

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

JENNIFER GRATZ, et al.,

*Plaintiffs-Appellants (01-1333, 01-1418),
Plaintiffs-Appellees (01-1416),*

v.

LEE BOLLINGER, et al.,

*Defendants-Appellees (01-1333, 01-1418),
Defendants-Appellants (01-1416),*

and

EBONY PATTERSON, et al.,

Intervening Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN (DUGGAN, J.)

**BRIEF OF THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY
AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS
(IN SUPPORT OF AFFIRMANCE IN NOS. 01-1333 AND 01-1418,
AND REVERSAL IN NO. 01-1416)**

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RULES

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INTEREST OF AMICUS CURIAE

The Civil Rights Project at Harvard University submits this brief as amicus curiae in support of Defendants Lee Bollinger, et al., urging this Court to uphold the constitutionality of the University of Michigan's race-conscious undergraduate admissions policies. Specifically, The Civil Rights Project asks the Court to affirm the district court's holding that promoting educational diversity is a compelling governmental interest, to affirm the court's holding that the current admissions policy is narrowly tailored, and to reverse the court's holding that the admissions policy employed from 1995 to 1998 was not narrowly tailored.

Founded in 1996, The Civil Rights Project is a nonprofit organization based at Harvard University whose mission is to advance research and advocacy in pursuit of racial justice. The Civil Rights Project devotes significant attention to educational issues, including the consequences of racial and ethnic diversity in higher education, the problem of minority dropouts, the effects of high stakes testing on minority children, K-12 school reform proposals, racial disparities related to special education and school discipline, the rights of English language learners, and the problem of resegregation in the public schools.

A central focus of The Civil Rights Project's research has been the development of scholarship that provides insights into the impact of diversity in

higher education. Since its founding, The Project has commissioned or produced over seventy-five studies on a range of topics, including the consequences of the elimination of affirmative action in several states and the effects of diversity in higher education. As a result of these studies and numerous conferences and roundtables, two volumes focusing on legal and social science findings involving diversity and higher education admissions have been published: *Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives* (1998) and *Diversity Challenged: Evidence on the Impact of Affirmative Action* (2001).

Because of its core mission and its research and advocacy work in defense of civil rights, specifically in the area of racial diversity in higher education, The Project has a direct stake in the outcome of this case. However, The Civil Rights Project does not, in this brief or otherwise, represent the official views of Harvard University.

SUMMARY OF ARGUMENT

The district court below correctly held that the promotion of educational diversity is a compelling governmental interest. Justice Powell's opinion in *Regents of the University of California v. Bakke*, in which he held that promoting educational diversity is a compelling interest, is binding precedent in this case. The extensive body of social science literature demonstrating the positive effects of student body diversity fully supports a holding that promoting diversity is a

compelling interest. Both the uncontroverted evidence introduced in the court below and the growing number of social science studies examining racial diversity in higher education show that student body diversity leads to improved learning outcomes, enhanced civic engagement, and better preparation for a diverse society and workforce.

The district court correctly held that the current undergraduate admissions policy at the University of Michigan is narrowly tailored. The admissions policy is a carefully defined program that employs the limited use of race to promote diversity, consistent with the legal standards set forth in Justice Powell's opinion in *Bakke*. The district court erred, however, in holding that the University's admissions policy from 1995 to 1998 was not narrowly tailored. The previous admissions policy fully complies with the *Bakke* standard and should be upheld as constitutional.

ARGUMENT

I. PROMOTING EDUCATIONAL DIVERSITY IS A COMPELLING GOVERNMENTAL INTEREST.

A. The Supreme Court's Ruling in *Bakke* is Binding Precedent.

Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), is controlling law in the instant case. In *Bakke*, the U.S. Supreme Court upheld the use of race in higher education admissions, but

struck down the medical school admissions policy at the University of California, Davis because it reserved exclusive seats for minority applicants. Writing in *Bakke*, Justice Powell held that “the interest of diversity is compelling in the context of a university’s admissions program,” because it contributes to “the robust exchange of ideas.” *Id.* at 314-15. Basing his decision on the well-established academic freedom of a university “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study,” Justice Powell held that the University of California invoked a constitutionally permissible goal under the Fourteenth Amendment. *Id.* at 312-13 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). Justice Powell then went on to hold that the University of California, Davis medical school admissions policy was not narrowly tailored because it created separate tracks for minority and non-minority applicants, but that the use of race as a “plus” factor among multiple admissions criteria would be a constitutional means to achieve educational diversity. *Id.* at 315-19.

Although five justices, including Justice Powell, voted to strike down the medical school admissions policy at issue in *Bakke*, Section V.C of Justice Powell’s opinion garnered the support of four other Justices who voted to uphold the consideration of race in higher education admissions. *Id.* at 320. Section

V.C of the Powell opinion states unequivocally that “the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” *Id.*

While several opinions were written in *Bakke*, Justice Powell’s opinion in *Bakke* is controlling in the instant case. In *Marks v. United States*, the U.S. Supreme Court held that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)); see *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994) (“Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land.”).

Justice Powell’s opinion is the narrowest opinion of the Justices in *Bakke*, particularly when compared to the opinion of Justice Brennan, who, along with three other Justices, joined Justice Powell to form the majority upholding the use of race in higher education admissions. Justice Powell called for the application of strict scrutiny to the medical school’s admissions program rather than the intermediate scrutiny standard offered by Justice Brennan. See *Bakke*, 438 U.S.

at 359 (Brennan, J., concurring in part). In addition, Justice Brennan would have upheld the admissions program based on an interest in remedying societal discrimination, a broader standard that was criticized by Justice Powell as being an “amorphous concept of injury that may be ageless in its reach into the past.” *Id.* at 307. Moreover, Justice Brennan would have upheld a more heavily weighted use of race – a separate track for minority applicants – than the “plus” factor policy endorsed by Justice Powell.

Justice Powell’s opinion is thus the narrower of the two opinions and should be treated as binding precedent in a case involving race-conscious admissions. The Ninth Circuit found this to be evident in *Smith v. University of Washington Law School*, stating that “apply[ing] the *Marks* analysis to the opinions of Justices Powell and Brennan . . . it becomes apparent that Justice Powell’s analysis is the narrowest footing upon which a race-conscious decision making process could stand.” 233 F.3d 1188, 1200 (9th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3593 (U.S. May 29, 2001) (No. 00-1341).

A small minority of courts – the Fifth Circuit in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), the district court in *Johnson v. Regents of the University of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), and the district court in *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001), which is on appeal in this Court – have wrongly ignored Justice

Powell's *Bakke* opinion as controlling law. Other courts addressing race-conscious admissions in education have consistently relied on Justice Powell's opinion in *Bakke*.¹ Indeed, as this Court indicated in *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757, 763 (6th Cir. 1983), Justice Powell's opinion in *Bakke* makes clear that "affirmative action admission programs of education institutions may take race into account, but racial quotas are prohibited." See also *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100, 103 (6th Cir.) (relying on Justice Powell's opinion in *Bakke*), *cert. denied*, 506 U.S. 830 (1992).

B. *Bakke* Has Not Been Overruled by Subsequent Case Law.

Plaintiffs in the instant case suggest that promoting diversity cannot be a compelling interest because more recent U.S. Supreme Court cases have in effect

¹See, e.g., *Smith v. University of Wash. Law Sch.*, 233 F.3d 1188, 1199-1201 (9th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3593 (U.S. May 29, 2001) (No. 00-1341); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 824 (E.D. Mich. 2000); *Davis v. Halpern*, 768 F. Supp. 968, 975-79 (E.D.N.Y. 1991); *McDonald v. Hogness*, 598 P.2d 707, 713 (Wash. 1979), *cert. denied*, 445 U.S. 962 (1980); see also *DeRonde v. Regents of Univ. of Cal.*, 625 P.2d 220 (Cal.), *cert. denied*, 454 U.S. 832 (1981) (upholding race-conscious admissions plan based on both Powell opinion and Brennan opinion); cf. *University & Community College Sys. v. Farmer*, 930 P.2d 730, 734 (Nev. 1997), *cert. denied*, 523 U.S. 1004 (1998) (relying on *Bakke* to uphold diversity-based employment plan). Several courts have also assumed, without deciding, that diversity is a compelling interest, consistent with Justice Powell's *Bakke* opinion. See *Tuttle v. Arlington County School Bd.*, 195 F.3d 698, 704-05 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000). *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 130 (4th Cir.), *cert. denied*, 529 U.S. 1019 (1999); *Wessman v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998).

overruled *Bakke*. Recent Supreme Court cases have delineated standards for evaluating race-conscious policies in remedial settings, see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), but no majority of the Court has ever held that remedial interests constitute the only possible interests that can satisfy a strict scrutiny standard. As the Seventh Circuit has indicated, a court “would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to [the court] and rejected” *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).

Consequently, several federal courts of appeals, including this Court, have held that non-remedial interests can constitute compelling governmental interests. See, e.g., *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 753 (2d. Cir. 2000) (reducing racial isolation); *Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1063-64 (9th Cir. 1999) (promoting research to improve educational quality in urban schools), *cert. denied*, 121 S. Ct. 186 (2000); *United States v. Ovalle*, 136 F.3d 1092, 1106 (6th Cir. 1998) (ensuring that jury pools represent a fair cross section of the community); *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996) (maintaining order within prison boot camp), *cert. denied*, 519 U.S. 1111 (1997).

Plaintiffs' suggestion that *Bakke* has been overruled by subsequent case law is entirely misplaced. A diversity-based admissions program, which is rooted in a university's mission to pursue academic excellence and receives due consideration under the First Amendment, is fully distinguishable from a remedial program designed to address past discrimination. As the Ninth Circuit has noted, the Supreme Court "has not returned to the area of university admissions, and has not indicated that Justice Powell's approach has lost its vitality in that unique niche of our society." *Smith v. University of Wash. Law Sch.*, 233 F.3d 1188, 1200 (9th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3593 (U.S. May 29, 2001) (No. 00-1341). The Supreme Court has warned that "other courts [should not] conclude [that] our more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). This Court should heed the admonition that if a Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). The correct precedent in this case is Justice Powell's opinion in *Bakke*, and this Court should adhere to that precedent.

C. Uncontroverted Evidence in the Court Below Supports the University’s Compelling Interest in Promoting Diversity.

The district court below correctly ruled that, as a matter of law, promoting educational diversity is a compelling governmental interest. In doing so, the court found “solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body.” *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 822 (E.D. Mich. 2000). One of Defendants’ experts, Professor Patricia Gurin of the University of Michigan, analyzed three sources of data – multi-institutional national data, the results of an extensive survey of students at the University of Michigan, and data drawn from a specific classroom program at the University of Michigan – and concluded that “[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.” Expert Report of Patricia Y. Gurin, *Gratz v. Bollinger*, No. 97-75231 (E.D. Mich.) & *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), in *The Compelling Need for Diversity in Higher Education* 99, 100 (1999) [hereinafter Gurin Report]. Gurin’s uncontroverted study, which carefully controlled for factors other than diversity and employed measures that have been tested and validated extensively in the field, yielded statistically significant and

consistent results showing that both classroom learning environments and informal student interactions are improved by student body diversity.

Plaintiffs and various amici curiae have introduced critiques of Gurin's expert report through amicus briefs submitted to this Court and the court below. *See, e.g.,* Brief for *Amicus Curiae* National Association of Scholars & Addendum. This Court should reject these critiques on both procedural and substantive grounds. Procedurally, while it is appropriate for this Court to examine research findings introduced in amicus briefs to settle a question of law, Plaintiffs should not be allowed to use amici curiae to supplement the record in the court below after they have conceded the absence of any factual dispute in their motion and arguments for summary judgment. Employing amici curiae to defeat summary judgment by attempting to create new issues of fact flouts both the federal rules, *see* Fed. R. Civ. P. 56(e), and this Court's earlier rulings limiting the appropriate role of amici curiae, *see United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) (drawing distinction between an amicus curiae and a named party or real party in interest). In addressing a question of law, this Court can and should consider relevant social science findings; however, it should not allow Plaintiffs to bypass discovery and upset summary judgment by disturbing a record that Plaintiffs have conceded is undisputed.

Substantively, amici curiae in support of Plaintiffs offer information that is

fundamentally flawed. Operating under the assumption that only direct measures of educational outcomes can adequately measure the value of diversity, amici curiae propose that Gurin's study be accorded little or no weight. However, as Gurin has documented in her extensive response to the National Association of Scholars' critique of her report, her methodology and findings are fully consistent with widely accepted social psychological theories and educational research methods. *See* Patricia Gurin, *Evidence for the Educational Benefits of Diversity in Higher Education: Response to the Critique by the National Association of Scholars of the Expert Witness Report of Patricia Gurin in Gratz, et al. v. Bollinger, et al. and Grutter v. Bollinger, et al.* (May 30, 2001) (available at <http://www.umich.edu/~urel/admissions/new/gurin.html>). Gurin's use of multiple databases and statistical methods measuring several educational outcomes yielded consistent findings that linked structural diversity (percentage of minority students), student interaction with diverse peers, and positive educational effects. The critiques offered by amici curiae, on the other hand, contain serious logical and methodological flaws, such as testing only the direct effects of student numbers on educational outcomes and conducting statistical analyses that control the variables that are themselves the mechanisms which affect educational outcomes – in essence, assuming away the basic inquiry into what actually causes positive educational outcomes. *Id.* Gurin's expert report is

fundamentally sound and should remain an uncontroverted element of the record in this case.

Neither the Plaintiffs nor their amici curiae have offered convincing evidence to demonstrate that diversity does not lead to positive educational outcomes consistent with a university's basic mission. However, as documented in Part II, *infra*, there is an extensive body of social science literature whose findings underscore Gurin's findings that student body diversity promotes positive educational outcomes – all of which support a judicial determination that the University's interest in promoting educational diversity is compelling.

II. SOCIAL SCIENCE STUDIES SUPPORT THE COMPELLING GOVERNMENTAL INTEREST IN PROMOTING DIVERSITY.

The district court's holding that promoting educational diversity is a compelling governmental interest is supported by studies which show that diversity can promote learning outcomes, democratic values and civic engagement, and preparation for a diverse society and workforce – goals that fall squarely within a university's basic mission. *See generally Diversity Challenged: Evidence on the Impact of Affirmative Action* (Gary Orfield & Michal Kurlaender eds. 2001) (compilation of studies on impact of race-conscious admissions policies); *Compelling Interest: Examining the Evidence on Racial Dynamics in Higher Education* (Mitchell Chang, et al. eds., forthcoming

2001) (draft available at <http://www.aera.net/reports/dynampp.pdf>) (overview of research on race and higher education); Jeffrey F. Milem & Kenji Hakuta, *The Benefits of Racial and Ethnic Diversity in Higher Education, in Minorities in Higher Education: Seventeenth Annual Status Report 39* (Deborah J. Wilds ed. 2000) (overview of research on benefits of racial diversity in higher education); Sylvia Hurtado, et al., *Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education* (1999) (review of research on racial diversity and campus climate) [hereinafter Hurtado, et al., *Enacting Diverse Learning Environments*].

A. Student Body Diversity Improves Educational Outcomes.

Recent studies suggest that student body diversity can produce a wide variety of positive educational outcomes, including richer classroom environments, improved critical thinking abilities, higher self-confidence, and improved interpersonal and leadership skills.

1. Student Body Diversity Improves Classroom Learning Environments.

Studies show that a racially and ethnically diverse learning environment provides the opportunity for students to share a broader array of perspectives and experiences. For example, a recent survey of students from the Harvard Law School and the University of Michigan Law School supports the proposition that

student body diversity has strong effects on the classroom environment. *See* Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in Diversity Challenged: Evidence on the Impact of Affirmative Action* 143 (Gary Orfield & Michal Kurlaender eds. 2001). In the Orfield and Whitley law school study, the Gallup Poll surveyed 1,820 law students at the University of Michigan and Harvard to determine the effects of diversity; the response rate for the survey was 81 percent, which is an exceptionally high figure. *Id.* at 154. When asked how diversity had affected the way in which they and their peers reflected upon problems and solutions in class, 68% of the Harvard law students and 73% of the Michigan law students responded that diversity had affected such discussions positively. *Id.* at 158. Sixty-three percent of the Harvard students and 66% of the Michigan students reported that racial diversity enhanced the manner in which topics were discussed in the majority of their classes. *Id.* at 160.

In addition, almost two-thirds of the law students in the Orfield and Whitley study reported “that most of their classes were better because of diversity.” *Id.* at 159. Moreover, when the law students were asked to compare their homogeneous classes to their diverse classes in three categories – (1) the range of discussion, (2) the level of intellectual challenge, and (3) the seriousness with which alternative views were considered – 42% of the students found the diverse

classes to be superior in all three respects while only 3% believed the homogeneous classes were superior. *Id.* at 166-67.

Surveys of faculty members show similar results. For example, a national survey of faculty at major research universities (a sample of 1,210 faculty, with a 47% response rate) found that a substantial number of respondents agreed that classroom diversity broadened the range of perspectives shared in classes; specifically, more than two-thirds of respondents indicated that students benefit from learning in a racially and ethnically diverse environment with respect to exposure to new perspectives and willingness to examine their own personal perspectives. Geoffrey Maruyama & José F. Moreno, *University Faculty Views About the Value of Diversity on Campus and in the Classroom*, in American Council on Education & American Association of University Professors, *Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms* 9, 14-16 (2000).

Similarly, in a study of the faculty at Macalester College, a liberal arts college in Saint Paul, Minnesota, 91% of the faculty agreed that “racial-ethnic diversity in the classroom ‘allows for a broader variety of experiences to be shared.’” Roxanne Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College*, in *Diversity Challenged: Evidence on the Impact of Affirmative Action* 251, 258 (Gary Orfield & Michal Kurlaender eds. 2001). More specifically, 80% the

faculty felt that minority students typically raise issues not normally raised by non-minority students, and 75% of faculty agreed that racial and ethnic issues are discussed more substantively in diverse classroom environments. *Id.* Research thus suggests that a diverse environment positively influences the ways in which students discuss and reflect on issues relevant to their studies.

2. Diverse Learning Environments Promote Critical Thinking Skills.

Research also indicates that students learn more and think more critically when educated in a racially and ethnically diverse learning environment. In her report to the court below, Gurin states: “Students learn more and think in deeper, more complex ways in a diverse educational environment.” Gurin Report, *supra*, at 118. Gurin goes on to suggest that a diverse educational environment, a curriculum which addresses racial issues, and engagement with peers from diverse backgrounds will result in “a learning environment that fosters conscious, effortful, deep thinking” as opposed to automatic, preconditioned responses. *Id.* at 105; *see also* Gudeman, *supra*, at 271 (non-minority students tend to read course materials more critically when part of a diverse classroom); Maruyama & Moreno, *supra*, at 16 (substantial numbers in faculty survey agree that diversity is important for developing critical thinking skills); José F. Moreno, Affirmative Actions: The Educational Influence of Racial/Ethnic Diversity on Law School

Faculty 92 (2000) (unpublished Ph.D. dissertation, Harvard University) (law school faculty members report that diversity helps students develop critical thinking skills). As one researcher suggests, a higher level of thinking can be attributed to the range of ideas and perspectives that diverse students bring to a discussion, which, in turn, “challenge students’ stereotypes, broaden their perspectives, and stimulate critical thinking.” Patricia Marin, *The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms*, in American Council on Education & American Association of University Professors, *Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms* 61, 69 (2000).

Another line of research suggests that studying with peers from diverse backgrounds will have a more “pronounced” effect on self-reported growth in critical thinking and problem-solving skills, even more than curricular diversity. Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Impacts the Classroom Environment and Student Development*, in *Diversity Challenged: Evidence on the Impact of Affirmative Action* 187, 198 (Gary Orfield & Michal Kurlaender eds. 2001) [hereinafter Hurtado, *Linking Diversity and Educational Purpose*]. This research suggests that the curriculum cannot replace or replicate the positive effects that a diverse learning environment will have on students’ critical thinking skills.

3. Cross-Racial Interaction Has Positive Effects on Retention, College Satisfaction, Self-Confidence, Interpersonal Skills, and Leadership.

Research also demonstrates that socializing across racial lines and engaging in racial discussions with diverse peers has positive effects on a variety of educational outcomes that go beyond cognitive abilities and skills. Studies indicate that socializing across racial lines and engaging in racial discussions can have an impact on outcomes such as retention, overall college satisfaction, intellectual self-confidence, and social self-confidence. *See* Mitchell J. Chang, *Does Racial Diversity Matter?: The Educational Impact of a Racially Diverse Undergraduate Population*, 40 J. College Student Dev. 391 (1999); *see also* Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected?* *Change*, Mar.-Apr. 1993, at 44, 47 (socializing across racial lines has positive effects on students' academic achievement). Related research has found that interaction among diverse students leads to improved interpersonal skills and leadership. Anthony Lising Antonio, *The Role of Interracial Interaction in the Development of Leadership Skills and Cultural Knowledge and Understanding*, 42 Res. Higher Educ. 593 (2001); *see also* Maruyama & Moreno, *supra*, at 15-16 (substantial numbers in faculty survey agree that diversity is important for developing leadership skills).

4. Student Body Diversity Promotes the Creation of Initiatives That Lead to Improved Educational Outcomes.

Recent studies have shown that a diverse student population can also lead to diversity-based initiatives and institutional change that improve educational outcomes. As one review of the literature notes: “The impact of diverse student enrollments has resulted in pressure for institutional transformation – a transformation that has affected both the academic and social life of the institution, including such changes as the development of ethnic studies programs, diverse student organizations, specific academic support programs, and multicultural programs.” Hurtado, et al., *Enacting Diverse Learning Environments*, *supra*, at 20.

In turn, diversity-based initiatives have been found not only to promote racial understanding and campus activism, but to have positive effects on retention, satisfaction with college, and academic development. *See* Jeffrey F. Milem, *College, Students, and Racial Understanding*, 9 *Thought & Action* 51, 75-76 (1994). Research also suggests that such initiatives can affect both students’ openness to diversity and their willingness to have their views challenged. *See* Ernest T. Pascarella, et al., *Influences on Students’ Openness to Diversity and Challenge in the First Year of College*, 67 *J. Higher Ed.* 188, 189 (1996).

B. Student Body Diversity Promotes Democratic Values and Increased Civic Engagement.

1. Diverse Learning Environments Challenge Students to Consider Alternative Viewpoints and Develop Tolerance for Differences

Recent studies suggest that diverse learning environments allow students to encounter and consider different perspectives, ultimately leading to a deeper understanding, respect, and tolerance for individual differences. Gurin indicates that students educated in a diverse environment were “most likely to acknowledge that group differences are compatible with the interests of the broader community.” Gurin Report, *supra*, at 101. Gurin further found that the students at the University of Michigan who interacted with diverse peers had “[a]n increased sense of commonality with other ethnic groups,” and that these students also exhibited a “growth in mutuality or enjoyment in learning about both one’s own background and the backgrounds of others, more positive views of conflict, and the perception that diversity is not inevitably divisive in our society.” *Id.* at 127.

Other studies have found that socializing across racial lines has positive effects on students’ cultural awareness and commitment to racial understanding. A study of undergraduates enrolled in the early 1990s found that studying with someone from a different racial or ethnic background resulted in a positive

growth in civic outcomes such as “the acceptance of people of different races/cultures, cultural awareness, tolerance of people with different beliefs, and leadership abilities.” Hurtado, *Linking Diversity and Educational Purpose*, at 198. Specific research on friendship groups developed among students on campuses with diverse student bodies reinforces the notion that diversity can provide students with the opportunity to develop close friendships with individuals of different races and ethnicities. These interracial friendships consequently become the norm for more general interracial interaction, thus promoting greater racial understanding and awareness. Anthony Lising Antonio, *Diversity and the Influence of Friendship Groups in College*, 25 *Rev. Higher Educ.* (forthcoming 2001) (manuscript at 22, on file at The Civil Rights Project – Harvard University).

Research also suggests that when confronted with new ideas and perspectives in diverse learning environments, students’ views are altered. When law students in the Orfield and Whitla study were asked whether conflicts due to racial differences challenged them to “rethink” their values, students responded affirmatively. Orfield & Whitla, *supra*, at 162. Sixty eight percent of the Harvard students and 75% of the University of Michigan students answered that such conflicts either enhanced or moderately enhanced a rethinking of their values. *Id.* In addition, 52% of the Harvard students and 60% of the Michigan

students reported that conflicts due to racial differences “ultimately [became] positive learning experiences.” *Id.* at 163.

Students in the Orfield and Whitley study also reported that diversity had a positive impact on classes dealing with the justice system. *Id.* at 163. When students were asked whether “discussions with students of different racial and ethnic backgrounds [had] changed [their] view of the equity of the criminal justice system,” 78% of the Harvard students and 84% of the Michigan students said that such discussions had changed their views either significantly, substantially, or a great deal. *Id.*

2. Diverse Learning Environments Can Increase Participation in Civic Activities.

Studies also indicate that students who are educated in a diverse environment are more likely to participate in civic activities. Results from the Gurin study “strongly support the central role of higher education in helping students to become active citizens and participants in a pluralistic democracy.” Gurin Report, *supra*, at 126. Gurin concluded that “[s]tudents educated in diverse settings are more motivated and better able to participate in an increasingly heterogeneous and complex democracy,” and that they “showed the most engagement during college in various forms of citizenship.” *Id.* at 101.

Researchers found similar results when they conducted a longitudinal

study of students graduating from selective colleges and universities that had used affirmative action in their admissions practices. *See* William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* vi (1998). Drawing from records of more than 80,000 students who matriculated at twenty-eight selective colleges and universities in 1951, 1976, and 1989, the Bowen and Bok study found that the 1976 cohort “participated in civic activities in very large numbers – nearly 90 percent of the cohort participated in one or more [civic] activity in 1995.” *Id.* at 156. The study showed that the students from these universities were “noticeably more likely than the control group to participate in professional and trade associations, college-related functions such as fund-raising and student recruitment, cultural and arts activities, and environmental and conservation programs.” *Id.* at 157. Bowen and Bok also noted students’ propensity to engage in political activity after graduating from college. The study found, for instance, that high percentages of the students, 94% of white respondents and 90% of black respondents, voted in 1992. *Id.* at 174.

C. Student Body Diversity Prepares Students for a Diverse Society and Workforce.

Studies also suggest that educational diversity better prepares students for living and working in a diverse society, another outcome that is integral to a

university's mission. One of Gurin's basic conclusions was that students in diverse learning environments "were comfortable and prepared to live and work in a diverse society." Gurin Report, *supra*, at 127. Gurin found that students who attended diverse classes and who engaged in informal interactions with diverse peers reported feeling the most prepared for graduate school. *Id.* at 133. The students who reported engaging and interacting with diverse peers felt that "their undergraduate education help[ed] prepare them for their current job." *Id.* In addition, Gurin found that diversity experiences during college had "impressive effects on the extent to which graduates in the national study were living racially or ethnically integrated lives in the post-college world. Students who had taken the most diversity courses and interacted the most with diverse peers during college had the most cross-racial interactions five years after leaving college." *Id.* at 133.

The law school students in the Orfield and Whitla study reported that diversity had affected their "ability to work more effectively and/or get along better with members of other races." Orfield & Whitla, *supra*, at 159. Sixty-eight percent of the Harvard students responded that diversity either "clearly enhanced" or produced a "moderate enhancement" in their ability to work and get along with members of other races. *Id.* Forty-eight percent of the Michigan students perceived a clear, positive impact on their ability to work and get along

with members of diverse backgrounds. *Id.* at 63.

Similarly, the students in Bowen and Bok's study were asked what difference their college experience made in "developing [their] ability to work with, and get along with, people of different races and cultures." Bowen & Bok, *supra*, at 225. Forty-six percent of the white students in the 1976 cohort "believe[d] that their undergraduate experience was of considerable value in this regard," and "18 percent said it helped 'a great deal.'" *Id.* Fifty-seven percent of black students in the 1976 cohort "gave college credit for helping them develop these 'getting along' skills." *Id.* The 1989 cohorts reported an even larger positive effect: 63% of whites and 70% of blacks attributed their ability to work with and get along with others, in part, to their college experiences. *Id.*

A related study found that students credited their improved job-related skills primarily to their ability to study frequently with diverse peers. *See* Hurtado, *Linking Diversity and Educational Purpose*, *supra*, at 198. These students reported "growth of important skills related to a diverse work force, including their ability to work cooperatively with others." *Id.* The study concluded that interacting with diverse peers "has the substantial positive effect of the development of skills needed to function in an increasingly diverse society" *Id.* at 199.

As one study summarizes: "To be competitive, in terms of entry-level

employment as well as advancement into positions of responsibility and leadership, students must acquire the understandings and the skills necessary for working productively and harmoniously with fellow workers and citizens who bring widely differing backgrounds and experiences to the workplace and to their communities.” Jack Meacham, et al., Student Diversity in Classes and Educational Outcomes: Student and Faculty Perceptions 20 (1999) (paper presented at American Council on Education’s Symposium on Diversity and Affirmative action; on file with The Civil Rights Project – Harvard University). Studying in a racially diverse environment provides the opportunity for students to obtain the skills necessary to participate successfully in a diverse workforce and society.

III. THE UNIVERSITY OF MICHIGAN’S UNDERGRADUATE ADMISSIONS POLICIES ARE NARROWLY TAILORED.

A. The University’s Current Admissions Policy is Narrowly Tailored.

The district court correctly held that the University of Michigan’s current admission policy adheres to the narrow tailoring principles articulated by Justice Powell in *Bakke*. 438 U.S. at 317-18. Without question, the University’s program treats every applicant as an individual in the admissions process. *See id.* at 318. The University is not operating a rigid quota-style admissions program, nor are they utilizing a minority set-aside. Instead, consistent with Justice

Powell's standards, every applicant to the school is competing for every seat in the first-year class. Unlike the medical school admissions program at issue in *Bakke*, no applicant to the University of Michigan is excluded from a specific percentage of seats because of the applicant's race or ethnicity. Applications from underrepresented minority applicants are reviewed by an admissions counselor assigned to the applicant's geographic area, not a separate admissions committee, which underscores the individualized nature of the review process.

The University of Michigan takes race into account in two ways, both of which operate in similar fashion to the "plus" factor approach approved in *Bakke*. *Id.* at 317. Under one method, admission counselors may initially assign an additional 20 points on a 150-point scale to students from underrepresented minority backgrounds. Under the second method, admissions counselors may, after a threshold review, "flag" a minority applicant, thereby keeping the applicant in the pool for further consideration at a later time. These two practices are valid uses of a plus factor, even when in some individual cases race may "tip the balance" in a particular candidate's favor. *See id.*

The University's concept of educational diversity encompasses many characteristics, of which race is but a single element. Underrepresented minority applicants may receive points based on their race, but other applicants receive points based on socioeconomic status, athletic talent, geographic factors, alumni

relationships, personal achievement, leadership and service skills, and for writing an outstanding essay. For example, a student coming from the upper peninsula of Michigan receives 16 points for that characteristic because students from that geographic area are underrepresented. In a similar fashion, applications from underrepresented minorities can be flagged, but so can applications from those who were at the top of their class, those residing in a preferred county of Michigan, those exhibiting unique life experiences, challenges, interests, or talents, those from a disadvantaged background, and those who are recruited athletes. These two elements of the admissions policy give the University the necessary flexibility to consider “pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.” *Id.* at 317.

In choosing among thousands of qualified candidates, the admissions policy allows the University to pay attention to the distribution of each class along multiple axes. *See id.* at 316-17. Neither use of race employed by the University results in academically unprepared minority applicants receiving offers of admission or in granting unconstitutional “protection” to minority applicants; rather, the policy uses race as one of many factors that can guide admissions counselors in bringing to the University a population of academically

prepared students who possess the array of diverse characteristics that the University has deemed important for the composition of its incoming class of undergraduates.

B. The University’s 1995-1998 Admissions Policy was Narrowly Tailored.

The district court erred, however, in finding that the University’s previous admission policy, which was in place from 1995 to 1998, was not narrowly tailored. The court mischaracterized the previous policy as a quota containing “protected” seats and thus created an unnecessary distinction between the current and the previous policies. The earlier policy was not the functional equivalent of a quota, and did not violate Justice Powell’s narrow tailoring principles in *Bakke*. The two-track system in *Bakke* is fundamentally different from the University of Michigan’s 1995-1998 policy. No applicants, minority or nonminority, had a set percentage of seats foreclosed to them under the Michigan policy. Rather, the University maintained a rolling admissions policy that required it to monitor the offers of admission along various dimensions in order to ensure diversity.

Under its rolling admission policy, the University could not, as Justice Powell noted in *Bakke*, “provide a truly heterogeneous environment that reflects the rich diversity of the United States . . . without some attention to numbers.” *Id.* at 323. The University sought both an academically well-qualified and diverse

student body. To attain this goal at the end of several months of admitting students, the University was fully justified in regulating and tracking its admittees. When an academically qualified applicant from a group with so-called “protected” spaces was admitted, the University correspondingly reduced the number of spaces it had sought to maintain for that group. In this way, the University could measure, at any given point in time, its success in admitting a diverse first-year class. If the University received an insufficient number of academically qualified applications for a group that had spaces allotted to it, then the spaces were open to every applicant. In addition to underrepresented minorities, the University tracked the admission of athletes, foreign applicants, and ROTC students, among others.

The policy entailed sufficient flexibility and operated as the functional equivalent of a point system. It was far from a rigid quota, and did not impose a significant burden on nonminority applicants. Nonminority applicants who were qualified, but less competitive, might not have been admitted on the first review while the school waited until it had a more complete picture of its applicant pool and could make final decisions. However, no nonminority applicant would be precluded from competing for a seat in the class. At the end of the admissions cycle, a nonminority student might have been denied admission and a minority student might have been admitted, but the use of race to “tip the balance” was

squarely within the *Bakke* framework. *See id.* at 317. The different codes used for minority and nonminority applicants parallel the additional twenty points that can be assigned under the current admissions policy. Moreover, like the current “flagging” process, the University’s postponement of a decision to reject an underrepresented minority applicant allowed a competitive consideration of race without excluding nonminority applicants. The University’s admissions policy during 1995 to 1998 was fully consistent with *Bakke* and was therefore constitutional.

CONCLUSION

For all of the foregoing reasons, the University of Michigan's undergraduate admissions policies should be upheld as constitutional. Accordingly, the district court's ruling that promoting educational diversity is a compelling governmental interest and the court's ruling that the University of Michigan's current undergraduate admissions policy is narrowly tailored should be affirmed. The district court's ruling that the University's policy between 1995 and 1998 was not narrowly tailored should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and 6 Cir. 32(a), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(C).

1. Exclusive of the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6,987 words.
2. The brief has been prepared in proportionately spaced typeface using Microsoft Word 2000 in Times New Roman 14 point type.
3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the work or line printout.
4. The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

Angelo N. Ancheta

CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of June, 2001, pursuant to Fed. R. App. P. 25 and 6 Cir. R. 31, I have caused two copies of the foregoing brief of amicus curiae The Civil Rights Project at Harvard University to be served by United States first-class mail, postage prepaid, on the following:

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