

No. 01-1447

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UNITED STATES COURT OF APPEALS  
FOR THE  
SIXTH CIRCUIT

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BARBARA GRUTTER,  
*Plaintiff-Appellee,*

v.

LEE BOLLINGER, et al.,  
*Defendants-Appellants,*  
and

KIMBERLY JAMES, et al.,  
*Intervening Defendants.*

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

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**BRIEF OF THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY  
AS AMICUS CURIAE IN SUPPORT OF APPELLANTS  
AND REVERSAL IN NO. 01-1447**

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## **INTEREST OF AMICUS CURIAE**

The Civil Rights Project at Harvard University submits this brief as amicus curiae in support of Appellants Lee Bollinger, et al., urging reversal of the district court's ruling that the University of Michigan Law School's admissions policy is unconstitutional. Specifically, The Civil Rights Project asks the Court to reverse the district court's holdings that promoting educational diversity is not a compelling governmental interest and that the Law School's admissions policy is not narrowly tailored to meet the compelling interest in promoting diversity.

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 erred in holding that the promotion of educational diversity is not a compelling governmental interest. The district court misapplied the legal standards in the instant case and ignored the binding precedent of 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. The district court also ignored the extensive body of social science literature demonstrating the positive effects of student body diversity. Both the expert evidence introduced at trial 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 – all of which support a holding that promoting diversity is a compelling interest.

The district court erred in holding that the admissions policy at the University of Michigan Law School is not narrowly tailored. The Law School’s admissions policy is a carefully defined program that employs the limited use of race to promote diversity and to extend minority group presence beyond mere tokenism. Among several errors, the district court erred in finding that the “critical mass” concept is too amorphous to satisfy narrow tailoring, and in finding that the Law School could have employed race-neutral alternatives to achieve educational diversity.

## **ARGUMENT**

### **I. PROMOTING EDUCATIONAL DIVERSITY IS A COMPELLING GOVERNMENTAL INTEREST.**

#### **A. Justice Powell’s Opinion 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)).

Relying on the U.S. Supreme Court’s ruling in *Sweatt v. Painter*, Justice Powell found that the contribution of diversity is compelling at the graduate and professional school levels of higher education. Justice Powell stated that “our tradition and experience lend support to the view that the contribution of diversity is substantial,” particularly in the area of legal education. *Bakke*, 438 U.S. at 313. “The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individual and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.” *Id.* at 313-14 (quoting

*Sweatt v. Painter*, 339 U.S. 629, 634 (1950)). Justice Powell then went on to hold that the 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.

While several opinions were written 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 his 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.*

The district court below erred by suggesting that no controlling law could be gleaned from *Bakke*. 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)). Clearly, Justice Powell’s opinion is the narrowest opinion of the Justices, 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), *petition for cert. filed*, 69 U.S.L.W. 3593 (Feb. 21, 2001) (No. 00-1341).

The court below erred by ignoring this reasoning and following the reasoning adopted by only two other courts – the Fifth Circuit in *Hopwood v.*

*Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), and a district court in the Eleventh Circuit in *Johnson v. Regents of the University of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000). Other lower courts addressing race-conscious admissions have consistently relied on Justice Powell’s opinion in *Bakke*.<sup>1</sup> 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. 1992) (relying on Justice Powell’s opinion in *Bakke*).

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

The district court further erred by ruling that promoting diversity cannot be

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<sup>1</sup>*See, e.g., Smith v. University of Wash. Law. Sch.*, 233 F.3d 1188 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3593 (Feb. 21, 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); *see also DeRonde v. Regents of Univ. of Cal.*, 625 P.2d 220 (Cal. 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) (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).

a compelling interest because more recent U.S. Supreme Court cases have in effect 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).

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, (9th Cir. 1999) (improving 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).

The district court's suggestion that *Bakke* has been overruled 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), *petition for cert. filed*, 69 U.S.L.W. 3593 (Feb. 21, 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 the district court erred in suggesting otherwise.

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

The district court below compounded its errors by ignoring both Appellants' expert evidence and the body of literature documenting the positive effects of a diverse student body in higher education. Justice Powell's determination in *Bakke* that promoting diversity is a compelling interest is supported by a growing number of studies which show that educational 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 Compelling Interest: Examining the Evidence on Racial Dynamics in Higher Education* (Mitchell Chang, et al. eds., forthcoming 2001) (prepublication 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.**

Appellants' expert, 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). Gurin’s 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. The court below erred by ignoring Gurin’s study, as well as other recent studies which 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.**

Recent 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 Whitla 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, in a national survey of law faculty conducted by the American Association of Law Schools (a sample of nearly 1,000 faculty, with a 57% response rate), approximately 75% of the respondents felt strongly about the importance of diversity in developing student willingness to examine their own perspectives and for exposing students to new perspectives. Richard A. White, *Preliminary Report: Law School Faculty Views on Diversity in the Classroom and the Law School Community* 5-6 (May 2000) (available at <http://www.aals.org/statistics/diverse3.pdf>).

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, *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, *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 Whitla 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, *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, *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 LAW SCHOOL’S ADMISSIONS POLICY IS NARROWLY TAILORED.**

The district court erred in holding the University of Michigan Law School’s admissions policy is not narrowly tailored to serve the compelling interest in promoting diversity. The policy employs race in a highly limited fashion and only in the context of reviewing individual applications for admission to the Law School; the policy thus adheres to the narrow tailoring principles articulated by Justice Powell in *Bakke*. 438 U.S. at 317-18. As Appellants demonstrate in their Brief to this Court, the district court’s analysis of narrow tailoring contains extensive errors of fact and law. *See* Brief for Appellants, at 42-55. Two of the court’s errors are particularly serious in light of expert testimony and recent social science studies. The district court’s reasoning suggesting that “critical mass” is too amorphous a concept to allow narrow tailoring is flawed, and the court’s analysis and findings related to the Law School’s consideration of race-neutral alternatives are erroneous.

**A. The Concept of “Critical Mass” is Not Amorphous.**

The district court erred by holding that the concept of a “critical mass” of minority students is so amorphous that it renders the Law School’s policy ill-fitting to the interest in promoting diversity. Citing to the Harvard undergraduate admissions policy, Justice Powell made clear in *Bakke* that the number of minority students within a student body must not be so small that minority students cannot make contributions to the learning environment or that minority students become isolated:

It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, . . . there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.

*Bakke*, 438 U.S. at 323 (Appendix to Opinion of Powell, J.).

The Law School’s admissions policy recognizes the harms that accrue from having only token numbers of minority students within its student body. Indeed, the dangers of tokenism are well documented and include racial isolation, alienation, and stereotyping. *See, e.g.*, Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White*

*and Historically Black Public Colleges and Universities*, 62 Harv. Educ. Rev. 26 (1992); Chalsa M. Loo & Garry Rolison, *Alienation of Ethnic Minority Students at a Predominantly White University*, 57 J. Higher Educ. 58 (1986). See generally Hurtado, et al., *Enacting Diverse Learning Environments*, *supra*, at 25-27 (reviewing literature on psychological impacts of racial isolation in higher education); Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 Am. J. Soc. 965 (1977) (describing the adverse effects of tokenism).

The concept of “critical mass” is designed to address the Law School’s interest in moving beyond tokenism, but it is neither so amorphous that it eludes definition nor so inflexible that it requires a fixed percentage of students. As one survey of college faculty indicates, critical mass focuses on “the need for students to feel safe and comfortable,” and serves as a counter to “the lack of safety or comfort felt when one finds oneself a ‘solo’ or ‘minority of one.’” Gudeman, *supra*, at 267-68. In other words, critical mass implies: “Enough students to overcome the silencing effect of being isolated in the classroom by ethnicity/race/gender. Enough students to provide safety for expressing views.” *Id.* at 268. A national survey of law school faculty underscores the point: “A high percentage (50% or more) of faculty [feel] strongly that having a *critical*

*mass of students* of a particular racial/ethnic group is important to their participation in the classroom . . . .” White, *supra*, at 3-4 (emphasis added).

Moreover, as one researcher has noted, it was increases in the critical mass of minority students that served as a significant predictor of race-related activities during the 1970s, and “[i]ncreases in the absolute numbers of minorities on campus resulted in new demands for institutional change . . . .” Sylvia Hurtado, *The Institutional Climate for Talented Latino Students*, 35 Res. Higher Educ. 21, 24 (Feb. 1994). In this way, critical mass provides a basis for diversity-based initiatives that can lead to positive educational outcomes. *See supra* Part IV.A.4. Nevertheless, critical mass need not be so rigidly defined that it exists independent of factors such as the size of a campus or the community in which the college is located. *See id.* at 24 (community size and location are positively related to racial tolerance among members of a community). Critical mass thus serves as a contextual benchmark that allows a university to exceed token numbers within its student body, therefore promoting the robust exchange of ideas and meaningful access to the curriculum that are central to a university’s mission.

When an institution such as the Law School has acted to admit a critical mass of minority students, it also strives to admit enough students to represent varied viewpoints and perspectives *within* underrepresented groups. Critical

mass promotes the notion of *intra*-group diversity, which counterposes the stereotype that all students within a group have identical experiences and possess identical viewpoints. As Gurin has stated: “[T]he presence of more than a token number of minority students decreases the likelihood that those minority individuals will be stereotyped by others.” Supplemental Expert Report of Patricia Y. Gurin, *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.) (Jan. 11, 2001), at 2; *see also* Bowen & Bok, *supra*, at 236 (noting that “greater diversity within the minority community tends to create a greater number of potential avenues of interaction”).

By requiring a rigid definition of critical mass, however, the district court makes it impossible for the Law School to establish the constitutionality of its policy. The district court’s inconsistent standard requires Appellants to navigate between the Scylla of amorphousness and the Charybdis of rigid quotas. Within the same opinion, the court thus rejects and accepts the *Bakke* standards, mandating both numerical definiteness and flexibility. This Court should reject this approach and accept the critical mass concept as a narrowly tailored method for achieving the educational benefits that result from having numbers within a student body that extend beyond mere tokens.

**B. Race-Neutral Admissions Cannot Achieve Student Body Diversity.**

The record clearly shows that the Law School has considered race-neutral alternatives to its policy and found them inadequate. The Law School has participated in both pre-admission and post-admission recruiting activities – such as visits to undergraduate institutions, involvement in law school recruitment fairs and forums, and personal correspondence and telephone calls to prospective students – and found them insufficient to create a diverse student body. As Appellants’ expert witness Stephen Raudenbush has made clear, a race-neutral admissions policy would substantially reduce the number of underrepresented minority students in the Law School student body and increase the occurrence of segregated learning spaces and social settings. *See* Supplemental Expert Report of Stephen W. Raudenbush, *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.) (Jan. 5, 2001).

The negative impact of race-neutral admissions policies on minority enrollments in state law schools in California and Texas, where race-conscious admissions policies have been eliminated, is well-documented. *See, e.g.*, Jorge Chapa & Vincent A. Lazaro, Hopwood *in Texas: The Untimely End of Affirmative Action*, in *Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives* 55, 62-68 (Gary Orfield & Edward Miller eds. 1998)

(discussing decline in minority enrollments in Texas law schools after *Hopwood*); Jerome Karabel, *No Alternative: The Effects of Color-Blind Admissions in California*, in *Chilling Admissions*, *supra*, at 33, 43-45 (discussing decline in minority enrollments at University of California law schools). See generally Linda Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U.L. Rev. 1 (1997). For example, the most recent data from the Boalt Hall School of Law at the University of California, Berkeley, suggest that “Boalt will find it difficult to achieve the levels of diversity that it had when race and ethnicity could be considered in the admissions process. . . . For the foreseeable future, then, Whites will dominate the student body . . . .” Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 Cal. L. Rev. 2241, 2248-49 (2000). Race-neutral alternatives have been found to be ineffective at Boalt; after the passage of Proposition 209 in California, an admissions program at Boalt that gave special consideration to socioeconomically disadvantaged students was abandoned after one year, following the determination that it did little to increase the representation of blacks and Latinos in the student body. *Id.* at 2248.

The record shows that the University of Michigan Law School is well aware of the failings of race-neutral admissions programs in other states, and the

Law School has made the determination that it cannot enroll meaningful numbers of minority students without the consideration of race as a factor in admissions. The district court's ruling that the Law School failed to consider race-neutral alternatives is therefore erroneous.

### **CONCLUSION**

The district court below erred by holding that promoting educational diversity is not a compelling governmental interest and that the University of Michigan Law School's admissions policy is not narrowly tailored. For all of the foregoing reasons, the ruling of the district court should be reversed.

Respectfully submitted,

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Dated: May 29, 2001

## **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 6,981 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.

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Angelo N. Ancheta

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 29th day of May, 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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