Nos. 05-908 & 05-915

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In The
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,
v.
SEATTLE SCHOOL DISTRICT No. 1, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

and

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT
FRIEND OF JOSHUA RYAN McDONALD,
Petitioner,
v.
JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

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

BRIEF OF FLORIDA GOVERNOR JOHN ELLIS "JEB" BUSH AND THE STATE BOARD OF EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

Florida Governor Jeb Bush ("Governor Bush") and the Florida State Board of Education ("State Board") respectfully submit this Brief as *amici curiae* pursuant to Sup. Ct. R. 37.3(a).[1] As the chief executive in the State of Florida ("Florida")--a state with a population of almost 17.9 million which enrolls almost 2.7 million students in its pre-kindergarten through twelfth-grade public education system, 280,000 students in its State University System, and 816,000 students in its community college system--Governor Bush has a significant interest in the outcome of all high court proceedings relating to state decision-making based on race or ethnicity in educational matters. So, too, does the State Board, the chief implementing, coordinating, and enforcing body of public education in Florida, with supervisory authority over Florida's entire pre-kindergarten through twelfth grade ("preK-12") system of free public education and community colleges.

The Governor and State Board have an interest in promoting opportunity, irrespective of race or ethnicity, for all students in their public preK-12 education system and for citizens in state-involved programs and initiatives generally (including higher education, state contracting, and employment). *See* § 1000.05(1), Fla. Stat. (2006) (forbidding any restriction of access to programs or courses on the basis of race or ethnicity and requiring that classes be available to all without regard to race or ethnicity). Florida has boldly reformed policies that previously used race and ethnic classifications to give unequal preferences to some individuals, and has turned from such policies advocating the "soft bigotry of low expectations" to

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[1]Both parties have granted blanket consent to the filing of briefs *amicus curiae* by letters of consent on file with the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation of the brief.

those set on ensuring equal opportunity for all individuals. If upheld, the lower court decisions reviewed here have the potential to undercut Florida's reforms and perpetuate harmful stereotypes.

Florida has chosen a better way. Over the past eight years, Governor Bush has initiated policies that give broad opportunities to students, irrespective of race or ethnicity, and that empower their learning and achievement using race-neutral means. In particular, Governor Bush initiated a sweeping race-neutral reform of Florida's preK-12 public schools that has spurred tremendous student achievement gains in all racial and ethnic groups. The results of this and other Florida education reforms, discussed *infra* at Section I.C., demonstrate that student learning and achievement come not by classifying students separately by race or ethnicity, but by affording equal opportunity to all students, and holding them, their teachers, and schools accountable for the results. *See, e.g.*, Jeb Bush and Michael R. Bloomberg, *How to Help Our Students, Building on the 'No Child' Law*, WASH. POST, Aug. 13, 2006, at B07 ("Our emphasis on accountability is a big reason our schools are improving, our students are performing at higher levels and we're closing the achievement gap between poor and minority students and their peers.").[2]

Taking a similar tack, Governor Bush's One Florida Initiative removed preferences, set-asides, and quotas in government contracting, in undergraduate admissions at state universities, and in graduate and professional programs. These policies also would be undercut if this Court recognizes "diversity" as a compelling state interest and thereby more broadly sanctions the use of racial and ethnic classifications.

Governor Bush and the State Board have an additional interest in the Court's overturning its rulings on "diversity"

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[2] *Available at http://www.washingtonpost.com/wp-dyn/content/article/2006/08/11/AR2006081101565_pf.html.*

being a compelling interest in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), or at least confining them to their specific facts. These decisions grant too much leeway for governments to apply subjective notions of "diversity," and on that basis to treat persons unequally. Our national history gives a shameful account of government's abuse of racial classifications, such that its authority to use them should not be expansively restored. "Diversity" is too vague a concept and too subject to manipulation to provide sufficient clarity or protection against discrimination by government based on race or ethnicity.

Finally, Governor Bush and the State Board have a clear interest in this Court's clarification of the principle that government actors are forbidden from engaging in decision-making that treats individuals differently because of race or ethnicity.

SUMMARY OF ARGUMENT

This case presents two questions of particular interest to Governor Bush and the State Board. The first is whether the Respondent school boards violated the Equal Protection Clause of the Fourteenth Amendment by deciding to admit or deny students a place in public educational programs based solely on their race or ethnicity. The second is whether this Court's rulings in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), should be overturned or explicitly limited to clearly restrict government's ability to treat persons differently based on their race or ethnicity--such as here where local school boards have admitted or denied students a place in certain schools based solely on their race or ethnicity.

Government's use of race or ethnicity to dictate the participation or exclusion of individuals from government-involved opportunities violates the Equal Protection Clause of the Fourteenth Amendment and should not be permitted. The Court's clear rule, repeatedly affirmed, is that government may have a compelling interest and classify its citizens on the basis of race *only* when absolutely necessary to remedy the present effects of past discrimination.[3] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989); *United States v. Paradise*, 480 U.S. 149, 170-71 (1987). The lower court decisions disregarded this rule. Citing the compelling "diversity" interest recognized by the Court in *Gratz* and *Grutter*, they concluded that school boards could dictate the racial makeup of schools by admitting or

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[3]The argument presented by *amici* here will focus on the Court's prohibitions against governmental use of racial and ethnic classification, but recognizes and assumes that government may use such classifications when necessary to remedy the present effects of past discrimination consistent with the above-cited cases.

denying students admission solely on the basis of their race or ethnicity.

The policies adopted by the School Boards here--which apply when a school is oversubscribed or when its preferred racial or ethnic mix is threatened--unlawfully cast aside any genuine evaluation of students' viewpoints or experiences that might contribute to a school's achievement or diversity in favor of inflexible, monolithic racial stereotypes (*i.e.*, prescribing one's acceptance or denial based on an assumption of inherent diversity between "whites" and "nonwhites").

This Court has never recognized a compelling governmental interest in the use of purely racial and ethnic classifications. Even in *Gratz* and *Grutter*, the Court recognized a diversity concept broader than race and ethnicity. While Respondents purport to seek certain educational and social benefits of diversity, they take no account of individual viewpoints or experiences. They apparently believe the "right mix" of racial and ethnic groups within their student bodies itself is a valid surrogate for individual consideration. This is incorrect. The Court has consistently rejected as harmful such blatant use of stereotypes.

Florida's experience in the wake of Governor Bush's preK-12 public school reforms and One Florida Initiative demonstrates that increasing students' educational achievement is *not* a function of a school's racial or ethnic makeup. Even if this Court accepts that diversity in the context of higher education represents a compelling state interest, such diversity does precious little in the preK-12 setting to increase student learning and achievement--the paramount goal of public education from which all other goals flow. Florida's students have demonstrated remarkable achievement and have taken large strides in closing the traditional minority/non-minority achievement gap by affording opportunity to students without regard to race or ethnicity, and then by holding students, their teachers, and schools accountable for their achievement results. Florida's across-the-board progress demonstrates that racial and ethnic

engineering of schools does not rise to the level of a compelling interest in meeting public preK-12 education goals.

Florida's ability to spur significant educational progress without the use of racial or ethnic classifications further suggests that the policies at issue here are not narrowly tailored to meet their purported ends--an additional flaw that is fatal to the constitutionality of the programs.

Finally, the Court should overrule its decisions in *Gratz* and *Grutter*, to the extent they denominate "diversity" as a compelling governmental interest. Although the Court wisely sought to confine the "diversity" interest it recognized in those cases to the narrow university context, "diversity" has now escaped from its cage--in this case to harm the fundamental rights of school children to be treated equally in Kentucky and Washington. Many feared, and these cases now confirm, that lower courts would too expansively define "diversity" and for its sake permit government to disregard basic constitutional rights.

ARGUMENT

The pertinent questions before this Court arising out of *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (2006), and *Parents Involved in Cmty. Sch.*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006), are: (1) whether local school districts violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), by admitting or denying students a place in certain public schools or programs based solely on their race or ethnicity; and (2) whether, in view of the lower courts' expansive applications of this Court's rulings in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court should overturn the compelling governmental "diversity" interest recognized by these rulings and instead re-affirm its prior unambiguous rule that restricts the use of such racial classifications.

Petitioners' briefs comprehensively address the constitutionality of the specific school board programs. This brief will focus primarily on Governor Bush's and the State Board's view of the applicable law and experience in implementing race-neutral programs--programs that increase the learning and achievement of all students, but especially of minority students. Racially and ethnically preferential public school student assignment is patently unconstitutional and unnecessary to achieve the paramount goal of education--learning and achievement gains for all children, irrespective of race or ethnicity.

I. RESPONDENT SCHOOL BOARDS HAVE NO COMPELLING INTEREST IN AWARDING OR DENYING SLOTS TO STUDENTS BASED SOLELY ON THEIR RACE OR ETHNICITY.

A. Standard Of Review.

Understanding that the matter before the Court is one of classification based on immutable racial and ethnic characteristics, the Court's analysis is the same under both the Equal Protection Clause and Title VI: strict scrutiny applies. *Adarand Constructors*, 515 U.S. at 234 (citing *Fullilove v. Klutznick*, 448 U.S. 523 & n.1 (1980)); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992). The underlying purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). This Court has clarified that courts must apply a strict scrutiny standard when evaluating all racial classifications, including those that may be benign. *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 226; *Croson*, 488 U.S. at 493. "[R]acial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Johnson v. California*, 543 U.S. 499, 506 (2005) (quoting *Shaw*, 509 U.S. at 651). The Court has repeatedly declined invitations to relax its strict scrutiny standard to more broadly allow government to discriminate by race. *See, e.g.*, *Wygant*, 476 U.S. at 313 (rejecting use of a relaxed standard in the context of teacher layoffs); *Johnson*, 543 U.S. at 509 (declining to apply a lesser standard in the context of prisoner security); *but see Grutter v. Bollinger*, 539 U.S. at 326-28 (appearing to have applied strict scrutiny in name only).

Under the Court's strict scrutiny analysis, there are two questions that must be answered in the affirmative for any challenged racial classification to be constitutional: 1) whether

it serves a compelling state interest; and 2) whether it is narrowly tailored to achieve that interest. *Adarand*, 515 U.S. at 227. The party implementing the classification bears the burden of proving that the racial classification is narrowly tailored to serve a compelling interest. *Croson*, 488 U.S. at 510-11. Governor Bush's experience in reforming Florida's schools answers both questions in the negative.

B. Racial Diversity Does Not Constitute A Compelling State Interest Sufficient To Permit Schools To Discriminate Against Children On Account Of Their Race Or Ethnicity.

This Court's Equal Protection jurisprudence makes clear that states have no compelling interest to achieve diversity for its own sake by dictating an optimal racial or ethnic mix of public school students and admitting or denying students to achieve that mix.

Racial classifications of this sort have been consistently forbidden. *Wygant*, 476 U.S. at 274; *Croson*, 488 U.S. at 500. The Court has not recognized a compelling interest in simple racial diversity, and, in fact, has on numerous occasions enumerated the dangers flowing from a mechanical, inflexible, and exclusive use of race as a determinant. *See, e.g.*, *Grutter*, 539 U.S. at 334 (noting that it insulates the preferred category of applicants from competition with other applicants); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (stating that "preferential programs may *only* reinforce common stereotypes holding that certain groups are unable to achieve success without special protection"); *Croson*, 488 U.S. at 493, 495 (granting benefits based on a quota or other mechanical use of race will breed cross-racial tension and impede the societal goal of relegating racial distinctions to irrelevance); *Johnson*, 543 U.S. at 507 (explaining, in a prison context, that "racial classifications threaten to stigmatize individuals by reason of their membership

in a racial group" and "perpetuate the notion that race matters most").

Contrary to this rule, the lower courts here upheld school board policies that dictate the racial makeup of schools and that admit or deny students to achieve that mix. While some of the goals described by the courts to support their rulings--improving academic education, increasing appreciation for political and cultural heritage, creating competitive and attractive schools, broadening community support, imparting societal values, broadening social interactions, lessening prejudice, increasing sympathy for other viewpoints, promoting cross-racial understanding, and ameliorating the racial concentration due to housing patterns[4]--are laudable (and goals for which Florida itself strives), the Constitution simply does not permit governments to accomplish even laudable goals by treating students differently based solely on their race or ethnicity.

The School Boards' goals and students' fundamental constitutional rights collide here as they would if the boards had allowed or denied students participation based upon their religion or political views. For instance, given current global tensions, a school system might decide that its diversity policy will classify and assign students based upon his or her religion or religious denomination. A district might then classify and assign to its schools a set sum of Buddhists, Christians (which, of course, could be subdivided again, *e.g.*, Catholics, Episcopalians-Anglicans, Baptists, *etc.)*, Muslims, or others. While such classifications might achieve very similar educational and socialization benefits, the Constitution simply will not permit preferences or decision-making on these intrusive grounds.[5]

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[4]*See McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 836, 852-54; *Parents Involved*, 426 F.3d at 1174-75, 1182-83.

[5]*Larson v. Valente*, 456 U.S. 228, 246 (1982) ("[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."). Should the Court extend constitutional protection to the

The lower courts relied heavily upon this Court's consideration of diversity in *Gratz* and *Grutter* to discount the Court's more applicable precedent. Notably, each acknowledged that the boards' policies were compelling in a "significantly different" manner than those affirmed by the Court in *Grutter*. *Parents Involved*, 426 F.3d at 1175; *see also McFarland*, 330 F. Supp. 2d at 849. They erred. The compelling interest recognized in *Gratz* and *Grutter* differs so fundamentally from the lower court decisions as to make them unconstitutional.

Most obviously, Respondents' policies hinge on group-wide stereotypes that the *Gratz* and *Grutter* opinions disdained. The Court made perfectly clear in *Gratz* and *Grutter* that a race-conscious admissions program must use race in "a flexible, non-mechanical way" if it is to pass constitutional muster. *Grutter*, 539 U.S. at 334; *Gratz*, 539 U.S. at 258, 270-72. Whereas in *Gratz* and *Grutter*, the Court recognized it permissible to take individual account of numerous characteristics and experiences unique to a person (including race, *i.e.*, a "race-plus" standard), the School Boards here mechanically classified students by race without any consideration of students' individuality. The school boards here have used racial stereotypes to classify students *en masse*, regardless of whether their categories correspond to facilitating diverse viewpoints and experiences or foster any educational benefits. Respondents' erroneous assumption is that a defined mix of whites and non-whites itself (corresponding to the cities' population mixes) will spur certain educational and social benefits--even without consideration of individual students' viewpoints and experiences. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 72 P.3d 151,169 n.5 (Wash. 2003) (Sanders, J., dissenting) (noting that the district "conceives of racial diversity in simplistic terms as a dichotomy

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School Boards' policies here, other experiments in engineering a "perfect" diversity may be expected to follow, *e.g.*, gender, disability, national origin, ideological positions, or other permutation of individual backgrounds or beliefs deemed relevant by government.

between white and nonwhite, as if to say all nonwhites are interchangeable").

Any process that seeks to classify and assign students by race will have inherent line-drawing problems, as these cases well demonstrate. The policies and lower court decisions here break students into simplistic "white," "nonwhite,""black," and "other" categories in disparate ways. In *McFarland*, the school district classified the race of each student as "black" or "other," while the lower court there used "black" or "white." *McFarland*, 330 F. Supp. 2d at 840 n.6. Conversely, the school district in Seattle divided students into "white" and "nonwhite" categories. *Parents Involved*, 426 F.3d at 1166. Under the plans, a Hispanic-American student would be considered "other" or "white" in Kentucky, and "nonwhite" in Washington. The contrasting permutations of local race classification policies, as well as the increasingly multi-racial nature of the population calls into question the veracity and legitimacy of "diversity"-seeking endeavors.[6]

The interest in prescribing schools' racial makeup constitutes pure discrimination, as opposed to the purported individual consideration for the students' viewpoints and experiences highlighted in *Grutter*. *See also Miller v. Johnson*, 515 U.S. 900, 920 (1995) (when a state actor makes an assumption that members of a particular race think alike or share the same political views, it engages in "racial stereotyping at odds with equal protection mandates"); *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). Such inflexible, purely race-based classification and decision-

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[6]*See* David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-based Decision-making by Individualized Discretion*, 56 Fla. L. Rev. 483 (2004) ("Racial categorizations of this kind-this individual is black, and that individual is white-are . . . difficult to make."); Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept*, 36 Ariz. St. L.J. 1093 (2004) ("[B]oth the legislatures and the courts have struggled with the fluidity of "racial" categories.").

making find no protection in the Court's prior rulings, even if they do highlight the intrinsically expansive nature of a governmental "diversity" interest wrought by this Court's *Gratz* and *Grutter* rulings.

Even laudable goals must be reached by constitutional means. Our nation has a sad history of invidious and destructive use of racial classifications against our youngest citizens in public school. This history cautions against a policy that would more broadly permit schools to racially discriminate, even where they proffer a laudable reason. The Court has clearly found harm to students when government discriminates solely on the basis of his or her race--a God-given characteristic over which a person has no control. The Constitution does not give leeway for school boards to discount this harm simply because they perceive a greater good can be achieved by discriminating. Because states have no compelling interest in racially classifying their school children and prescribing the racial makeup of their schools, these practices violate the Equal Protection Clause. This Court should reject Respondents' policies, thereby reaffirming the high bar required to establish a compelling interest with respect to the use of racial or ethnic classifications consistent with *Adarand*, *Shaw*, *Wygant*, and *Croson*.

C. Florida's Experience Demonstrates That, Even If Racial Diversity May Be Considered A Compelling Interest In Higher Education, It Has No Notable Benefit In Public School Education.

Even if the Court affirms a compelling "diversity" interest in context of higher education, it should not do so here. Racial diversity has very little impact on the paramount goal of public preK-12 education--increasing students' learning and achievement. Florida's experience in the wake of Governor Bush's preK-12 public school reforms and One Florida Initiative demonstrates that educational achievement and success are not

a function of a school's racial makeup: race-neutral policies will accomplish this goal.

The lower courts compiled a lengthy list of educational and social benefits that supposedly compel schools to discriminate by race.[7] These goals generally fall into three categories: educational benefits; social benefits; and community benefits best served by other means. Of these, the educational benefits of learning and achievement are paramount, the seminal goals from which other benefits flow.

Inherent in the very definition of "education" is the notion of obtaining discrete knowledge or skills, in contrast to having been socialized through one's educational experience. *See, e.g.*, THE *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE*, 569 (4th ed. 2000). While socialization benefits are important and incident to a high-quality education, imparting discrete knowledge, skills, and learning to students must be the highest goal of public education. Schools routinely test and grade students based on their tangible learning of knowledge and skills, not on their socialization skills (that is, once they demonstrate a primary-level ability to "play well with others"). Irrespective of whether school children can, amongst other things, interact sensitively, refrain from stereotypes, or appreciate the heritage of others, if they cannot read or add, the school system has failed them by denying them basic knowledge and skills necessary to fully engage, appreciate, and succeed in the world.

Uniquely informed by Florida's magnificent diversity and successful public school reforms, Governor Bush has found that student educational achievement is most powerfully encouraged by affording opportunity, empowering, and holding students, teachers, and schools accountable for the results--without any need to classify or discriminate on the basis of race or ethnicity to "balance" the make-up of particular schools or programs.

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[7] *See McFarland*, 330 F. Supp. 2d at 836, 852-54; *Parents Involved*, 426 F.3d at 1174-75, 1182-83.

Over the last eight years, Florida has witnessed remarkable gains in the achievement of minority students and a significant narrowing of traditional minority/non-minority educational achievement gaps. These gains, which have occurred across the board for all student racial and ethnic groups, irrespective of the racial and ethnic mix of their schools, demonstrate that the School Boards lack a compelling interest to dictate the racial and ethnic mix of their student bodies.[8]

1. Governor Bush's A+ Plan

Concerned that Florida's public school students were not acquiring the basic educational tools necessary for success in higher education and life in general, Governor Bush and the Florida Legislature implemented the A+ Education Plan in the summer of 1999. *See* 1999 Fla. Laws ch. 99-398; *A+ Plan for Education, available at http//:www.myflorida.com/myflorida/government/governorinitiatives/aplusplan/planEducation.html*; *Governor's Press Release*, February 14, 2006, *available at http://www.flgov.com/ release/7321*. Comprised of a number of

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[8]Florida's public schools are growing and increasingly diverse. From 1990 to 2006, the state's population increased from approximately 13 million to 17.8 million people. During this time, Florida's Hispanic-American population more than doubled, from an estimated 1.5 million to 3.4 million, and its African-American population grew 62 percent, from 1.8 million to 2.9 million. No single racial/ethnic group currently comprises a majority of Florida's public school students. *U.S. Census Bureau News*, Census Bureau Releases Population Estimates by Race (August 4, 2006), *available at www.census.gov/press-release/www/releases/archives/ population/007263.html*; *U.S. Census Bureau, 1990 General Population and Housing Characteristics* (last visited August 14, 2006) *available at http://factfinder.census.gov/servlet/QTTable?_bm=y&-context=qt&-qr_name=DEC_1990_STF1_DP1&-ds_name=DEC_1990_STF1_&-CONTEXT=qt&-tree_id=100&-all_geo_types=N&-redoLog=true&-_caller=geoselect&-geo_id=04000US12&-search_results=01000US&-format=&-_lang=en*; *Florida Education and Community Data Profiles*, Series 2006-11 (July 2006) *available at http://www.firn.edu/doe/eias/eiaspubs/pdf/fecdp0405.pdf.*

components, the operational premise of the program is that every student can achieve if given adequate opportunities, if empowered to improve in deficient areas, and if held accountable with his or her teachers and school. Under the Plan, each school is assigned a yearly grade based on student achievement, such that students, teachers, administrators, and districts are together held accountable for the results. *See* § 1008.34, Fla. Stat. (2006); Rule 6A-1.09981, Fla. Admin. Code (2006). Good schools and their teachers are rewarded for top grades. The list of underperforming schools is also publicized. To them, the state allocates additional resources and encourages administrators to address problems.[9]

The results of the A+ Plan have been striking. Students in all groups have made remarkable progress. Particularly for students in the lower grades and young minority students, Florida is closing the student achievement gap that has existed historically between minority and non-minority students. Since implementation, all groups have demonstrated significant learning gains, but African-American and Hispanic-American students have made the most progress.

The percentage of students scoring at least a level 3 on the Florida Comprehensive Assessment Test (FCAT)--the level equivalent to reading at grade level--has markedly increased since implementation of the A+ Plan. The percentage of Hispanic-American students reading at grade level increased 15 percentage points, from 35% in 2001 to 50% in 2006. *Fla. Dep't of Educ./Governor's Joint Press Release,* May 23, 2006, *available at http://www.fldoe.org/news/2006/2006_05_23-3.asp*; FCAT 2006 http://fcat.fldoe.org. The percentage of African-American students reading at grade level increased 13 percentage

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[9]In addition, students in repeated, failing schools were given an opportunity to transfer to better public schools or to private schools. *See* § 1002.38, Fla. Stat. (2006). In January 2006, the Opportunity Scholarship Program's private school option was struck down by the Florida Supreme Court as violative of the Florida Constitution's supposed prohibition against the State's making such use of non-public schools. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

points, from 26% to 39%. *Id.* The percentage of non-Hispanic white students reading at grade level increased 8 percentage points, from 59% to 67%. *Id.* Likewise for FCAT math scores, 56% of Hispanic-American students and 41% of African-American students performed at or above grade level in 2006, up from 41% and 26%, respectively, in 2001. *Id.*

Undercutting the school boards' policies in this case, Florida students significantly improved with little regard to the relative percentage of racial or ethnic minorities in the district or school. For instance, the State's top-ranked school districts in 2006 for closing the minority achievement gap included districts with large, medium, and small minority student populations. On the top-ten list of districts (of 67 total districts) with respect to African-American students in either reading or math in 2006 were (with percentage of African-American students):[10]

School District	**% African-Am.**
Holmes County	3.4%
Pasco County	4.3%
Lafayette County	10%
Wakulla County	11%
Putnam County	27%
Broward County	37%
Madison County	57%
Jefferson County	69%

[10] *See Fla. Dep't of Educ. Press Release,* June 21, 2006, *available at http://www. fldoe.org/news/2006/2006_06_21.asp*; *Florida Comprehensive Assessment Test 2006 Website*, *available at http://fcat.fldoe.org*; *Florida Education and Community Data Profiles*, Series 2006-11 (July 2006), *available at http://www.fsm.edu/doe/eias/eiaspubs/pdf/fecdp0405.pdf.*

On the top-ten list in closing the achievement gap in either reading or math for Hispanic-American students[11] in 2006 were (with percentage of Hispanic-American students):[12]

School District	% Hispanic-Am.
Holmes County	1.4%
Calhoun County	1.7%
Madison County	2.2%
Hamilton County	9.6%
Lafayette County	10%
Indian River County	13%
St. Lucie County	16%
Collier County	38%

This data demonstrates that the achievement results in these top-ranked districts--that closed achievement gaps anywhere from about 3% to 13% in a single year--had little to do with their

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[11]Florida's public school population is 22.5 percent Hispanic-American and is concentrated in five of the State's 67 county school districts (Dade, Broward, Palm Beach, Hillsborough, and Orange Counties). These five county school districts educate approximately 70% of Florida's Hispanic-American public school students. Florida Education and Community Data Profiles (July 2006), *available at http://www.firn.edu/doe/eias/eiaspubs/pdf/fecdp0405.pdf.*

[12]*See Fla. Dep't of Educ. Press Release,* (June 21, 2006), *available at http://www.fldoe.org/news/2006/2006_06_21.asp*; *Florida Education and Community Data Profiles* (July 2006), *available at http://www.firn.edu/doe/eias/eiaspubs/pdf/fecdp0405.pdf.*

relative racial or ethnic makeup. *Id.* Success may be more accurately attributed to Florida's race-neutral reforms.

Florida's experience with regard to particular schools is much the same. As earlier discussed, under Governor Bush's A+ Plan, Florida assigns a grade every year to each public school in the State based primarily upon student achievement data from the FCAT. *See* § 1008.34, Fla. Stat. (2006); Rule 6A-1.09981, Fla. Admin. Code. (2006). Analysis of school grades over the last eight years shows significant across-the-board improvement for Florida's schools, without regard to the racial or ethnic mix at schools. *School Grade Change Report* from 1999 to 2006 *by School Minority Rate, available at http://www.fldoe.org/arm/pdf/SchGrMinRate.pdf.* Of the Florida schools with the highest minority populations (by quartile), 32% improved one letter grade; whereas 35%, 31%, and 37% of second, third, and fourth quartile-schools, respectively, showed a one-letter grade improvement.[13] *Id.* The number of schools that *declined* a letter grade or more over the period was also roughly the same across all quartiles--between 2% and 4%. *Id.* These results demonstrate that engineering the "right" racial mix at a particular school has little bearing on the actual performance of that school's students.

2. Gifted Programs

Florida's experience also demonstrates little need to favor students by race or ethnicity with respect to entry into school gifted programs. In 2002, Governor Bush abolished the use of racial and ethnic preferences in school gifted programs. Rule 6A-6.03019, Fla. Admin. Code (2006). This change had no deleterious effect on minority participation, but has coincided with an overall increase in participation by minority students in

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[13]Fifty-two percent of schools in the highest minority quartile improved by *more than one* letter grade from 1999 to 2006--a higher percentage than in the other quartiles in part because the highest minority quartile had comparatively fewer A and B schools to begin with than the other quartiles. *Id.*

gifted education programs in Florida by about 5%--from roughly 33%, in 2001 to 38% in 2006. *Profiles of Florida School Districts 2000-2001, available at http://www.firn.edu/ doe/eias /eiaspubs/pdf/ssdata1.pdf*; *Statistical Brief*, Series 2006-08B (Mar. 2006) *available at http://www.firn.edu/doe/eias/eiaspubs/ pdf/esemem.pdf*. Again, providing race-neutral opportunity and holding students accountable to the same standards has proven successful.

3. College Reach Out Program

Some students need additional support in order to achieve success. With this in mind, Governor Bush and the State Board have expanded Florida's College Reach Out Program ("CROP"). *See* § 1007.34, Fla. Stat. (2006). The Program identifies disadvantaged students, of whatever race, and aims to prepare them for college through an increased number of tutors, homework clubs, and after-school and in-school academic enhancement strategies. CROP projects emphasize continuous educational interaction and offer a wide variety of activities and opportunities for participants. *See College Reach Out Program Summary available at http://www.firn.edu/doe/eeop/crop.htm.*

CROP serves approximately 8,546 students through nine state universities, twenty-five community colleges, and four independent colleges and universities. *Id.* Approximately 72% of those students are African-American and 12% are Hispanic-American. *Id.* Initial studies have shown that CROP is successfully improving the educational preparation and motivation of poor and educationally disadvantaged students. For example, in the 2003-04 school year, 78% of the high school seniors served by CROP received a standard diploma, compared to 62% of the random sample stratified on the basis of race and income. *CROP Achievement Data Summary available at http://www.fldoe.org/arm/pdf/CROPData.pdf.* CROP students were academically promoted (in sixth through eleventh grades) to the next grade at an 86% rate, compared to a 76% rate for the

random sample. *Id.* Of CROP students who graduated, 70% went on to pursue a postsecondary education, compared to only 61% of the random sample. *Id.*

Drop-out rates also significantly improved between 1998-99 to 2004-05 school years for Hispanic-Americans (from 8.3% to 3.6%) and African-American students (from 6.6% to 3.9%), outpacing by a little the improvement for non-minority students (from 4.2% to 2.4%). "*Dropout Demographics in Florida's Public Schools, and Dropout Rates*," *Florida Information Note,* Series 2006-15F (May 2006) *available at http://www.firn.edu/doe/ eias/eiaspubs/pdf/dropdemo/pdf.*

CROP shows that providing opportunity and empowering struggling students is a proven, powerful means to spur their success, without any need to take account of students' race or ethnicity.

4. Advanced Placement Tests and Virtual School

Another way that Florida has increased opportunities for all students has been to partner with the College Board to expand Advanced Placement ("AP") course offerings and to encourage students to enroll in them. As a result, participation in these courses has greatly increased, as has the number of students who take AP tests--especially for minority students.[14] The quality of examination and test scores continues to improve as well, while

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[14] *See Strategic Milestone on the Road to K-20 Education*: 1995 to 2005, *available at http://www.fldoe.org/arm/pdf/StrMilestones05.pdf.* Minority participation in AP courses and the minority passage rate have increased at a much greater percentage than for non-minorities. *Advanced Placement Participation and Results Survey, available at http://www.fldoe.org/arm/pdf/APCourseRes.pdf.* Consider, the number of African-American students taking Advanced Placement tests in Florida rose from 2,595 in 1998-99 to 7,260 in 2004-05. The number of Hispanic-Americans test-takers rose from 6,181 to 17,101 during this time. The total number of Florida test-takers rose from 34,607 to 77,910. *Id.*

more and more minority students are earning scores that qualify for college credit. *See Advanced Placement Participation and Results Survey, available at http://www.fldoe.org/arm/pdf/AP CourseRes.pdf.*

Additionally, the Florida Virtual School provides an online curriculum of AP courses to students who may not have access to such classes at their schools. *See* § 1002.37, Fla. Stat. (2006). Most of these students attend rural or inner-city schools that have yet to expand their AP course opportunities. Minority enrollment in Florida Virtual School classes has climbed from just over 200 in 1999-2000 to over 16,500 in 2005-2006 and continues to increase. *Virtual School Summary Data, available at http://www.fldoe.org/arm/pdf/VirtSchPartic.pdf.*

5. Access To Important Tests

Florida has taken other steps to encourage post-secondary education for all students. Recognizing that students who take examinations such as the Preliminary SAT/National Merit Scholarship Qualifying Test ("PSAT/NMSQT") are more likely to take the SAT or ACT and continue on to college, Florida made the PSAT/NMSQT and the PLAN, which is a tenth grade pre-college test offered by ACT, Inc., available at no cost to all students. Providing these tests free of charge removed the previous cost barriers that hindered economically disadvantaged students. Whereas before the test was administered only to those who were already aspiring to go to college *and could afford it*, Florida made it available to all students. These efforts have resulted in a six-year increase of 618% in the number of African-Americans and a 625% increase in the number of Hispanic-Americans taking the PSAT. *Test Participation Summary, available at http://www.fldoe.org/arm/pdf/PreCollTests.pdf.* Similarly, there has been a 230% increase in the number of African-Americans and a 148% increase in the number of Hispanic-Americans taking the PLAN test. *Id.*

All of these preK-12 reforms were premised on the basic idea that the best way to ensure student achievement for all students, minority students included, is to provide the same opportunities regardless of a students' race or ethnicity, to support those that need additional help, and to hold each student to the same standard as his or her peers.

6. Post-Secondary Admissions Opportunities

While Florida has made significant progress educating its students without the use of racial preferences or quotas, success is never final. Governor Bush determined to give a helping hand particularly to students already in the upper grades who did not have the full benefit of Florida's reforms.

Recognizing the achievement gap that exists between the scores of non-Hispanic white and minority students because of decades-old policies promoting the "soft bigotry of low expectations," Florida helped more students to obtain a post-secondary education. Educationally disadvantaged students who have shown solid classroom achievement and promise--without regard to their race or ethnic origin--have been aided in gaining admission to the State University System.

Upon initiating its Talented Twenty Program, Florida became the only state in America to guarantee state university admission to all of its public high school students who graduate in the top 20% of their class.[15] *See* Rule 6C-6.002(5), Fla. Admin. Code (2006); *Talented Twenty Program Guide 2005-06, available at http://www.firn.edu/doe/osfa/ttfactsh.htm.* To

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[15]Following on this program, the University of Florida instituted a "Talented 5%" Program, guaranteeing admission into the University of Florida for the top quarter of the Talented Twenty Program. *See One Florida Accountability Commission: An Independent Review of Equity in Education and Equity in Contracts Components of One Florida* at 3, 29 (June 2002), *available at http://www.myflorida.com/myflorida/government/otherinfo/documents/executive_summary.doc.*

qualify, students must have completed the required 19 credits of course work and have an SAT or ACT score. *Id.* No minimum test score is required. *Id.*

The Talented Twenty Program is designed to improve post-secondary educational opportunities for minorities and all students by guaranteeing admission to the top students at every school, whether they graduated from a high school that had the best or the worst academic standards in the State. In this way, top students from the poorest performing schools have the same opportunity for admission as top students from high performing schools. It is unlikely that students graduating in the top-20 percent of their class from the state's best schools need the guaranteed admission of the Talented Twenty Program, as they would be otherwise admitted. The program therefore is intended to benefit students at poorer performing schools who may have striven to do their best, but who still need assistance gaining admission to the state university system.

Additionally, Florida has a unique "2+2" system that grants students who successfully complete an Associate's Degree at a community college guaranteed admission into a state university as if he or she had initially attended a state university. *See* § 1007.23, Fla. Stat. (2006); *see also* Rule 6A-10.024 Fla. Admin. Code (2006). Because the Florida Community College System has an open admission policy for students meeting basic admission criteria, even students from the most disadvantaged backgrounds may ultimately gain university admission and a university degree.

This reform of Florida's post-secondary education system took place even as Governor Bush abolished the State's use of racial preferences. In November 1999, Governor Bush presented the One Florida Initiative proposing that racial preferences in state contracting be eliminated and that rules governing admissions into the State University System be modified to prohibit preferential admissions on the basis of race or gender. *See* Rule 6C-6.002(7), Fla. Admin. Code (2006); *One Florida Initiative Website, available at http//:www.myflorida.com/my*

florida/government/governor initiatives/one_florida/index.html. The undergraduate rule was effective for Fall 2000 admissions, and the graduate and professional rule was effective for Fall 2001 admissions. *Id.* Prior to these rule changes, various universities and programs within the university system had used racial preferences. *See, e.g., NAACP v. Florida Bd. of Regents,* 863 So. 2d 294 (Fla. 2003).

Since the implementation of the One Florida Initiative of race-neutral admissions in higher education, Florida's State University System has maintained ethnic and racial diversity within its overall student body, with attendance rates of minorities holding steady or increasing. *One Florida Summary Results, available at http://www.fldoe.org/arm/pdf/OneFL Figs.pdf.* Diversity in graduate and professional school enrollment has remained steady as well. Since the first year of the implementation of Florida's race-neutral admissions policy in 2001, system-wide minority enrollment in graduate programs increased from 16.8% in the Fall of 2000 to 22.2% in Fall 2005. *Id.*

Florida's remarkable educational progress together with the narrowing of the minority/non-minority achievement gap shows that the "compelling" benefits Respondents seek are achieved not by finding the perfect racial or ethnic mix, but by affording opportunities, empowering, and holding the system accountable.

II. FLORIDA'S EXPERIENCE SHOWS THAT SYSTEMS USING RACIAL PREFERENCES TO ADMIT OR DENY STUDENTS ARE NOT NARROWLY TAILORED.

No compelling state interest is served by dictating the racial and ethnic makeup of schools, nor have the School Boards' methods met narrow tailoring requirements.

To be narrowly tailored, the Schools Boards' use of race must be carefully "calibrated to fit the distinct issues raised by the

use of race." *Grutter v. Bollinger*, 539 U.S. at 334.[16] The efficacy of alternative remedies, including race-neutral policies, is a factor to be considered in determining whether a state's racial classification is narrowly tailored. *Paradise*, 480 U.S. at 171. *See also Johnson v. Bd. of Regents*, 263 F.3d 1234, 1252 (11th Cir. 2001); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999); *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994). If a compelling interest may be served without resort to racial classification, a race-based program is not narrowly tailored. *Johnson*, 263 F.3d at 1259.

While the lower courts found the School Boards had adequately considered race-neutral alternatives, *Parents Involved*, 426 F.3d at 1188; *McFarland*, 330 F. Supp. 2d at 861, Florida's experience and success in furthering educational achievement for all students in a race-neutral manner, *see infra* at § I.C., demonstrates that the policies involved here fail the narrow tailoring requirement. As in Florida, the School Boards could employ any number of strategies to achieve the educational benefits sought without resorting to racial classifications.

Moreover, Florida's programs and the principles that they advance are more than just *another* way of accomplishing robust public school benefits for all students. They provide a *better* way. Florida's plan is better because it no longer accepts the lack of quality in the public schools that serve our underprivileged children; better because it recognizes the need to provide mentoring, tutoring, and other extra attention to those underprivileged children and their teachers; better because it encourages all students regardless of race or economic status to

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[16]The Court has used four primary factors to determine whether a policy is narrowly tailored: (1) whether it amounts to a quota that seeks a fixed number of students by race and separates groups of applicants from each other; (2) whether the applicant is afforded an individualized review; (3) whether it unduly harms members of any racial group; and (4) whether the government entity has given "serious, good faith consideration of workable race-neutral alternatives" to achieve its goals. *Grutter*, 539 U.S. at 334-339.

aspire to educational success and the promise of a post-secondary education; better because it no longer accepts a separate classification or separate opportunities on the basis of race; better because it focuses on providing all races with the opportunity to meet common standards; and finally, better because the day has arrived when racial classifications and separate standards are no longer necessary.[17]

The ultimate goal of the Equal Protection Clause is to end racially motivated state action. *Hopwood v. State of Texas*, 78 F.3d 932, 947-48 (5th Cir. 1998). Florida's initiatives effectively accomplish this goal by ending racial classifications, improving learning and achievement for all, and providing equal educational opportunities. These reforms are closing the achievement gap. The School Boards' attempts to achieve these goals through race-based means are unnecessary, not narrowly tailored, and should be rejected.

III. THE COURT'S RULINGS IN *GRATZ* AND *GRUTTER* SHOULD BE OVERTURNED TO THE EXTENT DIVERSITY WAS FOUND TO BE COMPELLING OR STRICTLY LIMITED TO THE CONTEXT OF UNIVERSITY EDUCATION.

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[17]It is commonly accepted that children learn and are greatly influenced by the modeling of parents and respected elders. Ironically, the School Boards are contravening the very purposes they intend to advance by treating students differently based upon their race or ethnicity. By using race to classify our youngest students, the School Boards encourage students to make decisions based upon racial and ethnic distinctions and to perpetuate the use of racial and ethnic classifications to the next generation. If government actors are permitted to apply racially-based decision-making to the youngest generation now (whose students will be attending law school about 20 years from now), this Court can little expect that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 343.

The Court's recognition of a compelling "diversity" interest in *Gratz* and *Grutter* should be overturned or explicitly limited to the university context. On the basis of *Gratz* and *Grutter*, lower courts have recognized an expansive "diversity" interest that unconstitutionally violates individual rights to equal treatment with little prospect of cessation. These rulings have eroded the Court's previously clear, compelling interest principle that the use of such racial classifications are impermissible. This prior rule afforded notable protection for citizens against unequal treatment by government in all but the most pressing cases. *Gratz* and *Grutter* erroneously changed that simple calculus.

By approving "diversity" as a compelling interest in the narrow context of a university's undergraduate and graduate admissions process, *Gratz* and *Grutter* swung open the doors to regimes that discriminate on the basis of race and ethnicity. Lower courts have paid no attention to the narrow viewpoint and experientially-based diversity interest recognized by the Court, or to the university setting that the Court found uniquely compelling.

Recent lower court decisions concede their interpretations to have applied the Court's rulings in non-university settings that only "resembl[e]" it, and to have recast the diversity interest itself to protect purely race-based classifications. *See, e.g.*, *Comfort v. Lynn School Comm.*, 418 F.3d. 1, 15 (1st Cir. 2005) ("Lynn's asserted interests bear a strong familial resemblance to those that the *Grutter* Court found compelling. There is no reason to believe that these interests are advanced by viewpoint diversity but not racial diversity, or that they are substantially stronger in the context of higher education than in the context of elementary and secondary education."); *see also Parents Involved*, 426 F.3d at 1175 (noting that the school board itself acknowledged its policies to be compelling in a "significantly different" manner than those affirmed by the Court in *Grutter); McFarland*, 330 F. Supp. 2d at 849. By so ruling, the lower courts have tended to defer to governmental classifications, including purely racial classifications, for the sake of "diversity" so long as there is a

colorable, well-sounding rationale.[18] Such deference to government turns on its head traditional strict scrutiny analysis to which racial classifications are subject.

These results indicate that the Court may not have fully anticipated the lower courts' difficulty containing a *narrow* university-specific diversity interest when it decided *Gratz* and *Grutter*. Because the basic rights of individuals are seriously threatened by the lower courts' expansion of "diversity" as a compelling governmental interest, this Court should overturn *Gratz* and *Grutter*, or at least limit these rulings to the context of university education, and re-affirm this Court's commitment to the unambiguous rule that government may discriminate on the basis of racial classifications only to remedy the present effects of past discrimination.

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[18]The very nature of a "diversity" interest implies that government may classify and engineer some "right mix" of persons--an expansive idea with seemingly innumerable permutations. This effectively subjugates equal protection rights to local cultural engineers with little prospect of achieving consistent outcomes. Some, like the lower courts here, trumpet diversity as a paramount value and compelling societal interest, while others note the havoc wrought by the "diversity myth."*See* David O. Sacks and Peter A. Thiel, *The Diversity Myth* (Independent Institute 1995) (arguing that in the name of "diversity," leading universities and cultural institutions have aimed to squelch dissent and intellectual life). Questions such as "what kinds of diversity can be considering compelling?" and "how many slots may legitimately go to each group?" predominate.

CONCLUSION

Amici, Florida Governor Jeb Bush, and the Florida State Board of Education, respectfully request that this Court reverse the decisions of the lower courts and elucidate a rule that effectively proscribes courts from upholding unlawful racially- and ethnically-based classifications.

Respectfully submitted,

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