Nos. 02-241 & 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND, FEMINIST MAJORITY FOUNDATION, INTERNATIONAL HUMAN RIGHTS LAW GROUP, AND THE ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, YALE LAW SCHOOL, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel:

Martha F. Davis
Associate Professor of Law
NORTHEASTERN UNIVERSITY
SCHOOL OF LAW
400 Huntington Avenue
Boston, Massachusetts 02115
(617) 373-8921

Jennifer K. Brown
Wendy R. Weiser*
NOW LEGAL DEFENSE
AND EDUCATION FUND
395 Hudson Street
New York, New York 10014
(212) 925-6635

**Counsel of Record*

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Amicus curiae NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that has used the power of the law to define and defend women's rights for thirty years. It has participated as counsel and as *amicus curiae* in numerous cases in support of affirmative action. NOW Legal Defense is interested in these cases because of the positive impact affirmative action programs have in promoting equality and eliminating barriers for women, particularly for women of color, and for racial minorities.

Amicus curiae the Feminist Majority Foundation ("FMF") is a non-profit organization that promotes women's economic, social and political equality. FMF is dedicated to achieving civil rights for all people, including affirmative action programs for women and people of color. FMF strongly supports the affirmative action programs challenged in these cases and the need for diversity in higher education.

Amicus curiae the International Human Rights Law Group (the "Law Group") is a non-profit organization of human rights and legal professionals engaged in human rights advocacy, litigation, and training around the world. Founded in the District of Columbia in 1978, the Law Group works to empower advocates to expand the scope of human rights protection for men and women and to promote broad participation in creating more effective human rights standards and procedures at the national, regional, and international level. The Law Group has represented

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[1] The parties' letters consenting to the filing of *amicus curiae* briefs have been filed with the Clerk of the Court. Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation of this brief.

individuals and organizations before U.S. and international tribunals and has appeared as *amicus curiae* in a number of U.S. cases. The Law Group also maintains consultative status with the Economic and Social Council of the United Nations. Beginning in the 1990s, a central focus of the Law Group's work has been to promote the use of international human rights law and standards in efforts to combat racial discrimination. The Law Group joins this brief to emphasize the obligation of the United States to provide remedies for racial discrimination consistent with its obligations under international treaty law, particularly the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, as well as international customary law.

Amicus curiae the Allard K. Lowenstein International Human Rights Clinic (the "Clinic") is a Yale Law School program that gives students first-hand experience in human rights advocacy. The Clinic undertakes numerous litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. The Clinic's work is based on the human rights standards contained in international customary and conventional law, at the core of which is the prohibition against discrimination. Since the Clinic began more than ten years ago, its students have worked on a number of lawsuits and other projects designed to combat racial, gender, ethnic and other kinds of discrimination. In recent years, the Clinic has focused increasing attention on efforts to ensure respect for international human rights standards in the United States.

SUMMARY OF ARGUMENT

Comparative and international law support the lower courts' decisions upholding the University of Michigan's affirmative action programs, and are relevant for at least two reasons to this Court's consideration of the constitutionality of affirmative action programs. First, our legal tradition has long embraced looking to foreign and international precedent

and practice to help solve our legal questions. There is practical value in examining how other constitutional courts have analyzed similar issues. Second, in an era of globalization, this Court maintains its intellectual leadership in the human rights field by acknowledging the international context in which its decisions resonate.

The constitutional courts of states as diverse as Canada, India and South Africa, as well as the European Union, have all confronted challenges to affirmative action policies in recent years. These courts have uniformly upheld such policies, including policies similar to those at issue here, as consistent with their constitutional guarantees of equal protection. As members of this Court have previously recognized, wisdom gleaned from the opinions of colleagues in foreign jurisdictions—particularly those with legal traditions and political cultures similar to ours—can assist this Court in reaching sound conclusions under domestic law.

Furthermore, the United States is party to international treaties that not only permit race-based affirmative action programs, but that also may require the implementation of such programs when failure to do so would perpetuate wrongful discrimination. These treaties are valuable sources of interpretive guidance to this Court when considering the validity of the affirmative action programs at issue here.

ARGUMENT

I. COMPARATIVE AND INTERNATIONAL LAW ARE RELEVANT TO THE ISSUES BEFORE THE COURT

It is undisputed that the University of Michigan and its law school (together, "the University") use race as one of many factors in their admissions decisions, and that this use must be narrowly tailored to serve a compelling governmental interest. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Here, Respondents argue that the University justifiably uses race as an admissions factor to ensure diversity in higher education, and Intervenors argue that the

University's policies are justified as a measure to remedy past discrimination. *See Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 816 (E.D. Mich. 2000). The record amply supports the force of these arguments. In addition, *amici curiae* urge this Court to follow the trend of American jurists, including members of this Court, to look to international and foreign law to inform their decisions regarding domestic legal issues.

From its earliest days, this Court has recognized that the laws of the United States should be construed to be consistent with international law whenever possible. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) ("the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations"); *see generally* Sandra Day O'Connor, *Federalism of Free Nations, reprinted in International Law Decisions in National Courts* 13, 15-16 (Thomas M. Franck & Gregory H. Fox eds., 1996).

In recent years, the Court has continued to recognize the importance of looking to international and comparative law for interpretive guidance in areas of constitutional law. For example, last year in *Atkins v. Virginia*, 536 U.S. 340 (2002) (Stevens, J., joined by O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ.), this Court examined the opinions of "the world community" to support its conclusion that execution of persons with mental retardation would offend the standards of decency required by the Eighth Amendment. *Id.* at 347 n.21. Similarly, in *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.), in ruling that the State of Washington's statute prohibiting assisted suicide was not invalid on its face under the Due Process Clause of the Fourteenth Amendment, the Court noted that Canada, Great Britain, New Zealand, and Australia, like the State of Washington, have rejected efforts to establish a fundamental

right to assisted suicide, while Colombia has legalized voluntary euthanasia for terminally ill people. *Id.* at 718 n.16.[2]

Two broad rationales justify the use of international and comparative law perspectives to help resolve domestic legal issues. First, there is a practical value to drawing upon international law and the experiences of other nations as aids to interpretation. As Justice Holmes wrote, "the life of the law has not been logic, it has been experience." Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881). "Other legal systems," Justice O'Connor has recognized, "continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit." Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. Lawyer 20 (1998). The possibilities for such learning are particularly great when those other legal systems "have struggled with the same basic constitutional questions as we have: equal protection, due process, the rule of law in constitutional democracies." *Id.; see also New York v. Quarles*, 467 U.S. 649, 672-74 (1984) (O'Connor, J.,

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[2] *See also Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (looking to international standards regarding execution of persons under sixteen years old); *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982) (noting relevance of "the climate of international opinion concerning the acceptability of a particular punishment" to Eighth Amendment determination and looking to felony murder laws in England, India, Canada, and other Commonwealth countries) (citation omitted); *Miranda v. Arizona*, 384 U.S. 436, 488-90, 521-22 (1966) (considering law enforcement "experience in . . . other countries," including England, Scotland, and India, in interpreting Fifth Amendment); *New York v. United States*, 326 U.S. 572, 584 n.5 (1946) (looking to constitutional experiences of Canada, Australia, and Brazil relating to intergovernmental taxation to help decide scope of federal taxation power).

concurring) (supporting application of experience of other countries that addressed similar issues to determine scope of Fifth Amendment exclusionary rule); *United States v. Then*, 56 F.3d 464, 468-69 (2d Cir. 1995) (Calabresi, J., concurring) (noting that German and Italian constitutions "unmistakably draw their origin and inspiration from American constitutional theory and practice" and that, as a result, "how [those countries] have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues").

International and foreign law rulings on constitutional issues facing the Court "cast an empirical light on the consequences of different solutions to a common legal problem." *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). In this regard, the use of international and comparative law is similar to the use of state law by federal courts for interpretive guidance when giving content to federal law. In such circumstances, state law does not apply of its own force, but instead supplies a useful source of persuasive authority. *See generally D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 465-75 (1942) (Jackson, J., concurring) (describing federal courts' practice of looking to state common law to interpret federal law). Similarly,

> conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. . . . While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues we face here.

Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002).

Second, acknowledging the international context of this Court's decisions helps to ensure the continued intellectual leadership of the United States in human rights issues and to maintain international respect for our courts in an era of globalization. *See* Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 Alb. L. Rev. 417, 421-28 (2000) (arguing that in the twenty-first century, judicial legitimacy requires that courts acknowledge international context of decisions). Throughout its history, decisions rendered by this Court have served as a model for countries around the world. As Justice L'Heureux-Dube of the Supreme Court of Canada has explained, high courts in other countries have historically looked to the jurisprudence of this Court for guidance, and the United States government has been an international leader in proclaiming the importance of international law and the promotion of human rights. *See* Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 16-17 (1998) (acknowledging United States' past judicial influence "[i]n the fields of human rights and constitutional principles"). As Justice O'Connor has argued, we fail to "broaden[ ] our horizons" at our peril:

> The vibrancy of our common law legal culture has stemmed, in large part, from its dynamism, from its ability to adapt over time. Our flexibility, our ability to borrow ideas from other legal systems, is what will enable us to remain progressive with systems that are able to cope with a rapidly shrinking world.

O'Connor, *Broadening Our Horizons*, *supra*, at 21. Increased engagement with the constitutional courts of other countries can help to ensure the continued leadership role of American courts and the United States more generally.

Both of these rationales for considering international and comparative perspectives are relevant to the constitutionality of the programs at issue in these cases. The

United States is not alone among nations in using affirmative action to promote diversity and to remedy the current practices and lingering effects of discrimination against particular social groups; nor has the United States been alone in requiring that such programs be reconciled with formal guarantees of equality before the law. Moreover, this Court's pronouncements on equality traditionally have carried tremendous weight in international human rights law and the constitutional law of other countries, and that prestige can only be enhanced by considering how other nations have interpreted the equality norms they share with the United States.

Justice Ginsburg has directly addressed the relevance of international and comparative law to affirmative action:

> [C]omparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups.

Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999).

Indeed, a majority of the Justices of this Court has supported consideration by United States courts of international legal materials when expounding federal law. Chief Justice Rehnquist has called on courts to examine international precedents, noting, "it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." William Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), *reprinted in Germany and its Basic Law: Past, Present and Future—A German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993). Similarly, Justice O'Connor, a proponent of an international perspective, commented in 1998, after an initial meeting with

members of the European Court of Justice, that "[i]n the next century, we are going to want to draw upon judgments from other jurisdictions," including the decisions of the European Court. Press Release, New York University, European Court Members and Four U.S. Supreme Court Justices to Discuss Current European and U.S. Constitutional Issues, at 2 (Mar. 27, 2000), *available at* www.nyu.edu/publicaffairs/newsreleases/b_EUROP.shtml.

Justices Breyer and Stevens also have demonstrated interest in both comparative and international law materials as aids to constitutional interpretation. *See, e.g.*, *Atkins*, 536 U.S. at 347 n.21 (Stevens, J.); *Patterson v. Texas*, 123 S. Ct. 24 (2002) (Stevens, J., dissenting from denial of *certiorari*) (citing apparent international consensus against the execution of a capital sentence imposed upon a juvenile to urge Court to revisit issue of its constitutionality); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (noting that other nations' approaches to campaign finance are consistent with Supreme Court majority's approach); *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (Breyer, J., dissenting from denial of *certiorari*) (citing Universal Declaration of Human Rights and case law of Canada, India, Great Britain and Zimbabwe to support view that lengthy delay in administering lawful death penalty may be unusually and impermissibly cruel); *Printz v. United States*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (discussing experiences of federal systems in Switzerland, Germany, and European Union as aids to deciding question of U.S. federalism); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J.) (looking to opinions of "other nations that share our Anglo-American heritage" and "leading members of the Western European community" as aids to deciding Eighth Amendment question).

As elaborated below, courts and jurists around the world have grappled with issues of affirmative action, often in contexts analogous to those presented by the record in these cases. Wisdom gleaned from the opinions of colleagues in

foreign jurisdictions can assist this Court in reaching sound conclusions under domestic law.

II. HIGH COURTS OF OTHER NATIONS HAVE UPHELD AFFIRMATIVE ACTION MEASURES UNDER COMPARABLE CIRCUMSTANCES

Numerous countries have examined the issue of affirmative action under their own laws and have upheld programs benefiting minority populations who suffered discrimination. Most notably, the Court of Justice of the European Communities has endorsed affirmative action programs that use gender as a factor in employment decisions in order to remedy gender discrimination in employment. In two recent cases, the Court of Justice upheld national measures giving priority to women for promotion to public service positions in which women were underrepresented. *See* Case C-158/97, *Badeck & Others*, 2000 E.C.R. I-1875, [2001] 2 C.M.L.R. 6, 2000 All ER (EC) 289 (E.C.J. 2000) (*available on* Westlaw); Case C-409/95, *Marschall v. Land Nordhein-Westfalen*, 1997 E.C.R. I-6363, 1997 All ER (EC) 865 (E.C.J. 1997) (*available on* Westlaw). Critical to the opinions in both cases was the fact that—as with the admissions processes at issue here—women were not given automatic and unconditional priority in obtaining promotions when there were equally qualified male candidates available; rather, all of the candidates—male and female—were assessed individually according to objective criteria. *Badeck*, 2000 E.C.R. at 1918-19, 1923; *Marschall*, 1997 E.C.R. at 6393.

In *Marschall*, a German national rule permitted giving qualified women priority for promotions to positions where women were underrepresented, unless there was a specific reason to favor a male candidate. *Marschall*, 1997 E.C.R. at 6366. The rule was promulgated to promote equality of opportunity between men and women and to counteract the discrimination that had in the past led to a disproportionate number of higher positions being awarded to male

applicants. *Id.* The court held that the affirmative action policy was acceptable because the candidates were objectively assessed; indeed, the rule's "saving clause" specifically allowed the selection of a male candidate over a female where nondiscriminatory criteria tilted the balance in his favor. *Id.* at 6392-93.

Correspondingly, in *Badeck*, the Court of Justice was asked to decide whether the "positive action" program to promote equality between men and women mandated by the Hesse Equal Rights Law complied with European Community law. *Badeck*, 2000 E.C.R. at 1877, 1878. Building upon its earlier judgment in *Marschall*, the court again concluded it was lawful for women to be given priority over equally qualified males for promotion in public and private sector jobs, provided that the employer retained the flexibility to select the most suitable candidate, with gender as simply one criterion in the overall evaluation of the candidates. *Id.* at 1891-92. Because the program did not foreclose selection of a qualified male, the court determined that the national rule for affirmative action targeting women for advancement in the areas of public employment, academic service, and training programs comported with Community law. *Id.* at 1923, 1926-27.

Significantly, in both *Badeck* and *Marschall*, gender was used as a plus factor for promotion. *Cf. Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 318 (1978); *see also* Ginsburg & Merritt, *supra*, at 279 (acknowledging that race and gender may be plus factors in employment, promotion, or educational admissions). The discretion accorded by the German legislation is comparable to that permitted by the University's admissions programs where race and ethnicity are included as additional considerations to promote the goal of diversity. Though the European Court did not explicitly adopt the concept of "narrow tailoring" from United States jurisprudence, it engaged in an analysis similar to that invoked by American courts reviewing government action under the strict scrutiny standard. Thus, the European Court investigated whether the priority given to females in appointments and promotions pursued a legitimate social

objective and used means that were proportionate "in relation to the real needs of the disadvantaged group." *Badeck*, 2000 E.C.R. at 1889. Applying this standard, the court concluded that a program including such discretion was sufficiently customized to pass muster under Community law. *Id.* at 1919. This analysis comports with the rationale of *Bakke* and is applicable to the cases at bar.

Other countries also permit affirmative action programs that correct systemic discrimination using targeted measures to ameliorate the hardships suffered by certain minority populations. For example, the Canadian Charter of Rights and Freedoms states that its equal protection provision "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race." Can. Const. (Constitution Act, 1982) Schedule B, Pt. I (Canadian Charter of Rights and Freedoms), § 15(2); *see generally Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 Can. Sup. Ct. LEXIS 33, at *87-*100 (Can.) (discussing relationship between § 15(2) and Charter's equal protection provision). In interpreting the Canadian Human Rights Act, the Supreme Court of Canada upheld an affirmative action measure imposed on the Canadian National Railway to combat systemic discrimination in the hiring and promotion of women. *Canadian Nat'l Ry. Co. v. Canada*, [1987] 1 S.C.R. 1114, 1143-45, 1987 S.C.R. LEXIS 1136, at *48-*52 (Can.). The special, temporary measure—which went farther than the programs at issue here or in the European cases—required hiring at least one woman for every four nontraditional positions until women had achieved greater representation in positions traditionally filled by men. *Id.* at 1125-27, 1141, 1987 S.C.R. LEXIS at *17-*21, *44-*45.

Similarly, the South African Constitution adopted in 1996 specifically acknowledges the injustices of the past and promotes affirmative action policies to assist groups that have been disadvantaged under prior laws. S. Afr. Const. pmbl.; ch. 2, § 9(2). Indeed, the lack of quality education available to African students in South Africa led the dean of a medical

school to create an affirmative action program targeted to benefit African students. *Motala & Another v. Univ. of Natal*, 1995 (3) BCLR 374 (Durban Sup. Ct.), 1995 SACLR LEXIS 256 at *16-*17 (S. Afr.). An Indian woman who was denied admission challenged the school's program. *Id.* at *13-*14. In rejecting her claim, the court observed that, although Indians also suffered discrimination under apartheid, the experience for Africans was significantly worse, and compensating for this long-standing mistreatment of African applicants to the medical school did not represent unfair discrimination against Indian students under the constitution. *Id.* at *28.

In addition to the countries discussed above, many other nations also take into account the need to redress the effects of past discriminatory laws and practices. *See Committee on the Elimination of Racial Discrimination: Addendum by Israel*, at ¶ 48, U.N. Doc. CERD/C/294/Add. 1 (1997) (describing Israel's program of tutorial and financial assistance provided to Ethiopian immigrants in higher education to promote mobility and leadership); Herbert M. Jauch, *Affirmative Action in Namibia* 53-148 (1998) (detailing history of affirmative action in Namibia); Ginsburg & Merritt, *supra*, at 273-81 (discussing successful affirmative action policies in India and European Union). The legal analyses applied by other countries to uphold successful affirmative action policies for groups that, like racial minorities in the United States, have suffered past discrimination should inform United States courts as they address similar issues.

III. UNITED STATES TREATY LAW PERMITS AFFIRMATIVE ACTION AND, UNDER CERTAIN CIRCUMSTANCES, IMPOSES AFFIRMATIVE DUTIES TO ASSURE EQUALITY

The United States's duty to comply with its international treaty obligations further supports a finding that the University's interest in considering race when selecting its students is, indeed, "compelling," as the Constitution

mandates. *See* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. Cin. L. Rev. 423, 468 (1997); Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 Mich. J. Int'l L. 659, 675-76 (1997). Two treaties ratified by the United States specifically permit race-based distinctions in order to redress past discrimination and promote the values of diversity: the International Covenant on Civil and Political Rights, *opened for signature* December 19, 1966, art. 2(2), 999 U.N.T.S. 171, 173 (hereinafter "ICCPR"); and the Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, art. 2(2), 660 U.N.T.S. 195, 218 (hereinafter "CERD"). The United States has committed itself, by becoming a party to the treaties, to take the affirmative steps necessary to ensure that the equal enjoyment of rights is guaranteed to all racial groups and their individual members. Indeed, those treaties are now part of the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. What is more, the Senate's ratifications of these treaties acknowledged that, in our federal system, implementation of their principles is a responsibility of state and local government, as well.[3] Accordingly, the ICCPR and CERD offer relevant, legitimate guidance to this Court in evaluating whether the University's affirmative action programs further compelling interests in promoting a diverse intellectual community and remedying

[3] The United States Senate ratified the ICCPR with the express understanding that it "shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters contained therein, and otherwise by the state and local governments," and that "the Federal Government shall take measures appropriate to the Federal system to the end that competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." U.S. Reservations, Understandings, Declarations, and Proviso, ICCPR, 138 Cong. Rec. S4781-01 (daily ed. April 2, 1992); *see also* U.S. Reservations, Understanding, Declarations, and Proviso, CERD, 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994).

past discrimination in admissions. *Cf. Omaya v. California*, 332 U.S. 633, 649-50 (1948) (Black, J., concurring) (U.S. pledge in U.N. Charter to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" is additional reason that California law impermissibly interferes with federal policy) (citation omitted); *id.* at 673 (Murphy, J., concurring) ("Its inconsistency with the Charter . . . is but one more reason why the statute should be condemned.").

A. The ICCPR Supports Affirmative Action Programs Such As The Admissions Policies At Issue Here

States Parties to the ICCPR are bound to take "necessary steps" to effectuate rights guaranteed by the treaty. ICCPR, art. 2(2), 999 U.N.T.S. at 173. Article 26 of the ICCPR provides that "[a]ll persons are equal before the law" and that States Parties "shall . . . guarantee to all persons equal and effective protection against discrimination on any ground such as race." *Id.* at 179. Moreover, the Human Rights Committee created by the treaty has provided authoritative recognition that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, General Comment 18, para. 13, at 28 (1994) (hereinafter "General Comment 18"). According to the Committee:

> [T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. . . . Such action may involve granting for a time . .

> . certain preferential treatment in specific matters . . . .

Id. para. 10.

The United States affirmed the Human Rights Committee's construction when it ratified the ICCPR. The formal "understanding" adopted at that time states in pertinent part:

> The United States understands distinctions based upon race . . .—as those terms are used in Article 2, paragraph 1 and Article 26—to be permitted when such distinctions are, at a minimum, rationally related to a legitimate governmental objective.

United States: Senate Committee On Foreign Relations Report On The International Covenant On Civil And Political Rights, 31 I.L.M. 645, 655 (May 1992) (earlier draft, adopted later by the Senate and President).

The Report of the Senate Committee on Foreign Relations, addressing the ICCPR, also noted that the Human Rights Committee created by the Covenant had interpreted the treaty to allow certain forms of "differentiation":

> In interpreting the relevant Covenant provisions, the Human Rights Committee has observed that not all differentiation in treatment constitutes discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Id.; *see also* Paust, *Race-Based Affirmative Action*, *supra*, at 662-63 n.12.

In sum, the ICCPR has been construed—by the United Nations Human Rights Committee and the United States Senate—squarely to permit the purpose here, *i.e.*, affirmative action. Indeed, the Human Rights Committee has indicated

that affirmative action may be "require[d]" when States Parties' failure to take such affirmative steps would perpetuate discrimination. General Comment 18, *supra*, at para. 10.

B. CERD Endorses Affirmative Action Programs

CERD by its terms also authorizes affirmative action programs to redress past wrongs. While the treaty's general provisions outlaw all forms of racial discrimination, *see* CERD, arts. 2-5, 660 U.N.T.S. at 216-22, certain "special measures" are expressly excluded from the definition of proscribed racial discrimination. As the Convention states in Article 1, paragraph 4:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

CERD, art. 1(4), 660 U.N.T.S. at 216.

Again, when it ratified CERD, the United States expressly recognized that it permits race to be taken into account when necessary to secure equality. In his formal statement to Chairman Claiborne Pell of the Senate Foreign Relations Committee concerning ratification of the treaty, Conrad Harper, the Legal Adviser to the Secretary of State, noted: "Article 1(4) explicitly exempts 'special measures' taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection." Marian Nash, *U.S. Practice: Contemporary Practice of the United States*

Relating to International Law, 88 Am. J. Int'l L. 719, 722 (1994). Significantly, Article 2 of CERD also imposes on States Parties the *duty* to take special and concrete measures of affirmative action "when the circumstances so warrant." CERD, art. 2(2), 660 U.N.T.S. at 218; *see also* Paust, *Race-Based Affirmative Action*, *supra*, at 666-67. In ratifying CERD on November 20, 1994, the United States consented to all of its provisions.

Thus, carefully crafted race-based affirmative action programs to ensure equal enjoyment of rights by all racial groups are plainly permissible, and in some circumstances may be required, under both the ICCPR and CERD.

C. Self-Execution Is Not An Issue Where, As Here, The Treaty Provisions Are Cited As Aids To Interpretation

The United States's instruments of ratification for both the ICCPR and CERD contain declarations that many (but not all) of the articles are "non-self-executing." Louis Henkin *et al.*, *Human Rights* 784-86, 1043-44 (1999). The propriety of such declarations need not be resolved here, because the *amici* do not directly draw upon the treaty provisions as the foundation for their legal claims. Rather, the ICCPR and CERD are cited here as additional interpretive support for concluding that the University's admissions policies do not offend the United States Constitution. Such an informative and illustrative role for international law has been widely accepted by members of this Court. *See* Point I, *supra*. Even generally non-self-executing treaties can be used indirectly as aids for interpretation of other laws, defensively in civil or criminal contexts, or—as here—to support a claim that the state interest in race-based affirmative action is, indeed, "compelling." *See, e.g.*, Jordan J. Paust, *International Law as Law of the United States* 62-64, 68, 97-98, 134-35, 370, 377-78 n.4, 384 (1996); de la Vega, *supra*, at 457 n.206, 460, 467-68, 470; Joan Fitzpatrick, *The Preemptive and Interpretive Force of International Human Rights Law in*

State Courts, 90 Proc. Am. Soc. Int'l L. 259, 262, 264 (1996); Paust, *Race-Based Affirmative Action*, *supra*, at 671 n.45. Thus, the Court may appropriately consider these treaties here.

CONCLUSION

For the foregoing reasons, as well as those stated in the briefs for Respondents, the decisions of the courts below should be affirmed.

Respectfully submitted,

Of counsel:
Martha F. Davis
Associate Professor of Law
Northeastern University
School of Law
400 Huntington Avenue
Boston, Mass. 02115
(617) 373-8921

Jennifer K. Brown
Wendy R. Weiser*
NOW Legal Defense
and Education Fund
395 Hudson Street
New York, N.Y. 10014
(212) 925-6635

**Counsel of Record*