
IN THE
United States Court of Appeals for the Sixth Circuit

No. 01-1447

BARBARA GRUTTER,
Plaintiff/Appellee,

v.

LEE BOLLINGER, et al.,
Defendants-Appellants,

and

KIMBERLY JAMES, et al.,
Intervening Defendants

On Appeal from the United States District Court
for the Eastern District of Michigan

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION FOR HIGHER EDUCATION, AMERICAN ASSOCIATION OF COLLEGES FOR TEACHER EDUCATION, AMERICAN ASSOCIATION OF COLLEGES OF NURSING, AMERICAN ASSOCIATION OF COLLEGIATE REGISTRARS AND ADMISSIONS OFFICERS, AMERICAN ASSOCIATION OF COMMUNITY COLLEGES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN COLLEGE PERSONNEL ASSOCIATION, AMERICAN DENTAL EDUCATION ASSOCIATION, ACT, INC., ASSOCIATION OF ACADEMIC HEALTH CENTERS, ASSOCIATION OF AMERICAN COLLEGES AND UNIVERSITIES, ASSOCIATION OF AMERICAN LAW SCHOOLS, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES, ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES, ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES, ASSOCIATION OF JESUIT COLLEGES AND UNIVERSITIES, COLLEGE AND UNIVERSITY PERSONNEL ASSOCIATION, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, COUNCIL OF INDEPENDENT COLLEGES, EDUCATIONAL TESTING SERVICE, EDUCAUSE, HISPANIC ASSOCIATION OF COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION FOR COLLEGE ADMISSION COUNSELING, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS, NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS, NATIONAL COUNCIL OF UNIVERSITY RESEARCH ADMINISTRATORS, AND UNITED NEGRO COLLEGE FUND

IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(This statement should be placed immediately preceding the table of contents in the brief of the party. See copy of 6th Cir. R. 26.1 on page 2 of this form.)

BARBARA GRUTTER, Plaintiff-Appellee,

v.

LEE BOLLINGER, et al., Defendants-Appellants

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, amici curiae American Council on Education, et al.
(Name of Party) (see attachment)


makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

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(Signature of Counsel)

May 23, 2001
(Date)

**ATTACHMENT TO DISCLOSURE OF
CORPORATE AFFILIATIONS AND FINANCIAL INTEREST**

The undersigned certifies that none of the foregoing is a subsidiary or
affiliate of a publicly owned corporation:

American Council on Education

American Association for Higher Education

American Association of Colleges for Teacher Education

American Association of Colleges of Nursing

American Association of Collegiate Registrars and Admissions Officers

American Association of Community Colleges

American Association of State Colleges and Universities

American Association of University Professors

American College Personnel Association

American Dental Education Association

ACT, Inc.

Association of Academic Health Centers

Association of American Colleges and Universities

Association of American Law Schools

Association of American Medical Colleges

Association of American Universities

Association of Catholic Colleges and Universities

Association of Community College Trustees

Association of Governing Boards of Universities and Colleges

Association of Jesuit Colleges and Universities

College and University Personnel Association

Council for Advancement and Support of Education

Council of Independent Colleges

Educational Testing Service

EDUCAUSE

Hispanic Association of Colleges and Universities

National Association for College Admission Counseling

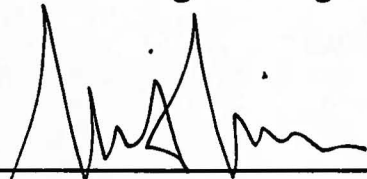
National Association of Independent Colleges and Universities

National Association of Student Financial Aid Administrators

National Association of Student Personnel Administrators

National Council of University Research Administrators

United Negro College Fund



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May 23, 2001
Date

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BRIEF FOR *AMICI CURIAE*
AMERICAN COUNCIL ON EDUCATION, ET AL.

All parties consent to the filing of this brief.

I. THIS CASE ENTAILS FUNDAMENTAL INTERESTS OF AMERICAN
HIGHER EDUCATION.

A. Amici Identified.

Amici are 32 associations of colleges, universities, educators, trustees, and other representatives of higher education in the United States. Amici represent public, independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions. American higher education institutions enroll some 14 million students (including one half million from overseas), and are generally regarded as pre-eminent in the world. For decades amici have worked to achieve student diversity.

Amicus American Council on Education (“ACE”) represents all sectors of higher education. Its approximately 1800 members include a substantial majority of colleges and universities in the United States. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education system to be the cornerstone of a democratic society. Among its initiatives to advance student diversity, ACE had a major role in establishing the Commission on Minority Participation in Education and American Life, chaired by former Presidents Ford and Carter, which issued One-Third of a Nation (1988), a report on minority matriculation, retention, and graduation. Appendix A contains information on the other amici on this brief.

B. Summary of Amici’s Argument.

Government has sound reasons to appraise skeptically even an attenuated and well-intentioned race-consciousness in decision-making. Amici explain here why promotion of student diversity in higher education amply meets the burden of that skepticism and rises to the level of a compelling governmental interest. Student diversity advances three core aims government entrusts to higher education: To strengthen the student’s powers of reason, to prepare the student for citizenship, and to ready the student for the economic world. Each of those purposes effectuates this basic mission of colleges and universities: To enable

students to surmount the intellectual, cultural, and experiential barriers that impede their growth as human beings.

C. Amici's Interest in this Case.

As stewards of the nation's colleges and universities, amici's members have learned that although no single standard of merit for admission is correct for every institution, sound conceptions invariably define it in ways that contribute to, and do not impede, education; advance the great conversation which is the essence of higher education; and rely on a range of considerations, not merely numerical measurement.

On March 6, 1860, President Lincoln spoke to the issue presented here:

If it was like two wrecked seamen on a narrow plank, when each must push the other off or drown himself, I would push the negro off or a white man either, but it is not; the plank is large enough for both This good earth is plenty broad enough for white man and negro both, and there is no need of either pushing the other off.

Roy P. Basler ed., Abraham Lincoln: Speeches and Writings 1859-1865 139

(Library of America 1989) (1953). Amici's members hold that if required to push off the plank that leads to their doors members of any racial or ethnic group, on the ground that they do not measure up to some other group, the conversation that

is higher education will be sapped, and the education of all who pass through those doors diminished.

Educators' knowledge that student diversity in the academy fosters learning is not new. They began to discuss the benefits of diversity at least "as early as the mid-nineteenth century." Harvard Univ., The President's Report 1993-1995, at 3. Cardinal Newman called for colleges at which "a multitude" of students would "come together and freely mix with each other," where "they are sure to learn one from another, even if there be no one to teach them." Id. at 4. As educators came to see the contribution race and ethnicity diversity bring to education, nearly all leading colleges and universities actively sought admission of more students from underrepresented minority groups, adding race and ethnicity to the traditional range of diversity-enhancing factors. The efforts were fruitful and continue. See, e.g., Deborah J. Wilds, Minorities in Higher Education 1999-2000: Seventeenth Annual Status Report 1-2 (2000).

Educators experience at close range the value of student diversity. As Harvard's president observed,

A diverse educational environment challenges [students] to explore ideas and arguments at a deeper level -- to see issues from various sides, to rethink their own premises

Neil L. Rudenstine, Why a Diverse Student Body is So Important, The Chronicle of Higher Educ. B1 (Apr. 19, 1996). See American Council on Educ., Making the

Case for Affirmative Action in Higher Education: What You Can Do to Safeguard Affirmative Action on Campus and in Your Community 24 (March, 1999); id. at 21-26 (reporting public statements by the presidents of 11 public and independent institutions); Harold T. Shapiro, Affirmative Action: A continuing discussion -- A continuing commitment, Princeton Weekly Bulletin (Oct. 16, 1995).

Leaders of higher education institutions of every type ^{1/} hold that diversity promotes learning. See American Ass'n of State Colls. and Univs. ("AASCU"), Policy on Racism and Campus Diversity (Mar. 1989); AASCU, Access, Inclusion and Equity: Imperatives for America's Campuses 32 (1997); On the Importance of Diversity in University Admissions, N.Y. Times, Apr. 24, 1997, at A27 (statement of Association of American Universities). Without it, "the quality and texture of . . . education . . . will be significantly diminished," and the institutions' role hindered. Id. See also, e.g., American Ass'n of Community Colleges, Statement on Inclusion (Apr. 12, 1997); ACE Bd. of Directors, Statement on Affirmative Action and Diversity (May 25, 1995); Council of Graduate Schools, Building an Inclusive Graduate Community: A Statement of

^{1/} A letter from a coalition of 32 higher education associations stating their members' commitment to diversity is reprinted in Making the Case for Affirmative Action, at 37-38.

Principles, 30 Communicator 1 (June 1997); American Ass'n of Univ. Professors, Affirmative Action, 83 Academe 38 (July-Aug. 1997). 2/

We describe below the basis for educators' judgment that student diversity, including racial and ethnic diversity, is essential to higher education. That judgment pertains to the question that we address -- whether student diversity in higher education is a compelling governmental interest.

II. STUDENT DIVERSITY IMPROVES THE QUALITY OF HIGHER EDUCATION.

A. Diversity is Essential to Basic Purposes of Higher Education.

Educators regard several aims as basic to higher education. Student diversity helps to achieve each: To enable students to lead "the examined life;" to prepare them to maintain the robust democracy that is their inheritance; and to give them tools with which to sustain the nation's economic health. Each of those aims entails breaking down barriers that isolate the student from the world he or she needs to know.

1. Diversity fosters the examined life.

A venerable purpose of higher education is to foster "the examined life." That is the focus of educators who view higher learning as desirable for its own sake, apart from its economic utility. See Robert M. Hutchins, The Higher

2/ Amici will provide the Court copies of any statement or publication cited in this brief that the Court indicates it wishes to receive.

Learning in America (Transaction Publishers 1995) (1936); J.H.C. Newman, The Idea of a University (M.J. Svačić ed., Univ. of Notre Dame Press 1982) (1873).

These educators consider the crucial work of education to be challenging students' embedded preconceptions, including the most deeply-held values. Only by critically examining those preconceptions can the student gauge rationally whether they are worthy. Educators who hold that the highest aim of colleges and universities is to develop students' powers of reason emphasize teaching how to think logically, how to expose fallacy, and how to test assumption through rigorous questioning and dialectic.

These educators believe that developing the powers of analysis in this way is not merely one among many skills to be taught; it is the chief skill, because on it rest human understanding and freedom. Socrates thought knowledge and freedom so essential, and so dependent on close reasoning, that the unexamined life is not worth living. The purpose of education, held the Stoics who carried his idea forward, is to confront the student's passivity, challenging the student's mind to take charge of its own thought. See Martha C. Nussbaum, Cultivating Humanity: A Classical Defense of Reform in Liberal Education 28 (1997). To strengthen the ability to reason is to enable the student to determine what to believe, what to say, and what to do, rather than merely to parrot thoughts, words,

and actions of convention, friends or family. Production of rational minds is a noble higher education goal.

Diversity contributes to the process of learning, on which the powers of reason depend. A precept of developmental psychology is that we learn by formulating, revising, and refining conceptions of the world. Peter B. Pufall, The Development of Thought: On Perceiving and Knowing, in Robert Shaw & John Bransford, Perceiving, Acting, and Knowing: Toward an Ecological Psychology 173-74 (1977). We learn when shaken by new facts, beliefs, experiences, and viewpoints. The student assimilates the new data so that they fit the existing conception, or revises the conception to accommodate the new data. This “disequilibrium,” as Jean Piaget called it, and the subsequent restoration of cognitive balance, force learners to refine their thinking. Piaget taught that “disequilibrium” experiences have greatest impact when they come from “social interaction.” Jean Piaget, Piaget’s Theory, in 1 Carmichael’s Manual of Child Psychology (P. H. Mussen ed., 3d ed. Wiley 1970). A student, confronted by a peer who has a new or unexpected way of looking at the world, meets that perspective as an equal, and can explore and absorb it more fully than if merely informed of it in, for example, a lecture. See, e.g., Diane N. Ruble, A Phase Model of Transitions: Cognitive and Motivational Consequences, 26 Advances in Experimental Social Psych. 163, 171 (1994). Colleges and universities supply,

David Ricardo observed, “that collision which is obtained only in society and by which a knowledge of the world and its manners is best acquired.” F.W. Garforth, Educative Democracy: John Stuart Mill on Education in Society 164 (1980).

These bedrock principles of developmental psychology, to which educators at all levels subscribe, teach that exposing students to an extraordinary array of peer life experiences and perspectives is critical to learning. The familiar, which tends to reinforce preconception, is less valuable; the new and different are food for intellectual growth. Piaget’s Theory, in 1 Carmichael’s Manual of Child Psychology. Student diversity provides all learners opportunities to develop their intellects, by exposure to increasingly complex and nuanced models presented by peers. These new perspectives and experiences are especially educational when encountered in direct interaction with a peer, because peer encounters entail the give-and-take and the emotional processes that promote complex thinking. Id.

Diversity thus awakens students from the sleepy “unexamined life” against which Socrates warned. A campus or classroom occupied by students from diverse backgrounds exposes each to a broader array of vantage points from which to view his or her own values and beliefs than does a classroom of like-minded students whose experiences, values, and beliefs are similar. Of course, students will not and should not always accept the new perspectives and abandon their own. Higher education teaches students to employ reason to decide for

themselves which belief is closest to the truth. And students in diverse institutions often learn that anticipated differences in perspectives or views do not exist, or do not correlate as expected with race or ethnicity. Preconception is thereby dispelled.

2. Diversity prepares students for citizenship.

A second purpose of higher education is to prepare students for citizenship. An educated citizenry is the predicate of a thriving democracy.

Mueller v. Allen, 463 U.S. 388, 395 (1983); DeRolph v. State, 677 N.E.2d 733, 736 (Ohio 1997). Colleges and universities seek to develop students' capacity not only to comprehend and reach their own informed views on issues of public import, but also to engage in deliberative aspects of democracy -- to interact and debate with other citizens, listen with an open mind, and persuade -- so as to achieve collective solutions to public problems. The "Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs." Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring). Government has long conceived higher education as an engine to ready students for citizenship in "a common vessel." See David J. Barron, The Promise of Cooley's City: Traces of Local Constitutionalism, 147 U. Pa. L. Rev. 487, 543-44 (1999).

A diverse student body demonstrably prepares students for citizenship. (See, R. 219 Appendix to defendants' motion for summary judgment, expert report of Patricia Gurin ("Gurin Report"), pg. 18). Diversity of backgrounds tends to broaden and give more credibility to campus discussion and debate, by exposing students to perspectives borne of different life experiences. Such exposure makes students better-informed voters, jurors, school board and neighborhood association members, and engaged participants in consideration of public affairs. Effective civic participation depends on ability to work with those whose backgrounds are different; students educated in a diverse setting are better prepared to work with fellow citizens from all walks of life. "Learning is not merely the acquiring of mastery over intellectual subject matter. . . . [I]n our schools and colleges, every citizen of the world should become 'at home' in the human 'state.'" Alexander Meikeljohn, Education Between Two Worlds 277 (1942). Encounters with classmates whose backgrounds are different help students apprehend better their own views. Student diversity in higher education thus takes students

out of the narrow circle of personal and family selfishness . . . accustoming them to the comprehension of joint interests, the management of joint concerns -- habituating them to act from public or semi-public motives and guide their conduct by aims which unite instead of isolating them from one another.

John Stuart Mill, On Liberty, in Three Essays 134 (Oxford Univ. Press 1975) (1859).

3. Diversity enhances education for economic and scientific progress.

A third aim of higher education is to prepare students to contribute to economic, scientific, and social progress, and to function effectively in the volatile global economy. Some academics once held business and other economic priorities irrelevant to higher education, see Hutchins, The Higher Learning in America, at 33, a view long outmoded. The need for higher education to be economically useful is no recent insight. Thomas Jefferson added “practical” studies to the classical subjects in the University of Virginia curriculum. See John S. Brubacher, On the Philosophy of Higher Education 4 (1982). In 1862, Congress endorsed the role of higher education in providing training, through the Morrill Land-Grant Act, which authorized agricultural and mechanical arts colleges in every state. Undeniably, colleges and universities today must teach students skills they need to maintain American leadership in commerce, law, medicine, and technology.

Educators are attuned to the need to train students for the fast-emerging international economy. Although more pressing now than ever before, that need has roots in classical texts from which American thinking about education derives. Asked where he came from, Diogenes answered, “I am a

citizen of the world,” a concept that influenced American thought through writings of Paine, Emerson, and Thoreau. Nussbaum, Cultivating Humanity, at 52-53.

To serve the increasingly multicultural, global economy, higher education must prepare professionals and business leaders equipped to function with diverse customers, clients, co-workers, and business partners. See Raymond V. Gilmartin, Diversity and Competitive Advantage at Merck, Harv. Bus. Rev. 146 (Jan. - Feb. 1999). Students who have had scant personal interaction with peers of different races and ethnicities are severely disadvantaged when they graduate into a nation in which minorities generate more than \$600 billion in purchasing power and constitute more than one-third of new entrants into the workforce. “Our success as a global community is as dependent on utilizing the wealth of backgrounds, skills and opinions that a diverse workforce offers, as it is on raw materials, technology and processes,” said a leading business executive. William G. Bowen & Derek Bok, The Shape of the River 12 (1998).

If the United States is to remain the world’s economic pace-setter, colleges must prepare graduates whose views are not parochial. So, too, in post-graduate fields, such as law, the natural sciences, and medicine, where international collaboration is increasingly essential, students today must receive direct experience with people of different races and ethnicities. They cannot

adequately acquire it from books, and will sorely need it. See Arthur H. Compton, Foreword to Huston Smith, The Purposes of Higher Education xiv (1955).

4. By breaking down barriers, diversity advances a chief purpose of higher education.

One goal unifies the foregoing aims of higher education: To enable students to overcome barriers that separate them from one another, divide them from the world they need to know, and block their growth. The developing theme of American higher education from the start has been to eradicate divisions, distinctions, and differences that limit and impede students, and thereby to teach critical self-reflection and impart knowledge. That theme, perhaps more than any other, has defined the role and the achievement of higher education in our society.

“The ‘American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.’” Plyler v. Doe, 457 U.S. 202, 212 (1982). The Founders saw higher education as essential to train the nation’s leaders who, John Adams held, should be recruited not from among “the rich or the poor, the high-born or the low-born, the industrious or the idle; but all those who have received a liberal education.” Frank Donovan ed., The John Adams Papers 182 (1965). They saw, too, that the role of education institutions must be to build and reinforce bonds among citizens, bonds the Founders knew were necessary to the nation’s functioning. The progenitors -- even in an era when college was accessible only to the well-placed few -- advocated common schools

to bring together the nation's children and instill a sense of national community, Noah Webster, On the Education of Youth in America (1790), in Essays on Education in the Early Republic 66 (Frederick Rudolph ed., 1965), and urged formation of a great university "where the youth of all the states may be melted (as it were) together into one mass of citizens," Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society 1780-1860, at 7 (Eric Foner ed. 1983) (quoting Benjamin Rush). Instilling not only "an ability" but also "an inclination" "to serve mankind, one's country, friends and family," wrote Franklin, is "the great Aim and End of all learning." Benjamin Franklin, Proposals Relating to the Education of Youth in Pennsylvania 30 (1749, reprint 1931).

Removal of barriers is no incidental by-product of American higher education. It is its essence, because "[a] democracy is more than a form of government; it is primarily a mode of associated living" that depends on "communicated experience." John Dewey, Democracy and Education 101 (Free Press 1966) (1916). We demand even more of graduates as the nation "break[s] down . . . barriers of class, race, and national territory," because such a society produces "more numerous and more varied points of contact" and "a greater diversity of stimuli to which an individual has to respond." Id.

Surmounting barriers is the heart of the idea of education because it is central to expanding horizons, developing capacities, and deepening understanding. “The worthy fruit of academic culture is an open mind” Charles William Eliot, Inaugural Address as President of Harvard College (1869), in Educational Reform: Essays and Addresses 8 (1905). Recoiling from the suggestion that “the scholar should be a recluse,” Emerson wrote: “Only so much do I know, as I have lived.” Ralph Waldo Emerson, The American Scholar, in The Portable Emerson 32 (1946). “Is it not true,” he asked, “that every landscape I behold, every friend I meet, every act I perform, every pain I suffer, leaves me a different being than that they found me?” Ralph Waldo Emerson, Education, in The Portable Emerson, at 251. Bertrand Russell equated intellectual “vitality” with “interest in the outside world,” which he held to be a key aim of education. Bertrand Russell, On Education, in Steven M. Cahn, The Philosophical Foundations of Education 295 (1970).

Education is far more than transmission of desiccated knowledge from teacher to student. That is the outer shell, the beginning. The very word “educate” derives from the Latin “educere”, “to draw out.” Ideas must be “utilised, or tested, or thrown into fresh combinations.” Alfred North Whitehead, The Organisation of Thought, Educational and Scientific 4 (1974). “There is only one subject-matter for education, and that is Life in all its manifestations.” Id. at 13.

The history of American higher education is a progression of overcoming barriers to learning. Examples follow. Religious barriers: Oxford and Cambridge maintained doctrinal tests for admission until 1870. American colleges never did. John S. Brubacher and Willis Rudy, Higher Education in Transition: A History of American Colleges and Universities (1958, 4th ed. 1997). Geographical barriers: On the eve of the Civil War, contact in college between a New Englander and a Southerner was valued as “a sort of education for its own sake.” Henry Adams, The Education of Henry Adams 58 (1927). Vocational barriers: The view was widely held even in those days that colleges owed a responsibility to American society to prepare a wide spectrum of the population for the professions and every walk of life. See Francis Wayland, Thoughts on the Present Collegiate System in the United States (1842) (cited in Merle Curti, The Growth of American Thought 352 (1964)). Factional barriers: By the late 19th century, as larger numbers advanced to higher education, educators saw that “a great university exerts a unifying social influence.” Charles William Eliot, The Aims of the Higher Education in Educational Reform: Essays and Addresses 234 (1905); see Oscar Handlin & Mary F. Handlin, The American College and American Culture: Socialization as a Function of Higher Education (1970). Class barriers: Reformers such as Horace Mann saw in universal education the way to strengthen a sense of national community among rich, middle class, and

impoverished Americans. Merle Curti, Human Nature in American Thought: A History 182 (1980). A decreased emphasis on class and family status followed at elite institutions. Gender, ethnicity, and race barriers: In the 20th century, the institutions' doors opened wider than ever before, with mass availability of quality higher education. Large numbers of immigrants were admitted to college. As president of Princeton, Woodrow Wilson advocated interaction among students from different backgrounds. See Woodrow Wilson, We Can Lead in Social Example: Report to the Board of Trustees (June 10, 1907), in A Day of Dedication: The Essential Writings and Speeches of Woodrow Wilson 80 (Albert Fried ed., 1965). Formerly all-male leading institutions admitted women.

Progress, especially in overcoming ethnicity, race and other barriers continued in recent decades, fostered by civil rights laws, notably the Civil Rights Act of 1964, that prohibited exclusion -- and by government policies that encouraged educators to compose student bodies based on the educational benefits of inclusion for all students.

Today, facing uniquely contentious, knotty issues of race and ethnicity, higher education stands poised to transcend this most formidable barrier, to confront the great issue of our age. Having caught a glimpse of the fruits that true diversity brings -- in historical terms, a fleeting glimpse -- is it not understandable that those entrusted with the leadership of higher education warn

against a course that threatens diversity? Would it not be harsh irony if higher education were barred from felling this last, highest barrier, in the name of laws enacted to remove the racial and ethnic divisions among Americans? Would history not see grave error in such a course?

B. Racial and Ethnic Diversity Is Valuable in a Student Body Because Salient to the World in Which We Live.

Obviously, racial and ethnic diversity is but one feature of a student body that colleges and universities must have to achieve their purposes.

Applicants are asked to demonstrate that they are, for example, academically prepared, industrious, curious, and accomplished. And the precise qualifications an institution seeks depend on its nature and particular mission. Racial and ethnic student diversity plainly is insufficient to sustain American higher education. But it is necessary.

Race and ethnicity do not dictate a student's viewpoint, nor does any viewpoint correlate absolutely with any group. But because it is indisputable that, for example, being black or being white often affects how a person is treated or perceived, students of different races and ethnic origins often bring a range of special experiences to the classroom. The interchange of these experiences is exactly what allows students to learn from each other. (See, e.g., R. 219 Appendix to defendants' motion for summary judgment, expert report of Kent D. Syverud).

Effective communication of experience

requires getting outside of it, seeing it as another would see it, considering what points of contact it has with the life of another so that it may be got into such form that he can appreciate its meaning. . . . [O]ne has to assimilate, imaginatively, something of another's experience in order to tell him intelligently of one's own experience.

John Dewey, Democracy and Education 5-6 (Free Press 1966) (1916).

Contrary to the canard voiced by opponents of diversity-promoting admissions practices, the educational value of diversity derives not from any false assumption that all members of one race think alike or that race is a proxy for viewpoint. Rather, diversity enables students to discover the falsity of such stereotyped, pernicious assumptions. See Jonathan R. Alger, The Educational Value of Diversity, 83 *Academe* 20 (Jan. - Feb. 1997).

Although the lens of race and ethnicity is unique, through it myriad, ever-changing visions are beheld. Admissions officers, even when able to learn much about an applicant from recommendations, essays, and interviews, cannot predict what light that applicant will shed on each issue that will be addressed in the classroom. But by considering for admission different cross-sections of the applicant pool, an institution can ensure that an exceedingly varied range of perspectives is likely to be represented on campus. To bar consideration of race and ethnicity would deprive institutions of a salient cross-section, and would

reject even the possibility that a particular black, Hispanic or native American student will add something of value another student would not.

In seeking diversity along as many salient dimensions as possible, colleges and universities strive to replicate the complexity and multiplicity of human experiences that occur outside the campus gates. Thus, although neither race nor ethnicity is by any means the only pertinent dimension of diversity, their exclusion from the mix would create in the academy an unfaithful, distorted model of the world that awaits students. An otherwise heterogeneous student body if racially or ethnically homogeneous would be not genuinely diverse, but a flawed simulacrum.

C. Research Confirms that Racial and Ethnic Diversity Improves Educational Outcomes.

Social science findings demonstrate the value of racial and ethnic diversity to achievement of higher education's purposes, and show that the interactions diversity allows yield concrete educational benefits for white as well as minority students. Professor Alexander Astin collected data on 25,000 students in 217 four-year colleges. He assessed attitudes, values, beliefs, career plans, achievement, and degree completion. He analyzed how students were affected by "Institutional Diversity Emphasis." He found that "strong emphasis on diversity" is associated with "widespread beneficial effects on a student's cognitive and affective development." Alexander W. Astin, Diversity and Multiculturalism on

the Campus: How are Students Affected?, 25 Change 44, 45 (Mar./Apr. 1993).

Students who interact more with students of different backgrounds, and have an opportunity to discuss issues of race and culture, tend to be more successful in college. Id. at 46. Socializing with members of other ethnic groups is positively associated with many measures of academic development and achievement. Id. “[T]he weight of the empirical evidence,” Professor Astin found, “shows that the actual effects on student development of emphasizing diversity and of student participation in diversity activities are overwhelmingly positive.” Alexander W. Astin, What Matters in College? 431 (1993).

Students, particularly whites, who have contact across racial groups express more satisfaction with college. Octavio Villalpando, Comparing the Effects of Multiculturalism and Diversity on Minority and White Students’ Satisfaction with College 12 (Nov. 9, 1994) (paper presented at Annual Meeting of Association for the Study of Higher Education, Nov. 10-13, 1994). Law students report that racial and ethnic diversity positively affects their education. Gary Orfield & Dean Whitla, Diversity and Legal Education: Student Experiences in Leading Law Schools, in Diversity Challenged: Evidence on the Impact of Affirmative Action (Gary Orfield & Michael Kurlaender eds., 2001).

Undergraduates who study with students of a different race or ethnicity report more growth in acceptance of people of different races and cultures, and tolerance

of those with different beliefs. Sylvia Hurtado, Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development, in Diversity Challenged: Evidence on the Impact of Affirmative Action (Gary Orfield & Michael Kurlaender eds., 2001) at 8-9.

Research also shows that institutional commitment to diversity is linked with student academic success and relatively low racial tension on campus (Daryl G. Smith et al., Paths to Success: Factors Related to the Impact of Women's Colleges, 66 J. of Higher Educ. 245 (May/June 1995); Hurtado, Linking Diversity and Educational Purpose), supports retention of minority students (Daryl G. Smith et al., Diversity Works: The Emerging Picture of How Students Benefit v-vii (Ass'n of Am. Colleges and Univ. 1997)), and, overall, has powerful educational impact on white and minority students (id.; see R. 219 Gurin Report; ACE and AAUP, Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms (2000)). Research findings show, too, positive effects of racially diverse education on students' subsequent behavior at work; attendance at a racially diverse institution affects decisions students, white and black, later make concerning those with whom to work and socialize. Marvin P. Dawkins & Jomills Henry Braddock II, The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society, 63 J. of Negro Educ. 394, 403 (Summer 1994).

Amicus National Association of Scholars' ("NAS") brief, and the "study" on which it relies, are flawed, and obscure rather than illuminate the scholarship. NAS erroneously characterizes the entire range of diversity experiences as "taking racial/ethnic studies classes." NAS Brief at 6. Extensive research, including the Gurin Expert Report and other researchers' analyses, such as those cited above, have measured a far broader array of such experiences. (See R. 219 Gurin Report, pg. 27-28; R. 287 Supplemental Expert Report of Patricia Y. Gurin, pg. 4 ("Gurin Supp. Report")). NAS' methodological quarrel with Professor Gurin's analysis, too, is flawed: Professor Gurin measured educational outcomes by established, accepted social science research methods, (see R. 287 Gurin Supp. Report, pg. 5-10), whereas NAS limits itself to a peculiarly narrow critique of the Gurin and Astin findings; addresses none of the other research that demonstrates benefits of diversity, see supra at 22-24; and fails to cite any study that shows that diversity has no educational benefit. If NAS' methodological exegesis proves anything, it is that the presence on campus of students of different races who never interact may yield no significant educational benefit. Such a conclusion would be unsurprising; students can, of course, learn from each other only if they interact. And NAS leaves undisturbed Professor Gurin's and other studies' findings that diversity experiences, which depend, obviously, on student diversity, have positive educational effects. (See R. 219 Gurin Report, pg. 35-48;

R. 287 Gurin Supp. Report). See supra at 22-24. The NAS contention, shorn of its jargon, appears to be that students in a diverse institution who have no communication with each other do not benefit from the diversity. NAS could as well contend that the student who sleeps through a lecture learns nothing from the lecturer.

A host of leading authorities, some of which this brief cites, stand for the educational value of student diversity in higher education; that value does not rest solely on recent social science findings. But those findings do confirm educators' judgment that student diversity is essential to central purposes of higher education. We address below why that judgment warrants considerable judicial deference.

III. COLLEGES AND UNIVERSITIES REQUIRE AND ARE ENTITLED TO LATITUDE, BASED ON THEIR JUDGMENT AND EXPERIENCE, IN DETERMINING HOW TO ASSEMBLE STUDENT BODIES.

For several reasons, the Court should accord great weight to educators' conclusion that diversity is critical to educational quality.

A. The First Amendment Protects Institutions' Academic Freedom to Determine "Who Shall Be Admitted to Study."

Educators' judgments about student body composition entail academic freedom and, as the Supreme Court has recognized, are a First Amendment concern. Academic freedom safeguards not only "[t]eachers and

students [who] must always remain free to inquire, to study and to evaluate,” Keyishian v. Board of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)), but also “autonomous decisionmaking by the academy itself.” Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985). The Supreme Court has identified “‘four essential freedoms’ 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.” Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (quoting Sweezy, 354 U.S. at 263 (Frankfurter, J., joined by Harlan, J., concurring in the result)). “[W]ho may be admitted to study” is paradigmatic academic judgment, id. at 311-12, that when made to foster students’ education is the classic exercise of academic freedom.

B. American Higher Education Is Strong Because Independent and Diverse.

“The characteristic danger of great nations,” wrote Walter Bagehot, “is that they may at last fail from not comprehending the great institutions which they have created.” Robert H. Bork, The Limits of Governmental Regulation, in The University and the State: What Role for Government in Higher Education? 170 (S. Hook et al. eds., 1978). A reason American colleges and universities are the envy of the world is our nearly unique tradition of government deference to educators’ judgment about how to educate. Deference is owed educators’

judgment that diversity improves education because such matters “require ‘an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.’” Ewing, 474 U.S. at 226 (quoting Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 89-90 (1978)). How the mix of students affects learning involves considerations educators are best equipped to gauge. Such judgments require knowledge of campus and classroom dynamics, cognitive processes, how to nurture students’ capacity for moral reasoning, and other specialized knowledge in which educators are trained.

Further, such judgments depend on the institution’s precise mission. The education a small liberal arts college aims to impart may call for a student body different than that a flagship state university needs; the student body a historically secular university seeks may ill-suit an institution committed to a delicate balance of Catholicism and denominational inclusiveness. And institutions’ needs evolve over time. To forbid the institutions from considering qualified applicants’ race and ethnicity would truncate the historic right of American colleges and universities to assemble students in a way that fits the institutions’ educational philosophies -- philosophies that, with salutary effect, are themselves extraordinarily diverse. See Carnegie Comm’n on Higher Educ., Reform on Campus: Changing Students, Changing Academic Programs 35 (1972).

C. Admissions Policies that Foster Diversity Benefit Non-minority as Well as Minority Students.

The freedom of higher education institutions to pursue diversity is especially worthy of protection because diversity benefits all students. White students and minorities alike lose if consideration of diversity-enhancing factors is banned. Prohibition of race- and ethnicity-consciousness in admissions would likely decrease dramatically the number of minorities on campuses -- an outcome disadvantageous to the whole student body.

Opponents of race- and ethnicity-consciousness in admissions argue that it denies admission to students who have more merit. That argument rests on a severely flawed conception of merit in the context of admissions. In the admissions process, institutions seek to develop the best possible mix of students to promote learning on campus. The student who brings to higher education life experience that enriches fellow students' understanding brings value to, and merit for, the institution.

Colleges and universities continuously appraise that which best benefits their entire student population, mindful that merit for admission depends on the institution's mission and educational needs. A college whose mission is to promote the humanities may place a premium on applicants' musical or artistic interest and ability; a university that emphasizes agricultural studies may recruit candidates raised on a farm (or in a city, for that matter); a sectarian institution

may be willing to admit a student whose academic achievement is less impressive, if strong character and religious conviction are demonstrated; and an eminent public university must respond to the educational needs of taxpayers who fund it. Each institution must judge precisely what value to accord racial and ethnic diversity in the spectrum of pertinent educational considerations. To prescribe for any institution a fixed and invariable measure of merit -- such as grades and test scores alone -- would be to deny that institution the ability to pursue its institutional mission in the interest of all students.

IV. SUPREME COURT PRECEDENT AND THE CONSENSUS OF EDUCATORS SHOW THAT DIVERSITY IN HIGHER EDUCATION SERVES A COMPELLING INTEREST.

Amici believe that Justice Powell's statement in Bakke, that "the interest of diversity is compelling in the context of a university's admissions program," 438 U.S. at 314, is sound law. Since Bakke, several Justices have reaffirmed that Justice Powell's statement represented the Court's holding. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (observing that diversity was found "'compelling,' at least in the context of higher education") (O'Connor, J., concurring in part and concurring in the judgment). The Supreme Court expressly endorsed Justice Powell's Bakke opinion in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 568 n.15 (1990). Although the level of scrutiny Metro Broadcasting applied to federal programs was elevated in Adarand Constructors,

Inc. v. Pena, 515 U.S. 200, 227 (1995), Adarand did not overturn Bakke regarding diversity. See id. at 258 (Stevens, J., joined by Ginsburg, J., dissenting); see Akhil Reed Amar & Neal Kumar Katyal, Bakke's Fate, 43 UCLA L. Rev. 1745, 1768 (1996). 3/

This Court has consistently followed Bakke. See Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757, 763 (6th Cir. 1983) (citing Bakke for proposition that "affirmative action admission programs of educational institutions may take race into account, but racial quotas are prohibited"); Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100, 103 (6th Cir.), cert denied, 506 U.S. 830 (1992). Other courts, too, have recognized that Bakke bound them to consider attainment of diversity a compelling interest in higher education. Smith v. University of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000), petition for cert. filed, 69 USLW 3593 (Feb. 21, 2001) ; University and Community College Sys. v. Farmer, 930 P.2d 730, 734 (Nev. 1997), cert. denied, 523 U.S. 1004 (1998). See

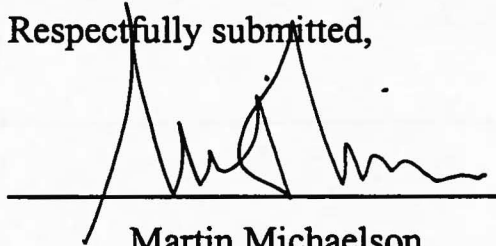
3/ The United States has consistently held that use of race and ethnicity as factors in narrowly tailored decisions regarding student admissions and financial aid is constitutional. See, e.g., 34 C.F.R. § 100.3(b)(6)(ii); Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756, 8760-62 (Dep't of Educ. Policy Guidance Feb. 23, 1994); Letter from Judith A. Winston, Gen. Counsel, Dep't of Educ. to College and Univ. Counsels 2 (Sept. 7, 1995); Letter from Judith A. Winston, Gen. Counsel, Dep't of Educ. to College and Univ. Counsels 1 (July 30, 1996); Letter from Walter Dellinger, Acting Solicitor Gen. to Judith A. Winston, Gen. Counsel, Dep't of Educ. 2 (Apr. 10, 1997).

also Buchwald v. University of New Mexico Sch. of Medicine, 159 F.3d 487, 499 (10th Cir. 1998) (Justice Powell's opinion "remains the leading jurisprudential authority in this area"). Concluding, as did the district court in Grutter v. Bollinger, No. 97-CV75928 (E.D. Mich. Mar. 27, 2001), that diversity in higher education is not a compelling interest, would be at odds with several other judicial analyses. See Smith, 233 F. 3d 1188; Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d. 738 (2d Cir. 2000); Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123 (4th Cir. 1999), cert. denied, 529 U.S. 1019 (2000); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999), cert. dismissed, 529 U.S. 1050 (2000); Wessmann v. Gittens, 160 F.3d 739 (1st Cir. 1998). But see Hopwood v. Texas, 78 F. 3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996), appeal after remand, 95 F.3d 53, on remand, 999 F. Supp. 2d 872 (W.D. Texas 1998), aff'd in part, rev'd in part, 236 F.3d 256 (5th Cir. 2000), petition for cert. filed (April 17, 2001). Neither the Supreme Court nor this Court has questioned the holding that colleges and universities have a compelling interest in seeking student diversity.

CONCLUSION

The interest in attaining a diverse student body is compelling because necessary to the missions of colleges and universities and the central purposes of higher education.

Respectfully submitted,

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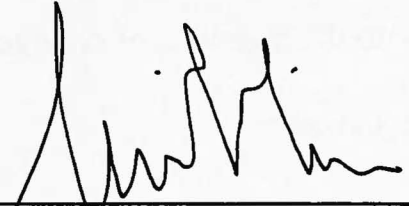
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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

I hereby certify that this amicus brief is proportionately spaced, has a typeface of 14 points or more, and is 6,983 words in length (not including tables, this certificate, and the certificate of service).



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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2001, a copy of the foregoing Motion for Leave to File a Brief as Amici Curiae and of the foregoing Brief of Amici Curiae American Council on Education, et al. were dispatched by Federal Express to the Clerk, U.S. Court of Appeals for the Sixth Circuit and to:

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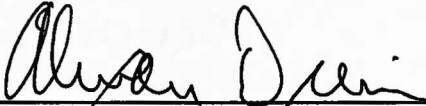
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APPENDIX A: AMICI ON THIS BRIEF

- American Council on Education. See description at page 2 of brief.
- American Association for Higher Education. On behalf of over 9,600 individual members, works to strengthen higher education teaching and administration.
- American Association of Colleges for Teacher Education. Represents approximately 735 colleges of teacher education.
- American Association of Colleges of Nursing. Represents more than 525 schools of nursing.
- American Association of Collegiate Registrars and Admissions Officers. Promotes standards and best practices in admissions, enrollment management, information technology, instructional management, and student services.
- American Association of Community Colleges. Represents 1,100 two-year institutions.
- American Association of State Colleges and Universities. Represents over 400 state colleges and universities.
- American Association of University Professors. Represents some 43,000 faculty members and research scholars; defends academic freedom and the free exchange of ideas in higher education.
- American College Personnel Association. Serves student affairs educators and administrators.
- American Dental Education Association. Represents all of the dental schools in the United States and Canada.
- ACT, Inc. Provides assessment, research, and guidance services, including the ACT Assessment, to students, parents, high schools, and colleges.
- Association of Academic Health Centers. Represents the health complexes of the major universities nationwide.
- Association of American Colleges and Universities. Works to advance college learning; its 700 members represent the spectrum of higher education institutions, public and private, large and small.
- Association of American Law Schools. Represents 164 law schools and shares with the American Bar Association responsibility for accrediting American law schools.

- Association of American Universities. Represents 62 public and private major research universities.
- Association of American Medical Colleges. Represents all 126 accredited U.S. medical schools.
- Association of Catholic Colleges and Universities. Facilitates exchange among and represents 214 Catholic institutions of higher education.
- Association of Community College Trustees. Represents over 6,000 board members who govern community, technical, and junior colleges.
- Association of Governing Boards of Universities and Colleges. Serves some 30,000 trustees, regents, and other senior administrators responsible for 1,700 colleges, universities, and independent schools.
- Association of Jesuit Colleges and Universities. Represents the 28 Jesuit institutions of higher education in the United States.
- College and University Personnel Association. Represents some 1,700 college and university human resources departments.
- Council for Advancement and Support of Education. Represents 2,900 education institutions and other organizations.
- Council of Independent Colleges. Represents 450 independent liberal arts colleges and universities.
- Educational Testing Service. Develops and administers achievement and admissions tests.
- EDUCAUSE. Promotes higher education quality through use of information technologies.
- Hispanic Association of Colleges and Universities. Represents 200 Hispanic-serving institutions and associate member institutions in 12 states and Puerto Rico.
- National Association for College Admission Counseling. Represents, and promotes ethics among, admission officers and school counselors.
- National Association of Independent Colleges and Universities. Represents over 900 independent colleges and universities on public policy issues before the federal government.

- **National Association of Student Financial Aid Administrators. Promotes effective administration of student financial aid.**
- **National Association of Student Personnel Administrators. Serves student affairs administrators at all levels.**
- **National Council of University Research Administrators. Promotes effective policies and procedures related to administration of sponsored programs.**
- **United Negro College Fund. Provides financial aid to students and represents 39 private, accredited four-year historically black colleges and universities.**

