Nos. 01-1333, 01-1416, 01-1418

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JENNIFER GRATZ, *et al.*,

Plaintiffs-Appellants (01-1333, 01-1418),
Plaintiffs-Appellees (01-1416),

v.

LEE BOLLINGER, *et al.*,

Defendants-Appellees (01-1333),
Defendants-Appellants (01-1416, 01-1418),

On Appeal from the United States District Court
For the Eastern District of Michigan
No. 97-75231

BRIEF FOR *AMICUS CURIAE* STANFORD INSTITUTE FOR HIGHER EDUCATION RESEARCH IN SUPPORT OF AFFIRMANCE IN NOS. 01-1333, 01-1418

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_____ _____

Jeffrey F. Liss Date

INTEREST OF *AMICUS CURIAE*

Amicus, the Stanford Institute for Higher Education Research (hereinafter "SIHER"), sponsors research projects that examine contemporary higher education planning and policy issues from a wide range of analytical perspectives, including those of social scientists and policy audiences in the United States and abroad. Since its formation in 1989, SIHER has sought to understand the dynamics of systemic change, productivity, management, and effectiveness pertaining to higher education organizations, as well as to offer suggestions for improvement. SIHER's projects examine a wide range of topics, including higher education finance, faculty, curriculum, governance, graduate education and academic restructuring.

Among the many research projects in which SIHER is currently involved are: (a) a project with the National Center for Postsecondary Improvement, a national research and development center, funded by a six year cooperative agreement with the United States Department of Education's Office of Educational Research and Improvement; and (b) The Bridge Project: Strengthening K-16 Transitions, a project to build on changing perspectives in how scholars, policymakers, and reformers think about educational policy and school reform within the context of the entire United States educational system. Further

information about SIHER's projects and its distinguished researchers can be found on SIHER's website, *http://www.stanford.edu/group/SUSE/research/siher.html*.

SIHER submits this brief pursuant to Fed. R. App. P. 29 in response to the National Association of Scholars' (hereinafter "NAS's") *amicus* brief of May 14, 2001, and, its addendum, the report of Thomas E. Wood & Malcolm J. Sherman's (hereinafter "Wood & Sherman report") upon which it relies. SIHER is committed to objective, independent social science analysis of important issues confronting higher education in this and other countries. SIHER has a strong interest in defending the integrity of serious research and analysis concerning the factors that improve learning in higher educational institutions, and in improving the understanding of methodologies relied upon by courts and policymakers on questions of significance to the future of higher education.

This brief will assist the Court by addressing the procedural issues raised by the filing of the Wood & Sherman report in this Court by an *amicus curiae*; by explaining the implications of the principal differences in approach between the Wood & Sherman report and the Gurin report which it attacks; by showing that it would be inappropriate to consider the assertions and new evidence in Section I of the NAS Brief and the Wood & Sherman report without a thorough opportunity for discovery, cross-examination and rebuttal by defendants; and by explaining that

the burden of proof set forth in Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), does not apply in the context of school admissions cases, such as this one. SIHER attaches the report of Professors Ewart Thomas and Richard Shavelson, "Analysis of Report of Wood & Sherman," (hereinafter "Thomas & Shavelson report") to this brief. The report and this brief contain a discussion of the methodologies relied upon by Professor Gurin and Wood & Sherman, which will be helpful, we respectfully submit, in explicating for the Court some of the fact-intensive methodology questions raised by these competing expert reports.

BACKGROUND

This case presents a fundamental question affecting the environment in which the people of our country are educated, the answer to which has the potential to change radically university classrooms and educational experiences across the nation. The question is this: Do institutions of higher education have the freedom to administer admissions policies which take race and ethnicity into account, as one of many factors, when deciding to admit students?

Both the Plaintiffs and the District Court in this case expressly agreed that substantial educational benefits flow from a diverse student body, including one that is racially and ethnically diverse. The District Court considered the University

of Michigan's expert report by Patricia Gurin (hereinafter the "Gurin report")[1] and found, as a matter of undisputed fact, that "a racially and ethnically diverse student body produces significant educational benefits." Gratz v. Bollinger, 122 F. Supp. 2d 811, 824 (E.D. Mich. 2000).

Thomas E. Wood, Executive Director of the California Association of Scholars, and Malcolm J. Sherman, Associate Professor of Mathematics and Statistics, State University of New York at Albany, released a report in May 2001 on behalf of NAS to refute the University of Michigan's Gurin report prepared for this litigation and admitted during the proceedings below. See Addendum to NAS Brief, filed May 14, 2001.

NAS summarized many of its arguments in general terms in an *amicus* brief filed with the District Court before the Plaintiffs conceded the educational benefits of diversity. However, NAS did not attempt to present a Wood & Sherman critique of the Gurin report to the District Court either as an addendum to its *amicus* brief below, or as evidence submitted by the Plaintiffs.

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[1] The Gurin report and Professor Gurin's supplemental reports are found at R-162, Appendix. Professor Gurin's most recent report is currently on the University of Michigan's website, *http://www.umich.edu/urel/admissions/new/gurin.html*.

Plaintiffs decided not to offer an expert report to challenge the Gurin report. Further, the Wood & Sherman report's criticisms of Patricia Gurin's report were not raised during Professor Gurin's deposition, nor by any expert witness in the court below.

The District Court granted summary judgment in favor of the University of Michigan with respect to its admissions programs for 1999 and 2000. In granting summary judgment in the University's favor, the Court found that there was no genuine issue as to any material fact. See Gratz, 122 F. Supp. 2d at 836. As the District Court noted, both parties asserted that the case involved a question of law surrounding the Supreme Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). See Gratz, 122 F. Supp. 2d at 816-17. Most important, the Plaintiffs "presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students." Id. Indeed, during oral argument, counsel for Plaintiffs conceded that diversity at the university is "good, important, and valuable." Id.[2]

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[2] The same is true in the companion law school case, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001). While the Grutter case went to trial, the Plaintiffs in that case also conceded the significant educational

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It was only after the District Court entered its opinion and Order in this case that the Center for Individual Rights, the organization representing the Plaintiffs in both this case and the companion law school case, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001), sought to take issue with Professor Gurin's expert testimony. Section I of NAS's Brief, filed as *amicus curiae* in support of the Plaintiffs, should be rejected because (i) it is an impermissible attempt to supplement the factual record on appeal, and sidesteps the rigors of cross-examination and fact-finding that assure the integrity of facts found by the District Court, and (ii) it contains fundamental errors in methodology, making it insufficiently reliable to cast doubt on the Gurin report admitted by the District Court. This Court should either decline to engage in a lengthy and complex reexamination of facts that were conceded by the Plaintiffs and accepted by the District Court, or, if it chooses to consider the Wood & Sherman report, reject it on its merits.

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benefits of diversity to all students. Id. at 850. In fact, the Grutter Court found that the educational benefits of diversity in the classroom are "important and laudable." Id.

ARGUMENT

I. THE COURT SHOULD REJECT SECTION I OF NAS'S BRIEF AS AN IMPROPER ATTEMPT TO SUPPLEMENT THE RECORD, ESPECIALLY SINCE PLAINTIFFS CONCEDED THE SIGNIFICANT EDUCATIONAL BENEFITS OF RACIAL DIVERSITY TO ALL STUDENTS.

NAS submitted its *amicus* brief for the "purpose of refuting the Report of Patricia Y. Gurin," NAS Brief at 2, which the University of Michigan submitted as evidence in the District Court. NAS filed its *amicus* brief despite the fact that the Plaintiffs themselves conceded the conclusion of the Gurin report—namely, that student racial diversity benefits all students.

NAS's belated attempt to contest the benefits of diversity by now offering a study attacking the Gurin report must be rejected by the Court. Significantly, the Plaintiffs' concession that diversity provides significant educational benefits to all students was made after NAS filed a similar brief with the District Court. The Plaintiffs deposed Professor Gurin, and, after evaluating whether to offer their own expert(s), made an informed decision to concede the benefits of student racial diversity. By contrast, the University has no opportunity to cross-examine or even respond on the record to Professors Wood and Sherman.

As for NAS, it filed an *amicus* brief in the District Court, but never attempted to present a detailed critique of the Gurin report, much less its own expert report.

In any event, NAS's attack against the Gurin report is a strawman. The District Court found diversity to be a compelling governmental interest based on Justice Powell's decision in Bakke, and correctly understood NAS's argument as being directed at the narrow tailoring prong of the Bakke analysis.[3] See Gratz, 122 F. Supp. 2d 811. The court below credited the Gurin report with demonstrating that diversity is beneficial to all students as a factual matter, and this point was conceded by the Plaintiffs.

A. THE DISTRICT COURT'S FINDING THAT DIVERSITY IS BENEFICIAL TO ALL STUDENTS, THEREBY CREDITING THE GURIN REPORT, IS AN UNDISPUTED FINDING OF FACT.

The validity of the statistical methodology employed by Professor Gurin to show that student racial diversity in higher education is beneficial to all students is an undisputed question of fact that was properly decided by the District Court. NAS cannot circumvent the requirement to present evidence first to the trial court rather than on appeal. It certainly cannot do on appeal what the Plaintiffs should have done at the trial level. "A party may not by-pass the fact-finding process of the lower court and introduce new facts in its brief on appeal." Groner v. Golden

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[3] Again, the same is true in the Grutter case. 137 F. Supp. 2d at 850. Both Gratz and Grutter were decided based on the District Court's legal interpretation of the Supreme Court's decision in Bakke.

Gate Gardens Apts., __ F.3d __, 2001 WL 557980 (6th Cir. May 25, 2001) (rejecting appellant's attempt to introduce a portion of a deposition on appeal that was never presented to the district court) (citing Sovereign News Co. v. United States, 690 F.2d 569, 571 (6th Cir. 1982)); see also American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, 185 F.3d 606, 612-13 (6th Cir. 1999) (ignoring on appeal citations to affidavits not presented to the jury).

The requirement to present evidence to the District Court and not on appeal is particularly important in the case of expert evidence. The District Court, not the Court of Appeals, must function as a general "gatekeeper" when screening the scientific validity of expert testimony and evidence, such as that presented by the Gurin report. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993). This Court has appropriately granted wide latitude to district court determinations regarding the admissibility of scientific testimony, including the validity of the principles and methodology underlying the testimony. See, e.g., United States v. Bonds, 12 F.3d 540, 556 (6th Cir. 2000) (affirming the magistrate's findings on expert scientific testimony); Pride v. BIC Corp., 218 F.3d 566, 578 (6th Cir. 2000) (affirming district court's decision to exclude scientific testimony).

The District Court decided this case on cross-motions for summary judgment, and found that there were no material issues of fact in dispute, including with regard to the benefits of racial diversity. Gratz, 122 F. Supp. 2d at 815. The District Court, when considering the motions, evaluated the Gurin report, and concluded that it constituted "solid evidence" of the educational benefits resulting from a racially and ethnically diverse student body. Gratz, 122 F. Supp. 2d at 822. Specifically, the District Court considered NAS's criticism of the Gurin report's methodology, but was "persuaded, based upon the record," of the foundations supporting the study's conclusions. Id. at 824. The District Court performed its gatekeeper role in expert testimony and its decision should not be disturbed. For this reason alone, Section I of the NAS brief should be rejected by the Court.

B. SECTION I OF THE NAS *AMICUS* BRIEF SHOULD BE REJECTED BECAUSE IT CANNOT SUPPLEMENT THE FACTUAL RECORD DEVELOPED AT THE TRIAL LEVEL.

NAS has inappropriately expanded its role as "*amicus curiae*"[4] by attacking the validity of Patricia Gurin's testimony presented at the district court level – a proceeding in which NAS participated by filing an *amicus* brief. An *amicus curiae*

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[4] The term "*amicus curiae*" means friend of the court, not friend of a party. United States v. Michigan, 940 F.2d 143, 164-65 (6th Cir. 1991), cert. denied, 513 U.S. 925 (1994).

cannot challenge the validity of testimony on the record, as it "has never been recognized, elevated to, or [been] accorded the full litigating status of a named party or a real party in interest." United States v. Michigan, 940 F.2d 143, 165 (6th Cir. 1991), cert. denied, 513 U.S. 925 (1994) (quoting, for example, Silverberg v. Indus. Comm'n, 128 N.W.2d 674, 680 (Wis. 1964) (striking *amicus* brief seeking to challenge validity of testimony in the record because this was not a proper function of *amicus*) (other citations omitted)). See also Cellnet Communications, Inc. v. FCC, 149 F.3d 429, 443 (6th Cir. 1998) (holding that an *amicus* may not raise additional issues or arguments not raised by the parties); Bakal Brothers, Inc. v. United States, 105 F.3d 1085, 1090 (6th Cir. 1997) (holding the same); Resident Council of Allen Parkway Village v. United States Dep't of HUD, 980 F.2d 1043, 1049 (5th Cir. 1993) (holding that an *amicus* may not expand the scope of the appeal); WRIGHT & MILLER, Appellate Practice § 31.14 at 568 (1999) ("An *amicus* is limited in one major way: it cannot raise issues that the parties could have but did not."). For this simple reason, Section I of the NAS brief must be rejected.

Additionally, NAS cannot insert itself into the case and decide what the issues are on appeal -- in this instance with regard to the validity of Gurin's report.[5] An *amicus curiae* must take the case as it finds it and "accept the case before the court with the issues made by the parties." 4 AM. JUR. 2d *Amicus Curiae* § 7 (1998). The Court should decline to consider NAS's arguments based on Wood & Sherman's attack against Gurin's report because these arguments were not presented by the parties[6] or by the lower court. See Dep't of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 76 n.11 (1994) (refusing to consider *amicus*' arguments that were not addressed by the lower court); United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 61 n.2 (1981) ("We decline to consider this argument since it was not raised by either of the parties here or below."); Bell v. Wolfish, 441 U.S. 520, 531 n.13 (1979) (holding the same); Knetsch v. United States, 364 U.S. 361, 370 (1960) (declining to address argument presented only by *amicus curiae*).

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[5] As the Supreme Court of Michigan stated in 1921, "the parties to the case have control of the issues and we find it necessary to only consider the issues raised by them." Union Steam Pump Sales Co. v. Sec'y of State, 185 N.W. 353, 354 (Mich. 1921).

[6] This is true even if the Plaintiffs appear to want to adopt NAS as a co-plaintiff in the case. See Proof Brief of Appellants at 42-44.

C. SECTION I OF THE NAS *AMICUS* BRIEF SHOULD BE REJECTED BECAUSE ITS ATTACK OF GURIN'S REPORT CANNOT BE PROPERLY TESTED.

There is particular reason to be suspicious of social science methodology presented for the first time on appeal. The invective that NAS's Brief heaps on the Gurin report is troubling because the University defendants have no opportunity to respond through their own expert and this Court has no suitable mechanism for assessing independently the validity of its statements submitted for appellate fact-finding. By contrast, the Gurin report was evidence that the University of Michigan properly and timely offered at trial. As a result, the Plaintiffs had an opportunity to test the evidence by conducting discovery regarding Professor Gurin's report, cross-examining her and challenging her findings by offering their own expert.[7]

Section I of the NAS Brief is not subject to any of these safeguards. "The poorly controlled use of social science data by *amici curiae* may not only be prejudicial to the parties, but inimical to sound judicial decision-making." MICHAEL RUSTAND & THOMAS KOENIG, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 95 (1993).

To reward *amicus curiae* who participated in the District Court for conducting an ambush in the Court of Appeals would undermine this Court's decision-making process, and would produce the anomalous result of allowing a non-party to supplement the factual record.

D. THE DISTRICT COURT WAS NOT REQUIRED TO CONSIDER NAS'S *AMICUS* BRIEF.

The District Court was not obligated even to consider the *amicus curiae* brief that NAS filed below. Participation of *amicus curiae* in proceedings is solely within the discretion of the court. See Michigan, 940 F.2d at 164-65; see also 4 AM. JUR. 2d. *Amicus Curiae* §§ 3, 8 (1998). Thus, NAS's present complaint about the District Court's response to its brief below, see NAS Brief at 20-21, is misplaced. In any event, the broad contours of NAS's current brief – unlike its addendum – restate the brief it filed with District Court. The District Court considered the arguments even though the underlying facts were not in dispute, and rejected them. This undisputed finding may not be attacked by a non-party who

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[7] NAS could also have sought to intervene in the case and present the opinions of Professors Wood and Sherman either directly or in cooperation with the Plaintiffs.

lacks standing. See Michigan, 940 F.2d at 165 (holding that an *amicus curiae* is not a real party in interest).

II. THE NAS BRIEF AND THE WOOD & SHERMAN REPORT ARE PERVADED BY METHODOLOGICAL ERRORS AND FAIL TO OVERCOME THE DISTRICT COURT'S FINDINGS CONCERNING THE SIGNIFICANT EDUCATIONAL BENEFITS OF STUDENT RACIAL DIVERSITY.

The evidence that NAS seeks to introduce for the first time in the Court of Appeals is a methodological attack by Professors Wood and Sherman against the Gurin report, and a number of other studies of the educational effects of affirmative action in student admissions programs. The Wood & Sherman report raises complex statistical issues, and is presented at a procedural juncture during which Professor Gurin cannot respond in the record.

In the unlikely event that this Court decides to evaluate the complex, fact-intensive issues raised by the Gurin and Wood & Sherman reports, SIHER offers as an addendum to this brief a relatively short analysis by Stanford Professors Ewart Thomas and Richard Shavelson of methodological differences between these reports. Professors Thomas and Shavelson are respectively the former Dean of the Stanford University School of Humanities and Sciences and the former Dean of the Stanford School of Education.

The Thomas & Shavelson report explains the central methodological difference between both reports—Gurin's appropriate decision to examine the

indirect effects of student racial diversity ("structural diversity") on educational outcomes, as opposed to Wood & Sherman's contention that indirect effects are irrelevant. This analysis shows that the Wood & Sherman report and Section I of the NAS Brief make a number of fundamental methodological errors. For these reasons, from a social science perspective as well as a legal perspective, it would be inappropriate for this Court to rely upon them absent a thorough opportunity for cross-examination and rebuttal.

Wood & Sherman diverge in a number of important ways from accepted methodology for analyzing effects on educational outcomes. These methodological errors, which pervade the NAS Brief, include: (1) rejecting relevant evidence of indirect effects; (2) assuming that social scientific evidence of the benefits of structural diversity under Bakke must show direct effects; (3) assuming that in Gurin's methodology diversity experiences are "proxies" for student racial diversity; (4) claiming that the educational benefits of diversity programs in Gurin's model could be obtained without affirmative action in student admissions; and (5) criticizing use of self-reported academic outcome data and reliance upon educational outcome data other than grades.

A. WOOD & SHERMAN INCORRECTLY ASSUME THAT SOCIAL SCIENTIFIC PROOF OF EDUCATIONAL BENEFITS FROM STUDENT DIVERSITY CAN ONLY BE PROVEN THROUGH DIRECT EFFECTS.

As Thomas & Shavelson demonstrate, Gurin's examination of indirect effects of structural diversity is methodologically appropriate and a standard form of analysis in research concerning higher education outcomes. Thomas & Shavelson at 2, 9 & n.5. As they explain, Gurin's model is designed to test whether student racial diversity (structural diversity), "when combined with appropriate campus experiences, is a necessary condition to producing certain improved educational outcomes." Id. at 2. In such a model, displayed graphically in Figure 1 of their report, student racial diversity remains necessary to serve the compelling governmental interest, but operates indirectly through student campus experiences. Id. at 4. In this model, students do not obtain educational benefits of student racial diversity simply because diverse students are at an institution, but because they interact with, and learn from, one another on campus in appropriate settings. A similar example of indirect causation can be found in the causal relationship between smoking and lung cancer, which is caused indirectly through destruction of lung tissue. Id. at 2.

Wood & Sherman repeatedly and mistakenly attack Gurin's report on the ground that she has failed to prove that student racial diversity has *direct* effects on

improved educational outcome, misunderstanding her well-accepted methodology as a subterfuge. See Wood & Sherman at 79 (calling her approach "absurd, . . . a devious attempt to distract attention from" the absence of direct effects), 81-82. For the same reason, Wood & Sherman err when they claim that Gurin's "in turn" (indirect effects) analysis fails because correlations between student racial diversity and educational outcomes are not significant "when one properly controls for" campus experience diversity activity variables. Id. at 82, 109; NAS Brief at 19-20. In fact, as Thomas & Shavelson explain, this result "strongly supports" and is "fully consistent" with Gurin's indirect effects thesis, because in her model student racial diversity operates through campus experiences. If one controls for those experiences, these correlations would be expected to drop off. Thomas & Shavelson at 8, 10.

Wood & Sherman's failure to acknowledge the relevance of indirect effects forms the principal basis for NAS's objection to the Gurin report and the District Court's finding regarding the benefits of diversity. See, e.g., NAS Brief at 6 ("The Gurin report is flawed because Gurin does not even attempt to compare racial diversity directly with educational benefits . . . . Her study is therefore irrelevant to this case."); see also id. at 8-9. Ironically, it is this very methodological error by

Wood & Sherman that renders much of their attack on the District Court's decision unresponsive to Gurin's evidence and essentially irrelevant.

B. WOOD & SHERMAN INCORRECTLY ASSUME THAT BAKKE REQUIRES PROOF OF DIRECT EFFECTS ON EDUCATIONAL OUTCOMES.

Wood & Sherman make the further mistake of assuming that proof of educational benefits under Bakke requires proof of direct effects on educational outcomes. Wood & Sherman at 53; Thomas & Shavelson at 3-4. While this explanation conforms to Wood & Sherman's theory, it is at odds not only with standard statistical methods for studying academic outcomes, but with the language of Justice Powell's opinion in Bakke.[8]

Wood & Sherman quote from Bakke, but fail to point to any language in Justice Powell's opinion that requires proof of direct effects. Wood & Sherman at 53. They also neglect to discuss a lengthy quote in Justice Powell's opinion from then President Bowen of Princeton University explaining that "a great deal of learning [from diversity] occurs informally" through interaction of students from diverse backgrounds. Bakke, 438 U.S. at 312 n.48; Thomas & Shavelson at 3-4 &

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[8] Wood & Sherman's choice of the subtitle for their report, "Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected," makes plain the authors' disdain for the theory that they attempt to describe statistically.

n.1. The focus in Gurin's methodology on informal learning and student interaction, not Wood & Sherman's model, thus "appears entirely consistent with Justice Powell's opinion." Id. at 4.

C. WOOD & SHERMAN AND NAS INCORRECTLY ASSUME THAT DIVERSITY EXPERIENCES ARE "PROXIES" FOR STRUCTURAL DIVERSITY IN GURIN'S MODEL.

Another fundamental methodological error that pervades the Wood & Sherman analysis and Section I of the NAS Brief is the assumption that in Gurin's model student on-campus diversity experiences are mere "proxies for" (serve the place of) structural diversity. See, e.g., Wood & Sherman at 82-83; NAS Brief at 6-8, 10, 12. For example, the NAS brief complains that student campus diversity experiences "are woefully inadequate" as proxies for student racial diversity. Id. at 7.

This complaint in no way undermines Gurin's theory because, as Thomas & Shavelson explain, diversity experiences play an "entirely different" function in Gurin's model. Thomas & Shavelson at 6. In Gurin's model, diversity experiences are not a stand-in for student racial diversity, they are "intervening causal variables." "The causal effect of structural diversity on student outcomes works through the diversity experiences students have in an institution." Id. Therefore, this criticism, which pervades the NAS Brief, is misplaced.

D. WOOD & SHERMAN AND NAS INCORRECTLY ASSERT THAT DIVERSITY EXPERIENCES CAN YIELD BENEFICIAL EDUCATIONAL OUTCOMES WITHOUT A RACIALLY DIVERSE STUDENT BODY.

Perhaps as a result of their erroneous assumption that campus diversity experiences are a proxy for student racial diversity, Wood & Sherman claim that student racial diversity is unnecessary in order for students to obtain the educational benefits of campus diversity experiences. Wood & Sherman at 85; NAS Brief at 8. Leaving aside the question of whether this hypothesis bears any relationship to human experience, Thomas & Shavelson prove algebraically that according to Gurin's model, this result is impossible. Thomas & Shavelson at 10-12. This is so because in Gurin's model, a decline in the diversity of a student body produces a decline in the educational benefits of diversity. Id. at 12.

E. WOOD & SHERMAN'S AND NAS'S ATTACKS ON GURIN'S USE OF SELF-REPORTED DATA AND HER LIMITED CORRELATIONS REGARDING GRADES ARE MISPLACED.

Wood & Sherman and NAS also complain that Gurin relies upon self-reported data. Wood & Sherman at 81 & n.66; NAS Brief at 10, 12. As Thomas & Shavelson explain, "[t]his criticism is at odds with standard social scientific practice," including in the circumstances Gurin examines. Thomas & Shavelson at 12.

Similarly, Wood & Sherman complain that her results regarding educational outcomes on grades are statistically insignificant. NAS Brief at 11. However, this criticism ignores other categories of educational outcomes Gurin studied, such as engagement, motivation and democratic outcomes. All are "very important measures of educational outcome" and are consistent with the considerations in then President Bowen's letter quoted by Justice Powell in Bakke, 438 U.S. at 312 n.48. Thomas & Shavelson at 12.

III. NAS MISREADS THE SUPREME COURT'S OPINION IN WYGANT IN A FAILED ATTEMPT TO PLACE AN EVIDENTIARY BURDEN ON THE UNIVERSITY.

NAS contends that there must be a "strong basis in evidence for [the District Court's] conclusion that" the University's use of racial classifications to achieve student racial diversity is "compelling." See NAS Brief at 14-15 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)). NAS then claims that the Gurin report does not meet the University's burden in this regard. Id. at 15.

NAS misreads the plurality opinion in Wygant. The Supreme Court in Wygant held that if the justification for affirmative action is to remedy *past discrimination*, then strong evidence of this discrimination must be present before the institution embarks on an affirmative action scheme. Id. Specifically, the Court found that a public employer, before embarking on a program to remedy *past discrimination*, "must have sufficient evidence to justify the conclusion that

there has been prior discrimination [by that same public employer]." Wygant, 476 U.S. at 277.

Wygant involves a different context from that in Bakke and in this case, however. Unlike the race-based plan at issue in Wygant that provided minority employees greater protection against layoffs because of their race, the University's admissions policy does not have solely a remedial purpose. As such, an evidentiary analysis is not required to confirm the legal rule set forth by the Supreme Court in Bakke that a "diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education." Bakke, 438 U.S. at 311-12. The Supreme Court has yet to decide an affirmative action case in the context of higher education with more than testimonial and anecdotal evidence, and has not imposed an evidentiary burden with regard to the benefits of student diversity on the defendant-university. Rather, the Supreme Court has found as a matter of law that diversity in education is a compelling government interest.[9] Bakke, 438 U.S. at 311-12. NAS's attempt to graft an evidentiary burden onto this standard is entirely misplaced.

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[9] The District Court, although it was not required to make such findings, nonetheless found as an undisputed fact that student racial diversity at the

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Furthermore, the exacting evidentiary standard that may be required in other contexts, such as remedial programs, is not appropriate in the context of academic institutions because education requires academic freedom and implicates First Amendment values. The Supreme Court has long recognized that educators' choices about academic matters have enjoyed considerable judicial deference. In its evaluations of academic policies, the Court has attempted to leave space so as not to constrain the "atmosphere of speculation, experiment and creation . . . so essential to the quality of higher education." Bakke, 438 U.S. at 312. See Note, An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education, 109 HARV. L. REV. 1357, 1365 (1996); RYAN JAMES HAGEMANN, Diversity as a Compelling State Interest in Higher Education, 79 OR. L. REV. 493 (2000).

Finally, NAS's contention that the University must prove both that its admissions policy does not have a negative direct effect on student outcomes *and that* it has positive indirect effects is faulty. NAS Brief at 15. There is no reason in law or logic why this would be the case. The only support NAS cites for its contention is the Supreme Court's decision in Wygant. However, in Wygant, the

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University, achieved through its admissions program, results in significant

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Supreme Court explicitly distinguished the "school admission" cases, such as this one, from cases involving hiring goals. The Court found that the injury to a person denied admission into school is not of the same kind or degree as the injury to a person who is laid off from a job he already has. 476 U.S. at 283 n.11.

In short, the University's admissions program seeks to advance prospectively an entirely different interest from that in Wygant, and one which has been determined as a matter of law to be a compelling governmental interest. The burden in Wygant does not apply.

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educational benefits to all students.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to affirm the judgment below.

Respectfully submitted,

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June 13, 2001

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) & 32(a)(7)(B).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN THE FED. R. APP. P. 32(a)(7)(B)(iii), THE BRIEF CONTAINS:

   5,337 words

2. THE BRIEF HAS BEEN PREPARED:

   in proportionately spaced typeface using Word 2000 in Times New Roman 14-point type

3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE AN ELECTRONIC VERSION OF THE BRIEF AND/OR A COPY OF THE WORK OR LINE PRINTOUT.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN FED. R. APP. P. 32(a)(7), MAY RESUT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

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Jeffrey F. Liss

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2001, I have caused copies of the foregoing Brief of *Amicus Curiae* Stanford Institute for Higher Education Research to be served by United States first-class mail, postage prepaid, on the following:

_____

Jeffrey F. Liss