Sixth Circuit's proposition appears to be drawn from a line of First Amendment defamation cases, beginning with *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Those cases "turn on the Court's determination that findings of voluntariness or actual malice involve legal, as well as factual, elements." *Hernandez*, 500 U.S. at 367. They have "no relevance" to a case such as this one, involving claims of discrimination. *Id.* (rejecting argument that *Bose* and its progeny should be applied to alter the clearly-erroneous standard of review for claims of equal protection violations). Indeed, the Court has consistently held that the clearly-erroneous standard applies to review of findings of discrimination. *See, e.g., Anderson v. City of Bessemer*, 470 U.S. 564, 578 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 286-291 (1982).

The important findings of the district court rejected by the court of appeals in the wake of its improper *de novo* review cannot be characterized as essentially legal. First, the district court found that the Law School "effectively reserved" approximately 10% of each class for students from the "underrepresented" minority groups. Pet. App. 249a. *See also id.* at 248a (finding Law School has an "unwritten policy" of having 10-12% of each class composed of students from the "under-represented" minority groups). The finding was amply supported by the record,

including the fact that the proportion of underrepresented minorities never dipped below 10% during the years in question, *see Id.* at 207a-08a, the testimony of Law School witnesses to the effect that 10% constituted a "critical mass" of the specified groups, *see*, *e.g.*, *id.*, and the undisputed existence of an earlier policy that specifically had a 10-12% goal, *see id.* at 225a. Given this evidence, it was surely within the province of the trier of fact to disbelieve the Law School witnesses who suggested that the quota had been abandoned with the implementation of the 1992 Policy.

Second, the question whether the Law School had considered race-neutral alternatives is also a factual inquiry. The district court found that it had failed to do so. *Id.* at 251a. Here, the district court relied upon the fact that the Law School failed to produce any witness involved with the promulgation of the 1992 Policy, or its subsequent administration, to describe the actual consideration of race-neutral alternatives. *Id*. It was certainly within the province of the trier of fact to determine that the insistence of the Law School's witnesses *at trial* on the necessity of using race was not the same thing as actual consideration at the time of the Policy's adoption, or during its implementation, of race-neutral alternatives.

Third, a determination of which racial or ethnic groups receive a preference is entirely a factual inquiry. The district court found that the Law School had provided a preference for Puerto Ricans raised on the United States mainland, but not those raised in Puerto Rico, and to Mexican Americans, but not other Hispanics, and that it had offered "[n]o satisfactory explanation" for these distinctions. *Id*. at 250a. The district court had extensive evidence from which to draw this conclusion, including (1) the Law School's own Bulletins, *see* Pet. App. at 200a-202a, App. 74, 84, which specifically identify Mexican Americans and Puerto Ricans born on the United States mainland (but not other Hispanics) as groups "encouraged" to apply, (2) the Law School's grids, *see* App. 127-55, which distinguished between "Mexican Americans" and "Other Hispanics," and (3) Professor Larntz's testimony,

which generally confirmed a "giant" preference for the identified groups borne out by his statistical analysis. Tr.Exh. 332, 2 Tr. 71-72. Reviewing all fact findings *de novo*, the court of appeals, with no mention of the district court's finding or the evidence, apparently concluded that the Law School made no such distinction (*i.e.*, that it gave a preference for all Hispanics), and it concluded that it would grant "some degree of deference . . . to the educational judgment of the Law School in its determination of which groups to target." Pet. App. 37a. Thus, remarkably, the court of appeals gave considerable deference to the administrators who discriminated on the basis of race and ethnicity, and no deference at all to the trier of fact. The court below got it exactly backwards.

Important and divergent legal consequences follow from the opposing findings of the district court and the court of appeals. The identity of the racial and ethnic groups included in the preferences as found by the district court are even more arbitrary, haphazard, and random than those identified by the court of appeals' findings. This is certainly not consistent with narrow tailoring. *See, e.g.*, *J.A. Croson Co.*, 488 U.S. at 506. The failure of the Law School to consider race-neutral alternatives is a glaring departure from narrow-tailoring requirements. *Id*. at 507. And the Law School's reservation of a percentage of the class for members of designated racial and ethnic groups is forbidden by the case to which it looks to for cover, *Bakke*. Accordingly, under a correctly applied clearly-erroneous standard, the Law School's racial and ethnic preferences could not survive even if they had been justified by a compelling interest.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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