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Prologue: Brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates of ABA Accredited Law Schools: Vicky L. Beasley, Devon W. Carbado, Tasha L. Cooper, Kimberlé Crenshaw, Luke Charles Harris, Shavar Jeffries, Sidney Majalya, Wanda R. Stansbury, Jory Steele, Et Al., In Support of Respondents

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BRIEF OF AMICI CURIAE ON BEHALF OF A COMMITTEE OF CONCERNED BLACK GRADUATES OF ABA ACCREDITED LAW SCHOOLS: VICKY L. BEASLEY, DEVON W. CARBADO, TASHA L. COOPER, KIMBERLÉ CRENSHAW, LUKE CHARLES HARRIS, SHAVAR JEFFRIES, SIDNEY MAJALYA, WANDA R. STANSBURY, JORY STEELE, ET AL., IN SUPPORT OF RESPONDENTS†

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The brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates of ABA Accredited Law Schools in *Grutter v. Bollinger*[1] was written so as to intervene and to assist in the reframing of the public debate surrounding minority admissions programs in institutions of higher education.

Some commentators and social justice advocates have celebrated the Supreme Court's decision in *Grutter* because it builds on Justice Louis Powell's opinion in *Regents of the University of California v. Bakke*.[2] To be sure, it does affirm and expand Justice Powell's use of the "diversity rationale" as a constitutional justification for affirmative action. In this respect, *Grutter* represents a serious loss to the opponents of affirmative action. A broad range of conservative organizations had hoped that the court would use the *Grutter* decision to affirm the ideological triumph of a particular vision of colorblindness under the Fourteenth Amendment's Equal Protection Clause. They hoped that, when there was no proof of intentional discrimination, states would be forbidden from exposing and correcting racial disparities. They also hoped that the Court would constitutionalize a theoretical framework that normalizes an extraordinarily inegalitarian

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† Wanda Stansbury and Vicky L. Beasley originated the idea to bring this team of academics and practicing attorneys together to author this brief. Without their wisdom, patience, and extraordinary logistical skills, this project could never have been successfully completed.

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1. 123 S. Ct. 2325 (2003).
2. 438 U.S. 265 (1978).

status quo, not only with respect to racial minority participation in higher education, but in many other spheres of American life as well. In the end, the Court did no such thing. It in no way endorsed a vision of colorblind neutrality. Quite to the contrary, it proclaimed that states could both take official notice of and act to address patterns of racial exclusion.

For these reasons, the *Grutter* decision should be celebrated. At the same time, however, we must be careful not to lose sight of the danger inherent in the current trajectory of equal protection jurisprudence. This danger has to be uncovered and confronted in ways that resonate deeply both with advocates of social justice and with the general public. In this regard, we must consider what *Grutter* failed to accomplish. Most importantly, it failed to connect the rationale for affirmative action policies to historical and contemporary forms of racism. In this sense, *Grutter,* like the *Bakke* decision before it, represents only a modest victory for the proponents of affirmative action. Unfortunately, the task of uncovering the inadequacies of *Bakke* was largely ignored by the civil rights community in favor of undertaking tremendous efforts to sanction the use of affirmative action programs within the narrow diversity framework. In some very important respects, the civil rights community simply allowed issues of distributive justice, unwarranted institutional exclusion, and community interest to be taken off the table. In the aftermath of *Grutter,* we must not repeat this error.

While civil rights advocates remained largely silent on these issues, conservative think tanks, researchers, grass roots activists, and lawyers worked hard to appropriate the language of the Civil Rights Movement to create a common sensibility about the apparent contradictions between affirmative action policies and colorblind justice. They maintained that, as a general rule, the Equal Protection Clause compels us to ignore racial categories in the formulation of state-sponsored public policies. Indeed, they effectively framed affirmative action as measures inimical to the American vision of equality. We must boldly challenge and vigorously contest this misleading perspective. Our brief carefully reframes the terms of the affirmative action debate by placing contemporary remedial concerns rooted in problems of institutional discrimination at its center. Those concerns were not considered in the *Grutter* case. We contend that remedying such problems will ultimately lead to more diverse environments in different domains of American life, with all of their attendant benefits. Diversity, then, remains a major component of our analysis. We argue, however, that it represents a complementary justification for affirmative action rather than the core justification for it.

What then are the weaknesses of the diversity rationale? To begin with, it only legitimizes affirmative action on the grounds of institutional

diversity.[3] Thus, it casts into the shadows a variety of social justice arguments for affirmative action that focus on the problems faced by the members of racial minority groups that continue to suffer the effects of historical and ongoing forms of systemic discrimination. By not focusing on such concerns, the *Bakke* decision left open the implication that affirmative action initiatives are inextricably bound to a process tainted by "reverse discrimination," "preferential treatment," "unfairness to Whites," and "the stigmatizing effects of affirmative action on racial minorities."[4] These notions continue to dominate and distort the public perceptions of these programs to this day. Indeed, they are reflected in the *Grutter* decision and oral arguments. Through our brief we hope to assist in the reframing of the national debate on these issues by introducing considerations that transcend, even as they incorporate, Justice Powell's diversity rationale in the *Bakke* case.

At the heart of our argument is the notion that affirmative action policies are not a matter of affording "preferential treatment" to their beneficiaries. Rather, we maintain that these initiatives represent nothing more than an attempt to offer their beneficiaries a greater equality of opportunity in a social context marked by pervasive inequalities: a context in which many institutional practices serve to impede a fair assessment of the capabilities of the beneficiaries of these programs. Affirmative action programs, then, are not simply a form of recompense for a history of slavery, apartheid, and racism. Nor are they merely tools for the diversification of academic environments. Instead, they are egalitarian measures designed primarily to offset patterns of institutional discrimination in many different spheres of American life. Viewed from this perspective, the only "burden" that Whites face in the context of the use of affirmative action policies in higher education is the loss of the expected privilege that accrues to them when admissions officials who overemphasize the importance of traditional conceptions of meritocracy evaluate members of racial minority groups unfairly. Not surprisingly, then, we are deeply skeptical of perspectives on affirmative action that concentrate excessively on the perceived educational benefits of diversity for academic institutions and too little on the unfair and unwarranted obstacles that confront minority students seeking to attend these institutions.

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3. *See* Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate,* 11 HARV. BLACKLETTER L.J. 1 (1994); Luke Charles Harris & Uma Narayan, *Affirmative Action as Equalizing Opportunity: Challenging the Myth of "Preferential Treatment, in* ETHICS IN PRACTICE: AN ANTHOLOGY 451 (Hugh LaFollette ed., 2nd ed. 2003).

4. *See* Luke Charles Harris, *Rethinking the Terms of the Affirmative Action Debate Established in the* University of California v. Bakke *Decision, in* THE COLOR LINE: RACIAL AND ETHNIC INEQUALITY AND STRUGGLE FROM A GLOBAL PERSPECTIVE 133 (Gwen Moore et al. eds., 1999).

This brief was also used to frame a series of discussions at the African American Policy Forum's (AAPF) two-day affirmative action conference at Columbia Law School in March 2003. The conference brought together academics, policy advocates, lawyers, and media experts to discuss *Grutter* and *Gratz v. Bollinger*[5] and the ongoing need for affirmative action policies to offset institutional forms of discrimination in many spheres of American life. Conference materials can be downloaded from the AAPF's website at www.aapf.org.

5. 123 S. Ct. 2411 (2003).