Nos. 02-241, 02-516

IN THE
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

-and-

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of neither petitioners nor respondents in the within cases.[1]

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, the parties have lodged letters with the Court consenting generally to the filing of briefs *amicus curiae*. Pursuant to

(Continued...)

ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. It is today one of the world's leading civil and human rights organizations. ADL's 90-year history is marked by a commitment to protecting the civil rights of all persons, whether they are members of a minority group or of a non-minority group, and to assuring that each person receives equal treatment under the law. ADL believes that each person in our country has a constitutional right to be treated as an individual, rather than as simply part of a racial, ethnic, religious, or gender-defined group. In this connection, ADL has often filed briefs *amicus curiae* in this Court urging that laws or practices are unconstitutional or illegal under the Equal Protection Clause of the Fourteenth Amendment to the Constitution or the nation's civil rights laws.[2]

Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus* and its counsel, made a monetary contribution to its preparation or submission.

[2] *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Cardona v. Power*, 384 U.S. 672 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416

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ADL has long sought to reconcile its core mission—"to secure justice and fair treatment to all citizens alike . . . [and] put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens"—with the use of racial preferences in access to social opportunity such as employment and education. ANTI-DEFAMATION LEAGUE 1913 CHARTER (1913). While ADL has endorsed limited racial preferences in order to remedy specific discrimination, it has consistently opposed the non-remedial use of race-based criteria, believing that the eradication of discrimination in our society is best achieved through strict assurance of equal treatment to all. Thus, while strongly sympathetic to the goal of increasing the

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U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Taxman v. Bd. of Educ.*, 92 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *appeal dismissed per stipulation*, 522 U.S. 1010 (1997); and *Alexander v. Sandoval*, 532 U.S. 275 (2001).

numbers of minority students in our nation's selective universities and professional schools through the pursuit of diverse viewpoints, life experience, and outlooks, ADL continues to adhere to the principle that school admissions programs must be race-neutral.

In the context presented here, ADL agrees with the University of Michigan and its Law School that diversity in higher education is an appropriate and legitimate educational goal. ADL believes in the importance of diversity in education, not only because of its contribution to the educational experience but as a factor in the positive evolution of a fully integrated society which honors inclusiveness and which is free of racial and ethnic hatred and the discrimination which flows from it. But while we approve of the ends sought by the University and its Law School, we cannot agree with their methods. The admissions systems before this Court deny to applicants who are not members of designated minority groups fundamental equal protection because those systems value persons for their race, not for relevant individual characteristics. In doing so, they violate this nation's core constitutional precepts and its civil rights laws.

STATEMENT

The University of Michigan and its Law School are selective state institutions of higher education. Each employs an admissions system in which college or law school applicants who declare themselves to be African-Americans, Hispanics, or Native Americans receive a preference in admissions over those who are

not within these specified "minority" groups. This categorical racial preference is effected by viewing the race of an applicant as a "plus" factor in the evaluation of the applicant for admission. The University and the Law School implemented these systems in response to this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 816-17 (E.D. Mich. 2001).

In making their admissions choices, the schools evaluate applicants' scores on standardized tests such as the SAT and LSAT, in combination with, respectively, their high school or undergraduate grade-point averages. As the composite of these scores increases, the chances of acceptance also increase. *Grutter*, 288 F.3d at 736. In addition to these "hard" data, however, the schools consider "soft" variables. In the Law School, these include "the enthusiasm of the [applicant's] recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, residency, leadership and work experience, unique talents or interests, and the areas and difficulty of undergraduate course selection." *Id*. The schools view these "soft" factors as indicators of ability to excel academically notwithstanding composite "hard" data lower than other applicants.[3]

[3] There is no evidence, however, that in assigning less weight to the index-based "hard" data, either the University or the Law School admit students who are unqualified because they fail to satisfy the minimum qualifications fixed

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Specifically, the law school's admissions process seeks to identify those "for whom [there is] good reason to be skeptical of an index score based prediction," and those who "may help achieve that diversity which has the potential to enrich everyone's education and thus make a . . . class stronger than the sum of its parts." *Id*.

Such "diversity admissions," according to the Law School's admissions policy, have "many possible bases." In defending the *Grutter* action, for example, the Law School pointed to individualized cases where students might bring unique or extraordinary experiences or viewpoints to a classroom. Illustratively, it identified applicants who had achieved "an Olympic gold medal, [or] a Ph.D. in physics," or who had had the experience of having been a Vietnamese boat person. *Id*. Similarly, the Law School pointed to actual examples of "diversity admissions." One was a person who was born in Bangladesh, graduated from Harvard College (although with a relatively low grade-point average), and scored relatively low on the LSAT, but who also had "outstanding references" from his college professors, and an "exceptional record" of extracurricular activity. *Id*. Another also had low

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for admission. Nor does the record indicate the degree to which applicants who are less qualified on the basis of race-neutral standards were admitted over applicants who were more "qualified" based solely on consideration of "hard" data.

LSAT scores, but "was an Argentinian single mother with extensive business experience, who graduated *summa cum laude* from the University of Cincinnati, [and] . . . was fluent in four languages . . . ." *Id.* A third had a high grade-point average (3.99 from the University of Florida) and an LSAT score at the 90th percentile, but was selected because as the daughter of Greek immigrants she was "'immersed in a significantly ethnic home life' and fluent in three languages." *Id*.

In contrast to *these* "diversity admissions," however, all of which are marked by individualized attention to the specific human characteristics of the applicant, the University and Law School conceded that self-declared membership in one of the so-called "minority" groups alone is sufficient to confer a "plus" for diversity purposes. The Law School's admissions policy describes "'a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.'" *Id*. at 737.

The Law School believes that such students "'are particularly likely to have experiences and perspectives of special importance to [its] mission,'" *id*., and thus grants a preference to such students. It does so solely on the basis of their declared membership in the particular group. It does so without regard to whether individualized scrutiny would support the conclusion that their life experience

and the outlooks and perspectives they bring to an academic institution are in fact different from those of other applicants in any way that is either meaningful or relevant to the purposes of the institution.[4]

Neither the Law School nor the University has sought to justify these racial preferences in admissions policy as remedial—that is, neither argues that its commitment to diversity is intended to remedy past discrimination in its admissions policies or in its schools generally. *Id*. at 737. Rather, the sole justification advanced is the interest in "diversity." While the policies reflect the belief that members of the designated minority groups are "particularly likely" to bring with them that diversity of viewpoints the institutions wish to achieve, they do not seek to justify their admissions procedures by any interest in racial diversity *per se*. Neither the Law School nor the University admit using a "quota" system in which a set number of places in their classes is reserved for minority students; instead, both assert that they strive to achieve a "critical mass" of such minority students through the preferences granted. (In the Law School that "critical mass" has varied within a narrow range between 1993 and 1998, the last years for which data were available, from 13.5 % to 13.7 % of the entering class. *Id*. at 801-02.) Finally, both schools contend,

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[4] The University admissions system similarly awards a possible 150 points to applicants, and automatically assigns 20 points to "minority" applicants, without regard to other, individualized factors. *Gratz*, 122 F. Supp. 2d at 827.

and there is little dispute, that the proportion of such minority students in their classes in the most recent decade would have declined precipitously without the use of these racial preferences. *Id*. at 737; *Gratz*, 122 F. Supp. 2d at 830.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that no State "shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, § 1.

Section 601 of Title VI of the Civil Rights Act of 1964 provides that:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

42 U.S.C. § 2000d-1 (1994).

SUMMARY OF ARGUMENT

1. Because they classify applicants by race, the University and Law School admissions systems at issue must be subjected to searching inquiry. An integral part of that inquiry is whether the classification is narrowly tailored to a legitimate

governmental purpose. Here, that asserted purpose is the interest in assembling a class of students with diverse life experience, viewpoints, and outlooks; the purpose is not the creation of racial diversity in itself, but rather the composition of classes in which racial diversity informs and furthers educational diversity.

2. The University and Law School systems at issue, however, do not adequately provide for the individualized consideration of applicants that is necessary to demonstrate that they are narrowly tailored to the ends sought. In assigning to race or ethnicity an automatic presumption of diversity in life experience, outlook, and viewpoint, they substitute a racial classification for treatment of applicants as individuals. This use of race as a proxy for diversity violates constitutional and statutory mandates.

3. Because the programs under review fail narrow tailoring, the Court need not reach the question of whether diversity in education is a compelling governmental interest for equal protection purposes. Similarly, because the issues before the Court relate only to the Michigan systems, it is neither necessary nor desirable to enunciate fixed rules or boundaries in this area; it is enough to nullify Michigan's systems. There may well be university and professional school admissions systems in which race may appropriately be considered in the admissions process, but such systems are not before the Court.

* * *

ARGUMENT

THE UNIVERSITY OF MICHIGAN UNDERGRADUATE AND LAW SCHOOL ADMISSIONS SYSTEMS VIOLATE THE EQUAL PROTECTION CLAUSE AND TITLE VI

The central commands of the Equal Protection Clause and of Title VI are unequivocal, forbidding unequal treatment by the states and in programs receiving federal assistance, in the first instance by denial of equal application of the laws' protections, and in the second by denial of equal access based on race, color, or national origin to federally-funded educational opportunities. While diversity in the composition of the student bodies of colleges and professional schools is a constitutionally permissible goal (*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)), that diversity must be accomplished without abrogation of the paramount right to individualized consideration that is enunciated in the Equal Protection Clause and codified in Title VI. *Id*. at 318. When it is not, the central commands of these provisions are violated.

In analyzing the cases before the Court, we start with three well-established principles. *First*, the analysis under the Equal Protection Clause and the analysis under Title VI are identical. *Id*. at 287. *Second*, all racial classifications "must be analyzed by a reviewing court under [constitutional] strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). *Third*, in order to satisfy

constitutional strict scrutiny, the racial classification must "serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id*. at 235.

A. Governmental Racial Classifications Are Presumptively Unlawful.

It is axiomatic that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). As Justice Powell has said, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 317. Thus, the Court has "consistently repudiated '[distinctions] between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Stated differently, under equal protection the notion of individual meritocracy mandates that every individual in our society is entitled to compete for opportunities on his or her own merits, without regard to membership in a racial or ethnic group.

Consistent with these bedrock principles, the Court has historically recognized only one justification for racial classifications—they may be used, sparingly, in remedial circumstances. *See*, *e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (racial classification in local government contracting sustained to remedy past

discrimination but subjected to the "most searching" scrutiny). It is not societal discrimination that is being corrected by remedial preferences (for this end is too amorphous and unlimited to be reached in this manner), but rather a specific, demonstrable history of discrimination in a workplace, a system of employment, or an educational institution.

The Court's precedents make the point forcefully. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), a school board and teachers union negotiated a collective bargaining agreement which provided for a preference to minority teachers in the order of lay-offs. The preference was not tied to a specific history of discrimination in the school system. Instead, the school board argued that it was permissible as a remedy for societal discrimination because it enabled the school board to provide role models for its schoolchildren of their own race or ethnicity.

The Court held that the school board could not resort to such a system of race-based employment decisions in an attempt to remedy society-wide ills stemming from discrimination. *Id*. at 274. The Court noted that, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id*. at 276. Rather, as the Court held, Equal Protection Clause strict scrutiny requires that an employer demonstrate both "prior discrimination . . . before allowing limited use of racial classifications," and "convincing evidence that remedial action is warranted." *Id*. at 277.

Similarly, in *Bakke*, Justice Brennan expressed what he termed the "central holding" of the Court as follows: that "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." *Bakke*, 438 U.S. at 325 (Brennan, J., concurring).[5]

Finally, of course, narrow tailoring is an indispensable condition of any permissible racial classification. Thus, even when the compelling governmental interest in remedying specific existing discrimination or the lingering effects of past discrimination justifies the use of race-conscious means, those means must still satisfy the test of narrow tailoring. *Adarand*, 515 U.S. at 227. The means chosen must be closely suited to the permissible ends sought, and must not impinge on others' competing rights. Unless the means is narrowly tailored, race-conscious classifications remain odious and impermissible, however salutary their goals.

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[5] Both the University and the Law School, although not the Intervenors, specifically disclaim any reliance on a remedial justification. *See Grutter*, 288 F.3d at 737, 795; *Gratz*, 122 F. Supp. 2d at 816.

In short, racial classifications in the granting or withholding of government benefits, including access to educational opportunities, are presumptively unconstitutional, and may be justified under current law only when used in remedial circumstances and only when narrowly tailored to that end.

B. The University And Law School Programs Are Not Narrowly Tailored.

The central contention before the Court is that the racial preferences here are justified, not by the interest in remedying existing or past harms, but by something else, by the interest in educational "diversity"—that is, the interest in assembling college and law school classes whose members bring to the classroom and campus diverse viewpoints, life experience, outlooks, and thinking. It is said that such "diversity" is of great value to the educational process, and this can be taken as a given. The defect in the argument, however, is that where race alone is used as a proxy for diversity, as it is here, that use runs afoul of the Equal Protection Clause.[6]

Thus, while the Law School, for instance, provides examples of "diversity admissions" that

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[6] ADL takes no position on the question of whether diversity *vel non* is a compelling governmental interest, as we do not believe that an answer to the question is necessary to the resolution of this case. We do note that ADL supports diversity as a legitimate and appropriate educational goal.

plainly involve individualized scrutiny of applicants (*Grutter*, 288 F.3d at 736), the admissions system that it actually uses belies the examples. It may well be lawful to admit a minority student because the totality of the student's relevant characteristics (family background, life experience, exposure to several societies, national origin, race, overcoming adversity resulting uniquely from discrimination, knowledge of languages other than English, extra-curricular accomplishments, leadership skills, etc.) leads an admissions officer to a specific articulable conclusion that the applicant will bring views to the classroom that other candidates will not. It is quite another thing to presumptively assign such a conclusion to an applicant because the applicant has declared herself an African-American. The former does no violence to the expectation of other applicants that they will be evaluated as individuals, just as it does not diminish the dignity of the minority applicant. The latter serves only to assign persons to categories based on their race—the very evil the Equal Protection Clause forbids.[7]

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[7] Nor would it be permissible to argue that an institution's resources do not permit individualized consideration of applicants. It is not an answer to a constitutional violation to say that constitutional compliance is too costly. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) ("administrative convenience" cannot justify denial of individualized procedures).

In short, by their use of race as a proxy for individualized consideration the admissions programs here fail narrow tailoring, and thus pass neither constitutional nor statutory muster. As conceived and applied, they cannot be sustained.

C. A "Bright-Line" Test Is Neither Necessary Nor Desirable, And Should Be Avoided.

Notwithstanding our disagreement with respondents' admissions systems, it is unnecessary to decide this case in a manner that would establish a "bright-line" test for *all* university and professional school admissions systems. In the first instance, the only systems before the Court are those of Michigan; a decision on systems (real or hypothetical) that are not before the Court would be a prohibited advisory opinion. *See United States v. Freuhauf*, 365 U.S. 146, 157 (1961). More to the point, consistent with the Court's precedents, the narrowest possible ground of decision should be preferred. *See Bakke*, 438 U.S. at 411; *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69 (1947) (constitutional issues will not be determined "in broader terms than are required by the precise facts to which the ruling is to be applied")). Since the systems here fail the narrow tailoring test, they may be disallowed on that narrow ground alone, and other challenges and considerations left for another day and for other, concrete cases.

On policy grounds as well, it would be unfortunate if this case were used, as petitioners ask, as a vehicle for the wholesale rejection of "diversity" as a legitimate concern of university and professional

school admissions. The evil here is not consideration of race alone, but the lack of narrow tailoring and the resulting failure to provide individualized consideration of applicants. Stated otherwise, while we agree that the University's and Law School's admissions policies, in the quest for "diversity," deny to non-minority applicants the individualized consideration that is at the core of equal protection, we cannot say that in all cases any consciousness of the race of applicants would constitutionally nullify an admissions system.

ADL endorses only race-neutral means to achieve diversity in higher education, but this does not inevitably mean that all consciousness of race in admissions must always be unlawful. It is unrealistic to believe that university and professional school admissions officers will always be blind to the race of an applicant. The fault lies in the use of race as a proxy for something else—in this case, diversity—without any showing that it bears any real relationship to the type of diverse viewpoints, life perspectives, and experience that our institutions of higher education seek to bring to their classrooms. This Court need go no further to decide these cases.

* * *

While ADL supports the promotion of diversity in higher education, we as a society do not promote racial justice by subjecting some of our citizens to unequal treatment. Such race-conscious decisions embrace the very harm they are designed to cure, and in doing so run the risk of perpetuating racial

stereotypes and of fostering racial enmity. Our society disserves critical goals when it permits its institutions of higher education to allocate opportunity on the basis of race or ethnicity in an effort to achieve "critical mass," as the Michigan systems do. As Justice Douglas wrote in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), the Equal Protection Clause "commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *Id*. at 342 (Douglas, J., dissenting).

We do not doubt the good faith of the University and its Law School, either in their motives or their ends, but their strategies simply do not pass constitutional muster. ADL submits that the non-remedial racial preferences they employ, though well-intentioned, are antithetical to the Constitution and civil rights laws of the United States, and are contrary to the principles of equality on which our society is based.

* * *

CONCLUSION

By their use of race as a proxy for individualized consideration, the University of Michigan's and its Law School's admission systems fail narrow tailoring and thus violate the Equal Protection Clause and Title VI.

Respectfully submitted,

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