

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

BARBARA GRUTTER

Plaintiff - Appellee

v.

LEE BOLLINGER, et al.

Defendants

and

KIMBERLY JAMES, et al.

Defendants - Appellants

---

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

# DEFENDANT-INTERVENORS' APPEAL BRIEF

Miranda K.S. Massie (P-56564)  
George B. Washington (P-26201)  
Jodi-Marie Masley (P-62116)  
Scheff & Washington, P.C.  
3800 Cadillac Tower  
Detroit, Michigan 48226  
313-963-1921

Attorneys for Defendant-Intervenors

## TABLE OF CONTENTS

<p>STATEMENT OF FACTS 1</p> <p style="padding-left: 20px;">A. Introduction. 1</p> <p style="padding-left: 20px;">B. Social and individual relations to experiences, status, world-view and self-definition are shaped by race and racism in American society. 1</p> <p style="padding-left: 20px;">C. The separate and unequal reality of American primary and secondary education. 2</p> <p style="padding-left: 40px;">1. Black students. 2</p> <p style="padding-left: 40px;">2. Latino/a students. 3</p> <p style="padding-left: 40px;">3. Native Americans students. 3</p> <p style="padding-left: 20px;">D. The continuing reality of racism in American colleges and universities, and its impact on UGPAs. 4</p> <p style="padding-left: 20px;">E. Race and the Law School Admissions Test. 5</p> <p style="padding-left: 40px;">1. The discriminatory impact of the LSAT. 5</p> <p style="padding-left: 40px;">2. Sources of the LSAT gap. 6</p> <p style="padding-left: 20px;">F. The Law School’s admission plan. 7</p> <p style="padding-left: 40px;">1. The development of the affirmative action plan. 7</p> <p style="padding-left: 40px;">2. The Law School’s current admission plan. 7</p> <p style="padding-left: 20px;">G. The district court’s decision. 8</p> <p style="padding-left: 40px;">1. The central contradiction in the district court’s factual findings. 8</p> <p style="padding-left: 40px;">2. The effect of the district court’s decision. 8</p> <p>SUMMARY OF THE ARGUMENT 9</p> <p>ARGUMENT 9</p> <p style="padding-left: 20px;">I. BECAUSE INTEGRATION IS A COMPELLING STATE INTEREST AND AFFIRMATIVE ACTION IS THE ONLY AVAILABLE MEANS OF INTEGRATING THE LAW SCHOOL AND THE LEGAL PROFESSION, THE DISTRICT COURT COMMITTED A FUNDAMENTAL AND HISTORIC ERROR OF LAW IN STRIKING DOWN THE UMLS PLAN. 9</p> <p style="padding-left: 40px;">A. Standard of review. 9</p> <p style="padding-left: 40px;">B. The integration of a public university is the most compelling state interest possible under the Fourteenth Amendment. 9</p>	<p>10</p> <p>12</p> <p>12</p> <p>12</p> <p>13</p> <p>13</p> <p>13</p> <p>14</p> <p>15</p> <p>15</p>	<p style="padding-left: 20px;">C. The <i>Bakke</i> decision reaffirms the legality of affirmative action while circumscribing both the rationales that support it and the means to achieve it 10</p> <p style="padding-left: 20px;">D. The district court erred as a matter of law in striking down the Law School’s affirmative action plan. 12</p> <p style="padding-left: 40px;">1. The district court erred in defying <i>Bakke</i>. 12</p> <p style="padding-left: 40px;">2. The district court erred in ruling that the Law School plan failed to comply with <i>Bakke</i>. 12</p> <p style="padding-left: 20px;">E. The district court erred in usurping the right of the people of the State of Michigan to democratically determine the steps needed to integrate their universities. 13</p> <p style="padding-left: 20px;">II. THE DISTRICT COURT ERRED WHEN IT FAILED TO RECOGNIZE THE SIGNIFICANCE OF RACE AND RACISM FOR VIEWPOINT AND FOR ACADEMIC CREDENTIALS. 13</p> <p style="padding-left: 40px;">A. Because race and viewpoint are inseparably linked, the district court erred when it disregarded the compelling state interest in racial diversity as a necessary component of intellectual diversity. 13</p> <p style="padding-left: 40px;">B. The district court clearly erred in rubber-stamping the plaintiff’s view that admissions criteria are race-neutral measures of merit in the face of overwhelming and largely uncontested evidence that they are saturated with racial bias and discrimination. 14</p> <p style="padding-left: 40px;">C. UMLS has the right, if not the obligation, to maintain an affirmative action plan that reduces the reign of racism and race in admissions. 15</p> <p>CONCLUSION 15</p>
---	---	--

## STATEMENT OF FACTS

### A. Introduction.

“Race has been a dividing line in American society since the settlement of the colonies in the beginning of the Seventeenth Century. ...As historians ... we talk about ... race as socially constructed ... as something that has developed and changed over time. It’s a set of ideals. It’s what society deals with, the coexistence of people of different backgrounds of that society. Different societies define race in different ways, and our society has made race a very, very rigid dividing line between its citizens.”

(Foner, TR10, 193, Apx 8413).

Erika Dowdell, the daughter of a nurse’s aide, attended a middle school in Detroit without windows, without usable athletic facilities, and without sufficient books for its students. By her musical talent, she secured admission to Cass Technical High School, one of Detroit’s best public schools. Cass was “run down” and “falling apart” and it lacked sufficient books for its students. But having achieved a 3.7 grade point average and having taught herself to play four musical instruments, Ms. Dowdell secured admission to the University of Michigan under its affirmative action program. (Dowdell, TR6, 8-9, 12-20, 22, 32-36, 43, Apx 7787-7788, 7791-7799, 7801, 7811-7815, 7822).

She has done well at Michigan, is a student leader of the Defend Affirmative Action Party, is the only black student to be repeatedly elected to the Michigan Student Assembly, and now hopes to go to the University of Michigan Law School. If the decision rendered by the district court in this case is allowed to stand, she will have little hope of going there or desire to go there. (Dowdell, TR6, 73-76, Apx 7852-7855).

Concepción Escobar is the daughter of an Apache father, who died when she was young, and a Mexican immigrant mother who has spent her life as a factory worker. Ms. Escobar went to elementary and middle schools in Chicago like those that Ms. Dowdell attended in Detroit. By early tracking, Ms. Escobar entered Whitney Young High School, the best public high school in Chicago. She, too, did well, securing, without the help of her counselor, both admission to and a scholarship from Amherst College. Overcoming a particularly acute form of racial and class prejudice there, she achieved a 3.43 grade point average and secured admission to UMLS under its affirmative action plan (Escobar, TR8, 160-161, 165-166, 177-178, 192-196, Apx 8105-8106, 8110-8111, 8122-8123, 8137-8141).

As set forth in the record below—developed in large part by the student intervenors and acknowledged in part in the grudging findings by the district court, Ms. Dowdell and Ms. Escobar are not unique. The undisputed facts demonstrate that the overwhelming majority of black, Latino/a and Native American students receive a segregated and unequal education. This is the result

of conscious social policy and judicial decisions. The two main admissions criteria used by the Law School, standardized test scores and undergraduate grade point averages, both reflect and magnify this inequality.

The inescapable factual conclusion, so systematically avoided by the district court, is that without affirmative action, tens of thousands of talented black, Latino/a and Native American students will never be admitted to UMLS or to any other selective school.

If the district court’s decision is allowed to stand, under the purported command of the Fourteenth Amendment, these schools will soon return to what they were not so very long ago: segregated institutions, with only token numbers of black, Latino/a and Native American students, in the midst of a society that will be majority nonwhite within the lifetimes of Erika Dowdell and Connie Escobar.

### B. Social and individual relations to experiences, status, world-view and self-definition are shaped by race and racism in American society.

At trial, Professor Eric Foner, the DeWitt Clinton Professor of History at Columbia University, and this nation’s most distinguished scholar on Reconstruction and the history of race relations in America, explained the role that race has played in the development of every social institution in the United States. Professor Foner made clear that the fundamental contradiction of American history has been our claim to stand for equality, freedom and democracy while our institutions implement and enforce social policies that deny black and other minority citizens basic rights and equal opportunities. He explained that the ideology of black inferiority derives from the material reality of socially planned and enforced inequality. He also made clear that the success of unified struggles of black and white citizens beginning with the abolitionist movement is due to their mass character. These struggles have determined the direction and character of our society. The question of race has led to some of this nation’s largest, most tumultuous, and violent upheavals, including the Civil War and the civil rights movement. (Foner, TR10, 193, 200, 208-214, Apx 8413, 8420, 8428-8434).

Professor John Hope Franklin, Emeritus Professor of History at Duke University and one of the nation’s preeminent historians and leading authorities on the struggle for black equality, offered extensive testimony on how race and racism shaped the twentieth century. Professor Franklin made clear that racism is “improvisational” and that segregation and inequality are used to give white people a “vertical advantage and have been the basis of a caste system based on race.” Professor Franklin made clear that the struggle against racism is ongoing and requires constant vigilance, and that while we have made great progress since *Brown v Board of Education*, the attack on affirmative action represents the latest improvisation of segregationist impulses that still exist in our nation. (Franklin, TR7, 14-37, 54-62, 98-99, 104-106, 124-125, 155, Apx 7931-7954, 7971-7979, 8015-8016, 8021-8023, 8041-8042, 8057).

Tania Kappner, an Oakland high school teacher, a named student intervenor, and a founding member of the Coalition to Defend Affirmative Action & Integration, and Fight for Equality By Any Means Necessary (BAMN), offered testimony on how the fight to defend affirmative action is developing a new generation of student and youth integrationist leaders and a new militant, mass, integrated civil rights movement. As a result of this new civil rights movement, on May 16, 2001, the Regents of the University of California unanimously voted to reverse their 1995 ban on affirmative action in the University of California (UC) System. The 1995 ban was the point-of-departure victory for opponents of affirmative action—its reversal has been hailed as the turning of the tide in the struggle to defend affirmative action and to make real the nation’s promises about integration.<sup>1</sup>

Ms. Kappner, a recent graduate from the University of California at Berkeley Graduate School of Education, described the determined and dynamic fight that students and youth across California have been making to defend affirmative action and integration. She also described the unwillingness of students to accept the proposition that ballot measures or court decrees could return this society to segregation, and she stressed how important minority student participation in mass actions has been to lifting the stigma of inferiority. (Kappner, TR14, 183-190, Apx 8766-8773).

C. The separate and unequal reality of American primary and secondary education.

As the testimony below definitively established, the path to admission to UMLS is permeated with discrimination against black, Latino/a and Native American students. To understand the need for affirmative action—and the inevitable resegregation that will result if it is eliminated—it is necessary to begin by sketching that path.

As the UMLS draws two-thirds of its students from outside Michigan, that path begins in the nation’s primary and secondary schools. (Shields, TR4, 196, Apx 7679; Lehman, TR5, 152, Apx 7759; Munzel, TR1, 147, Apx 7238). In uncontradicted testimony, the foremost authorities in the country described how those schools systematically disadvantage black, Latino/a, and Native American students of all social and economic backgrounds.

1. Black students.

Gary Orfield, Professor of Education at Harvard University and one of the nation’s most distinguished experts on race and education, described the separate and unequal education received by the overwhelming majority of black students in the nation’s primary and secondary schools.

---

<sup>1</sup> “UC regents’ symbolic step to spur change in admissions,” *San Jose Mercury News*, May 16, 2001, p. 1.

As a result of conscious government policies, both housing and schools were and are segregated, with Michigan among the most segregated areas in the country. In Professor Orfield’s words, before *Brown*, the nation’s schools were “very segregated,” with an “apartheid” structure in the South. After 1970, however, when the federal executive finally began enforcing *Brown*, the South became the most integrated region. Since then, the most intense segregation has been located in the schools of the major industrial states of the Northeast and Midwest, with Michigan one of four “absolute center[s] of segregation”. In the nation as a whole, two-thirds of black students and 70 percent of Latino/a students attend segregated schools today; in Michigan, 83 percent of black students are in segregated schools, with 64 percent in “extremely segregated” schools. (Orfield, TR6, 86-91, 96-97, 126-127, Apx 7856-7861, 7866-7867, 7881-7882; Ex 195, Apx 6053; Ex 196, Apx 6054; Ex 167-C, Apx 5882).

The students in these segregated schools are generally very poor. For schools with over 90 percent black and Latino/a students, almost 90 percent have a majority of students on free or reduced-cost school lunches. In contrast, in schools with less than 10 percent black or Latino/a students, only 7.7 percent have a majority of students on free or reduced school lunches. (Orfield, TR6, 97-100, Apx 7867-7870; Ex 197, Apx 6055).

While poverty distorts educational opportunities for everyone, the burden of poverty and segregation bears down far harder on black students. Poor white people are more dispersed residentially. Thus, their children are far less likely to end up in schools with heavy concentrations of students from poor backgrounds. (Orfield, TR6, 99, Apx 7869).

Even for black students from middle and upper middle class families, substantial disadvantage remains. While the income or employment of many black middle class families may be equivalent to some white families, black middle class families have less wealth, less education, and fewer relatives who can provide—rather than request—financial assistance in times of trouble. (Orfield, TR6, 102-104, Apx 7872-7874).

In education, very few white middle-class children attend inner city schools; but many middle-class black and Latino/a children attend those schools. As Professor Orfield testified, even if those students attend the best magnet schools in the segregated city school systems, the education they receive is “very average or low average” in comparison to suburban districts. (Orfield, TR6, 132, 135-138, Apx 7887, 7890-7893).

Partly as a result, there has been a “huge increase” in the migration of middle-class black people and Latinos/as to nearby suburbs. Many of those suburbs, however, are, or quickly become, segregated. As the white middle class leaves, the tax base declines, trained teachers retire or leave rather than adapt, and the school systems quickly decline. (Orfield, TR6, 102-107, Apx 7872-7877).

Even for those very few black families who “escape” into stable white, upper-middle class suburbs with excellent school systems, there remain racial isolation, stereotyping, tracking, and stigma. (Orfield, TR6, 104-106, Apx 7874-7876).

As has been shown in “thousands of cases for many generations,” the segregated education received by the overwhelming majority of black and Latino/a students means that those students receive an unequal education:

There never was a separate but equal school system. That’s because of many things. It’s because the poverty levels in segregated schools are much higher....[T]here are fewer minorities in teacher training. There are many fewer teachers who choose to go to work in schools of this sort. Most teachers who start in segregated schools leave faster. The curriculum that is offered is more limited. The probability that the teacher will be trained in their field is much more limited. The level of competition is less. The respect for the institution in the outside world is less. The connections to colleges are less. There are more children with health problems...The population is much more unstable. ... The kids don’t have books.... There [are] no facilities....[I]t is like a different planet, a different society.

(Orfield, TR6, 92-93, Apx 7862-7863).

As Oakland, California English teacher Tania Kappner testified, and as Professor Orfield confirmed, within segregated schools very talented students work extremely hard to obtain an education. (Kappner, TR14, 180-181, Apx 8763-8764; Orfield, TR6, 134, Apx 7889). Even with affirmative action, however, admission officers at schools such as the University of Chicago “routinely reject[ed] valedictorians from Chicago high schools...because of the experience that they could not survive for a single quarter on the campus.” (Orfield, TR6, 127-128, Apx 7882-7883).

Thus, long before the Law School sends out its applications, the American educational system has rendered the vast majority of black students ineligible for admission—and has imposed on the remaining black students serious handicaps in entering, completing, and succeeding in the college education required to even apply to the Law School.

## 2. Latino/a students.

Eugene García, the Dean of the Graduate School of Education at UC Berkeley and one of the nation’s foremost authorities on bilingual education, described the analogous burdens imposed upon Latino/a students.

Dean García began by describing the education received by the largest concentration of Latinos/as in the country—the Latino/a population of California. As he later testified, the conditions faced by Latinos/as elsewhere in the United States differ only in detail. (García, TR11, 66-67, Apx 8505-8506).

Like the black population, Latinos/as live in segregated housing and attend segregated schools. But in addition to segregation by race and ethnicity, they face segregation by citizenship and language, with over 50 percent of the

state’s Latinos/as speaking Spanish in their home. (García, TR10, 160, Apx 8393).

As described by Dean García, California’s segregated public school system is vastly “underresourced” for Latinos/as and black people. Fifty percent of Latino/a third graders have a teacher who is “not credentialed, has not been trained as a teacher, and is in almost every term unqualified to teach in the classroom.” In predominantly black and Latino/a schools, the curriculum, textbooks, laboratories and educational experiences are seriously deficient, with many such schools not even offering prerequisites for admission to the University of California. Forty percent of the Latino/a students in California never graduate from high school. (García, TR10, 152-155, 174-175, Apx \_\_, 8401-8402; García, TR11, 65, Apx 8504).

For the sixty percent who do graduate, a single statistic captures the disadvantage they face. By law, the eight campuses of the University of California—including its world-renowned campuses at UC Berkeley and UCLA—are the elite institutions in the state, required to serve the top 12.5 percent of the state’s students. Last year, only 3.8 percent of Latino/a high school graduates—and 3.2 percent of black graduates—were *eligible to apply* to any of the eight UC schools. (García, TR10, 142-143, Apx 8391-8392; García, TR11, 60, Apx 8499).

As with Chicago’s valedictorians, the separate and unequal education imposed upon Latinos/as in California and across the country eliminates a vastly disproportionate number of such students from any hope of ever applying to UMLS or any school like it.

## 3 Native American students.

Faith Smith, the President of Native American Educational Services (NAES) College, the only private college controlled by Native Americans in the United States, described the separate and unequal education received by Native Americans. (Smith, TR13, 158-160, Apx 8674-8676). Many are still relegated to underfunded and segregated government-run reservation and boarding schools, while others attend schools in the poorest sections of the major cities. President Smith characterized Native American education as suffering from “discrimination by omission.” Most Native Americans learn nothing about the role that Native Americans have played in the development of this nation. (Smith, TR13, 164, Apx 8680).

President Smith ascribed the huge increase of Native Americans in higher education to the creation of affirmative action programs, but made clear that many Native American students have difficulty surviving the experience of being on a majority white campus because of the isolation caused by their numbers being too small. (Smith, TR13, 175, Apx 8681).

D. The continuing reality of racism in American colleges and universities.

While the achievements of affirmative action have been historic, the continuing racism on American campuses has depressed the grades of black, Latino/a, and Native American students and thus placed a further barrier in their path to schools like Michigan's Law School. While the gap between the undergraduate grade point averages (UGPAs) of white and minority applicants at Michigan is small, in the context of a very competitive admissions process in which UGPA is one of two major factors, it is nevertheless significant. (Dist Op, 74-75, n55, Apx 169-170).

One of the most eminent authorities on the education of black, Latino/a, and Native American students at the nation's universities, Professor Walter Allen of UCLA, described the special hurdles facing black, Latino/a, and other minority students on the nation's campuses. (Allen, TR9, 82-85, 174-176; Apx 8210-8213, 8266-8268; Ex 211, Apx 6069).

When students are brought together for the first substantial interracial experience of their lives, the legacy of segregation and discrimination does not simply disappear. While the majority of white administrators, faculty, and students harbor good will, many also exhibit varying degrees of ignorance and prejudice. As set forth in direct testimony by Ms. Dowdell and Ms. Escobar and in repeated examples from Professor Allen's work, black and other minority students face systematic racism—a daily run of slights, slurs, profiling, and even physical assaults. These include professors who cannot tell one black student from another; white students who exclude black people from their study groups or laugh as minority students talk in class; teaching assistants who automatically charge cheating when a black student scores well on a math exam; white students who ask all black males what sport they play; library employees who search Latino students' book bags with particular regularity; and campus police who require predominantly black parties to use the back doors and who question, arrest, and search black students with disturbing regularity. In all, the message sent is that minority students do not belong on mostly white campuses—a message that is inextricably bound up with the racist stigma of intellectual inferiority faced by black and other minority students. (Allen, TR9, 101-102, 134-135, 138-145, 153-158, 177-181, Apx 8229-8230, 8239-8240, 8243-8250, 8258-8263, 8269-8273; James, TR9, 10-12, Apx 8144-8146).

In contrast, Frank Wu, Associate Professor of Law at Howard University and this nation's leading expert on Asian Americans and affirmative action, testified that while the racist stigma of intellectual inferiority is generally not directed against Asian Americans, other stereotypes including the myth of the "model minority" attach to Asian Americans. This stereotype isolates and stigmatizes Asian Americans, and has been used by anti-affirmative action advocates to pit Asian Americans against other minority students and to reinforce the myth of black inferiority. (Wu, TR13, 52-64, 78-80, Apx 8637-8649, 8663-8665).

The myth of racial inferiority and similar prejudices—whether conscious or unconscious—have two consequences for black, Latino, and Native American students who may eventually apply to UMLS.

As an initial matter, racism affects the way professors and teaching assistants assign grades. While grades are seemingly objective, grading is not a science, but an art—particularly in the humanities and social sciences, where prospective law students tend to congregate. At the cut points in particular, prejudice, whether or not conscious, affects the grade a student receives. (Allen, TR9, 99-100, Apx 8227-8228).

The second effect of campus climate on grades is less visible but more pernicious. Racist incidents that might seem trivial in isolation have the cumulative effect of "wearing down" the morale of minority students. As Professor Allen testified—and as the district court ignored—extensive literature and several surveys of representative samples of college students have documented that black students feel higher levels of isolation, more often consider dropping out of school, and have more problematic relations with faculty than their white peers. Even for students from similar economic status and with roughly similar academic performance, the surveys have demonstrated that black and other minority students experience higher degrees of "despair, discouragement and isolation." (Allen, TR9, 88-89, 102-107, Apx 8216-8217, 8230-8235).

For purposes of this litigation, Professor Allen conducted smaller surveys and twelve focus groups on four of the top ten feeder campuses for the Law School: University of Michigan, Michigan State University, UC Berkeley, and Harvard. (Ex 157 at 7, Apx 5649). In extended transcribed discussions led by trained sociologists, including Daniel Solórzano, the Chair of UCLA's Graduate School of Education and Information Sciences, the black and other minority students recounted experiences of the same forms of prejudice and the same reactions of anger, despair, and disengagement documented in the representative surveys and in the literature. Based upon the professional literature (including his own), the large-scale surveys described above, and the in-depth research reflected in the focus groups on the four feeder campuses, Professor Allen concluded that racism on campus diminishes the graduation rates and grade point averages of black and other minority students:

In very aggregate quantitative terms, the impact is one that translates into a diminishment of black representation...and lower levels of success in terms of the accepted indicators of academic success [including]...grades and the test score performance[.]

(Allen, TR9, 88-89, Apx 8216-8217).

Professor Allen testified that increasing the representation of minority students on campuses through more vigorous affirmative action plans could further reduce the GPA gap and eventually eliminate it. (Allen, TR9, 88-91, 160, 165, Apx 8216-8219, 8265, \_\_).

Currently, however, the B+ of a black, Latino, or Native American student simply does not mean the same thing as the B+ of a white student. (Allen, TR9, 159-160, Apx 8264-8265).

While it launched into an unfounded criticism of Professor Allen’s work, the district court conceded his point: “[M]any underrepresented minority students find the racial climate hostile at the Law School’s ‘feeder’ institutions,” which doubtless has a “negative effect on these students’ academic performance.” (Dist Ct Op, 75-76, Apx 170-171).

E. Race and the Law School Admissions Test.

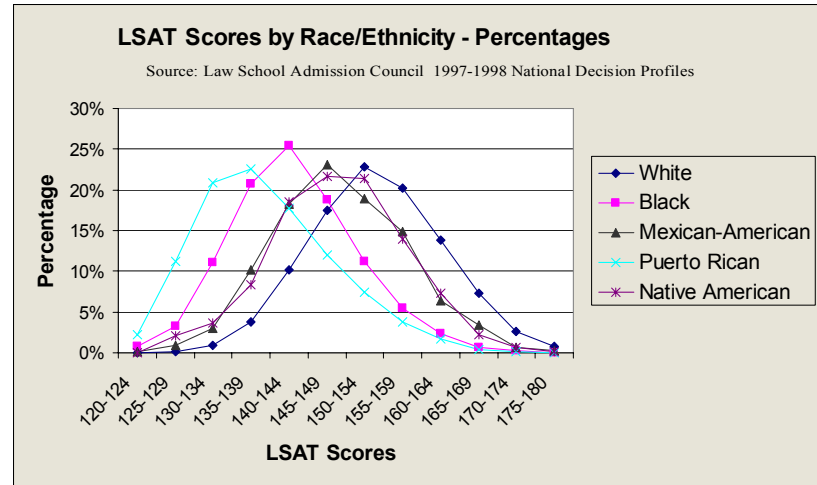
1. The discriminatory impact of the LSAT.

LSAT scores, the second major factor in admissions, not only capture and reflect racial discrimination—they concentrate and intensify it.

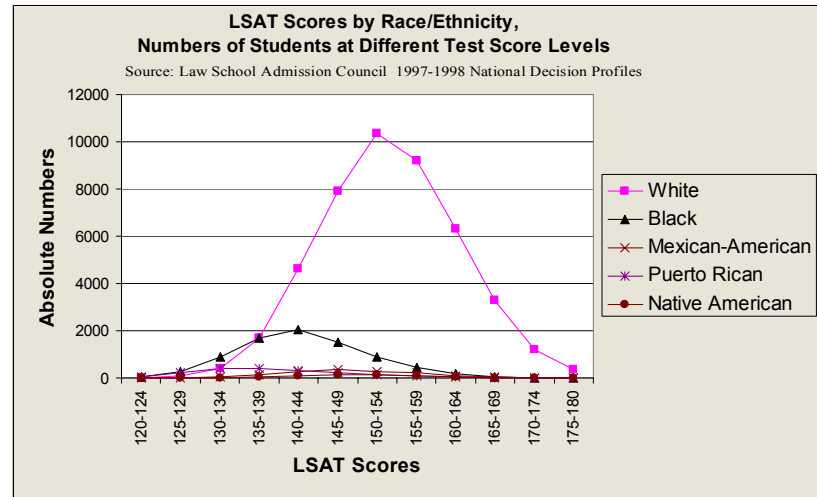
As required by the American Bar Association, and like every accredited law school in the country, the UMLS uses the only standardized law school admissions test in existence—the LSAT. (Shields, TR4, 178, Apx 7660; Munzel, TR1, 134, Apx 7225).

Despite the persistent myth that such tests measure intelligence or aptitude, the manufacturer of the LSAT claims only that it predicts some of the variation in academic performance in the first year of law school. Even on that, its predictive value varies considerably among institutions (Shapiro, TR8, 62, Apx 8082), with test scores and grades together predicting only 27 percent of the variation in first-year grades at Michigan. (Ex 4 at 3, Apx 4231; Lempert, TR3, 101-102, Apx 7500-7501). As UMLS Professor Richard Lempert testified and the district court noted, the LSAT has no ability to predict a UMLS graduate’s success as a lawyer. (Dist Ct Op, 71-73, Apx 166-168).

The LSAT, however, imposes a terrible cost on black, Latino/a and Native American applicants. Professor Orfield prepared graphs dramatically demonstrating the vast difference in scores on this test by underrepresented minorities:



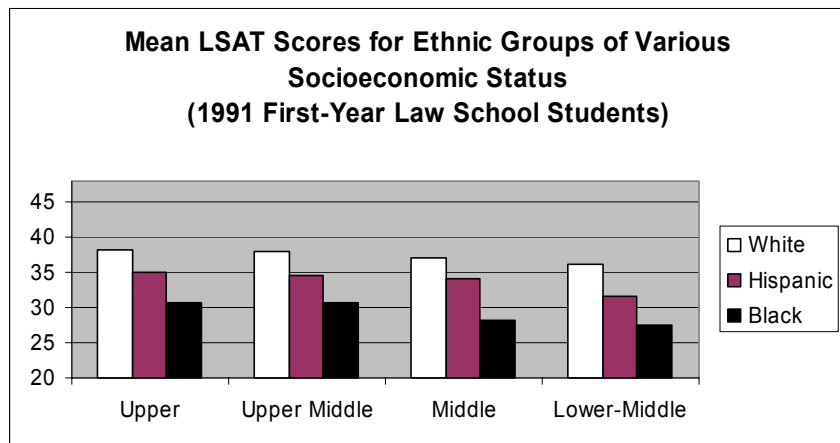
Using the same data—plotted to show the far greater numbers of white applicants—Professor Orfield demonstrated that any rigid use of the LSAT, including as a cutoff point in a lottery, would necessarily result in a vast drop in the number of successful applicants from underrepresented minorities:



(Orfield, TR6, 153-160, Apx 7900-7907; Ex’s 199-200, Apx 6057-6058).

Mr. David White—Director of the non-profit research group Testing for the Public, and a man who has spent his professional life studying standardized tests—assembled data that demonstrate the tremendous significance of this gap. While 46 percent of white students scored at or above 155 on the LSAT, only 8 percent of black law school applicants did so. (Dist Ct Op, 69, Apx 165; White,

Ex 219, Apx \_\_). While that difference was in part due to social class—with richer students of all races scoring higher on the tests—Mr. White’s unchallenged data demonstrated that black students from the wealthiest backgrounds scored worse on average than white students from the poorest backgrounds:



(White, Ex 220, Apx 6185).

As Mr. White’s data demonstrated, even for students with the same grade point average from the same elite schools, whites on average score 9.2 points higher on the LSAT than blacks, 6.8 points higher than Latinos/as, and 4.0 points higher than Native Americans. That LSAT gap has remained constant for the last 20 years. As 9.2 points is greater than the average score differential between the most prestigious and least prestigious law schools in the country, the rigid use of LSAT scores in admissions would force black people out of not just the most selective schools, but out of law school altogether. (White, TR11, 144-152, Apx 8550-8558; Ex 173-D (final page), Apx 5976; Ex 223, Apx 6188; Lempert, TR14, 83-84, Apx 8720-8721).

## 2. Sources of the LSAT gap.

In finding that the Law School “discriminated” against white applicants by admitting blacks and others with lower LSAT scores, the district court essentially held that the LSAT, if used at all, had to be rigidly used across racial and ethnic lines. Before entering such a directive, it would seem vital to determine the sources of the gap in test scores. But the district court simply opined that the reasons for the gap are very “difficult to explain.” (Dist Ct Op 79-81, Apx 174-176).

The court did find two reasons “plausible.” First, whether due to lack of money or information or to race-related anxiety about the test, black people and other minorities take LSAT preparation courses, which substantially boost scores, far less frequently than whites. (Dist Ct Op, 81, Apx 176). Second, the LSAT,

like the SAT, favors monolingual applicants raised in households in which academic English is spoken—i.e., applicants whose first and only major language exposure is to the English spoken in privileged, white households. (Dist Ct Op, 81, Apx 176; Shapiro, TR8, 55-56, Apx 8075-8076; García, TR10, 165-167, Apx 8397-8399).

While its own findings were more than sufficient to discard its directive that the test scores be applied rigidly across racial lines, the district court went out of its way to dismiss other evidence demonstrating that the tests incorporated racial discrimination within them.

As the court noted, Professor Claude Steele of Stanford has conducted a series of experiments demonstrating that blacks and other minorities do poorly on any test billed as high stakes, while performing at the same level as whites if the test is billed differently. Professor Steele concluded that the students were aware of racist stereotypes about intellectual ability and that the high-stakes testing triggered a heightened anxiety, causing them to perform worse because they were so concerned to avoid confirming those stereotypes. (Steele Exp Rep, 6-8, Apx 2506-2508; Dep of Steele, 77, 80-81, 177-182, Apx 7043, 7043-7044, 7068-7069).

While Professor Steele testified by deposition and Dean García—himself a substantial expert on educational testing—expressed his agreement with Professor Steele’s work, the district court claimed the record was too sparse to support the claim that “stereotype threat” had resulted in the gap in scores on the LSAT—even though the district court had precluded Professor Steele’s trial testimony after the University unexpectedly dropped him from its “will call” list at the last minute. (Dist Ct Op, 79-81, Apx 174-176; García, TR11, 33-42, 72, Apx 8472-8481, 8511).

Similarly, the district court went out of its way to minimize the significance of the un rebutted testimony of Professor Martin Shapiro of Emory University. (Dist Ct Op, 67-69, 79, Apx 162-164, 174). As he testified, the LSAT was patterned on the SAT, which was developed in the 1930’s by a noted advocate of the “superiority of the Nordic races” for the specific purpose of cutting down the number of supposedly “overachieving” Jewish students in Ivy League colleges. (Shapiro, TR8, 66-68, Apx 8086-8088). While Professor Shapiro testified that the test maker no longer proclaimed such an openly racist intent, the district court simply ignored Professor Shapiro’s testimony that the content of the LSAT exam still reflected the “value judgments” of the test maker, not any objective requirements for the study of law. (Shapiro, TR8, 25-26, 31-32, 34-37, Apx 8058-8059, 8064-8065, 8067-8070).

Similarly, the district court ignored the significance of Professor Shapiro’s description of the manufacturer’s process of pre-testing new questions, keeping only those that high scorers answered at a high rate and low scorers answered at a low rate—and thus perpetuating the biases in past exams. (Shapiro, TR8, 39-41, Apx 8072-8074).

The district court was even more hostile to the testimony of Mr. Jay Rosner of the Princeton Review Foundation. Consistent with Professor Shapiro’s work, Mr. Rosner studied those few questions for which the test maker had

released demographic data. He found that the manufacturer excluded from the actual exam questions on which black people scored better on pretests than whites—while including questions on which whites scored better. The district court ignored the conclusion that test scores purportedly showing qualifications for the study of law are based on the particular questions which the test manufacturer chose to use on the exam. (Dist Ct Op, 79, Apx 174; Rosner, TR8, 118-127; Ex 210, Apx 8093-8102).

Having rejected all the student intervenors' evidence of bias intrinsic to the test, the district court found that no bias had been proven—even though the record was largely undisputed and even though the district court found plausible two reasons for the score gap that are rooted in discrimination. (Dist Ct Op, 79, 81, Apx 174, 176).

#### F. The Law School's admission plan.

##### 1. The development of the affirmative action plan.

As the Law School learned from three decades of experience, in the face of discrimination in the path applicants took to enter the School, it could not achieve a racially integrated student body without affirmative action.

Until 1966, UMLS based admissions on a rigid mathematical index derived from the applicant's UGPA and LSAT score. For two decades, this produced virtually all white classes, discouraging black college graduates from even applying. (Ex 53 at 7, Apx 4857; Ex 97, Apx 5064).<sup>2</sup>

In 1966, the Law School adopted its first affirmative action plan by departing from numerical credentials for a small part of the class, with particular concern expressed for the admission of black students, disadvantaged students, students with significant non-academic achievements, and students with military service. As grounds for the shift, the Admissions Committee asserted that black students would "introduce more heterogeneity in our student body, hopefully adding to the variety of attitudes and views expressed in the classroom." Under this policy, nine black students gained admission for the fall 1966 semester. (Ex 53 at 4, 7, Apx 4854, 4857).

In its continuing debate over admission policies, the faculty deepened its understanding that numerical credentials discriminated against black and other minority applicants, "caus[ing] [their] actual potential...to be underestimated, especially when gauged by standard testing procedures...thought to be 'culturally biased.'" By 1970, the Dean of Admissions had generalized some of the lessons learned from early black recruitment and advocated abandoning the rigid use of numerical criteria for *all* applicants, resulting in an increase in economically

disadvantaged students of all races. (Ex 53 at 6, 16-19, 22-23, Apx 4856, 4866-4869, 4872-4873).

The resulting integration transformed the life of the Law School. The campus was animated by debate on affirmative action. In reports, meetings, and resolutions, the faculty supported affirmative action because of the urgent need to integrate the profession, to open a door of opportunity to minorities, and to provide a more diverse learning environment for all its students. (Ex 53 at 4-5, 8, 33, 35-38, 40, Apx 4854-4855, 4858, 4883, 4885-4888, 4890).

In 1973, UMLS graduated 41 black law students and the first Latino/a in recorded history. In 1975, the Law School graduated its first two Asian-Americans, followed by the first Native American in 1976. The increasing number of black and other minority students cleared the way for the admission of increasing numbers of women students of all races. (Ex 97, Apx 5065; Wildman Rep, 2, Apx 3139).

After *Bakke* was decided in June 1978, UMLS reaffirmed its affirmative action program, including its intent to evaluate students' potential by flexible criteria. (Ex 53 at 53-55, Apx 4903). For fourteen years, the policy remained unchanged.

##### 2. The Law School's current admission plan.

In 1992, the then Dean of UMLS, Lee Bollinger, appointed a new Director of Admissions and a committee to review the admissions program and to develop a clear mission statement for it.

Committee member Professor Theodore Shaw testified that the committee determined that "...in the absence of special efforts to be conscious about producing diversity, [an] institution like University of Michigan Law School could end up being very racially exclusive." (Dep of Shaw, 72, 78, 80-81, Apx 3871, 3872, 3873). When pressed for an explanation, he explained that standardized test scores are correlated with privilege and do not "adequately explore all of the qualities of the applicant." As a result, the committee adopted a "holistic review process that reflected real individualized considerations of each applicant's qualifications and background." (Dep of Shaw, 91-92, Apx 3875).

While that policy declared that the Law School would use grades and LSAT scores as a guide to admissions, it foreswore any rigid adherence to them because these criteria predicted first-year grades only weakly, and because "the asserted connection between graded law school performance and the likelihood of success in practice is based more on faith and anecdote than it is on rigorous research findings." (Ex 4 at 3-6, Apx 4232-4235).

Moreover, the policy declared that admitting some students with lower index scores would help "achieve that diversity which has the potential to enrich everyone's education and thus make the law school class stronger than the sum of its parts." (Ex 4 at 8-10, Apx 4237-4239). In that context, the Policy singled out the gains of integration by reaffirming the School's committed to admit students "...from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans, who without this commitment

---

<sup>2</sup> Exhibit 53 is a document entitled "The History of Special Admissions at UMLS, 1966-1981," published in July 1992 by Alissa Leonard, who was then Assistant Director of Admissions at the Law School.

might not be represented in our student body in meaningful numbers.” Noting that such students are “likely to have experiences and perspectives of special importance to our mission,” the Law School reaffirmed its commitment to enroll a “critical mass” of such students in order to ensure their actual ability “to make unique contributions to the character of the Law School.” (Ex 4, 8-10, 12; Apx 4237-4239, 4241).

Under the 1992 policy, the Law School has paid some attention to the numbers of minorities. However, enrollment has fluctuated greatly, and because the numbers are still too low, minority students face a hostile environment at the Law School. (Allen, TR10, 90-91, Apx 8218-8219; Ex 98, Apx 5066).

#### G. The district court’s decision.

##### 1. The central contradiction in the district court’s factual findings.

In its lengthy opinion, the district court struck down the Law School’s affirmative action plan because it believed that the school could not consider race at all in the absence of proof that it had engaged in intentional racial discrimination in the recent past. (Dist Ct Op, 46, Apx 141). In reaching this conclusion, the district court strained to minimize evidence as to the continued existence of racism in American society and to reject much of the students’ testimony regarding grades and test scores. Nevertheless, the largely un rebutted evidence—and the plain truth about American society—did force the district court to reach some very contradictory factual findings.

The district court agreed that there was a vast disparity in educational opportunities for whites and minorities; that this difference, along with a racially hostile climate in the nation’s undergraduate colleges, helped cause the difference in UGPA between white and minority applicants; and that the even larger difference in LSAT scores reflects nothing about what kind of lawyer the applicant may become, but instead may indicate nothing more than the availability of test preparation classes or household linguistic experience of the applicant or other causes not known to the district court. (Dist Ct Op, 61-65, 69-70, 71-73, 75-76, 81, Apx 156-160, 164-165, 166-168, 170-171, 176).

Having made those findings, however, the district court specifically adopted the plaintiff’s claim that white applicants suffered discrimination at the Law School based upon the cell-by-cell comparisons propounded by the plaintiff’s statistician, Dr. Kinley Larntz. (Dist Ct Op, 33, Apx ). As summarized by the district court, those comparisons grouped applicants by criteria that it had found incorporated discrimination—the UGPA and LSAT scores—and then compared the odds of admission for white students in each cell with the odds of admission for each category of minority in the same cell. According to Dr. Larntz and the district court, the difference in the odds of acceptance—the “odds ratio”—showed an “enormous preference” for underrepresented minorities—even though the district court admitted that the very criteria on which these odds ratios were based contained an enormous preference for white students! (Dist Ct Op, 26, 32-34, Apx 121, 127-129).

According to the district court, if the Law School uses criteria that the court recognizes contain racial discrimination within them, the Fourteenth Amendment requires that it must either abandon those criteria altogether or must use them with a rigidity across racial lines that guarantees that they will exclude the vast majority of blacks, Latinos/as, and Native Americans.

##### 2. The effect of the district court’s decision.

While the district court accepted Dr. Raudenbush’s conclusion that its decision would result in an immediate drop in minority enrollment of over 65 percent (Dist Ct Op, 28-29, 34-35, Apx 123-124, 129-130), the actual effect of its decision is far greater than that. If adopted by this court or by the Supreme Court, the district court’s decision would quickly choke off the supply of black, Latino/a and Native American applicants from undergraduate colleges across the country. Even if at first the Law School somehow managed to enroll a student body with four percent underrepresented minorities, the percentage would quickly drop to where it once was: at or near zero.

Even before that occurred, the district court’s decision would result in conditions that would drive out some black, Latino/a and Native American students. In her testimony, Chrystal James, one of two black students in her entering class at UCLA Law School, described the wave of racial hostility and isolation that swept that school after the passage of Proposition 209. (James, TR9, 8-75, Apx 8142-8209). In his deposition, Eric Brooks described similar conditions when he was the only black law student entering Boalt Hall after the passage of Proposition 209. (Dep of Brooks, 25-31, Apx 6546-6547).

The district court suppressed evidence it did not want to consider. It asserted that the percentage of underrepresented minorities at the three law schools in the University of California system increased slightly from 1999 to 2000—but it did not mention that at those law schools most comparable to Michigan—UCLA and Berkeley—the entering classes of black law students dropped from 7.9% in 1995 to 2.6% in 2000 at Berkeley, and from 7.4% in 1995 to 1.6% in 2000 at UCLA. (Dist Ct Op, 84-85, Apx 179-180; Ex 118, Apx 5102).

Similarly, the district court claimed that there has been a drop in underrepresented minority students of only one percent throughout the University of California system, while neglecting to note that even in the face of a vast increase in the Latino/a population, there has been a 42 and 45 percent drop in black and Latino/a students entering UCLA and Berkeley. (García, TR10, 180, Apx 8407; Ex 213, Apx 6102). As Professor Allen testified—and the district court ignored—at UCLA, barely 15 miles from South Central Los Angeles, the entering class of 4,000 undergraduate students had exactly 25 black men who were not scholarship athletes. (Allen, TR9, 175, Apx 8267).

As Dean García’s unrefuted testimony demonstrated—and as the district court again ignored—the only reason that the UC system as a whole has shown only a 1% drop in such enrollment is that there has been a large increase of minority enrollment at UC Riverside and UC Santa Cruz. (Ex 213, Apx 6102). As Dean García testified, without contradiction, that increase will end as the

swelling population forces those schools to become more selective, and as the continuing inability to use affirmative action drives out the black and Latino/a students who have now found a temporary refuge there.

As Dean García and Professor Orfield testified, California’s universities have found no way to replace the conscious use of race—affirmative action—to assure an integrated student body. At UCLA, officials attempted to use income as a substitute for race; it did not work because there are too many poor white people who do not suffer the same degree of deprivation as blacks, Latinos/as, and Native Americans. (Orfield, TR6, 100-101, 150-151, 175-176, Apx 7870-7871, 7879-7880, 7913-7914; Foner, TR10, 219, Apx 8439). At Berkeley, officials attempted to use holistic file review as a substitute for affirmative action; it has not worked because the lack of resources in predominantly black and Latino/a schools simply camouflages the achievements of the students in those schools. (García, TR11, 62-63, Apx 8501-8502; Orfield, TR6, 150-151, 176-177, Apx 7879-7880, 7914-7915). The passage of Proposition 209 is forcing the resegregation of the largest public university in the country. (García, TR11, 108-110, Apx 8540-8542).<sup>3</sup>

### SUMMARY OF THE ARGUMENT

Race inflects every experience. More specifically, racism saturates the educational process. The impact of racial discrimination in education—from gross to subtle—is determinative. To deny this fact is to accept the biological determinist lie that the gaps in test scores and GPAs between white and underrepresented minority students is a function of biology rather than a creation of social policies and conditions. Integration, democracy, freedom, and equality require defeating this lie. We have made our greatest progress when we have acknowledged the role that race and racism play within our society and when we have taken conscious and positive action to achieve integration. Integration is the key to social progress and equality.

The district court never engaged with either side of the fundamentality of race—not with the students’ arguments about racism and meritocracy and not with their arguments for integration, diversity, and progress. The opinion is rife with legal and factual errors that all have the same source—a complete failure to recognize that racism and race matter deeply for social experience, for intellectual and social viewpoint, for performance on measures of academic achievement and potential, and for our common future.

---

3 In its attempt to obscure that result, the district court cites Dean García’s own school, the Graduate School of Education, which had been able to slow the decline of minority enrollment for a variety of idiosyncratic reasons. The other graduate schools in the UC System have suffered dramatic declines in minority enrollment, as have the undergraduate institutions campuses at UCLA and Berkeley.

## ARGUMENT

### I

BECAUSE INTEGRATION IS A COMPELLING STATE INTEREST AND AFFIRMATIVE ACTION IS THE ONLY AVAILABLE MEANS OF INTEGRATING THE LAW SCHOOL AND THE LEGAL PROFESSION, THE DISTRICT COURT COMMITTED A FUNDAMENTAL AND HISTORIC ERROR OF LAW IN STRIKING DOWN THE UMLS PLAN.

#### A. Standard of review.

This Court reviews the district court’s legal rulings *de novo* and its factual findings for clear error. *Cousin v Sundquist*, 145 F 3d 818 (CA6 1988), *cert den* 525 US 1138 (1999).

#### B. The integration of a public university is the most compelling state interest possible under the Fourteenth Amendment.

In *Brown v Board of Education*, 347 US 483 (1954), the Supreme Court reaffirmed the original intent of the Fourteenth Amendment to extend the basic guarantees of equality, democracy and freedom to the oppressed minorities of the nation. *Brown* stated a simple but profound truth: “Separate educational facilities are inherently unequal.” 347 US at 495.

No other decision has fashioned so sweeping, radical, and just a solution—the integration of public education—as the means to address the persistence of inequality and injustice. No other decision has declared so boldly that black and other minority citizens could only realize the full rights of citizenship if public education were desegregated.

*Brown* resuscitated the Fourteenth Amendment and transformed the concept of equal protection under the law from a hollow and meaningless platitude to the living expression of the fight for equality. The *Plessy* era of “separate but equal” had turned the Fourteenth Amendment on its head, using it to disenfranchise and degrade black people and other minorities and to cast them into second-class citizenship.

In *Brown*, the Court asserted that the Constitution could protect the interests of black people and other minorities. Not surprisingly, this change in constitutional interpretation extended new rights to white people as well. The interests of white people and black people and other minorities were no longer counterposed. The struggles for equality that were initiated in response to *Brown* proved that through integration we can advance together.

The fact that the federal judiciary had taken a stand in favor of expanding the rights of black people inspired hundreds of thousands of black and white students and youth to stand and fight for equality, even in the face of great danger and resistance. The integrated struggles of the civil rights movement and

in particular the courage, determination, and leadership of black youth challenged the racist lie of black inferiority and convinced millions of Americans of all races that we could become a multiracial and multiethnic nation of equals.

The new civil rights “revolution”—the second American Reconstruction—swept out of the South into the entire country. The 1963 March on Washington, the 1964 Civil Rights Act and the 1965 Voting Rights Act made clear that there was a national mandate for integration and equality. Urban uprisings in many northern black communities, including Watts, Detroit, and Newark, made clear that the time to end de facto segregation had come as well.

Thousands of northern university students traveled to the South to fight for integration and voting rights. Most of these students returned to the North determined to fight against segregation and inequality on their own campuses. Many also became active in the movement to end the Vietnam War. Together, the anti-war and the civil rights movements changed the consciousness and the culture of almost every university campus and won broad, new rights and power for students. Student activists demanded that the American ideals of democracy, equality, and justice be realized in action. In response to the demands of the student movements and the change in consciousness within American society, university faculty and administrations began to develop and implement affirmative action programs. (Bowen and Bok, *Shape of the River*, 6-8).

The resulting partial integration of higher education stands as one of the great achievements of the civil rights movement. For the first time in American history, minorities, women, and poor and working-class whites gained new access to higher education and opportunities for careers never before possible. Affirmative action facilitated the expansion of the whole middle class—and virtually created the black middle class.

In recognition of the popular demands and the crying need for equality, this Court, the Supreme Court, and numerous state courts emphatically recognized before *Bakke* that duly elected public officials had the *obligation* to take affirmative, racially conscious steps to eliminate de jure segregation—and the *right* to take affirmative, racially conscious steps to eliminate de facto segregation. *Swann v Charlotte Mecklenberg Bd of Educ*, 402 US 1, 15-16 (1971); *Deal v Cincinnati Board of Education*, 369 F 2d 55, 61 (CA 6 1966), *cert den* 389 US 847 (1967).<sup>4</sup>

After *Bakke*, including very recently, the other circuits have continued to recognize that duly elected local officials have the right to take affirmative, racially conscious steps to eliminate the de facto segregation of public education.

---

4 Among many other pre-*Bakke* cases expressing this consensus, see, e.g., *School Committee of Springfield v Board of Education*, 362 Mass 417 (1972) (“...State may, in its discretion, adopt a policy of achieving racial balance in its public schools”); *Tometz v Board of Education, Waukegan City School District No. 61*, 39 Ill 2d 593, 597 (1968) (“State laws or administrative policies, directed toward the reduction and eventual elimination of de facto segregation of children...have been approved by every high State court which has considered the issue...”).

*Brewer v West Irondequoit Central School District*, 212 F 3d 738 (CA 2 2000); *Parents Ass’n of Andrew Jackson High Sch v Ambach*, 738 F 2d 574, 577 (CA 2 1984)(Lumbard, J); *Johnson v Board of Education*, 604 F 2d 504, 514-515 (CA 7 1979), *rev’d on other grounds* 449 US 915 (1980).

The District Court in this case rejected the obvious and fundamental truth that maintaining the integration of higher education is a compelling state interest. (Dist Ct Op, 44-47, 49, Apx 139-142, 144). It is hard to imagine any state interest that could be more compelling.

C. The *Bakke* decision reaffirms the legality of affirmative action while circumscribing both the rationales that support it and the means to achieve it.

In 1978, the United States Supreme Court rejected the first sustained attack on the programs that were successfully integrating the universities and the professions. *Regents of the University of California v Bakke*, 438 US 265 (1978).

In that case, Allan Bakke, a rejected applicant at the University of California at Davis Medical School, claimed that he had suffered discrimination because he had higher scores and grades than many of the minorities admitted to one of the 16 slots reserved for minorities under that school’s affirmative action plan. Justices Brennan, White, Marshall and Blackmun upheld that plan as a valid means to achieve the compelling interest of overcoming historic discrimination and achieving a racially integrated student body. Justice Powell cast the deciding fifth vote holding on narrower grounds that the university could validly consider race as a factor in admitting students because attaining “a diverse student body...clearly is a constitutionally permissible goal for an institution of higher learning.” *Id.*, 438 US at 312.

As Justice Powell’s Opinion has shaped both the law and public debate over affirmative action ever since, it demands further examination.

Justice Powell based his decision on the right under the First Amendment for the university “to determine for itself on academic grounds who will teach, what may be taught, how it shall be taught, [and] who may be admitted to study.” *Id.*, 438 US at 312. After noting that “speculation, experiment and creation” was “widely believed to be promoted by a diverse student body,” Justice Powell held that it was clear that “[p]eople do not learn very much when they are surrounded only by the likes of themselves.” *Id.*, 438 US at 313 n48. Quoting with approval the Harvard admissions plan, Justice Powell recognized that “a black student can usually bring something that a white person cannot offer.” *Id.*, 438 US at 318 n 51.

While Justice Powell declared that he could not support quotas, he made clear that diversity requires “the necessity of including more than a token number of black students,” which could not be accomplished “without some attention to numbers.” *Id.*, 438 US at 323. As declared in the Harvard plan that he appended to his Opinion, if there were to be enough black students “to bring to their classmates and to each other the variety of points of view, backgrounds, and experiences of black people in the United States,” and to overcome the “sense of

isolation among the black students themselves [which would] make it more difficult for them to develop and achieve their potential,” the university had to have the right to take the steps necessary to achieve a critical mass of black and other minority students. *Id.*, 438 US at 323.

While there might be a fine line between a quota and a plan that granted a plus factor for race and “paid some attention to numbers,” Justice Powell held that “[a] boundary line...is none the worse for being narrow.” As if to ward off suits like this one, he declared that the courts should presume that “a university, professing to employ a facially nondiscriminatory admissions policy, would [not] operate it as a cover for the functional equivalent of a quota system.” *Id.*, 432 US at 318-319.

By rejecting the racist challenge to affirmative action, by declaring that universities could award a “plus factor” for race, and by establishing a very broad range of discretion in which the universities could “pay attention to numbers,” Justice Powell’s Opinion allowed the universities to preserve the essential gains achieved by affirmative action.

But even at that time, and increasingly over the years, the contradictory way in which Justice Powell’s Opinion treated the question of race left affirmative action programs vulnerable to political, legal, and intellectual attack. By dissolving racial integration into “diversity,” the *Bakke* opinion suggested that being born and growing up black, Latino/a, or Native American could be equated with becoming a tuba player, a chess champion, or an Olympic diver. Because it stated that the use of race in admissions programs could not be justified to correct the effects of societal discrimination, university administrators and other supporters of affirmative action began to treat race as if it were just an abstract personal quality.

The use of race in admissions was increasingly justified as a way to get a greater variety of different types of individuals in a particular class. The significance of race and the social imperative of desegregating higher education were completely played down. The First Amendment diversity rationale for affirmative action programs became the main social and political justification for their existence. Race was turned into a discrete personal characteristic that could be abstracted from the central role it plays in defining every American’s viewpoint about the fundamental issues of American society.

If universities and supporters of affirmative action had continued to argue that these programs were necessary to integrate higher education and the legal profession, and to counteract the continued impact of inequality based on race, then affirmative action programs would have maintained greater support not only from minorities and women, but also from a larger majority of white people. The more universities framed affirmative action programs as being beneficial to the education of whites rather than being necessary to achieve equality, the more they strangled support for the programs. To this day, affirmative action programs have the support of the majority of this nation when it is clear that they counter discrimination and inequality and promote integration and equal opportunity.

Over time, when university administrators were pressed by anti-integrationist opponents of affirmative action to explain what the benefit of a

diverse student body is, they responded that diversity enhanced classroom debates and discussion, increased the chance for socializing with people of different races, and therefore improved the educational experiences of mostly white student bodies.

While these arguments are undeniably true, they opened the door to the view that affirmative action brought black people and other minorities into the universities not as a matter of right but in order to broaden the experience of white students. As this more narrow rationale for affirmative action programs weakened popular support for them, the opponents of affirmative action began to press the claim that if affirmative action programs existed only to introduce different viewpoints into a classroom discussion, then there was no reason to consider race in admissions.

Again, the response of university administrators was to further obscure the integrationist purposes and gains of affirmative action and the obvious truth that race completely shapes a person’s viewpoint, by claiming that affirmative action programs were necessary in order to give white students the opportunity to see that blacks, Latinos/as, and Native Americans do not all think alike. Many of UMLS witnesses in this case, for example, explained in part the benefits of diversity by describing how important it was for white students to hear minority students make very conservative and reactionary legal and political arguments.

At the same time that Justice Powell’s decision minimized and distorted the significance of race, it placed the consideration of race in admissions decisions in a separate category from all other admissions factors. Race is the only factor used in admissions decisions that is subject to strict scrutiny. This has placed universities in the absurd position of being able to give great weight to any factor used in the admissions process apart from race.

Finally, by outlawing quotas, Justice Powell’s Opinion lessened public accountability, deprived supporters of the popular, democratic argument that public universities in particular should at least approximately reflect the racial and ethnic composition of their state or of the nation, and opened the doors to attacks on any actual attempt to “pay attention to numbers.”

As this case makes clear, taken as a whole, the set of contradictions contained in the *Bakke* decision has left universities in the impossible and odious position of attempting to carry out a vital social policy—the integration of education and society—without stating their true aims; of having to mitigate against the continued existence of racism, segregation, and inequality without being able to openly state that it is impossible to fairly assess an applicant without looking at his or her race; and of trying to admit a critical mass of minority students without ever being able to openly state what constitutes a critical mass. In this case, the student intervenor defendants were the only party who could tell the truth about race and racism in this society and about the purpose and aims of affirmative action.

While, as will be seen, the University’s plan is squarely in the middle of plans approved by *Bakke*, the artificial debate over that plan demonstrates that affirmative action plans must be upheld on more than just diversity grounds. Race-conscious admission plans must be upheld on the more solid and more

straightforward ground that they are justified and essential as a means to achieve the integration of higher education, the professions, and American society. The Law School and other institutions of higher education must be given the freedom to continue carrying out the critical social policies furthered by affirmative action and to declare *all the actual reasons for doing so*.

D. The district court erred as a matter of law in striking down the Law School's affirmative action plan.

1. The district court erred in defying *Bakke*.

After a generation in which courts, universities and students had regarded Justice Powell's decision as the definitive approval of affirmative action plans in higher education, a single panel of the Fifth Circuit suddenly declared that Justice Powell's Opinion was no longer binding. *Hopwood v State of Texas*, 78 F 3d 932 (CA 5 1996), *reh and reh en banc den* 84 F 3d 720 (1996), *cert den* 518 US 1033 (1996). Seven members of the Fifth Circuit dissented from this decision when that court denied en banc consideration. *Id.*, 84 F 3d at 723-724. Not a single other circuit has adopted the *Hopwood* panel's decision—and that panel's decision is still subject to almost constant challenge. See *Smith v University of Wash Law Sch*, 233 F 3d 1188, 1200-1201 (CA 9 2000) *cert den* \_\_\_ US \_\_\_, 69 USLW 3593 (May 29, 2001); *Hopwood v State of Texas*, 236 F 3d 256 (CA 5 2000), *cert den* \_\_\_ US \_\_\_, 69 USLW 3702 (June 25, 2001).

The district court claimed that later Supreme Court decisions had undercut the *Bakke* decision. (Dist Ct Op, 45-46, Apx 140-141). But whatever unfortunate force those later decisions may have in the area of public contracting, the Supreme Court emphatically did not apply them to affirmative action plans in colleges and universities. See *City of Richmond v J.A. Croson Co*, 488 US 469 (1989); *Adarand Constructors, Inc v Pena*, 515 US 200 (1995); *see also Larry P. v Riles*, 793 F 2d 969, 980 (CA9 1986) (refusing to extend Title VII cases on employment testing to the educational context). In striking down a plan to afford equal opportunity to black, Latino/a and Native American students on the basis of decisions striking down set-aside plans in public contracting, the district court erred grievously.

Finally, the district court erroneously held that past discrimination by the institution in question is the only basis for affirmative action. The Supreme Court has never so held, and it is in fact clear that new rationales for race-conscious decision-making must be considered as they arise. *See, e.g., Wygant v Jackson Bd of Education*, 476 US 267, 286 (1986) (“[C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently ‘important’ or ‘compelling’ to sustain the use of affirmative action policies.”)(O’Connor, J.); *see also Wittmer v. Peters*, 87 F 3d 916, 919 (1996) (noting, in response to arguments like those put forward by the district court, and en route to finding that correctional needs justified affirmative action in promotions at boot camp, that “there is a reason that dicta

are dicta and not holdings, that is, are not authoritative”); *Hunter v. Regents*, 190 F 3d 1061 (CA9 1999), *cert den* 121 S Ct 186 (use of race in admissions to a laboratory school justified by research needs).

2. The district court erred in ruling that the Law School plan failed to comply with *Bakke*.

Having declared its right to ignore *Bakke*, the district court proceeded in two major and countless minor ways to give that decision the narrowest possible construction in order to reach the conclusion that the Law School plan did not comply with *Bakke* in any event. (Dist Ct Op, 49-54, Apx 144-149).

First, the district court asserted that the University's goal of achieving a “critical mass” of minority students is both too “amorphous,” because it “cannot be quantified,” and too definite “because it is an essentially fixed minimum percentage figure.” (Dist Ct Op, 50-51, Apx 145-146). How a goal can simultaneously be too “amorphous” and too “fixed” the district court does not say—but the logical conclusion is that any attention to numbers is, in the district court's opinion, improper.

Yet that is precisely what is allowed by five justices in *Bakke*—four who accepted a hard quota and one who rejected such a quota but declared that he recognized that the universities had to “pay some attention to numbers.”

In its zeal to strike down the Law School's “attention to numbers,” the district court seizes upon any attention to numbers, however flexible, as evidence of a quota. Ignoring *Bakke*'s directive that the university be afforded wide latitude and a presumption of good faith, the district court disregards the wide fluctuations in each underrepresented minority group, amalgamates all groups of underrepresented minorities together, and asserts that there is a “quota” variously described as from 10 to 12 percent and from 10 to 17 percent. (Dist Ct Op, 36, 50-51, Apx 131, 145-146).

According to the district court, there is a quota because the total number of underrepresented minorities has never dropped below 10 percent. By this logic, the minimum number enrolled will always be a quota—unless the university allows its underrepresented minorities to drop to zero in a particular year. (Dist Ct Op, 36, 50-51, Apx 131, 145-146).

The district court's claim that “there is no logical basis for [choosing] the groups which receive special attention under the current admissions policy” is belied by the record. (Dist Ct Op, 51-52, Apx 146-147). The district court ignores the very distinct and extreme history of discrimination and persecution visited upon blacks, Latinos/as and Native Americans. It ignores as well the voluminous testimony establishing the reasons affirmative action is necessary for these groups, and how affirmative action opens up education to other groups, including Asian Americans. (Wu, TR13, 54-56, Apx 8639-8641). Even more to the point, in its professed desire to avoid singling out any particular group that has faced discrimination, the district court makes it impossible for the university to use affirmative action at all. (Dist Ct Op, 51-52, Apx 146-147).

In sum, to find the Law School plan unlawful, the district court first defied *Bakke* and then distorted it beyond recognition.

E. The district court erred in usurping the right of the people of the State of Michigan to democratically determine the steps needed to integrate their universities.

By popular votes, the people of the State of Michigan have repeatedly reelected Regents favoring the use of affirmative action. In place of the wide deference given to universities in *Bakke*, the district court has held that the Fourteenth Amendment allows popularly elected Regents to use criteria that incorporate discrimination within them—but prohibits them from taking any conscious steps to integrate the Law School and the University.

To be sure, the district court hopes that the “unfortunate” result of the resegregation of the Law School does not come about—and glibly suggests spurious and unrealistic solutions to avoid that outcome, e.g., “eliminating the alumni preference”; creating a lottery system whereby prospective lawyers are chosen by chance; and having the state invest in its primary and secondary schools to eliminate the gaps in undergraduate grades and LSAT scores, something clearly beyond the law school’s power to realize. (Dist Ct Op, 53-54, 87, 88, Apx 148-149, 182, 183).

Additionally, the court “suggests” that the law school utilize methods that have completely failed to maintain a real measure of integration and diversity. It suggests that the Law School “increase recruiting efforts”—despite voluminous evidence that the Law School already heavily recruits black and Latino/a students but cannot admit them without its affirmative action program. (Dist Ct Op, 53-54, Apx 148-149; Shields, TR4, 186-188, Apx 7668-7670; Stillwagon, TR1, 199-222, Apx 7210-7216; García, TR11, 49-50, Apx 8488-8489).

The district court suggests “decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores”—while ignoring the fact that in California the attempt to do this at UCLA and Boalt Hall Law Schools and at every selective undergraduate institution in the UC system has failed utterly. (Dist Ct Op 53-54, Apx 148-149; Orfield, TR6, 150-151, 175-177, Apx 7879-7880, 7913-7915; García, TR11, 49-64, Apx 8488-8503).

Put bluntly, the district court favors every ineffective plan for integrating the universities and bars the one plan that has worked.

Despite the district court’s “suggestions”—which amount to nothing more than a fig leaf—the historic experience of California makes clear that the end of affirmative action means the resegregation of American universities.

At a time when there is rising dissatisfaction among black people with the legal system—as most recently revealed in Cincinnati—the district court threatens to make that system even more segregated. In place of the Governor standing in the school house door shouting about segregation lasting forever, the district court proposes putting the federal courts in that door, shouting that the schools cannot be integrated because of the Fourteenth Amendment!

As *Brown* makes clear, the Fourteenth Amendment was never intended for that shameful role. The intervening defendants ask that this Court uphold on broad and straightforward grounds the right of the University and the people of Michigan to use racially conscious measures to continue and deepen the integration of *their* Law School and *their* university.

## II

### THE DISTRICT COURT ERRED WHEN IT FAILED TO RECOGNIZE THE SIGNIFICANCE OF RACE AND RACISM FOR VIEWPOINT AND FOR ACADEMIC CREDENTIALS.

Race and racial inequality permeate American society. Race largely determines one’s relations to healthcare, to housing, to criminal justice, to political participation and representation, and to education. (Franklin, TR7, 54-61, Apx 7971-7978; Orfield, TR6, 87-97, Apx 7857-7867; Foner, TR10, 199, Apx 8419; García, TR10, 135, Apx 8384). It shapes day-to-day interactions and perceptions, including our perceptions of ourselves. (Foner, TR10, 193-199, Apx 8413-8419; García, TR11, 20, Apx 8470 ; Franklin, TR7, 115-116, 122-124, Apx 8032-8033, 8039-8041; Dowdell, TR6, 55-57, 65-67, Apx 7834-7836, 7844-7846; Escobar, TR8, 182-184, Apx 8127-8129). It has been built into basic public institutions and has shaped the experiences of all since colonization. (Foner, TR10, 199-202, Apx 8419-8422). Racial inequality confers benefits and privileges on white people. It sharply though sometimes subtly disadvantages all others, not least through the imposition of baseless racist stigmas—above all the stigma of intellectual inferiority the *Brown* Court sought to eradicate. (Allen, TR9, 97-98, 140-144, Apx 8225-8226, 8245-8249; James, TR9, 31, 35, Apx 8165, 8169; Dowdell, TR6, 57-65, Apx 7836-7844; García, TR11, 39-40, Apx 8478-8479).

The signal importance of race has two consequences for this litigation. First, in the United States, the idea of intellectual diversity without racial diversity is an insult and a sham. Second, given the way in which racism operates in education, one cannot measure performance or qualification without taking race and racism into account; specifically, UGPA and LSAT scores cannot be regarded as race-neutral, either for the sake of admissions decisions or for the sake of legal proofs.

A. Because race and viewpoint are inseparably linked, the district court erred when it disregarded the compelling state interest in racial diversity as a necessary component of intellectual diversity.

The district court ignored copious evidence of the inextricable links between race and viewpoint. In rejecting the argument of both the University and the students that achieving racial diversity is a compelling state interest, the court found that “a distinction should be drawn between viewpoint diversity and racial diversity,” and indicated that the benefits of the former are clear while those of

the latter are “less so.” The court then dismissed any link between the two: “[t]he connection between race and viewpoint is tenuous, at best.” (Dist Ct Op, 47, Apx 142).

The district court disregarded evidence presented at trial and in summary judgment proceedings that was overwhelming in quantity and in quality. The two statisticians, Professors Lamtz and Raudenbush, may have been the only witnesses in the trial who did not help elucidate the connections between race and viewpoint and the indispensability of racial diversity for meaningful intellectual diversity.

As one example among many, Professor Foner offered substantial testimony on the relationship of race to viewpoints about our most fundamental political and civic concepts. After describing the history of slavery, segregation and discrimination—and that of heroic, integrated efforts to end racism in Reconstruction, in the 1930’s, and in the modern civil rights movement—Professor Foner described how students’ experiences and that of their parents, their families and their communities led to very different attitudes toward the federal government, local authorities, the police and the courts, educational institutions, and American and world history. Because of their different historical and present reality, he testified, black and white people have different ideas about freedom itself:

[M]ost white people in America think freedom is something they have. Sometimes they’re afraid that someone is trying to take it away from them, whether it’s the federal government, or terrorists, or conspirators, or big corporations. Most African Americans [however] think freedom is something they are still striving to achieve. It’s something that lies in the future. It’s not a given, it’s a struggle. It’s an aspiration. And since freedom is such a central value in our society...that basic difference in outlook percolates out into many, many other areas.

(Foner, TR10, 198-199, Apx 8418-8419)

The real question is not whether race affects viewpoint. Everyone knows that it does. It is rather whether one values the viewpoints of black, Latino/a, and Native American students, or whether one prefers to leave undisturbed the presumptions of race privilege, the taking-for-granted of freedom.

B. The district court erred in rubber-stamping the plaintiff’s view that admissions criteria are race-neutral measures of merit in the face of overwhelming and largely uncontested evidence that they are saturated with racial bias and discrimination.

The affirmative action plan at UMLS has the effect of reducing the bias and discrimination in admissions that otherwise would constitute a clear double standard disfavoring minority applicants. This bias and discrimination are *racial*. They are captured in LSAT and UGPA, the Law School’s chief meters of

selection and the plaintiff’s chief meters of proof, and they would be inscribed in any putative measure of academic or intellectual wherewithal. Affirmative action makes admissions more fair, not less so.

The district court criticizes the students’ position on the grounds that “[t]here is no basis in logic or in the evidence for assuming that all members of some racial groups are victims of adverse circumstances or, conversely, that all members of other racial groups are beneficiaries of privilege.” (Dist Ct Op, 82, Apx 177). However, the evidence showed that across class, and whatever the idiosyncrasies and vicissitudes of individual history, race and racism matter. The caste system in America is not absolute, and there are other kinds of privilege and disadvantage besides those strictly based on race. Nevertheless, racial bias on the LSAT means that the black daughter of bankers will be outscored by the white daughter of municipal employees by on average 6 points, the difference between attending a competitive law school or none at all. (White, TR11, 139-141, Apx 8547-8549; Ex 221, Apx 6186). Further, the latter will never confront on her college campus the disabling stigma that she does not belong because her entire race is intellectually inferior.

The district court rejected the students’ arguments on the grounds that “the Supreme Court has held that the effects of general, societal discrimination cannot constitutionally be remedied by race-conscious decision-making.” (Dist Ct Op, 83, Apx 178). So it has, but famously enough to ensure that the student intervenors never argued that the affirmative action plan at UMLS is justified on the basis that it remedies general societal discrimination. On the contrary, their arguments and evidence about discrimination and bias, while grounded in a broader exposition of the context of race in America, were centered on the two academic criteria at the heart of law school admissions across the country and at the heart of the plaintiff’s case.

As discussed in more detail above, the district court, after wrongly criticizing the evidence on UGPA presented by the students, conceded their main point: undergraduate grades are saturated with bias.

As the court found, grades for black and other minority students are depressed by the hostile racial climate on campuses and the legacy of segregated education. While science does not allow the precise effect on each minority student to be calculated, that is not and cannot be the basis for refusing to consider the conceded fact that UGPA discriminates against minority students as a whole. (Dist Ct Op, 77-78, Apx 172-173).

Even more significantly, the court recognized that LSAT scores predict little or nothing and substantially disadvantage underrepresented minorities. (Dist Ct Op, 81, Apx 176). And as the discussion above demonstrates, the bias in the tests in fact extends far beyond what the district court found. The test content is arbitrary and racialized; questions are selected in a manner that reproduces the racial bias in past tests; and the tests are administered in a way that maximizes their discriminatory impact. As Mr. White testified—and as the study of students with the same grades at the same schools demonstrates—the achievements made by black, Latino/a and Native American students over the course of four years are sharply diminished in the four hours allotted to the LSAT.

When the evidence and even the findings about the discrimination incorporated in the UGPA and the LSAT scores are considered in light of the extent to which racial inequality and segregation restrict the educational opportunities of black, Latino/a and Native American students from every social class, the case against the plaintiff's cynical number crunching—and against the district court's opinion—becomes overwhelming.

C. UMLS has the right, if not the obligation, to maintain an affirmative action plan that reduces the reign of racism and race in admissions.

Differences by race in law school entry credentials are a direct product of stigma and discrimination on college campuses, of bias and unfairness in standardized tests, and of segregation and inequality in K-12 education. To use them as a meter for evaluating alleged reverse discrimination, as the district court did, or as a rigid means of distributing opportunities in legal education, as every law school will if the decision below is upheld, is to guarantee a rigid double standard. It is not possible to make any fair assessment of the meaning of any academic credential, including UGPA and LSAT, without taking race and racism into account.

Thus, in addition to threatening the resegregation of higher education, the district court's decision threatens to intensify the unfair stigma and prejudice minority students already face. When the window-dressing is pulled aside, the court has ratified the validity of test scores and grades as measures of merit, lending the authority of the federal judiciary to the racist view that black, Latino, and Native American students are less able, less gifted, and less deserving than white students. The brand of dishonesty in the opinion of the district court is reminiscent of that of the majority in *Plessy v Ferguson*, 163 US 537 (1896), which commented that if black people take segregation as an insult, it is their own fault:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

*Plessy*, 163 US at 551.

The Supreme Court has made it clear that the Fourteenth Amendment cannot be taken to compel the Law School to function as a "passive participant" in racial discrimination such as that which permeates any and all academic criteria. *Croson*, 488 US at 492. In *Bakke* itself, Justice Powell went out of his way to observe that the University of California had not presented evidence showing that affirmative action was made necessary by bias in academic criteria: "Racial classifications conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic

promise in the light of some cultural bias in grading or testing[.]" 438 US 265, 306 n43. He went on to say that such consideration of race might not be a "preference" at all.

The record that was missing in 1978 has finally been presented to the public and to this Court—as this Court anticipated in reversing the district court to grant the students' motion to intervene. *Grutter v Bollinger*, 188 F 3d 394, 401 (CA6 1999) (allowing students to intervene in part on grounds that "the disparate impact of some current admissions criteria... may be important and relevant factors in determining the legality of a race-conscious admissions policy").

There are no race-neutral measures of merit, and there will not be until racial inequality has been eradicated. The Law School has a compelling interest in taking account of that unmistakable fact and in acting as a force for equality. So too does this Court. The Fourteenth Amendment must tell the truth of this society. The decision below forces it to lie.

## CONCLUSION

For these reasons, the student intervenors ask the Court to reverse the district court's injunction and to remand the matter to the district court with instructions to enter judgment in favor of the student intervenors and UMLS.

By Intervening Defendants' Attorneys,  
SCHEFF & WASHINGTON, P.C.

BY:

\_\_\_\_\_  
Miranda K.S. Massie (P-56564)  
George B. Washington (P-26201)  
Jodi-Marie Masley (P-62116)  
3800 Cadillac Tower  
Detroit, Michigan 48221  
(313) 963-1921

Date: July 26, 2001