BAMN
COALITION TO DEFEND AFFIRMATIVE ACTION & INTEGRATION
AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY

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Press release

For immediate release:

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What follows is the argument that will be made on December 6 to the United States Court of Appeals for the Sixth Circuit, sitting en banc, in the University of Michigan Law School affirmative action case, Grutter v Bollinger, et al. by lead counsel for the student intervenors in Grutter, Miranda Massie.

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This case is about more than diversity. We ask you to hold that the affirmative action plan being challenged here is justified because it promotes integration and equality.

I come before you with petitions signed by over 50,000 people who speak for the vast majority of this nation in reiterating our commitment to the holding of *Brown v Board of Education*. The signers include President Lee Bollinger and, as of yesterday, the members of the Congressional Black Caucus. *Brown* was decided correctly: separate can never be equal. Democracy and justice require that thirty years of progress toward integration be continued and that the door to higher education remain open to all. The courts must not stand in that schoolhouse door falsely proclaiming that the Fourteenth Amendment can be used to turn black and other minority young people away.

Twenty-three years ago, in *Bakke*, the Supreme Court upheld the right of public institutions of higher education to desegregate. Justice Powell adopted the "Harvard Plan" diversity rationale for defending the new and still fragile gain of the integration of America's most prestigious universities and professional schools.

Racial diversity divorced from integration is a meaningless construct; racial diversity matters because the social experience of race matters. Justice Powell was not concerned to promote a hollow, abstract and socially insignificant notion of diversity for its own sake. On the contrary, he made it clear that racial diversity is compelling. It is impossible to separate its importance from the question of equality. The underlying question confronting the *Bakke* Court was whether the programs established in the 1960's to desegregate higher education were constitutionally permissible. While striking down the specific plan at issue, *Bakke* unequivocally upheld the continuation of these programs. This Court confronts the same

question today and must confirm and clarify *Bakke*'s holding for diversity and integration.

At the same time the *Bakke* Court recognized that universities might have the right to take positive measures to offset the racism, bias, and unfairness captured in and compounded by academic admissions criteria. We also ask this Court to follow that suggestion—which was echoed by the panel that permitted student intervention in these cases.

The overwhelming evidence presented by the student intervenors at trial shows that grade point averages and LSAT scores capture and magnify racial bias and discrimination. It is thus impossible to assess the significance of these two criteria in any application file absent consideration of race. The Fourteenth Amendment does not require the University to choose between abandoning the use of these criteria altogether and using them in a maximally rigid and discriminatory manner--particularly since the trial record shows that there is no race-neutral measure of academic achievement or capacity. The University has the right to offset the discriminatory impact of LSAT scores and grades through affirmative action.

Prior to the use of such policies, racism overdetermined admissions, as the trial record shows. The Law School was segregated. In 1964, it graduated a class of 293 students, all of whom were white (and the overwhelming majority of whom were men). 1964 was no aberration. Between 1950 and 1970 the Law School graduated 5772 students, of whom a mere 44 were black. None were Latino/a, Asian-American or Native American.

The Law School implemented its first desegregation and affirmative action plan in the late 1960's and transformed itself into an integrated institution. From then on, the Law School's affirmative action plans, including the 1992 plan at issue in this case, have been ratified by the elected University of Michigan Board of Regents. It is clear in the K-12 context, and should be just as clear for higher education, that educational authorities like the Regents have the right to take steps to end de facto segregation.

Extensive trial testimony presented by the students on the recent experience in California shows that if the Regents are stripped of this power, the University of Michigan Law School will resegregate. In 1995, the University of California (UC) Regents voted to eliminate their longstanding affirmative action policies. The results were clear and devastating – minority admissions to the best-regarded schools plummeted; inequality in educational opportunity between white students and minority students increased as the UC system split into two separate and unequal tracks; prejudice on campus grew. Earlier this year, the UC Regents, admitting the failure of their ill-conceived social experiment, unanimously voted to lift the ban on affirmative action programs throughout the UC System. Now the plaintiff asks you to graft the same intensification of inequality that has been repudiated in California onto the Fourteenth Amendment—to make a permanent constitutional provision out of an educational disaster and a political time bomb.

Racial inequality has fettered this nation's democracy from the start, as the testimony of distinguished historians John Hope Franklin and Eric Foner made clear at the trial. It

constrains us individually as well as collectively, dehumanizes every person in this room, just as slavery, to paraphrase Frederick Douglass, destroyed the humanity of both the slaveholder and the slave. What this Court decides will either tighten those fetters or make us all freer.

Integration is our most compelling state interest and only measures which openly take race into account are capable of achieving it.

Turning a blind eye to racism will not end it. If the law is to possess meaning and authority, it must stand on the truth. Our traditions of racism and of gross and glaring inequality can be shattered, but only if we are first prepared to acknowledge the continuing centrality of race and inequality. Without this recognition, we will regress, for we cannot move forward as a society at once increasingly diverse and increasingly segregated.

We urge the Court to reverse the decision below and to stand on the promise of *Brown* and our common progress.

12-05-2001

back | **home**

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