No. 02-241

IN THE SUPREME COURT OF THE UNITED STATES

BARBARA GRUTTER, PETITIONER

v.

LEE BOLLINGER, ET AL.

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

BRIEF OF *AMICUS CURIAE* THE SCHOOL OF LAW OF THE UNIVERSITY OF NORTH CAROLINA SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The University of North Carolina is the oldest public university in the nation. Authorized by North Carolina's Constitution of 1776, chartered in 1789, the University opened its doors to students in 1795.[2] Ever since its first

[1] Letters from the parties, consenting generally to the filing of brief by *amici curiae*, are on file with the Court. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party. No entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

[2] Albert Coates, *The Story of the Law School at the University of North Carolina*, 47 N.C. L. Rev. 1, 5, 11-13 (1968); *see generally* William S. Powell, *The First State University* 4-10 (3d ed. 1992).

professor of law was appointed in 1845, the University's School of Law has been a preeminent training ground not only for generations of lawyers who have served the State and region but for much of the State's leadership class—its governors, judges, legislators, business and public leaders.[3]

Despite its central role in nurturing North Carolina's youth and molding its leadership structure, during the first 106 years after it began offering legal education, the University of North Carolina restricted, by race, both admission to its halls of learning and the many lifelong privileges afforded to its graduates.[4] No matter how qualified by talent and preparation, black and Native American applicants were systematically denied the professional opportunities and the manifold personal associations the University afforded to whites.[5] Only with the success of a

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[3] William K. Boyd, 2 *History of North Carolina: The Federal Period 1783-1860*, at 362-63 (1919) (noting the influence of University graduates on the public life of the State); Hugh Talmage Lefler & Albert Ray Newsome, *North Carolina: The History of a Southern State* 406-07 (3d ed. 1973) (same).

[4] In rejecting a challenge brought against the University's all-white policies in 1950, a federal district court observed that "[s]egregation is provided for under the constitution of North Carolina in relation to its public schools." *Epps v. Carmichael*, 93 F. Supp. 327, 331 (M.D.N.C. 1950), *rev'd sub nom. McKissick v. Carmichael*, 187 F.2d 949 (4th Cir.), *cert. denied*, 341 U.S. 951 (1951). The district court cited N.C. Const. art. 9, §2, which then read: "And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race." This provision, a post-Reconstruction amendment in 1876 to the North Carolina Constitution of 1868, was not overruled until *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *See* John V. Orth, *The North Carolina State Constitution* 145 (1993).

[5] For example, Pauli Murray, a young black woman from Durham, North Carolina, who had graduated from Hunter College in New York, who eventually received her law degree from Howard, her LL.M. from Berkeley, her J.S.D. from Yale—an extraordinary woman who served as a civil rights lawyer, an author, a college professor, a deputy attorney general in California, a friend of Eleanor Roosevelt and a co-counsel with then-Professor Ruth Bader Ginsburg in the seminal case of *Reed v.*

federal lawsuit brought in 1950 by Floyd B. McKissick and others—with the legal support of Thurgood Marshall, Robert Carter, and the NAACP Legal Defense & Educational Fund, Inc.—did qualified non-white applicants finally break through the University's color barrier,[6] allowing African Americans, Native Americans, and others—some 26 percent of the State's citizens and taxpayers[7]—their first access to this center for legal and leadership training.

The University and its School of Law have since reached out to offer higher education and legal training to qualified young men and women—rich and poor, black and white, Native American, Hispanic, and Asian American—drawn from all across the State, from small towns in the valleys of the Great Smokies and Blue Ridge Mountains to the prosperous cities of the State's Piedmont region, to the market towns and hamlets of the Coastal Plain plantation country, to the remote villages of the Outer Banks.[8]

Public universities in the United States embrace a special mission, one significantly different from that of the nation's private colleges and universities. North Carolina's School of Law necessarily and proudly offers higher education to young people of promise and talent from every spectrum of the State's diverse citizenry. To them it provides crucial training and a subsequent web of acquaintances and

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Reed, 404 U.S. 71, 72 (1971)—was denied admission to the University of North Carolina School of Law in 1938 solely because of her race. Pauli Murray, *Song in a Weary Throat: An American Pilgrimage* 114-23 (1987).

[6] *See McKissick v. Carmichael*, 187 F.2d 949 (4th Cir.), *cert. denied*, 341 U.S. 951 (1951) (ordering admission of Floyd McKissick and other African American students to the University of North Carolina School of Law). *See generally* Charles E. Daye, *African-American and Other Minority Students and Alumni,* 73 N.C. L. Rev. 675, 678-686 (1995).

[7] *See Epps*, 93 F. Supp. at 330 (noting that the parties stipulated that whites comprised only 74% of the State's population in 1950).

[8] *See* Rebecca Morphis, *The 18 Percent Rule*, Carolina Alumni Review, Mar./Apr. 2002, at 20, 27.

mentors who will offer lifelong assistance as they mature into the future leaders of this State and region.[9] No institution in our society works more effectively than higher education to fulfill the American promise of upward mobility.

The benefits of this public university mission do not flow exclusively to the individual students who come to Chapel Hill. The University and its School of Law are charged to call forth the next generation of State leadership—to train those who will sit as our judges, people our legislative assemblies, serve as corporate officers and non-profit directors, advise our school boards, and bring legal services to the poor throughout the State of North Carolina. That leadership cadre is crucial for the collective future of the State. *To nurture the future leaders of our State and region, then, is the most compelling end to which the School of Law could dedicate itself.*

We come before the Court today convinced that this crucial mission stands at risk in *Grutter*. From our State's

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[9] The stated mission of the UNC School of Law is threefold:

> "[T]o educate future practitioners and leaders of the bench and bar; to accomplish an ambitious research agenda; and to serve the legal profession, the state of North Carolina, and the nation through significant involvement in law reform and similar activities."

School of Law, The University of North Carolina at Chapel Hill, *2002-2003 Record* 4 (2002).

The public mission statement of the University of North Carolina at Chapel Hill begins:

> The University of North Carolina at Chapel Hill has been built by the people of the State and has existed for two centuries as the nation's first state university. Through its excellent undergraduate programs, it has provided higher education to ten generations of students, many of whom have become leaders of the state and the nation.

See University of North Carolina at Chapel Hill, *University Mission*, *at* http://www.unc.edu/about/mission.html (last visited Jan. 28, 2003).

decades of bitter experience, from our hard-won commitment to racial justice, we know that a careful effort to build racially diverse student bodies in our public universities constitutes *the single most effective—indeed, an indispensable—means* of assuring that all the people of our State will be participants in its collective future, avoiding the reemergence of a regional apartheid, and contributing to our general State need for well-trained government and business leadership. The School of Law has used race-conscious methods—carefully and sparingly, to be sure, but regularly—ever since this Court in 1978 gave them its approval in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-12 (1978) (Powell, J.); *id*. at 362-63 (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

We also know that race-conscious methods succeed. The careers of UNC's first generation of non-white law graduates demonstrate that success daily. African American and Native American graduates of the School of Law have provided the State with: its first black chief justice, its first black federal district judge, its first black associate justices, its first Native American state judge, as well as leading private practitioners, leaders of state legal services and other public interest activities, corporate directors and prominent business men and women.[10]

We are compelled to inform you that the gains of the past forty years—precious not only to non-white citizens, but to the collective future of all North Carolinians—will be compromised, their benefits substantially curtailed, if this Court accepts the petitioner's invitation to foreclose all consideration of race in law school admissions decisions. Well aware of tragic lessons that our regional history has taught us, summoning all the passion we can muster, we

[10] *See* Daye, *supra* note 6, at 681-703 (recounting the careers of the African American, Native American, and Latino graduates of the School of Law prior to the mid-1990s).

inform the Court, as conscientious educators and regional leaders, that any abrupt end to race-conscious admissions threatens a return of *de facto* racial segregation to many public institutions of higher education throughout this State and region. Any such resegregation, even if *de facto* rather than *de jure*, would be absolutely devastating to our State—and, we believe, to our national future.

That disturbing prospect, nothing less, constitutes our interest in this case.

SUMMARY OF ARGUMENT

Public universities and their law schools share a special educational mission, for their citizens have charged them with nurturing the future leadership of their states and regions. *Amicus* shares Dr. Martin Luther King's long-awaited vision of a nation in which children "will not be judged by the color of their skin but by [the] content of their character."[11] Yet regrettably, in the year 2003, we have not reached that goal. North Carolina's electoral strategies and political appointments often turn on issues of race. All too frequently, financial institutions, auto sales personnel, and restaurants vary their products and services by race. Doctors and hospitals offer lifesaving treatments differently, dependent upon the race of their patients. Prosecutors and defense counsel select their juries, shape their arguments, and launch their jury pleas with race in mind.

To combat these socially destructive tendencies, *amicus* finds it indispensable to draw future leadership from among the State's and region's racial and ethnic communities—from white, African American, Native American, Hispanic, and Asian American applicants. It is essential that future State leadership possess collective trust

[11] Martin Luther King, *I Have a Dream, in A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 217, 219 (James M. Washington ed., 1986).

sufficient to overcome old barriers that have divided our citizens, subordinating some while favoring others. The State of North Carolina knows, in short, that its future statewide leadership cohort *should be*, and inevitably *will be*, racially and ethnically diverse. The principal challenge is to prepare these nascent leaders for their future responsibilities. The School of Law is determined to provide them the finest education we can offer.

Our mission creates a compelling interest in race-conscious student admissions policies, an interest that has not received full consideration in prior cases. For, in addition to selecting students who will enrich daily in-class learning by their diverse backgrounds, the University of North Carolina and its School of Law, like other public universities, bear the special burden to prepare the State's future leaders for the diverse needs of the region they will soon serve.

No lesser means than race-conscious admissions can fully accomplish these ends. The United States suggests that the Equal Protection Clause demands the use of race-neutral means instead.[12] This Court has never so held. To be sure, the Court has insisted that when states employ racial classifications *for remedial purposes*, those remedies must stretch no farther than necessary, and that race-neutral means be employed when possible. Yet the constitutional propriety of a State's chosen means will necessarily depend, even under strict scrutiny, on the nature of the State's compelling end.

Here, the School of Law's end necessarily looks toward the State's future, not merely its present or its past, for it is acting to foster its future leadership cohort, recognizing that in the 21st century, it is democratically imperative—and demographically inevitable—that future leaders be drawn from the different racial and ethnic

[12] Brief for the United States as Amicus Curiae at 22-23, Grutter v. Bollinger (No. 02-241).

populations that make up our state. To acknowledge this goal and to set about its achievement honestly, through the selection of students from diverse racial backgrounds, is not only constitutionally permissible, but also infinitely preferable to the subterfuge the United States endorses—to reach racial diversity by following a roundabout path of non-racial means.

The United States suggests that the recent experiences of Texas, Florida, and California demonstrate that race-neutral admission methods can equally avail to reach these goals.[13] The carefully chosen admissions practices, refined by college and university administrators during the past generation, refute that assumption. Indeed, only when faced with judicial or legislative decrees have unwilling educational leaders resorted to awkward race-neutral alternatives, abandoning with reluctance the more straightforward affirmative action policies long approved in *Bakke* and faithfully followed by university officials ever since. Moreover, despite the United States' assurances, minority student enrollments have declined in the flagship educational institutions of Florida, Texas, and California because of these race-neutral means. Yet if history is a guide, it will be from these flagship institutions, now once again disproportionately white, that the state leadership of 2025 will emerge.

The United States offers a final dollop of reassurance with its plea for reversal, insisting that *Grutter* can be decided on the basis of well-settled constitutional principles that would "break no new ground."[14] This consolation is misguided as a statement of constitutional law and myopic as a prediction of real-world consequences. This Court surely recognizes that if it overturns the *Grutter* decision below and ends race-conscious admissions practices, it will turn the lodestar rule in *Bakke* on its head— a rule that has guided

[13] *Id*. at 17-22.
[14] *Id*. at 12, 37.

public and private college admissions principles and practices for almost thirty years. Moreover, the good faith efforts of a full generation of public university admissions officers—who have acted year in and year out in every state, with the full sanction of governors, legislatures, and university chancellors to broaden access to public higher education—would be irreparably injured by an adverse ruling from this Court.

Grutter will inescapably determine the future student complexion of our public and private universities, and with it, the future of American leadership. The only future worthy of our deepest hopes is one that embraces young Americans from every racial and ethnic background. Public university officials have recognized this truth for a generation. The Court should resist the present call to displace these good faith educational judgments with a rigid and inflexible judicial decree.

ARGUMENT

I

PUBLIC UNIVERSITIES HAVE A SPECIAL MISSION TO PREPARE THE FUTURE LEADERS OF THEIR RESPECTIVE STATES

In recent years, the Court has strongly suggested that every choice by government to employ a racial classification "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235-36 (1995).[15]

[15] *But see Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473-74 (1982) (assuming that no constitutional principle prevents public school boards from voluntarily employing race-conscious policies when assigning students to public elementary and secondary schools).

This principle of strict judicial scrutiny is not, however, invariably "fatal in fact," as the Court has also reminded us, *id*. at 237, for some state goals are sufficiently compelling to justify careful use of racial classifications:

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it . . . .When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

Id; *see also Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring) (noting "the ample authority legislatures possess to combat racial injustice"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (observing that strict scrutiny "assur[es] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool").

Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), validates one permissible use of race-conscious means: race may serve as one factor in university admissions practices aimed at the "attainment of a diverse student body." *Id*. at 311-12 (Powell, J.). Justice Powell reasoned that First Amendment considerations justify race-conscious practices, since racially diverse student communities promote an "atmosphere of 'speculation, experiment and creation.'" *Id*. at 312-13.

We as *amicus*, drawing upon over three decades of experience as law teachers, scholars, and administrators,[16] know and confirm that racially diverse law schools deepen legal study and enrich student understanding of the law.[17] Joining thousands of other academic and administrative officials, then,[18] we fully endorse both the empirical assumptions that underlay Justice Powell's opinion in *Bakke* as well as its legal conclusion, which affirmed the careful use of race as "a plus factor" in university admissions. *Id*. at 317. Indeed, Justice Powell's conclusions echoed the Court's earlier, unanimous observation in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), recognizing the crucial value of a racially diverse legal education.

Yet we here argue for another compelling interest—one that is not solely dependent upon the richness

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[16] Counsel include the present Dean of the UNC School of Law, Gene R. Nichol, who previously served as dean of the University of Colorado School of Law; Julius L. Chambers, former Chancellor of North Carolina Central University; Charles E. Daye, former Dean of North Carolina Central University School of Law, who has previously served as President of the Law School Admission Council; and John Charles Boger, former Associate Dean of the UNC School of Law.

[17] *See* Richard A. White, *Preliminary Report*: *Law School Faculty Views on Diversity in the Classroom and the Law School Community* (May 2000) (reporting law school professors' opinions about the positive effects of racial diversity on classroom experience); Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity From Affirmative Action in the Law School Admissions Process*, 77 N.C. L. Rev. 1479, 1488 (1999) (reporting on the difference that a lack of diversity makes in the law school classroom experience); *see also* Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, *in Diversity Challenged: Evidence on the Impact of Affirmative Action* 161 (Gary Orfield & Michael Kurlaender eds., 2001) (reporting that over 90% of the students surveyed at the Harvard and Michigan Law Schools felt diversity had a positive impact on their educational experience, and noting that such a substantial majority is "very rare" in public opinion research).

[18] Brief of *Amicus Curiae* Association of American Law Schools at 10-12, Grutter v. Bollinger (No. 02-241).

that racial diversity brings to the classroom. State universities exist, and state taxpayers have long supported them generously, not simply because they offer educational enrichment to individual students. Rather, these special institutions undertake a profoundly important societal duty: to produce the next generation of state and regional leadership.

North Carolina must have doctors and lawyers, judges and dentists, social workers and public health officers, city planners, teachers, pharmacists, and many other trained professionals in every single corner of this sprawling state, in every single generation. Since 1795, the University of North Carolina has endeavored to fill these needs. With a similar mission, the School of Law has labored since 1845 to people the chambers of our county courthouses, the halls of our General Assembly, the Governor's mansion, and every public and private law office where citizens who seek legal counsel can consult with well-trained professionals.[19] Like other public universities, the University of North Carolina has labored for more than two centuries to fashion leadership for each emerging generation.[20]

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[19] Living alumni of the University of North Carolina include some 472 who self-report that they are chief executive officers of companies in North Carolina, 422 who are executive directors, 3,402 who are presidents of companies or their organizations, and 3,688 who are attorneys/lawyers practicing in North Carolina. University of North Carolina at Chapel Hill, Alumni Database, 2003. Since only 8,950 attorneys were registered to practice law in North Carolina in 2000, the School of Law has clearly produced a very substantial fraction of the State's current bar. Bureau of Labor Statistics, U.S. Dep't of Labor, *2000 State Occupational Employment and Wage Estimates: North Carolina*, http://www.bls.gov/oes/2000/oes_nc.htm#b23-0000 (last visited, Jan. 28, 2003).

[20] Historian James Leloudis has noted that "[b]y the 1860s, the [University of North Carolina] had produced a president and vice president of the United States, twenty governors, eight senators, forty-one members of the House of Representatives, and innumerable judges, state legislators, and justices of the peace." James L. Leloudis, *Schooling*

Earlier in this brief, we acknowledged an original sin of exclusion: the University deliberately and grievously omitted from its mission, for a full century after Lincoln's Emancipation Proclamation and despite the adoption of the post-Civil War Amendments, large and important segments of the State's citizenry. African Americans and Native Americans were shut out, not only from all that the University and its School of Law offered,[21] but also from the many important public roles that University graduates assumed thereafter.[22]

The University has in recent decades, by word and deed, strongly repudiated its former exclusivity. Just as we now select students from every far corner of the state, so

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the New South: Pedagogy, Self, and Society in North Carolina, 1880-1920, at 50 (1996).

[21] *See McKissick*, 187 F.2d at 950-51; *see also Adams v. Richardson*, 356 F. Supp. 92, 94 (D.D.C. 1973) (reciting a 1969 conclusion rendered by the United States Department of Health, Education, and Welfare, that the State of North Carolina had been operating a racially segregated system of higher education in violation of Title VI of the Civil Rights Act of 1964, and noting that the State, as late as 1973, had "totally ignored HEW's requests . . . and have never submitted a desegregation plan"), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973); *see generally* Walter H. Bennett, Jr. & Judith Welch Wegner, *Lawyers Talking: UNC Law Graduates and Their Service to the State,* 73 N.C. L. Rev. 846, 862 (1995) (recounting the recollections of Superior Court Judge Dexter Brooks, the first Native American to graduate from the UNC School of Law in 1976, who recalled as a child "a very prominent Lumbee Indian, who grew up in [his community], served in the Second World War, . . . received a bachelor's degree" but upon seeking law school admission "was told that Carolina did not accept Native Americans").

[22] *See generally* Gunnar Myrdal, *An American Dilemma: The Negro Problem & Modern Democracy* 304-07 (20th anniv. ed., 1962) (observing that while lower wage African American workers nationwide could enter much of the broader, white-dominated labor market, though excluded from many trades and given the lowest jobs in others, "most Negro businessmen, professionals, and Negro white collar workers are either dependent on the segregated Negro community for their market or they serve in public institutions—like schools and hospitals—set up exclusively for the use of Negroes").

likewise have we determined to ensure that students of all racial and ethnic backgrounds will become part of the next generation of this State's leadership.

To do so is a compelling necessity. The demographic transformation is already quite obvious, both for the State and the nation. African Americans, who constituted only 11.8% of the national population in 1980, are projected to increase to 14.7% of the population by 2050. Hispanics are expected to increase from 6.4% to 24.3% of the population during the same period. Asian Americans will grow from 1.6% to 9.3% of the population, while Native Americans will grow from 0.6% to 1.1%.[23]

North Carolina's population is already experiencing the impact of these profound changes. African Americans have long constituted more than 20% of the State's population, reaching 22% by 1997. Moreover, while Hispanics comprised only 2% of the State's population in 1997, their numbers are rising far faster than those of any other group in North Carolina—an increase of more than 163% between 1980 and 1997.[24]

African Americans and Hispanics have begun to move into positions of public leadership commensurate with their growing numbers. Black elected officials nationwide more than quintupled between 1970 and 1999, from 1,469 to 8,896,[25] while Hispanic elected public officials increased from 3,147 to 5,205 between 1985 and 2000.[26] Fully 19% of all state and local government employees were African

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[23] Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States: 2001*, at 13, tbl. 10 (121st ed., 2001).

[24] James H. Johnson, Jr. et al., *A Profile of Hispanic Newcomers to North Carolina*, Popular Gov't, Fall 1999, at 2, 4, tbl. 1. Indeed, the 2002 Census reports that Hispanic North Carolinians now comprise 4.7 % of the State's population. Bureau of the Census, *supra* note 23, at 25, tbl. 23.

[25] Bureau of the Census, *supra* note 23, at 250, tbl. 399.

[26] *Id*. at 250, tbl. 400.

American by 1999, while 7.8% were Hispanic.[27] Meanwhile, the percentage of African American lawyers has climbed from 2.6% of the national bar in 1983 to 5.4% in 2000, while the percentage of Hispanic lawyers has grown from 0.9% to 3.9%.[28]

We could offer additional data, but the basic point is clear: non-whites are already moving into leadership positions throughout North Carolina and the nation as a whole. It is public universities, including the University of North Carolina, that bear a special responsibility to train them. For example, as the Law School Admission Council reported in 2001, 60.3% of the law graduates from the University of North Carolina remained in the state, while only 12.1% of those from nearby Duke University, which has a wonderful private law school, did so. The University of North Carolina sent 14.4% of its graduates into government jobs, and 4.8% into public interest jobs; Duke's comparable statistics were 3.0 % and 0.5%.[29] These numbers do not diminish Duke's important service to the national legal profession, of course. What they do reveal is how crucial to the State's future is the University of North Carolina's unique public mission to educate students drawn from across the State, and from all racial and ethnic backgrounds.

Despite, or perhaps because of, North Carolina's changing demographic realities, racial discrimination remains a serious problem, as the Court well knows. The State's voting patterns and political struggles display the residual effects of racial discrimination and prejudice. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 39-40 (1986) (reciting the district court's finding that "historic discrimination in education, housing, employment, and

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[27] *Id*. at 295, tbl. 452 (providing state and local totals by race and ethnicity).

[28] *Id*. at 380, tbl. 593.

[29] American Bar Ass'n & Law School Admissions Council, *ABA-LSAC Official Guide to ABA-Approved Law Schools* 51 (2003 ed.).

health services had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites," and that "this lower status both gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and elect representatives of their choice," even as "white candidates in North Carolina have encouraged voting along color lines by appealing to racial prejudice"); *see also Easley v. Cromartie*, 532 U.S. 234, 239, 245 (2001) (noting the persistence of racially identifiable voting patterns, by political party, in North Carolina).

Serious disparities by race continue in North Carolina and the South, and they call for thoughtful State leadership in a wide variety of public and private contexts. For example, the Court has found that white agents who worked for North Carolina's Agricultural Extension Service received systematically higher levels of pay than similarly qualified black agents, long after formal segregation of the program had ended and Title VII of the Civil Rights Act of 1964 had been enacted. *Bazemore v. Friday*, 478 U.S. 385, 394-95 (1986) (per curiam). There has been continuing evidence of private discrimination against African Americans who seek mortgage finance assistance in the South and elsewhere.[30] Non-whites often receive less adequate medical care from doctors and hospitals in North Carolina and elsewhere.[31]

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[30] *See* William Dedman, *The Color of Money* (pts. 1-4), Atlanta J.-Const**.**, May 1-4, 1988, at A1. (documenting racial disparities by Georgia banks in credit and lending policies involving African American customers); George Galster, *Use of Testers in Investigating Discrimination in Mortgage Lending and Insurance, in Clear and Convincing Evidence: Measurement of Discrimination in America* 287-334 (Michael Fix & Raymond J. Struyk, eds., 1993) (reviewing various studies, using "testers," that found widespread discrimination against African American consumers who sought loans or credit from financial institutions).

[31] Brian D. Smedley, *Unequal Treatment: Confronting Racial & Ethnic Disparities in Health Care* 2-3, 44 (Institute of Medicine, National Academies, 2002) (reporting upon a "large body of published research [which] reveals that racial and ethnic minorities experience a lower quality of health services, and are less likely to receive even routine

We adduce these remnants of our racially polarized past to stress the interest of our State in overcoming racial divisions and to emphasize how much work remains to be done in the year 2003. That work must be led by State and local officials from the bench and bar, from legislative committee rooms, from district attorneys offices, from a variety of executive agencies, all of whom must earn the trust of the State's citizens and call upon the better angels of our citizens' natures. To win that trust and be effective in their crucial work, those leaders, we are deeply persuaded, *must include* citizens from the State's various racial and ethnic communities.

II.

ALLOWING LAW SCHOOLS TO CONSIDER RACE AS ONE FACTOR IN SELECTING STUDENTS HAS PROVEN THE LEAST RESTRICTIVE AND FAIREST MEANS OF ASSURING THAT STATES CAN PROVIDE HIGHER EDUCATION TO THEIR MOST PROMISING FUTURE LEADERS

The University has traditionally admitted students with all of North Carolina's geographical regions firmly in mind. The University and the State could not afford to restrict its educational opportunities to the thousands of bright young men and women who annually pour out of the high-tech communities of our Piedmont high schools while leaving Appalachia or our Coastal Plains without their needed share of doctors, lawyers, and teachers. Of course students' grades and SAT scores are appropriately considered in making admissions decisions, but they alone cannot be determinative, lest we penalize the future leaders

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medical procedures than are white Americans," and specifically noting one study of racial differences in cardiac care in North Carolina teaching hospitals).

of our less prosperous regions which are often served by poorly funded public elementary and high schools.[32]

North Carolina's demand for future leadership similarly requires that the School of Law be free to take some account of race as it makes its admissions decisions. Of course, any need for race-conscious admission practices will diminish once African American and Hispanic students in North Carolina regularly perform at levels equivalent to those of white students on standardized tests (a goal toward which public elementary and secondary schools are presently striving). At present, regrettably, they do not.[33] While many black and Hispanic students can offer academic credentials fully as dazzling as those of the ablest white students, on average, white law school applicants post higher scores on standardized tests than do African American, Native American, or Hispanic applicants. This "achievement gap" has been long documented, especially on standardized tests such as the SATs and LSATs, upon which this University, like many others, relies when making its admission decisions.[34] Explanations for the gap remain unclear, though

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[32] *See generally,* Public School Forum of North Carolina, *2001 North Carolina Local School Finance Study* 1 (Dec. 2001) (documenting a substantial spending gap between the state's wealthiest and poorest counties that has increased since 1987).

[33] The North Carolina Comm'n on Raising Achievement and Closing Gaps, *First Report to the State Board of Education* 4 (Dec. 2001) (the "Bridges Report") (reporting that "[w]hen poverty is factored out, middle class white students [in North Carolina] still score significantly higher than middle class African American students" on North Carolina's statewide standardized tests of academic performance).

[34] Linda F. Wightman, Law School Admission Council, *Research Report 99-05*, *Beyond FYA: Analysis of the Utility of LSAT Scores and UGPA for Predicting Academic Success in Law School* 8-14 (2000) (reporting on a longitudinal study of 142 law schools, demonstrating that, on average, black students consistently score lower than white students on the LSAT); Linda F. Wightman & David G. Muller, Law School Admission Council, *Research Report 90-03*, *An Analysis of Differential Validity and Differential Prediction for Black, Mexican American, Hispanic, and White Law School Students* 7 (1990) (concluding that

there is some evidence that African Americans continue to face discrimination in receiving quality education even within their local school districts.[35]

The University of North Carolina and its School of Law do not, of course, court academic failure. We admit only students, of whatever race, who are fully qualified to succeed in higher education. We have consistently found that qualified non-white students not only graduate at rates equivalent to their white peers, but also go on to deliver precisely the kind of service as lawyers that fulfills our principal mission as a public university.[36] Former Princeton

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minority students scored lower than non-minority students on the LSAT, based on analysis of LSAT results for 1986-1988*); see generally The Black-White Test Score Gap* (Christopher Jencks & Meredith Phillips eds., 1998) (examining many aspects of this phenomenon, including its extent, the historic changes in the gap, and possible reasons for a recent narrowing of the gap).

[35] *See, e.g.,* Roslyn Arlin Mickelson*, Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 Am. Educ. Research J. 215, 232 & tbl. 2 (2001) (reporting on high levels of racial imbalance in Charlotte-Mecklenburg's twelfth grade English, biology, and United States history classes, and finding that even those black students who scored in the top ten percentile on national standardized tests were disproportionately tracked into "regular" or lower academic tracks and were markedly underrepresented in "advanced placement" tracks). *See also* William Darity, Jr. et al., *Increasing Opportunity to Learn via Access to Rigorous Courses and Programs: One Strategy for Closing the Achievement Gap for At-Risk and Ethnic Minority Students* 14-15 (report to the N.C. Dep't of Public Instruction, May 2001) (finding a substantial "enrollment gap" in placing talented African American, Native American, and Hispanic students into more challenging elementary, middle, and high school courses in North Carolina public schools).

[36] This state interest is significantly different, of course, from the narrower interest asserted by the University of California at Davis, which justified its special admission quota for non-white applicants on the unproven assumption that minority graduates would disproportionately return to serve minority communities. *Bakke*, 438 U.S. at 310-11. We fully expect non-white graduates of the University and the School of Law to serve the State's general need for well-trained leadership.

President William Bowen and Harvard President Derek Bok reported similar findings from their extensive study of a cohort of non-white graduates of leading private and public universities. Black graduates, they found, were "much more likely than their white classmates to have taken on leadership positions in virtually every type of civic endeavor," a result that held true even when multiple regression analysis was applied to filter out other predictors of civic involvement. The authors added:

> The willingness of black . . . graduates to assume leadership roles is particularly significant in light of the role of civic participation in building a stable community structure. . .It underscores the fact that this group of well-educated individuals is charged, in effect, with twin responsibilities: not only to help build a more integrated American society, but to strengthen the social fabric of the black community.[37]

Our experience in North Carolina has been identical. That experience underlines our strong need, in light of our public university mission, to continue considering race as a factor as we make admissions decisions.

It is also true that subsequent research has vindicated what the University of California asserted, but failed to prove in *Bakke*: non-white applicants admitted to professional schools return disproportionately to serve non-white patients and communities. *See* Harry Holzer & David Neumark, Nat'l Bureau of Econ. Res., *Assessing Affirmative Action* 57 (1999)(noting that "[t]he results show quite uniformly that 'special admit' and even more so minority physicians are more likely to treat patients who are minorities, poor . . . non-English speakers, and/or those located in rural/inner-city (or 'physician shortage') areas").

[37] William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 168-69 (1998).

The United States has suggested, however, that although public universities do have an interest in opening themselves to "a broad and diverse array of individuals, including individuals of all races and ethnicities," and while this interest is "important and entirely legitimate,"[38] it should be pursued through the "variety of race-neutral alternatives available."[39]

As a constitutional matter, we believe the United States reads the Court's precedents too narrowly. In remedial contexts such as those addressed in *Croson* and *Adarand*, the search for race-neutral methods is an imperative part of narrow tailoring, since the aim is to redress wrongs to those who may have been injured with the least adverse consequences to others. Yet the Court has frankly acknowledged that some compelling ends do "permit[] unequal treatment based on race to proceed." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995). Here, when the State's interest is in assuring that some portion of its future leadership will be drawn from every racial and ethnic group, adopting "race-neutral" means to attain racial diversity is, at best, an awkward and roundabout means toward the acknowledged end.

At worst, as the examples of the United States reveal, "race-neutral" tailoring succeeds only by sacrificing the full attainment of states' admittedly compelling educational ends. Attempts to carry out race-blind admissions in Florida, Texas, and California have "succeeded"—*except* at those very states' flagship universities in Gainesville, Austin, Berkeley, and Los Angeles that constitute the preeminent source of the states' future leadership.[40] Even more

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[38] Brief of the United States as Amicus Curiae, *supra* note 12, at 9.

[39] *Id*. at 10.

[40] The United States recognizes that, under these new admissions policies, African American and Hispanic enrollment at the University of Florida has declined "slightly," from 9.95% to 7.15% for African Americans and 11.38% to 11.13% for Hispanics. Brief of the United States as Amicus Curiae, *supra* note 12, at 20. Moreover, despite an

troubling, decisions to couple guaranteed admission to some fixed percent of each state high school's graduating class strips university administrators of their traditional discretion to look beyond grades for other qualities that may be important indicators of potential promise. We *know* that some students whose high school grades land them within those artificial bounds will *not* prove the best choices for university life, just as we are sure that not all of the most promising white *or* black students *are* to be found in each high school's top 5 or 10%.[41]

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increase of 23% in the number of African American *applicants* to the University of Texas at Austin from 1996 to 2001, the number of black undergraduates actually *admitted* has declined sharply during that period, from 461 to 280. Hispanic admissions have also declined, from 1,617 to 1,513, over the same period, despite a 20% increase in Hispanic applications. U.S. Comm'n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* 37-39, 17-23 (2002), http://www.usccr.gov/pubs/percent2/percent2.pdf (last visited Jan. 28, 2003). In the University of California system between 1995 and 2000, the number of resident African American applicants admitted to Berkeley has declined from 566 to 338, while the number admitted to UCLA has declined from 661 to 325. Chicano admissions decreased from 1,128 to 641 at Berkeley, and from 1,452 to 849 at UCLA. Latino admissions declined from 306 to 244 at Berkeley, and from 540 to 303 at UCLA. University of California, *Application, Admissions and Enrollment of California Resident Freshmen for Fall 1995 through 2000*, http://www.ucop.edu/news/factsheets/Flowfrc-9500only1.pdf (last visited Jan. 31, 2003) (cited in U.S. Comm'n on Civil Rights, *supra* at 23).

[41] The implicit premise of these schemes, of course, is that most neighborhoods and school districts in Florida, Texas, and California remain racially segregated in 2003, so that a rigid "race neutral" policy will yield racially diverse college classes. Those dreary assumptions may well be accurate. We are confident, however, that many excellent African American or Hispanic students who attend majority white high schools, but do not make the new arbitrary cut-offs, will not be admitted under these quota-like admission devices. Conversely, there will surely be many ill-prepared minority students from weak and underfunded high schools who will nonetheless sail into these universities—despite very low SAT scores, very poor academic preparation, and dismal prospects

Even were the Texas, Florida, and California approaches a rational means to satisfy the state's interest in undergraduate diversity, the United States offers no plausible similar device to guide graduate and professional admissions. Surely public law schools will not be forced to accept the top 10% of all college graduates from every public four-year college in their State, heedless of whether those graduates majored in studio art, quantum physics, or hotel management; though such a policy could quickly fill the seats at most public university law schools, the resulting student body would have neither rhyme nor reason.

Indeed, the very readiness of opponents of affirmative action to abandon admissions officers' traditional reliance upon an array of other factors—intellectual promise, past achievement, personal character, motivation for further study, or the recommendations of teachers and mentors—in favor of an ironclad rule based on grade point percentages shows just how empty are their demands that each and every candidate be judged as an individual. In truth, the argument seems to be: "Any preference at all, any conceivable scheme, as long as non-white students get no special benefit, however small, or however crucial for the future of the state."

The Court should not accept the invitation to determine the future of all university admissions procedures by an unreflective reliance upon decisions rendered in very different contexts—public contracting, public employment, federal licensing, and the like. In each of those areas, the Court recognized that the *public*'s direct interest lay not in *who* actually performed these contracts, but ultimately, in the simple assurance that these jobs would be performed

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for success in a challenging environment—merely because they prove to be the top students from woefully bad high schools. *See generally,* Marta Tienda, et al., *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* 40-44 (Jan. 21, 2003) (noting complex, unanticipated consequences of the new Texas admissions policies on non-white applicants).

economically and well. The quality of toilets in Richmond's public jail or the safety of highway guardrails in Colorado, after all, would not be affected by the race of those who built or installed them. As the Court peered into the bottomless pit of contractor preferences posed by these cases, it saw the threat of a racial spoils system unrelated to the public interest and appropriately pulled back.

Public higher education is different. The citizens of every state do have a strong present interest, and an even more profound *future* interest, in the overall selection of those who will receive higher educational benefits. That is why *Bakke* was so universally welcomed in the community of higher education, so widely adopted, so faithfully followed. It met, and still meets, the deepest social needs of our states and our nation. That is why it received bipartisan support from university presidents, deans, and administrators who differ on scores of other important university policies. Furthermore, affirmative action in higher education commands strong support among America's leading corporations[42]—no sentimentalists there, but hard headed realists who constantly assess their own and the nation's future human resource needs—and who provide further assurance, if any be required, that *Bakke* is not some faded relic from an age of bell bottoms and lava lamps.

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[42] *See* Brief of 3M, Abbott Laboratories, American Airlines, Inc., Ashland, Inc., Bank One Corp., The Boeing Co., The Coca-Cola Co., The Dow Chemical Co., E.I. du Pont de Nemours & Co., Eastman Kodak Co., Eli Lilly & Co., Ernst & Young, LLP., Exelon Corp., Fannie Mae, General Dynamics Corp., General Mills, Inc., Intel Corp., Johnson & Johnson, Kellogg Co., KPMG Int'l, Lucent Technologies, Inc., Microsoft Corp., Mitsubishi Motor Sales of America, Inc., Nationwide Mutual Insurance Co. & Nationwide Financial Services, Inc., Pfizer, Inc., PPG Industries, Inc., The Proctor & Gamble Co., Sara Lee Corp., Steelcase, Inc., Texaco, Inc., TRW Inc., & United Airlines, Inc. as *Amici Curiae* in Support of Defendants –Appellants Seeking Reversal, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc) (No. 01-1447).

The stakes in this case for public universities, and for the American future, could not be higher. The Court should not deprive the schools of law of this and other great public universities of a means they have found indispensable for shaping those students who, as well-trained lawyers and other professionals, will soon lead our states and nation into the uncharted future. We understand that federal courts should stand vigilant to ensure that the tool of race-conscious admissions be not abused. We await the day when such tools will no longer be needed. At present, however, we know no effective, tailored alternative.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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