

Nos. 02-241, 02-516

In the
Supreme Court of the United States

Barbara Grutter, Petitioner

v.

Lee Bollinger, *et al.*

Jennifer Gratz and Patrick Hamacher, Petitioners

v.

Lee Bollinger, *et al.*

On Writ of Certiorari And Writ of Certiorari Before Judgment
To The United States Court of Appeals
For The Sixth Circuit

**BRIEF FOR THE UNITED NEGRO COLLEGE FUND
IN SUPPORT OF RESPONDENTS**

DREW S. DAYS, III*
JONATHAN BAND
BETH S. BRINKMANN
SETH M. GALANTER
CHARLES C. CARSON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

Attorneys for Amicus Curiae

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT 5

THE HISTORY OF RACIAL DISCRIMINATION IN AMERICAN EDUCATION
DEMONSTRATES THAT CONTINUED EFFORTS TO ADDRESS RACIAL
DIVERSITY IN COLLEGE AND GRADUATE ADMISSIONS FURTHERS A
COMPELLING STATE INTEREST 5

A. The Exclusion Of African Americans From The Nation’s Historically White Educational
Institutions Resulted In A Long History Of Disproportionate Numbers Of African
Americans Attending Substandard Schools 8

1. Historically black educational institutions were created to educate emancipated
slaves because they were excluded by law and practice from white schools
because of their race 8

2. UNCF was founded in 1944 to provide capital to historically black institutions of
higher education and later expanded its mission to administer scholarships and
fellowships 13

B. The Dramatic Increase In Access Of African Americans To Higher Education Over The
Past Several Decades Was Not Achieved Through Efforts Like UNCF’s Alone, But Was
Also The Result of Substantial Efforts By Historically White Institutions To Foster
Racial Diversity 15

1. Historically black colleges and universities continue to play an important role in
higher education, but African Americans should have access to the full spectrum
of colleges, universities, and professional schools 15

2. Efforts by historically white institutions have contributed significantly to the
increased representation of African Americans in higher education 18

3. Use of race-conscious admission criteria to supplement traditional quantitative
measures of college preparedness has assisted many colleges and universities in
identifying qualified African American students 20

C. Colleges, Universities, And Professional Schools Must Continue To Have Flexibility In
The Admissions And Financial Aid Process To Maintain Access By African Americans
..... 23

1. Colleges, universities, and professional schools should be free to use a variety of
strategies with regard to admissions and financial aid in order to assemble
different student bodies that best advance their varied educational missions 24

2. Inclusion of students of diverse racial backgrounds in higher education is
significant to ensuring the inclusion of African Americans in critical professions
and positions of leadership in American society 26

CONCLUSION 29

TABLE OF AUTHORITIES

INTEREST OF *AMICUS CURIAE*¹

Amicus United Negro College Fund (UNCF) was founded in 1944 to increase educational opportunities for African Americans. A UNCF member institution must be a historically black, private, accredited, four-year college, university, or professional school in the United States that was founded prior to 1945 and that is operated solely for educational or scientific purposes. The 39 historically black colleges and universities that have joined as members of UNCF are located in ten southern States, Ohio, and Texas. The members include nationally known institutions such as Morehouse College and Spelman College in Atlanta, Georgia; Xavier University in New Orleans, Louisiana; Tuskegee University in Tuskegee, Alabama; and Fisk University in Nashville, Tennessee. *See, App., infra*, 1a-2a (listing UNCF member institutions).

UNCF's founding purpose was to raise general operating funds for its member institutions in order to lower tuition costs. It provides unrestricted operational support to its members. Tuition and fees at UNCF member colleges and universities are half as much as other private American colleges even though their endowments are equal to one-third.

UNCF's mission has expanded to also include administering financial assistance that is awarded to deserving students and increasing access to technology for students and faculty at its member institutions. Today, UNCF administers more than 450 scholarships and fellowships to students and faculty who attend UNCF member colleges and

¹ Letters from the parties consenting to the filing of this brief have been filed pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

universities, non-UNCF historically black colleges and universities, as well as other colleges and universities throughout the country. UNCF also administers Ph.D. fellowships to increase the number of African Americans with doctoral degrees, international programs that include foreign language studies, work experience, and faculty exchanges, and domestic programs that provide training for students interested in pursuing public service careers.

UNCF administers a Corporate Scholars Programs, which is a combination of scholarship, work experience and mentoring within corporate America. UNCF has partnered with particular corporations such as Pfizer, Inc., and The Merck Company Foundation to offer scholarship awards to minority students pursuing careers in the biomedical sciences. For example, the Merck Science initiative is dedicated to expanding the pool of world-class African Americans biomedical scientists “to achieve the complementary goals of national economic competitiveness and social diversity.” *A Brief History of the United Negro College Fund, Inc.* __ (20__).

In 1999, UNCF became an administrator of the Gates Millennium Scholars Program. The program is funded by a \$1 billion grant from the Bill and Melinda Gates Foundation. It is aimed at increasing the number of African Americans, Hispanics, Native Americans, and Asian Americans with academic promise, significant unmet financial need, and demonstrated leadership who enroll in and complete undergraduate and graduate degree programs. Its stated goal is to enable 20,000 such students over the next 20 years to attend the institutions of their choice.

UNCF has enjoyed widespread support by Americans of all races and backgrounds. Significantly, it has been honored by a tradition of support from Presidents

of the United States, beginning with President Franklin D. Roosevelt who supported the first annual fundraising campaign. President John F. Kennedy donated to UNCF the Pulitzer Prize funds awarded for his book, *Profiles in Courage* and supported the second capital campaign in 1963 that raised \$33 million. President George H.W. Bush hosted the reception to help UNCF launch its most ambitious capital campaign in 1990 that ultimately raised \$280 million over the subsequent six years.

Since its founding, UNCF has raised nearly \$2 billion to support its member institutions and has assisted more than 300,000 students earn undergraduate and graduate degrees. It is the Nation's oldest and most successful African American education association.

UNCF joined in an *amicus curiae* that was filed in the instant case[s?] in the United States Court of Appeals for the Sixth Circuit urging that court to sustain the constitutionality of respondents' consideration of race in making admissions decisions for its undergraduate college and law school.

Given the historical mission of UNCF and its role over the past half-century in promoting access to higher education for African American students, *amicus* has a strong interest in the proper resolution of the questions presented in these cases.

SUMMARY OF ARGUMENT

ARGUMENT

THE HISTORY OF RACIAL DISCRIMINATION IN AMERICAN EDUCATION DEMONSTRATES THAT CONTINUED EFFORTS TO ADDRESS RACIAL DIVERSITY IN COLLEGE AND GRADUATE ADMISSIONS FURTHERS A COMPELLING STATE INTEREST

The commitment of historically white colleges, universities, and professional schools to racial diversity in their student bodies cannot be understood fully without consideration of the history of racial exclusion, segregation, and discrimination that, for centuries, permeated all aspects of the Nation's educational system. It is only against that background that one can appreciate the compelling interest furthered by educating students in a racially integrated setting, a governmental interest that benefits both individuals and society.

The vast majority of African Americans were barred by law from educational institutions throughout the United States for the first one hundred years of the Nation's existence. Indeed, at the time of the Civil War, 92 percent of the entire population of African Americans in this country were enslaved, without the legal right to earn a living of their own, and generally without the most fundamental of human rights to marry or raise their own families, let alone to obtain any type of education. *See* H.N. Drewry & H. Doermann, *Stand and Prosper: Private Black Colleges and Their Students* 13-15, 23 (2001). After the emancipation of more than 4 million slaves in 1865, that legal framework of exclusion was replaced with widespread systemic racial discrimination and legally sanctioned segregation throughout all levels of public and private education, particularly in the South where most African Americans continued to live. Consequently, African Americans continued to have dramatically reduced opportunities to obtain a quality education for the second hundred years of the country's history. *See id.* at 15-98.

Finally, in 1954, this Court declared in *Brown v. Board of Education*, 347 U.S. 483 (1954), that racial segregation and discrimination in education could not be defended against constitutional challenge as “separate but equal” because segregated schools were inherently unequal. It proved difficult, however, to transform that decree into reality, *see, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958); *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962), *stay denied*, 83 S. Ct. 10, 11 (1962); *United States v. Fordice*, 505 U.S. 717 (1992), even in the area of higher education, in which the Court made clear from the beginning that it would accept no delay. *See Lucy v. Adams*, 350 U.S. 1 (1955) (per curiam); *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (per curiam);

Nonetheless, in the less than 50 years since *Brown*, the educational system in America has undergone a remarkable transformation, with the African American children who attended the substandard segregated schools of the 1950s growing up to see many of their children not only attend integrated elementary and secondary schools, but also have the opportunity to attend colleges and universities. For example, in 1992-1993, nearly 45 percent of African Americans who received college degrees were first-generation college students. M.T. Nettles and L.W. Perna, *The African American Education Data Book, Vol. I: Higher and Adult Education* 265, table 5 (1997).

In light of that national history, one cannot dispute that race is a unique factor in America generally, and in American education in particular. And, this Court has repeatedly recognized that education is a particularly important means of overcoming past racial discrimination. Educational opportunity provides not only the means for individual success, *see Brown*, 347 U.S. at 493, but also a way to lessen the underlying prejudices that burden historically disfavored groups. *See Plyler v. Doe*, 457 U.S. 202,

222 (1982) (“by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority”).

The generation of change since *Brown* has not been able to overcome completely the continued effects of the prior two centuries’ exclusion, segregation, and discrimination for all African Americans. Thus, there is a continued need for attention to be given to matters of race in the colleges, universities, and professional schools of America. In particular, *amicus* United Negro College Fund (UNCF) and the historically black colleges and universities that form its membership believe that promoting racial diversity in higher education, including at selective institutions, is a compelling governmental interest. Racially diverse student bodies at the Nation’s most prominent colleges, universities, and professional schools ensure that the unique benefits and opportunities gained through attendance at such schools extend beyond the all-white population that most of those institutions were founded to serve. *Cf. United States v. Virginia*, 518 U.S. 515, 552-554 (1996) (describing tangible and intangible benefits of educational institutions that cannot easily be replicated). Moreover, affording colleges, universities, and professional schools flexibility in admissions decisions allows the development of a diverse pool of institutions that aim to serve the needs of an increasingly diverse Nation.

A. The Exclusion Of African Americans From The Nation’s Historically White Educational Institutions Resulted In A Long History Of Disproportionate Numbers Of African Americans Attending Substandard Schools

1. Historically black educational institutions were created to educate emancipated slaves because they were excluded by law and practice from white schools because of their race

a. Most of the historically black colleges and universities that are members of UNCF were established during the first decade or two following the end of the Civil War in the South, where more than 90 percent of African Americans then lived. *Stand and Prosper, supra*, at 23. The institutions were created as a direct response to the profound need of the African American population, nearly 90 percent of whom were illiterate because of laws that had made it a crime to teach African Americans, enslaved or free, to read or write. *Id.* at 34; 2 James Kent, *Commentaries on American Law* 253 n.a (4th ed. 1840) (citing laws of Georgia, Virginia, Alabama, and Louisiana prohibiting teaching slaves or “free negroes” to read or write). In Louisiana, commission of such an offense had been punishable by the death penalty. *Ibid.* Even in the “free” States, there had been almost no opportunities for African Americans to obtain even the most minimal education. Less than 2 percent of school-aged African Americans in 1860 were enrolled in school. *Stand and Prosper, supra*, at 25, table 2.3. It was only in the rarest of circumstances that an African American was able to attend a college or university. By 1865, only 28 individuals among the 4.4 million African Americans living in this country had received college degrees. J.B. Roebuck and K.S. Murty, *Historically Black Colleges and Universities: Their Place in American Higher Education* 22 (1993).

Following emancipation in 1863 and the end of the Civil War in 1865, a major effort was made to provide the more than 4 million former slaves with educational opportunity. Initially, that effort was led by a loose coalition of religious missionary

groups and private northern freedmen's aid societies. Further support was provided by the federal Freedmen's Bureau, a branch of the War Department. Their combined efforts nearly quadrupled the number of schools for African Americans in the United States in the first four years following the Civil War. *Stand and Prosper, supra*, at 39-40; *see also* J.H. Franklin and A.A. Moss, Jr., *From Slavery to Freedom: A History of African Americans* 256-257 (8th ed. 2000); E. Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* at 144-148 (1988). Later, in the 1870s, a true public elementary school system and, to a lesser extent, a secondary school system for African Americans began to take shape in the South. That system was almost entirely segregated and, of course, remained so for nearly a century. *Reconstruction, supra*, at 365-368; *From Slavery to Freedom, supra*, at 445-455.

Although many of the private institutions established in the years following the Civil War were founded as colleges and universities to educate adults, their initial focus had to be on elementary and secondary education because African American adults and adolescents, as well as children, had no formal education. Many institutions did not award baccalaureate degrees for at least twenty years. For example, Tuskegee Institute (now University), founded in Alabama in 1880, did not add college courses to its curriculum until 1927. *Stand and Prosper, supra*, at 74. Spelman College, established in Georgia in 1881, awarded its first college degrees in 1901. *Spelman Bulletin* at 5 (2002-2003). Meanwhile, in 1890, in response to newly enacted federal legislation permitting States to use federal land-grant funds for the "establishment and maintenance of such colleges separately for white and colored students," 26 Stat. 417, 418, many southern States began establishing public land-grant colleges for African Americans. The

curriculum in those segregated public institutions focused, however, on teacher training and industrial education. By 1915, less than 2 percent of the African Americans engaged in college-level work were enrolled in the land-grant schools. *Stand and Prosper, supra*, at 50. And despite federal requirements to the contrary, “black public colleges suffered substantial, consistent, and nearly universal discrimination in funding” as well as “restricted programs of instruction and narrowly defined institutional missions” in comparison to their white counterparts. Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 Minn. L. Rev. 29, 45, 64 (1987).

The newly founded private educational institutions did not exclude students based on race. Indeed, some of the institutions admitted whites despite state law prohibitions against doing so. *See, e.g., Berea College v. Kentucky*, 211 U.S. 45 (1908) (upholding criminal conviction of private college that violated state law prohibiting the operation of “any college, school, or institution where persons of the white and negro races are both received as pupils for instruction”). In 1887, Atlanta University (the predecessor to Clark Atlanta University) lost its state funding when it refused to stop enrolling white students. *Stand and Prosper, supra*, at 53. The historically black colleges and universities were once considered the only educational institutions in the country admitting all races and were “among the few common meeting grounds for African Americans and whites.” *A Brief History of the United Negro College Fund, Inc.*

At the same time, historically white schools continued to exclude African American students through a variety of means, including through state laws that required

racial segregation of educational institutions -- laws that were understood to be ratified by *Plessy v. Ferguson*, 163 U.S. 537 (1896).²

b. The States' refusal to admit African Americans to educational institutions that served whites was not the only means by which they sought to limit educational opportunities. The States also refused to provide sufficient resources to the segregated public schools that were established to address the educational needs of African Americans. As late as 1934, only 39 public secondary schools for African Americans in the South were accredited, including only two in Alabama, one in South Carolina, and none in Mississippi, which had the largest percentage of African American citizens of any State. *Stand and Prosper, supra*, at 72.

In the 1940s in the South, where over three-quarters of African Americans continued to reside, per-pupil spending on education for African American children averaged about one-third of that for white students and the school year was one to three months shorter. S.T. Hill, *The Traditionally Black Institutions of Higher Education 1860-1982*, at 11 (1985). African American children were taught in classes that contained, on average, 25 percent more students, but African American teachers were

² Racially segregated schools were, of course, only one manifestation of the legal and extra-legal means that conspired to deny African Americans an opportunity to advance in American society for approximately 100 years. For example, many state and local governments in the South enacted the infamous "Jim Crow" laws that segregated African Americans from whites in nearly every aspect of daily life until well into the 1960s. The well known and tragic history of violence against African Americans who sought to exercise their rights included the lynching of more than 2500 African Americans between 1886 and 1916. *Stand and Prosper, supra*, at 17. Also, such violence, combined with suffrage legislation enacted in the South in the late 1890s, and the actions of local election officials, effectively deprived African Americans of the right to vote, despite the Fifteenth Amendment, until the federal civil rights legislation of the 1960s. *From Slavery to Freedom, supra*, at 281-291.

paid almost half the salary of white teachers. D. Card and A.B. Krueger, *School Quality and Black-White Relative Earnings: A Direct Assessment*, 107 *Quarterly J. of Economics* 151, 167 (1992).

The States' failure to provide adequate resources to black elementary and secondary schools meant that many African Americans were not prepared for college-level studies. By 1940, the median amount of education received by African Americans in the country aged 25-29 was 6.5 years. G.D. Jaynes and R.M. Williams, Jr., eds., *A Common Destiny: Blacks and American Society* 334 (1989). Therefore, although the increased number of elementary and secondary schools for African Americans by the early part of the 20th Century allowed private black colleges and universities to begin to focus exclusively on higher education, the African American student population did not increase in a corresponding manner. Thus, the number of college degrees awarded by historically black colleges more than doubled from the 1920s to the 1930s,³ but still less than 2 percent of African Americans had received a college degree by 1940, compared with 7.5 percent of white men and 5 percent of white women. *Id.* at 339. In 1950, only 5 percent of college-aged African American men and 4 percent of African American women were enrolled in college, whereas 15 percent of white men and 8 percent of white women were enrolled as undergraduates. *Stand and Prosper, supra*, at 76.

³ In 1926-27, private black colleges awarded 818 college degrees, while public black colleges awarded 165. The number of college degrees awarded in 1935-36 were 1,970 and 1,490, respectively. *Stand and Prosper, supra*, 73, table 6.2.

2. UNCF was founded in 1944 to provide capital to historically black institutions of higher education and later expanded its mission to administer scholarships and fellowships

a. Because of the continuing state-sanctioned racial segregation in education, over 90 percent of black college students in the years prior to *Brown* attended historically black institutions. *Historically Black Colleges, supra*, at 43. By the time of the Second World War, those institutions suffered from a lack of financial resources that led to the formation of UNCF in 1944.

UNCF's founding purpose was to raise general operating funds for its member institutions to lower tuition costs. Twenty-seven private black colleges and universities answered the call that year of the President of Tuskegee Institute, Dr. Frederick D. Patterson, to "pool their small moneys and make a united appeal to the national conscience" through formation of UNCF. UNCF provided those member institutions with a stronger combined voice that could ensure that their appeal to conscience was heard by all Americans, both black and white, including prominent national leaders. *See* pages __-, *supra*. UNCF's first annual campaign demonstrated the wisdom of the combined approach by raising three times the amount of funds that the member colleges had been able to raise independently the prior year.

b. Although UNCF's focus on raising general operating funds for its members continues to be one of its primary functions, UNCF's mission also has evolved over the years to include capital campaigns, solicitation of special project grants, and contributions to endowments. And UNCF further broadened its mission to include a public awareness campaign, originally launched in 1972, under the slogan -- "A mind is a terrible thing to waste" -- which served as a dramatic reminder to the Nation of the vital importance of education both to individuals and to society as a whole.

Perhaps most significantly, UNCF expanded its financial support for higher education to include the administration of scholarships and fellowships to individual students. Although most of those awards are not based on race, the focus on financial aid at historically black colleges and elsewhere directly responded to a particular need of African Americans. In 1940, 90 percent of African Americans still lived in poverty, earning less than half of the average white person, due in no small part to the absence of equal educational opportunity. W.G. Bowen and D. Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 1 (1998). Even today, an African American today is twice as likely to live in poverty than a white American. U.S. Census Bureau, *Statistical Abstract of the United States* 442 (2002). In 1995, approximately 70 percent of the families of the African American students enrolled in four-year colleges had incomes below the national median. *Stand and Prosper, supra*, at 202, table 11.6. In four-year colleges as a whole, a larger percentage of African Americans need financial aid than any other group. Franklin D. Patterson Research Institute / UNCF, *UNCF 2001 Statistical Report* 18, fig. 11 (2001); *Education Data Book, supra*, at 115, table 2. Most UNCF college students come from economically disadvantaged families – 59 percent have family incomes below \$25,000. *UNCF Statistical Report, supra*, at 19, fig. 12. Approximately 90 percent of UNCF students require financial assistance.

UNCF scholarships enable thousands of students to attend not only UNCF member institutions, but also other historically black colleges and universities as well as traditionally white institutions. Currently, UNCF administers more than 450 programs, including scholarship programs, mentoring, summer enrichment, curriculum and faculty

development, and leadership development. The UNCF scholarship programs represent an increasingly significant part of the UNCF mission.

Today, more than 65,000 students are currently supported by UNCF. Approximately 60,000 students attend UNCF's 39 member institutions and another 5,000 attend over 950 schools across the Nation.

B. The Dramatic Increase In Access Of African Americans To Higher Education Over The Past Several Decades Was Not Achieved Through Efforts Like UNCF's Alone, But Was Also The Result of Substantial Efforts By Historically White Institutions To Foster Racial Diversity

1. Historically black colleges and universities continue to play an important role in higher education, but African Americans should have access to the full spectrum of colleges, universities, and professional schools

The increase in African American participation in education at all levels over the past several decades has been dramatic. In 1940, only 8 percent of African Americans over the age of 25 had completed four or more years of high school. Franklin D. Patterson Research Institute / UNCF, *The Torch: A Research Bulletin Shedding Light on Critical Issues in African American Education* 5 (December 2001). By 2000, nearly 80 percent had done so. *The Torch, supra*, at 5. In that same time period, the number of African Americans over 25 years of age who had completed four or more years of college increased more than 2600 percent. *Id.* The efforts of UNCF, its member institutions, and other historically black colleges and universities have played, and continue to play, an important role in that progress. That degree of success could never have been achieved, however, without many other factors, including legal rulings by this Court ordering an end to racial segregation, the improvement of elementary and secondary education for African Americans, and most important, the substantial efforts by other institutions of higher education.

Indeed, UNCF and its members institutions do not have the financial or other resources to provide higher education opportunities to all qualified African American students, nor do they wish to do so. As noted above, UNCF institutions are not limited to African American students, have never been segregated, and were, at one time, recognized as the only institutions that students of all races could attend. *See* page __, *supra*. UNCF's continued significance in the Nation's system of higher education is possible, in part, because UNCF institutions provide but one of the many higher education options available today. UNCF believes that African American students should be ensured access to the full spectrum of educational opportunities.

Before *Brown v. Board of Education*, 90 percent of African Americans who were enrolled in college attended historically black colleges and universities. By 1996, that number had decreased to approximately 25 percent because historically white institutions were educating nearly 75 percent of the African Americans in college. Franklin D. Patterson Research Institute / UNCF, *Two Decades of Progress: African Americans Moving Forward in Higher Education* 20-21, table 7 (1999). That shift has been of major benefit to African Americans students because they have profited from being able to select among a diverse array of institutions of higher education. *Cf. United States v. Fordice*, 505 U.S. 717, 748-749 (1992) (Thomas, J., concurring). That is particularly true for selective colleges, universities, and professional schools because such schools are not fungible with each other or with non-selective programs in many respects.⁴ Each

⁴ The term "selective" in this context refers to the 20-30 percent of accredited four-year institutions that are estimated to have enough applicants to be able to select among them. *Shape of the River, supra*, at 15; *see also id.* at 15 n.1 (citing an unpublished analysis that

selective institution has a unique set of intangible qualities “which are incapable of objective measurement,” but which define the value of the education apart from the curriculum. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). “Such qualities, to name but a few, include * * * position and influence of alumni, standing in the community, traditions and prestige.” *Ibid.* As this Court has recognized, an individual thus derives unique advantages from attending a school from which are drawn those who will hold “the most distinguished positions” in public and private life. *Id.* at 633; *United States v. Virginia*, 518 U.S. 515, 552-554 (1996).

UNCF and its member institutions embrace the benefits gained by African Americans attending the Nation’s selective colleges, universities, and professional schools. As noted above, page __, UNCF’s mission today includes administering scholarships and fellowships to students that attend such schools. In addition, graduates of UNCF colleges and universities have a particular interest in attending selective graduate and professional schools because of the more limited number of such institutions generally, as well as the particular significance of such an experience in one’s professional career.⁵

estimates that race-conscious admissions occurs only in the top 40 percent of all four-year institutions).

⁵ The examples of UNCF graduates who have gone on to pursue advanced degrees at selective institutions are many, including renowned national leaders such as John Hope Franklin (historian; 1995 recipient of the Presidential Medal of Freedom) (B.A. Fisk University, A.M. and Ph.D. Harvard University); Marian Wright Edelman (attorney; 2000 recipient of the Presidential Medal of Freedom) (B.A. Spelman College, LL.B. Yale Law School); Ruth Simmons (President of Brown University) (B.A. Dillard University, Ph.D. Harvard University); Deborah Hyde, M.D. (one of only four African American female neurosurgeons in the country) (B.S. Tougaloo College, M.D. Case Western

2. Efforts by historically white institutions have contributed significantly to the increased representation of African Americans in higher education

One of the important factors contributing to the dramatic increase in African American representation in higher education over the past 30 years is the concerted effort by historically white institutions to increase African American enrollment on their campuses. Beginning in the early 1960s, in the midst of the growing civil rights movement and this country's increased attention to the discrimination suffered by African Americans, many such institutions committed themselves to identifying and enrolling qualified African Americans. They recognized that the lack of racial diversity on their campuses was, in significant part, a consequence of the Nation's history of racial segregation and discrimination in education. **[add citations, check briefs in Bakke by Harvard, by Ivy League Deans]**

The effort to build a diverse student body served a dual function -- it provided black students "with the same opportunities and education as their white peers," while benefiting "majority as well as minority students" because of the diverse backgrounds and perspectives that were brought together for classroom debate. E.A. Duffy and I. Goldberg, *Crafting A Class: College Admissions and Financial Aid, 1955-1994*, at 141 (1998). Experience in creating an academic environment in which students of different races may exchange ideas also helped to dispel stereotypical views of minority groups. Admission of greater numbers of individuals from such groups demonstrates, by example, that such individuals are as different from one another as are any other

Reserve Medical School); and Donald Hopkins, M.D. (1995 MacArthur Fellow) (B.S. Morehouse College, M.D. University of Chicago, M.P.H. Harvard University).

individuals, although there is often a shared experience of having grown up in a society that sometimes did not treat them as such.

The benefits of a diverse student body motivated many of the most selective educational institutions in the country to adopt new strategies in their admissions process.

William G. Bowen and Derek Bok, in their influential book, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998), describe the efforts by Harvard Law School in the 1960s to enroll African Americans:

It was in this context that Harvard Law School dean, Erwin Griswold (later solicitor general of the United States), undertook to increase the number of black students. Griswold was struck by the fact that law had come to play a crucial role in the lives of American blacks, yet virtually no black students were enrolled in the Harvard Law School or any other predominantly white law school. In 1965, therefore, he launched a special summer program for juniors from historically black colleges to interest them in attending law school. One year later, Harvard began admitting black students with test scores far below those of their white classmates. The strategy that Griswold employed was adopted by other law schools, and black enrollment began to rise.

Id. at 5.

Colleges, universities, and professional schools also learned that recruiting students who did not fare as well on traditional tests or grading systems did not lead to a significantly different rate of graduation. They found that the success rate of African Americans whom they admitted at such institutions did not differ substantially from their peers. *See id.* at xxxi-xxxii, 60-61, 110-111, 138-140. That is not to say that all African American students, any more than all white students, can compete successfully at selective institutions of higher education. Rather, that success reflected the care that the institutions have taken in making admissions decisions that reaffirm that considerations of non-quantitative factors such as contributions made to school and society, family

circumstances, and the like are useful predictors of likely success in academia and beyond. *See ibid*; R.O. Lempert *et al.*, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 *Law & Social Inquiry* 395, 496 (2000).

The recruitment efforts of historically white institutions of higher education succeeded in significantly increasing African American access to both undergraduate and professional schools. "From 1960 to 1995, the percentage of blacks aged 25 to 29 who had graduated from college rose from 5.4 to 15.4 percent." *Id.* at 10. The percentage of blacks in law school "grew from barely 1 percent in 1960 to 7.5 percent by 1995." *Ibid.* And the percentage of medical students who were black "climbed from 2.2 percent in 1964 to 8.1 percent in 1995." *Ibid.*

3. Use of race-conscious admission criteria to supplement traditional quantitative measures of college preparedness has assisted many colleges and universities in identifying qualified African American students

Many of the efforts by historically white institutions to increase the enrollment of African Americans have included race-conscious outreach. *Amicus* believes that such efforts continue to be a necessary component of any successful strategy to maintain significant enrollment of African Americans in higher education, particularly at selective institutions.

It is undisputed that the efforts over the past 30 years to increase African American representation in selective colleges, universities, and professional schools, could not have succeeded absent the application of selection criteria that extended beyond a strict comparison of grade point averages and scores on standardized performance tests. Historically, the grades and standardized test scores of African Americans have on average been lower than those of whites. While that gap has narrowed over the last 30

years, it remains significant today. The reasons for the current disparities are varied and complex, but ultimately rooted in the history of systemic discrimination against African Americans:

[T]est-score gaps remain . . . That is hardly surprising, given the deep-seated nature of the factors that impede academic opportunity and achievement among minority groups – including the fact that a very large proportion of such students continue to attend primary and secondary schools that are underfinanced, insufficiently challenging, and often segregated. It would be naïve to expect that a problem as long in the making as the racial divide in educational preparation could be eradicated in a generation or two.

W.G. Bowen and N.L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, The Chronicle of Higher Education B9 (Feb. 7, 2003).

The effects of past discrimination against African Americans are felt today in a variety of ways including not only through attendance at substandard schools, but also through factors such as parents who did not have an opportunity to attend college themselves. Those less tangible factors also contribute to a child, regardless of ability, being less likely to perform well on tests or to attend college or graduate school. Indeed, a recent comprehensive study of the preparedness gap between African Americans and whites and relative differences in academic performance has concluded that such differences can be attributed largely to the persistent educational and socioeconomic disadvantages suffered by African Americans:

Students in general perform poorly in college when the circumstances of their upbringing have denied them access to some form of capital – human, social, cultural, psychic, or financial – that is important in producing success in higher education. Minority students generally do not lack for self-esteem and self-confidence, so it is not psychic capital that is the problem, and socially blacks and Latinos are probably more prepared for campus diversity than either Asians or whites, at least on average. The capital they lack is generally financial and human, which reflects the fact that many blacks and Latinos come from backgrounds of residential segregation, school isolation, and socioeconomic disadvantage.

D.S. Massey et al., *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities*, at 166, 205-206 (2003); see also Susan Sturm & Lani Guinier, *Rethinking the Process of Classification and Evaluation*, 84 Calif. L. Rev. 953, 987-992 (1996) (noting linkage between SAT scores and family income).

Significantly, however, a determination that there is a lack of preparedness under traditional evaluation criteria does not mean that African Americans who are identified through other means are not qualified and do not thrive at selective institutions once admitted. See page ___, *supra*. The use by historically white institutions of additional admission criteria has helped to identify qualified African Americans who perform well in college or graduate schools and in the “real world.” *Amicus* is particularly aware of such success with regard to its own alumni/ae, including some who did not qualify for admission to selective undergraduate schools, but gained the academic skills through their four years of undergraduate education to then qualify for admission at selective graduate and professional schools. Indeed, that is one of the niches in the higher education system that UNCF is particularly apt at filling. Historically black colleges and universities have always devoted significant attention and resources toward ensuring that disadvantaged students are afforded the support, such as remedial instruction to overcome poor secondary school preparation, necessary for them to succeed at the college level and beyond. See *Stand and Prosper*, *supra*, at 235-236. For example, since 1990, more than 150 Xavier University students (an approximate average of 10 per year) with SAT scores near or below the national average performed especially well in college course work and, following graduation, went on to medical school and obtained medical degrees from institutions such as the University of Pennsylvania, Emory University, New York

University, and the University of Michigan. Other Xavier graduates with similar SAT scores have obtained doctoral degrees from the Massachusetts Institute of Technology and Princeton University, and law degrees from Columbia University and Tulane University.

C. Colleges, Universities, And Professional Schools Must Continue To Have Flexibility In The Admissions And Financial Aid Process To Maintain Access By African Americans

As demonstrated above, the history of the denial of educational opportunities for African Americans in this country, rooted in slavery and antebellum laws and the subsequent disparate funding of racially segregated public education, has resulted in a financial gap for many African Americans, as well as a college preparedness gap for some, that persists to this day. As a result, African Americans continue to be underrepresented at institutions of higher education, particularly among selective institutions. The underrepresentation is most pronounced in graduate and professional schools. African Americans received 6.4 percent of professional degrees, 6.0 percent of Master's degrees and 3.5 percent of doctoral degrees awarded in 1996. *Two Decades of Progress*, at 61, fig. 24; 69, fig. 26; 76.

Ensuring that qualified African Americans continue to have access to a diverse range of higher education options, including selective undergraduate and professional schools, is important. As this Court noted in *Sweat*, 339 U.S. at 634, the value of an education is reflected not only in what one learns, but the identity of one's classmates and the reputation of the institution. Moreover, attendance by African Americans at historically white institutions is critical to the overall goal of providing higher education opportunities to such students because historically black colleges and universities do not have the financial or other resources to meet the needs of all qualified African American

students.

1. Colleges, universities, and professional schools should be free to use a variety of strategies with regard to admissions and financial aid in order to assemble different student bodies that best advance their varied educational missions

a. Maintaining current levels of African American representation in selective colleges, universities, and professional schools will depend upon a continued commitment by those institutions actively to seek out and enroll qualified African Americans. At this time, equal access to such schools can only be ensured if those institutions retain the ability to look beyond narrow quantitative measures of college readiness and to take into account other factors that measure potential for success at an institution of higher learning and beyond. Without such flexibility in the admissions process, much of the gains in African American representation in higher education will be lost, and many African Americans will be shut out of critical sectors of American society.

Educational institutions must have the flexibility to use strategies other than traditional quantitative means of evaluating preparedness and likelihood of success. The only alternative that has consistently proven effective is one that incorporates some measure of race-consciousness into its admission criteria. Although many race-neutral alternatives have been suggested – and some implemented – none of them have yet proven effective, and all suffer from serious limitations.

For example, the “percentage plans” adopted in states like Texas rely upon an arbitrary and mechanical admissions factor – a student’s fixed rank in a high school – that leaves no room for consideration of other applicant qualifications or the relative academic strengths of high schools. Moreover, to the extent such plans are effective in achieving

racial diversity in colleges, it is only because of *de facto* racial segregation in the high schools. In any event, such a plan is not an option for a private college or university or for a graduate or professional school, public or private, that draws from a national and international applicant pool.

In a recent defense of race-conscious admissions policies, William G. Bowen, the president emeritus of Princeton University, and Neil Rudenstine, the president emeritus of Harvard University, discuss several purportedly “race-neutral” approaches, including percentage plans and plans focused on socioeconomic or geographic factors. They explain that all of the plans “pose serious problems” and cannot “be accurately described as ‘race-neutral’”:

They have all been conceived with the clear goal (whether practicable or not) of producing an appreciable representation of minority students in higher education. In some cases, they involve the conscious use of a kind of social engineering decried by critics of race-sensitive admissions.

Surely the best way to achieve racial diversity is to acknowledge candidly that minority status is one among many factors that can be considered in an admissions process designed to judge individuals on a case-by-case basis. We see no reason why a college or university should be compelled to experiment with – and “exhaust” – all suggested alternative approaches before it can turn to a carefully tailored race-sensitive policy that focuses on individual cases. The alternative approaches are susceptible to systematic analysis, based on experience and empirical investigation. A preponderance of them have been tested for decades. All can be shown to be seriously deficient. Indeed, if genuinely race-neutral (and educationally appropriate) methods were available, colleges and universities would long ago have gladly embraced them.

Race-Sensitive Admissions, supra, at B10.

b. Allowing the use of race-conscious policies in the awarding of financial aid to students in colleges, universities, and professional schools is also critical to ensuring continued access by African Americans to higher education. After all, the admission of

qualified African Americans to selective institutions even under the most rigid, traditional quantitative standards means nothing if such students cannot afford to attend.

It is unclear how reversal of the court of appeals' ruling would affect the wide variety of financial aid programs in use today. Privately administered scholarships would not, of course, be subject to the same strictures as public funds. Nonetheless, a decrease in available public sources of aid would increase the demand for private aid. That is particularly true in light of the sky-rocketing tuition at both public and private colleges, universities, and professional schools that has increased the loan burden on all students, with a particularly adverse affect on African Americans and members of other minorities who come from socio-economically disadvantaged communities. That limited pool of private financial aid certainly is inadequate to meet such an increase in demand.

2. Inclusion of students of diverse racial backgrounds in higher education is significant to ensuring the inclusion of African Americans in critical professions and positions of leadership in American society

For most Americans, education is a means of achieving economic and social success. Thus, the underrepresentation of African Americans in higher education, particularly in selective colleges, universities, and professional schools, means that proportionately fewer African Americans have access to society's more influential and lucrative occupations. Such occupations represent "powerful engines of social mobility," and in many ways hold the key to the emergence of a substantial and permanent African American middle class. *See Shape of the River, supra*, at 10-14, 94-96, 118-154; *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

Between 1960 and 1990, for example, the number of African American physicians in the country almost doubled and the number of African American attorneys and engineers nearly tripled. *Shape of the River, supra*, at 10. The percentage of

managers or professionals among African Americans has increased from 5 percent in 1950 to 20 percent in 1990. *Id.* The proportion of African Americans who earned more than \$50,000 per year rose from 5.8 percent in 1967 to 13 percent in 1992. *Id.* at 10-11. Despite these gains, the African American middle class remains much smaller proportionately than the white middle class, with African Americans less than half as likely as whites to earn \$50,000 per year. *Id.* at 11. Continued improvement will depend upon continued access to higher education.

According to a recent statistical analysis of medical school admissions and enrollment in 1996, an admissions policy based strictly upon undergraduate grades and MCAT scores would have resulted in an 85 percent drop in African American acceptances at historically white medical schools, leading to a 2 percent population of underrepresented minorities at these schools. H.W. Nickens, Association of American Medical Colleges, *Questions and Answers on Affirmative Action in Medical Education* 7 (1998). Similarly, according to one estimate, if law school admissions had been based solely on numerical measures, 90 percent of the African Americans in the 1991 entering class would not have been admitted. L.F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race As a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. Rev. 1, 50-51 (1997). Yet African Americans who were admitted through such admissions practices have graduated from such schools and successfully entered professions. *See, e.g.*, R.O. Lempert *et al.*, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 Law & Social Inquiry 395, 496 (2000). For example, African American graduates of Harvard Law School include

more than one hundred partners in law firms, more than ninety black alumni/ae with the title Chief Executive Officer, Vice President, or General Counsel of a corporation, more than seventy professors, at least thirty judges, two members of Congress, the mayor of a major American city, the head of the Office of Management and Budget, and an Assistant U.S. Attorney General.

Shape of the River, supra, at 284.

As for selective undergraduate institutions, a statistical analysis of admissions data predicts that such institutions would suffer “drastic” decreases in African American enrollment if race were not considered, with enrollment at the most selective of these schools falling more than 70 percent. *Shape of the River, supra*, at 31-42. Those predictions are consistent with the over 50 percent drop in enrollment that the University of California, Berkeley, experienced in 1998, the first year following the University of California’s state-wide abandonment of race-conscious admissions policies. C.L. Horn and S.M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States’ Experiences* 49, Table 29 (2003).⁶

The long-term consequences of such drops in enrollment that would result from a prohibition on race-conscious admissions are easy to predict, but difficult to fathom. Based on the studies of what would have happened if institutions of higher education had not, in the past, looked beyond “the numbers,” there would be 40% fewer minority doctors today. *Questions and Answers, supra*, at 7. No doubt similar reductions would have occurred in other elite professions. That waste of human potential would be

⁶ In 2001, the Regents of the University of California implemented a percentage plan that guarantees admission to the University of California system to individuals graduating in the top four percent of their high school class. *Id.* at 17-18.

detrimental not only to individual African American students, but to the Nation as a whole.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Sixth Circuit in *Grutter v. Bollinger*, Case Nos. 01-1447, 01-1516 (May 14, 2002) should be affirmed, and the Court of Appeals for the Sixth Circuit should be instructed to affirm the judgment of the District Court for the Eastern District of Michigan in *Gratz v. Bollinger*, Case No. 97-CV-75231-DT (Dec. 13, 2000).

Respectfully submitted.

DREW S. DAYS, III*
JONATHAN BAND
BETH S. BRINKMANN
SETH M. GALANTER
CHARLES C. CARSON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 887-1500

Attorneys for Amici Curiae

* *Counsel of Record*

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United Negro College Fund
Member Institutions

Barber-Scotia College (est. 1867), Concord, NC
Benedict College (1870), Columbia, SC
Bennett College (1873), Greensboro, NC
Bethune-Cookman College (1904), Daytona Beach, FL
Claflin University (1869), Orangeburg, SC
Clark Atlanta University (1865), Atlanta, GA
Dillard University (1869), New Orleans, LA
Edward Waters College (1866), Jacksonville, FL
Fisk University (1866), Nashville, TN
Florida Memorial College (1879), Miami, FL
Huston-Tillotson College (1876), Austin, TX
Interdenominational Theological Center (1867), Atlanta, GA
Jarvis Christian College (1912), Hawkins, TX
Johnson C. Smith University (1867), Charlotte, NC
Lane College (1882), Jackson, TN
LeMoyne-Owen College (1862), Memphis, TN
Livingstone College (1879), Salisbury, NC
Miles College (1905), Birmingham, AL
Morehouse College (1867), Atlanta, GA
Morris College (1908), Sumter, SC
Morris Brown College (1885), Atlanta, GA
Oakwood College (1896), Huntsville, AL
Paine College (1882), Augusta, GA
Paul Quinn College (1872), Dallas, TX
Philander Smith College (1877), Little Rock, AR
Rust College (1866), Holly Springs, MS
Saint Augustine's College (1867), Raleigh, NC
Saint Paul's College (1888), Lawrenceville, VA
Shaw University (1865), Raleigh, NC
Spelman College (1881), Atlanta, GA

Stillman College (1876), Tuscaloosa, AL

Talladega College (1867), Talladega, AL

Tougaloo College (1871), Tougaloo, MS

Tuskegee University (1881), Tuskegee, AL

Virginia Union University (1865), Richmond, VA

Voorhees College (1897), Denmark, SC

Wilberforce University (1856), Wilberforce, OH

Wiley College (1873), Marshall, TX

Xavier University (1915), New Orleans, LA