No. _____

In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the University of Michigan Law School's use of racial preferences in student admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

2. Should an appellate court required to apply strict scrutiny to governmental race-based preferences review *de novo* the district court's findings because the fact issues are "constitutional"?

PARTIES TO THE PROCEEDING

Petitioner is Barbara Grutter. She is plaintiff in the District Court and appellee in the Court of Appeals. She brings this action on her own behalf and on behalf of a certified class of similarly situated persons.

Respondents are Lee Bollinger, Jeffrey Lehman, Dennis Shields, and the Board of Regents of the University of Michigan. They were defendants in the District Court and appellants in the Court of Appeals.

The following additional respondents were defendant-intervenors in the District Court and appellants in the Court of Appeals:

> Kimberly James, Farah Mongeau, Jeanette Haslett, Raymond Michael Whitlow, Shabatayah Andrich, Dena Fernandez, Shalamarel Kevin Killough, Diego Bernal, Julie Fry, Jessica Curtin, James Huang, Heather Bergman, Ashwana Carlisle, Ronald Cruz, Nora Cecelia Melendez, Irami Osei-Frimpong, Gerald Ramos, Arturo Vasquez, Edward Vasquez, Vincent Kukua, Hoku Jeffrey, Karlita Stephens, by her Next Friend Karla Stephens-Dawson, Yolanda Gibson, by her Next Friend Mary Gibson, Erika Dowdell, by her Next Friend Herbert Dowdell, Jr., Agnes Aleobua, by her Next Friend Paul Aleobua, Cassandra Young, by her Next Friend Yolanda J. King, Jaasi Munanka, Jodi-Marie Masley, Shannon Ewing, Julie Kerouac, Kevin Pimental, Bernard Cooper, Norberto Salinas, Scott Rowekamp, Russ Abrutyn, Jasmine Abdel-Khalik, Meera Deo, Winifred Kao, Melisa Resch, Oscar De La Torre, Carol Scarlett, United for Equality and Affirmative Action, The Coalition to Defend Affirmative Action by Any Means Necessary, and Law Students for Affirmative Action

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals (App. at 1a) is reported at 288 F.3d 732 (6th Cir. 2002). The decision of the District Court (App. at 189a) is reported at 137 F. Supp. 2d 821 (E.D. Mich. 2001).

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

2. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, states:

> 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.

3. 42 U.S.C. § 1981(a) (2000) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of person and property . . . .

STATEMENT OF THE CASE

This case presents questions about what constitutes a compelling interest that may justify race-based preferences in student admissions at a state law school to applicants from certain racial or ethnic groups. The Sixth Circuit resolved this issue by concluding that the opinion of Justice Powell in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), constituted binding precedent establishing "diversity" as such a compelling governmental interest. The Fifth, Ninth, Eleventh, and Sixth Circuits have split on this issue of profound national importance. The First and Fourth Circuits, in cases involving racial preferences in admissions to public elementary and secondary schools, have issued opinions noting uncertainty about whether diversity is an interest sufficiently compelling to justify such preferences.

Even assuming "diversity" to be a compelling interest, this case presents additional questions concerning what constitutes appropriate "narrow tailoring" of an admissions policy designed to achieve diversity. The decision of the Sixth Circuit conflicts with the approach to narrow tailoring taken by this Court and by other lower courts. The Sixth Circuit's *de novo* review of the district court's factual findings concerning the racial preferences at issue was also an extraordinary departure from the rule that such findings should be reviewed under a "clearly erroneous" standard.

A related case challenging the race-conscious admissions policies of the University of Michigan's principal undergraduate institution was decided on motions for summary judgment by another district court. *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000). That case was argued to the Sixth Circuit on the same day as this case, but has not yet been decided.

I. FACTUAL BACKGROUND

A. Plaintiff

Plaintiff Barbara Grutter is a white resident of the state of Michigan who applied at the age of 43 in December 1996 for admission into the fall 1997 first-year class of the University of Michigan Law School ("Law School"). (Complaint, JA.84[1]). She applied with a 3.8 undergraduate grade point average and an LSAT score of 161, representing the 86th percentile nationally. (Application, JA.272-98). The Law School first placed Ms. Grutter on the "wait-list," and subsequently denied her admission. (Application file, JA.274-75, 299). Ms. Grutter has not subsequently enrolled in law school elsewhere. She still desires to attend the Law School.

The Law School admits that Ms. Grutter probably would have been admitted had she been a member of one of the racial minority groups to which the Law School gives a preference. App. at 87a. (Boggs, J., dissenting) (citing to comments of Law School counsel during oral argument).

B. Law School Admissions Policies and Practices

1. The Law School Policy

Defendants admit that they use race as a factor in making admissions decisions and that the race of plaintiff Grutter was not a factor that "enhanced" the consideration of her application. (Answer, JA.197). The Law School receives federal funds. (Answer, JA.196).

Defendants justify the use of race as a factor in the admissions process on one ground only: that it serves a

[1] Citations herein, other than to the Appendix filed with this petition, are to record documents or trial transcripts contained in the Joint Appendix (JA) filed by the parties in the Sixth Circuit.

"compelling interest in achieving diversity among its student body." (Defendants' Responses to Interrogatories, JA.305-06). Many more students apply each year than can be admitted, and the Law School rejects many qualified applicants. (Vol. 17 Trial Transcript ("Tr."), JA.7265-67).

The written policy ("Policy") at issue in this case was adopted by the Law School faculty in 1992. It has remained in effect, unchanged, since that date. (Trial exhibit ("Ex.") 4, JA.4229-44). Among other things, it states that the Policy was intended "as much to ratify what had been done and to reaffirm our goals as it is to announce new policies." (*Id*. at 4242). The consideration of race in admissions was one of the practices of the past that the Policy continued or "ratified." Prior to adoption of the Policy, the Law School had a "special admissions program" to ensure adequate representation in the class from members of designated "underrepresented minority groups," namely, African Americans, Mexican Americans, and Native Americans. (Ex. 55, JA.4922-23).

Pursuant to resolutions adopted by the faculty, the Law School had prior to 1992 a written goal of enrolling at least 10-12% of its students from these minority racial groups. (Ex. 53, JA.4866, 4869, 4872, 4877, 4881, 4884, 4895, 4898-4900, 4902). Generally, grades and test scores are important factors in the Law School's admissions process. (Vol. 1 Tr., JA.7231). Applicants from the underrepresented minority groups have historically scored lower on average on those criteria than students from other racial and ethnic groups. (Vol. 1 Tr., JA.7206-07). Under the "special admissions program," the Law School admitted and enrolled its desired level of minority students by placing less emphasis on the LSAT scores and undergraduate grades of underrepresented minority students than it did for students from other racial and ethnic groups. (Vol. 17 Tr., JA.7201-11).

The 1992 Policy abandoned use of the term "special admissions program." It continued, however, the Law School's reliance on the importance of grades and test scores (measured by a composite known as "selection

index") and the Law School's explicit consideration of race in the admissions process. With respect to the consideration of race, the Policy states that the Law School has 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 the student body in meaningful numbers." (Ex. 4, JA.4241). Elsewhere on the same page, the Policy emphasized the importance of enrolling a "critical mass" of minority students. *Id*.

The Policy described and attached a "grid" of admissions decisions plotted by different combinations of undergraduate grades and test scores. App. at 294a. It noted that the upper right portion of the grid, with the highest combinations of grades and test scores, characterized these credentials for the "overwhelming bulk of students admitted." (Ex. 4, JA.4236). The Policy listed reasons, however, that the Law School had admitted, and should continue to admit, students "despite index scores that place them *relatively far* from the upper corner of the grid." (*Id*. at 4237) (emphasis added). One of these reasons is to "help achieve diversity" in the student body, including "one particular type of diversity" – racial and ethnic diversity. (*Id*. at 4241).

2. The Law School Admissions Data

The evidence at trial included actual admissions data for a six-year period – 1995-2000. The data are voluminous and were presented in a number of different forms. Among these was a presentation that plotted on grids – in a manner similar to the grid appended to the Policy (App. at 294a) – admissions decisions characterized according to different combinations of LSAT scores and undergraduate grades of applicants, and also by racial group. The Law School had produced such a grid for the first-year class that enrolled in the fall of 1995. Using the Law School's database, plaintiff's expert statistical witness, Dr. Kinley Larntz, replicated the grid for 1995 and created similar

grids for years 1996-2000. (Exs. 137-39, 141, 143, JA.5238-5308, 5311-5326, 5386-5407, 5462-5478, 8939-8948, 8970-74).

Excerpts from the grids constructed from the Law School's database illustrate the way in which the Law School's policy of considering race in the process is reflected in admissions outcomes (applications ("Apps.") versus offers of admission ("Adm.")). The following two charts reproduce the data from the grids for two years (1997 and 2000) for students whose undergraduate grade point averages and LSAT scores are at least 3.0 and 148, respectively. (Ex. 137, 141, JA.5275, 5278, 5282, 5465, 5468, 5472). The admissions outcomes can be easily compared among the following racial groups for which the Law School maintains data: (1) Selected Minority Students (African Americans, Mexican Americans,[2] and Native Americans); (2) Caucasian Americans; and (3) Asian/Pacific Island Americans:

[2] As noted above, the 1992 policy identifies "Hispanics" as one of the "historically underrepresented" groups. The Law School's description of its admissions data for all years at issue, however, separately identifies "Mexican Americans," "Other Hispanics," and "Puerto Ricans." Plaintiff's statistical expert retained these Law School categorizations in depicting the data. In some years, the admission probabilities for students from the "Other Hispanic" category were similar to those from students from disfavored racial groups, such as Caucasian Americans and Asian Americans. In addition, there was evidence in the record that the Law School granted preferences to Puerto Ricans raised on the United States "mainland," but not to Puerto Ricans from Puerto Rico. App. at 249a.

1997 - Final LSAT & GPA Admission Grid
Selected Minorities
(African Americans, Native Americans, Mexican Americans)

Apps./ Adm.	148-150	151-153	154-155	156-158	159-160	161-163	164-166	167-169	170-Above	Total
3.75 & Above	3 0	0 0	4 1	7 5	5 5	**7** **7**	1 1	3 3	2 2	39 24
3.50 - 3.74	3 0	7 2	5 3	**16** **11**	4 4	5 4	**10** **10**	1 1	2 2	63 37
3.25 - 3.49	6 1	10 2	**9** **6**	22 15	**8** **6**	16 10	4 4	3 3	6 6	107 54
3.00 - 3.24	11 0	15 2	9 1	13 4	5 3	11 8	5 5	1 1	0 0	102 24

Caucasian Americans

3.75 & Above	6 0	20 0	29 0	29 2	37 3	**88** **17**	123 62	91 90	118 115	553 292
3.50 - 3.74	6 0	27 1	23 0	**51** **5**	40 3	97 6	**148** **42**	105 97	123 120	642 279
3.25 - 3.49	15 0	20 0	**15** **0**	45 3	**26** **1**	80 9	103 17	70 52	76 74	466 157
3.00 - 3.24	6 0	7 0	14 0	22 1	13 1	19 0	27 4	24 7	20 13	162 26

Asian/Pacific Island Americans

3.75 & Above	3 0	2 1	5 0	8 0	7 1	**13** **1**	10 5	10 9	11 11	70 28
3.50 - 3.74	0 0	3 0	4 0	**16** **1**	10 1	20 0	**25** **8**	20 20	11 10	113 40
3.25 - 3.49	4 0	5 0	**2** **0**	8 1	**10** **1**	23 1	16 9	14 11	13 11	100 35
3.00 - 3.24	1 1	1 0	3 0	3 0	4 0	5 0	6 0	6 3	5 4	36 8

2000 - Final LSAT & GPA Admission Grid
Selected Minorities
(African Americans, Native Americans, Mexican Americans)

Apps./ Adm.	148-150	151-153	154-155	156-158	159-160	161-163	164-166	167-169	170-Above	Total
3.75 & Above	1 0	2 1	2 1	3 2	3 3	**8** **7**	2 2	2 2	1 1	30 19
3.50 - 3.74	5 1	12 5	3 2	**12** **10**	4 2	8 8	**7** **7**	5 5	0 0	71 40
3.25 - 3.49	10 2	15 6	**5** **4**	14 10	**11** **5**	6 3	7 7	4 4	3 3	91 44
3.00 - 3.24	13 1	8 2	9 5	10 10	4 3	4 2	4 3	1 1	0 0	70 28

Caucasian Americans

3.75 & Above	8 0	21 2	23 1	37 2	40 3	**107** **31**	138 95	85 85	92 91	561 311
3.50 - 3.74	10 0	22 0	28 0	**59** **0**	42 3	135 17	**164** **90**	102 99	76 74	650 284
3.25 - 3.49	8 0	15 0	**20** **0**	49 2	**34** **1**	77 6	**77** 24	54 46	34 34	385 114
3.00 - 3.24	11 0	5 0	10 0	21 0	14 0	43 0	31 3	23 10	24 21	189 34

Asian/Pacific Island Americans

3.75 & Above	2 0	2 0	2 0	2 0	3 0	**14** **4**	14 10	10 10	11 11	62 35
3.50 - 3.74	2 0	7 0	11 1	**11** **0**	9 0	33 5	**25** **15**	24 24	13 13	139 58
3.25 - 3.49	4 0	11 0	**5** **0**	19 0	**12** **1**	26 2	27 10	15 11	7 7	131 31
3.00 - 3.24	0 0	6 0	0 0	5 0	3 0	7 0	15 4	1 0	3 2	46 6

The admissions data were presented in a number of other forms at trial. For example, plaintiff's statistical expert reported the median LSAT scores and undergraduate grade point averages for different racial groups. App. at 306a-311a. He also used the admissions data to produce a graphic that shows probabilities of admission for various racial groups compared to Caucasian Americans based on the Law School's "selection index" (a measure that combines grades and test scores) for years 1995-2000. The appendix contains these graphics for 1995. *Id*. at 312a-319a. The graphs plot probabilities of admission on a vertical axis (from zero ("0.0") to 100 percent ("1.0")) and selection indices on a horizontal axis (from a low index of 2 to a high index of 4.). *Id*. The graphs demonstrate substantial differences in admissions outcomes at given selection indices when comparing Caucasian Americans to African Americans, Mexican Americans and Native Americans. *Id*. at 312a-314a.

II. PROCEEDINGS BELOW

A. The District Court

This action commenced in December 1997. The Complaint alleged that the Law School illegally discriminated on the basis of race in violation of 42 U.S.C. §§ 1981, 1983, and 2000d. (Complaint, JA.84-95). The district court granted the plaintiff's motion to certify a class under Federal Rule of Civil Procedure 23(b)(2). In the same order, it also bifurcated the issues of liability and damages, with liability to be tried first. The district court had previously denied the intervenors' motion for intervention under Federal Rule of Civil Procedure 24. The Sixth Circuit reversed the district court's decision on intervention, thus making the intervenors parties. *Grutter v. Bollinger,* 188 F.3d 394 (6th Cir. 1999).

The district court heard the parties' motions for summary judgment on December 22, 2000. It ruled that it would decide as a matter of law whether diversity was a compelling interest, and that it would conduct a trial on (1) the extent to which race was considered in the Law

School's admissions policies; (2) whether the Law School imposed a race-based double standard in admissions; and (3) whether (as intervenors argued) race should be considered in the Law School's admissions process in order to create a "level playing field." (Summary judgment transcript, JA.7180).

The district court conducted a 15-day bench trial commencing January 16, 2001. It issued its 90-page Findings of Fact and Conclusion of Law and Order on March 27, 2001. App. at 189a-294a. Among the district court's findings of fact were the following:

1. The Law School gives a preference based on race to applicants from certain racial groups – African Americans, Mexican Americans, and Native Americans – which it considers to be underrepresented in the Law School. *Id.* at 224a.

2. The Law School's stated reason for giving the racial preference to these groups is that it desires a racially diverse student body, and the average LSAT test scores and undergraduate grades of applicants from the under-represented minority groups are lower than the scores of students from other racial and ethnic groups, *e.g.*, Caucasians and Asians, so that few from the underrepresented minority groups would be admitted in a system "based on the numbers." *Id.*

3. The Law School places a "very heavy emphasis" on an applicant's race in the admissions process. Race is an "enormously important" and "extremely strong" factor in the admissions process. *Id.* at 225a-227a.

4. The Law School seeks to enroll what it calls a "critical mass" of underrepresented minority students. In practice, this has meant that the Law School attempts to enroll an entering class consisting of 10-17% underrepresented minority students. *Id.* at 225a.

5. The Law School also seeks to ensure that each year's entering class consists of a *minimum* of 10-12% underrepresented minority students. This has meant that each year, the Law School "effectively reserve[s]" approximately 10% of the entering class for students from the

underrepresented minority groups, and those numbers of seats are "insulated from competition." *Id*. at 249a.

6. There is no time limit on the Law School's use of race as a factor in the admissions process. *Id*. at 247a-248a.

The district court also considered expert statistical evidence in resolving the parties' factual dispute about the "extent" to which race is a factor in the admissions process. The district court "adopt[ed]" the expert statistical analysis of plaintiff's expert, Dr. Kinley Larntz, Professor Emeritus and former chairman of the Department of Applied Statistics at the University of Minnesota. *Id*. at 227a. It rejected criticisms of Dr. Larntz's analysis by the Law School's expert witness, Dr. Stephen Raudenbush, a professor at the University of Michigan. *Id*. at 227a-228a.

The district court concluded as a matter of law that the Law School's stated interest in achieving diversity in the student body was not a compelling interest that could justify its racial preferences in admissions. *Id*. at 243a. It also found that even if diversity were compelling, the Law School's racial preferences were not narrowly tailored to achieve that interest. *Id*. at 246a-252a . The district court also rejected the alternative arguments of intervenors. *Id*. at 257a-292a. Accordingly, the district court ordered an injunction regarding the Law School's use of race in the admissions process. *Id*. at 293a.[3]

Defendants moved in the district court on March 28, 2001, for a stay of the district court's injunction, pending appeal. (Motion, JA.4182-83). Defendants also filed an

[3] The district court ruled also that (1) the individual defendants were entitled to "qualified immunity" and summary judgment in their favor on the claims asserted against them under Title 42 U.S.C. § 1983 for damages in their individual capacities and (2) the Board of Regents of the University of Michigan was not entitled to Eleventh Amendment immunity from plaintiff's claim for damages arising from Title VI violations. App. at 252a-254a, 254a-257a. The parties did not appeal the district court's interlocutory rulings on these issues.

Emergency Motion for Stay in the Sixth Circuit. The district court denied the defendants' motion for stay on April 3, 2001. The decision is reported at 137 F. Supp. 2d 874 and is included in the Appendix at 295a-305a. In the order denying the stay, the district court noted, among other things, that there was "overwhelming evidence" that the Law School's admissions process was not narrowly tailored to achieve an interest in a diverse student body. *Id*. at 301a. The district court also made clear the scope of the injunction: "This court's injunction should not be understood as prohibiting 'any and all use of racial preferences,' . . . but only the uses presented and argued by defendants and intervenors in this case – namely, in order to assemble a racially diverse class or remedy the effects of societal discrimination." *Id*. at 300a-301a. A motions panel of the Sixth Circuit nonetheless granted the stay on April 5, 2001. The decision is reported at 247 F.3d 631 and is included in the Appendix at 185a-188a.

B. The Court of Appeals

The Sixth Circuit's order staying the district court's injunction also provided that the case would be heard by the court on an expedited basis, with oral argument scheduled for October 23, 2001. *Id*. at 188a. On May 11, 2001, plaintiff filed a petition for initial hearing *en banc* of this case and *Gratz v. Bollinger*. On October 19, 2001, the court issued an order granting the petition for initial hearing *en banc*, and rescheduled the oral argument for December 6, 2001.[4] The decision is reported at 277 F.3d 803.

On May 14, 2002, the Sixth Circuit, in a 5-4 decision, reversed the judgment of the district court. It did so based on a *de novo* review of the district court's findings. App. at

[4] The procedural history of this case in the Sixth Circuit is discussed in substantially more detail in the "Procedural Appendix" to Judge Boggs' dissent. App. at 161a-169a.

9a. The court, in a majority opinion authored by Chief Judge Martin, held that Justice Powell's opinion in *Bakke* constituted binding precedent establishing "diversity" as a compelling governmental interest sufficient under strict scrutiny review to justify the use of racial preferences in admissions. *Id*. at 16a-17a. According to the court, Justice Powell's lone opinion with respect to diversity constituted the rationale for the holding of this Court by application of the analysis approved in *Marks v. United States*, 430 U.S. 188, 193 (1977), for interpreting decisions of the Court with fragmented opinions. App. at 12-17a.[5]

The Sixth Circuit also reversed the district court's determination that the Law School's racial preferences were unconstitutional because they were not narrowly tailored. *Id*. at 25a-38a. It held that the Law School's stated objective of enrolling a "critical mass" of "underrepresented" minority students was achieved through considering race as a "plus" factor in the manner approved by Justice Powell in *Bakke* and described in the "Harvard plan" referenced in Justice Powell's opinion. Finding that the Law School had no "fixed goal or target" for minority admissions, the court rejected the district court's finding that the Law School's "critical mass" was the functional equivalent of a quota. *Id*. at 29a.

The Sixth Circuit noted that Justice Powell did not define or discuss the size of a permissible "plus" for race with respect to the consideration of grades and test scores of minority applicants. *Id*. at 31a. Accordingly, the court did not evaluate the district court's findings and the statistical evidence on the size of the preference for race at the Law School, other than to conclude that the "difference, on average, between the standardized test scores

[5] The Sixth Circuit majority declined to address whether the separate remedial interests proferred by intervenors were sufficiently compelling to satisfy strict-scrutiny review. App. at 12a n.4.

and/or undergraduate grades" for minority and non-minority students did not render the Law School's admissions policy unconstitutional. *Id*.

The last part of the Sixth Circuit's narrow-tailoring analysis was a consideration of five factors that the district court had considered (as set forth in *United States v. Paradise*, 480 U.S. 149, 171 (1987)) in finding that the Law School's preferences were not narrowly tailored. App. at 32a-38a. The Sixth Circuit first expressed "serious reservations" about whether the district court should have even considered these factors since they were not set forth for consideration in *Bakke*. *Id*. at 32a. Nonetheless, it went on to reject the district court's findings and conclusions concerning each of the factors. *Id*. at 32a-38a.

Judge Clay wrote a concurring opinion that was joined by Judges Moore, Cole, and Daughtrey. *Id*. at 51a-83a. The concurring judges agreed with Chief Judge Martin's conclusion that Justice Powell's opinion respecting diversity was binding precedent. The concurrence went further than the majority opinion, however, by justifying the diversity rationale on the basis of empirical evidence and even on remedial grounds relating to the entire educational system: "Diversity in education, at its base, is the desegregation of a historically segregated population and as the intervenors essentially argue, *Bakke* and *Brown* [347 U.S. 483] must therefore be read together so as to allow a school to consider race or ethnicity in its admissions for many reasons, including to remedy past discrimination or prevent racial bias in the educational system." *Id*. at 72a-73a. Judge Clay did not explain how this last mode of analysis could be reconciled with the actual result in *Bakke*, in which the Davis special admissions program was found unlawful.

The four dissenting judges found the Law School's preferences to be unlawful. Judge Boggs authored a dissent, joined by Judge Batchelder and in part (all except the Procedural Appendix) by Judge Siler, which reached the conclusions (1) that diversity was not a compelling interest that could justify racial preferences in admissions

and (2) that the Law School's preferences were not in any event narrowly tailored to achieve an interest in diversity. *Id*. at 83a-169a.

On the first point, Judge Boggs explained why a *Marks* analysis could not yield a conclusion that Justice Powell's diversity rationale was narrower than Justice Brennan's "remedial" rationale, and hence why it could not be considered a rationale for the holding of this Court. *Id*. at 94a-112a. Finding that subsequent Supreme Court opinions concerning racial preferences had not directly confronted whether diversity in student admissions was a compelling interest, *id*. at 112a-114a, Judge Boggs conducted an assessment on the merits of the diversity rationale articulated by the Law School and concluded that it could not constitute a compelling interest. Judge Boggs noted first that the Law School's focus on racial diversity "for the sake of race" was not the kind of experiential or pedagogical diversity endorsed by Justice Powell. *Id*. at 121a-122a. Second, he explained why the nature of the diversity interest – with "'no logical stopping point'" and "no limiting principle" – could not conceptually qualify as a compelling interest. *Id*. at 124a-129a.

Judge Boggs' discussion of narrow tailoring criticized the majority's conclusion that using race as a "plus" factor was permissible as long as an admissions system "neither 'sets aside' an exact number of seats for racial and ethnic minorities nor admits minorities with a specific quota of admittees in mind." *Id*. at 130a. He expressed the view that it was important to examine the size of the preference (which the majority had not done) because he could not believe "that a 'plus' of any size, no matter how large" could be constitutional. *Id*. He found the size of the Law School's preferences to be "staggering," *id*. at 89a, and concluded that the Law School effectively maintained a "two-track" admissions system, with students from "underrepresented" minority groups held to lower standards for admission than students from other racial groups, *id*. at 135a. Judge Boggs concluded also that the Law School's concept of "critical mass," with the consistent levels of

minority admissions, was "functionally, and even nominally, indistinguishable from a quota system." *Id*. at 144a.

Judge Boggs also found an "empirical link between . . . 'critical mass' and the values of diversity lacking." *Id*. at 146a. He specifically criticized the report prepared by Law School witness Patricia Gurin (and relied upon in Judge Clay's concurrence) on grounds, among other things, that it did not study how much diversity was necessary to yield the claimed benefits, and that it did not examine any statistical correlation between increased diversity and increased educational benefits. *Id*. at 146a-151a.

Finally, Judge Boggs concluded that the Law School's preferences could not survive an inquiry into whether race-neutral alternatives were available to achieve the purported benefits of diversity. *Id*. at 152a-156a.

In a separate dissent, Judge Gilman concluded that it was unnecessary to decide whether diversity was a compelling interest because the Law School's preferences were not narrowly tailored. He described the Law School's "critical mass" as "functionally indistinguishable from a quota." *Id*. at 173a. Judge Gilman's opinion did not address (because it left unresolved whether diversity was a compelling interest) the propriety of the district court's injunction prohibiting the consideration of race to achieve student body diversity.

REASONS FOR GRANTING THE WRIT

There can be no serious doubt that the use of racial preferences in university admissions presents an issue of great national importance. *Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg and Souter, JJ., concurring in denial of certiorari) ("Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance."). There is now also sharp and substantial disagreement in the lower courts about the lawfulness of using race and ethnicity as a factor in admissions to achieve a "diverse" student body. The Sixth and Ninth Circuits have concluded that diversity is a

compelling interest and that Justice Powell's opinion in *Bakke* concerning diversity constituted a rationale for the holding of the Court through application of the *Marks* analysis. The Fifth and Eleventh Circuits have reached a different result (*see* discussion *infra* at 22-23).

Just as the lower courts have disagreed on the existence of a compelling interest, they have applied conflicting analyses on the issue of narrow tailoring. On its face, moreover, the Sixth Circuit's opinion acknowledges that there are important respects in which Justice Powell's opinion concerning diversity left significant unresolved questions. App. at 31a.

Indeed, many questions cry out for clarification if diversity is a compelling interest and if Justice Powell's formulation of it is held to be controlling, including the following: What constitutes the "functional equivalent" of a quota, which Justice Powell's rationale forbids? How important are large statistical disparities on items such as grades and standardized test scores among applicants from different racial groups in assessing whether a race-conscious admissions system is unlawful? May a "plus" for race be of any size or substance, so long as the form and language of a "quota" or "set aside" is avoided? Do traditional factors associated with narrow tailoring, such as the requirement that preferences be temporary, have no application to the diversity rationale? If universities may select the racial groups to which they give preferences based on "underrepresentation" of these groups in the student body, how is diversity different in principle from objectives of simple racial balancing or remedying the lingering effects of societal discrimination? If achieving diversity is a compelling interest sufficient to justify racial preferences in education because of the beneficial effects of obtaining diverse viewpoints, what limiting principle prevents diversity from justifying racial preferences in other areas of life where diverse viewpoints may also be beneficial, like jury selection or employment in positions with responsibility for management or creation of public policy?

I. THE *BAKKE* CASE.

In *Bakke*, this Court found that the admissions program of the University of California Medical School at Davis, which set aside 16% of the places in the class for educationally or economically disadvantaged minorities, violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Five Justices, including Justice Powell, held that the Davis program unlawfully considered race in the admissions process. Justice Powell concluded that Title VI prohibited only that conduct prohibited by the Constitution and that the Davis admissions policy violated Alan Bakke's rights under the Equal Protection Clause of the Fourteenth Amendment. Justice Stevens, writing for himself and three others, concluded that the system of racial preferences employed by the Davis Medical School violated the plain language of Title VI. Those Justices did not reach the question of whether the Davis system also violated the Constitution.

Another group of five Justices, also including Justice Powell, reversed the judgment of the California Supreme Court enjoining Davis from using race as a factor in admissions under any circumstances. In this conclusion, Justice Powell was joined by Justice Brennan, who wrote an opinion joined by Justices Blackmun, Marshall, and White that would have upheld the Davis admissions system.

Justice Powell applied strict scrutiny to the Davis program. He considered four objectives of the program offered by Davis, and found only one to be sufficiently compelling: an interest in "academic freedom" derived from the First Amendment. Justice Powell concluded that academic freedom, although not a specifically enumerated Constitutional right, was a "special concern" of the First Amendment and thus a sufficiently compelling interest to meet strict scrutiny. 438 U.S. at 312 (Powell, J.). "Academic freedom" included the freedom to determine who would be allowed to study at a state university. *Id.*

While rejecting the argument that Davis's specific program of reserving spaces for disadvantaged minorities

was necessary to achieve the robust exchange of ideas that the Regents allegedly wanted, Justice Powell did state that race and ethnicity could be considered as "plus" factors by universities seeking to achieve that goal. He cited to the text of the so-called "Harvard plan," which he said would pass constitutional muster under his approach. *Id*. at 316-18.

Justice Powell concluded that the Davis program was guilty of a "facial intent" to discriminate. *Id*. at 318. He described a "facially nondiscriminatory admissions policy" as one "where race or ethnic background is simply one element – to be *weighed fairly* against other elements – in the selection process." *Id*. (emphasis added). He specifically disapproved of an admissions system that reserved a specified number of spaces in the class for members of particular minority groups or that operated "as a cover for the functional equivalent of a quota system." *Id*. at 315, 318.

Justice Powell found that the Davis "dual admission" or "two-track" system, *id* at 314-15, in which a number of seats in the medical school class were reserved on the basis of an "explicit racial classification," *id*. at 319, violated the Equal Protection Clause, *id*. at 319-20.

Although Justice Brennan seemingly rejected "strict scrutiny," *Bakke*, 438 U.S. at 357 (Brennan, J.), he borrowed a scrutiny level from gender-discrimination cases that he characterized as "strict and searching." *Id*. at 362. Specifically, he required the use of race to serve important governmental objectives and to be substantially related to achieving those objectives. *Id*. at 359.

Justice Brennan concluded that the Davis program met his "strict and searching" scrutiny analysis because remedying the effects of past societal discrimination was a sufficiently important governmental objective, and because the Davis program was, in his view, substantially related to achieving that objective. In reaching the latter conclusion, Justice Brennan stated that remedies for past discrimination need not be limited to victims identified by specific proof, but that they should be limited to those

"within a general class of persons likely to have been the victims of discrimination." *Id.* at 363. In finding that the Davis program met that requirement, Justice Brennan emphasized:

> [T]he Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program.

Id. at 377. *Cf. Bakke*, 438 U.S. at 275 n.4 (Powell, J.) (the admissions chairman would confirm "disadvantage" of individual applicants).[6]

Justice Brennan did not mention or endorse the "academic freedom" or "diversity" rationale of Justice Powell. He did state that something like the "Harvard plan" would be "constitutional under our approach, *at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination*." *Id.* at 326 n.1 (emphasis added). While recognizing that no one opinion spoke for the Court, Justice Brennan purported to describe the "central meaning" of the various opinions without any reference to the "academic freedom" or "diversity" rationales:

> 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*

[6] Indeed, that is how Justice Brennan viewed the "Harvard plan" – an admissions system that "openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to *disadvantaged* minority students." *Bakke*, 438 U.S. at 379 (Brennan, J.) (emphasis added).

> *past racial prejudice*, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Id. at 325 (emphasis added).

In the only part of Justice Powell's equal-protection analysis that was joined by Justice Brennan, Part V-C, nothing was said, much less endorsed, about justifying racial preferences on grounds of diversity or academic freedom. *Id*. at 320. Part V-C made explicit that five Justices believed Davis should not be prohibited from any consideration of race in making admissions decisions. It did not however, purport to describe what interests would be sufficiently compelling to justify preferences in a "properly devised admissions program." *Id*.

II. THE LOWER COURTS ARE DIVIDED.

Aside from Justice Powell's opinion in *Bakke*, the opinions of the Court have never before or since addressed whether diversity is a compelling interest justifying racial preferences in university admissions. Subsequent opinions have included comment on the fractured nature of the *Bakke* opinions. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 218 (1995) ("*Bakke* did not produce an opinion for the Court."); *Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001) (Stevens, J., dissenting) (The five Justices in *Bakke* who voted to overturn the injunction imposed by the lower courts "divided over the application of the Equal Protection Clause – and by extension Title VI – to affirmative action cases. Therefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a majority for any particular substantive interpretation of Title VI").

In other contexts, this Court's more recent decisions have recognized only one interest as sufficiently compelling to justify racial classifications: remedying past, identified discrimination. *E.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless

they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.") (O'Connor, J.); *id.* at 520 (Scalia, J.); *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) (voting rights and redistricting). It has expressed disapproval of recognizing as "compelling" interests that are "amorphous" and that have "no logical stopping point." *J.A. Croson Co.*, 488 U.S. at 498-99 (citing and quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (plurality opinion)).

Not surprisingly, then, the lower courts have struggled and disagreed about whether academic freedom or diversity are interests that can justify racial preferences in student admissions. More than half the circuit courts of appeals have addressed the diversity rationale in some context, most of them relating to admissions in either elementary, secondary, or higher education.

The Fifth and Eleventh Circuits have held that Justice Powell's opinion in *Bakke* with respect to diversity *did not* constitute a rationale for the holding of the Court. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), the Fifth Circuit determined that Justice Powell spoke for no other Justice concerning diversity, and that Justice Brennan had implicitly rejected diversity as a compelling governmental interest. *Id.* at 944. *See also Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000) (Wiener, Stewart, JJ.) (Justice Brennan and the three Justices who joined his opinion in *Bakke* "disagreed with [Justice Powell] as to the rationale that is necessary to justify constitutionally the government's use of racial preferences. . . . None of the [concurring Justices] would go the extra step proposed by Justice Powell and approve student body diversity as a justification for a race-based admissions criterion."), *cert. denied*, 533 U.S. 929 (2001). Concluding that this Court's precedents had not resolved whether diversity was a compelling interest, the Fifth Circuit analyzed the question and determined that it was not. *Hopwood*, 78 F.3d at 945-46.

The Eleventh Circuit, in a case involving a challenge to racial preferences in admissions at the University of Georgia, reviewed the opinions in *Bakke* and determined that the *Marks* analysis did not support a conclusion that Justice Powell's opinion concerning diversity was the holding of the Court. *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1247-49 (11th Cir. 2001); *id*. at 1249 ("Simply put, Justice Powell's opinion does not establish student body diversity as a compelling interest for purposes of this case."); *id*. at 1261 ("[W]e do not believe that Justice Powell's opinion [in *Bakke*] is binding, and his discussion of the Harvard Plan was entirely dicta."). Ultimately, the Eleventh Circuit concluded that whether diversity was a compelling interest was an "open question," but that it need not be decided in the case before it because the University of Georgia's racial preferences under review were not narrowly tailored to achieve an interest in diversity. *Id*. at 1250, 1254-64.

In contrast, the Sixth and Ninth Circuits have concluded that Justice Powell's opinion with respect to diversity constitutes the rationale for the holding of the Court in *Bakke* through application of the *Marks* analysis. App. at 12a-17a; *Smith v. University of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

Other courts of appeals have noted expressly or implicitly that this Court has not resolved whether diversity is a compelling interest. *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130 (4th Cir. 1999) (elementary school student admissions) ("whether diversity is a compelling governmental interest remains unresolved"), *cert. denied*, 529 U.S. 1019 (2000); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704-05 (4th Cir. 1999) (same); *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (middle school student admissions) ("[W]e need not definitively resolve this conundrum [whether diversity is compelling] today."). *Cf. Taxman v. Board of Educ.*, 91 F.3d 1547, 1563-64 (3rd Cir. 1996) (striking down racial preferences in faculty employment which had "sole purpose" of obtaining educational benefits believed to result

from racially diverse student faculty) (holding that "[w]hile the benefits flowing from diversity in the education context are significant indeed," they did not satisfy requirements for use of racial preferences under Title VII), *cert. granted*, 521 U.S. 1117, *appeal dismissed per stipulation*, 522 U.S. 1010 (1997); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir.) (preferences in employment) ("whether [non-remedial] justifications are possible is unsettled"), *cert. denied*, 525 U.S. 981 (1998); *Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344, 354-56 (D.C. Cir. 1998) (rejecting racial diversity as a compelling interest justifying racial preferences in the award of broadcast licenses).

The Sixth Circuit's narrow-tailoring analysis also diverges from the approach taken by other circuits. Most notably, it gave no consideration to whether the size of the preference or "plus" was consistent with the requirements of narrow tailoring. The plaintiff had submitted much statistical evidence on this point, which the district court credited and relied upon. App. at 216a-222a, 227a. It was dismissed by the Sixth Circuit on the ground that neither the "Harvard plan" nor Justice Powell had defined limits on the size of a permissible "plus." *Id.* at 31a.

In contrast, the Eleventh Circuit has recognized that the size of the preference does bear on the question of narrow tailoring. *See Johnson v. Board of Regents of the Univ. of Georgia*, 263 F.3d at 1254 (narrow tailoring requires, among other things, that "the policy must use race in a way that does not give an arbitrary or *disproportionate* benefit to members of the favored racial groups") (emphasis added); *id.* at 1257-59 (holding that the disproportionate size of the preference granted to some races was incompatible with narrow-tailoring requirements).

Justice Powell made clear that a race-based "two-track" admissions system, or one that amounted to the "functional equivalent of a quota system" would be illegal. *Bakke*, 438 U.S. at 316, 319 (Powell, J.). Concluding that the Law School had no "*fixed* goal or target," App. at 29a (emphasis added), the Sixth Circuit did not address

whether the size of the preferences had the *practical* effect of creating a quota or "two-track" system. This was a consideration that led the Fourth Circuit to strike down, on narrow tailoring grounds, race-based assignments to a kindergarten school. *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d at 707 ("Although the Policy does not explicitly set aside spots solely for certain minorities, it has practically the same result by skewing the odds of selection in favor of certain minorities.").

The Sixth Circuit found it permissible that the Law Schools' preferences were focused on a small and limited number of racial groups. App at 37a. This is a factor that has proved inconsistent with narrow tailoring in other cases. *See, e.g., J.A. Croson Co.*, 488 U.S. at 506-08; *Wessmann v. Gittens*, 160 F.3d 790, 798-90 (1st Cir. 1998). *Cf. Hopwood v. Texas*, 78 F.3d at 966 (Wiener, J., concurring). It can be an indication that the preferences are overinclusive, underinclusive, or both, and that they are impermissibly the products of "unthinking racial stereotypes or a form of racial politics." *J.A. Croson, Inc.*, 488 U.S. at 510. *See also Wessmann v. Gittens*, 160 F.3d at 798-99.

Finally, on the questions of the availability of race-neutral alternatives and the indefinite duration of the Law School's preferences, the Sixth Circuit's analysis, App. at 33a-35a, was much less rigorous than that employed by other courts. *See, e.g., Tuttle*, 195 F.3d at 706; *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d at 1261; *id.* at 1254 ("We have held that only as a 'last resort' may race be used in awarding valuable public benefits . . . That principle applies equally to the university admissions process.").

III. THIS CASE PRESENTS ISSUES OF FUNDAMENTAL NATIONAL IMPORTANCE.

This case does indeed present, as Judge Boggs described it, "a straightforward instance of racial discrimination by a state institution." App. at 83a. What the record in this case proves is that for many students, especially those

applying to "selective" or competitive institutions, differences in an applicant's skin color – race or ethnicity – can have an enormous effect on admissions outcomes.

Although the case presents specific legal issues, at the most fundamental level the question it raises is whether our Nation's principles of equal protection and nondiscrimination mean the same thing for all races. This Court has said in the past that it does. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222 (1995) (standard of review for racial classifications is the same for all races). But the proposition is tested again by this case, and especially by the justifications for unequal treatment put forth by the Law School and intervenors.

This Court has rejected as compelling certain interests that indisputably are good and important, like remedying the lingering effects of societal discrimination and promoting role models for school children. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-77 (1986) (plurality opinion). *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (consideration of "best interests" of child is a substantial governmental interest, but cannot justify consideration of race in making custody determinations). There may be many reasons why an interest is not sufficiently compelling to withstand the strict scrutiny to which all racial classifications must be subjected, but among them certainly are that an interest is by its nature poorly defined, without reasonably ascertainable or objective standards or scope, or "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276 (plurality opinion).

The diversity rationale articulated by the Law School and accepted by the Sixth Circuit is one that "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration." *J.A. Croson Co.*, 488 U.S. at 498 (O'Connor, J.) (quoting *Wygant*, 476 U.S. at 276 (plurality opinion)). It has "no logical stopping point." *J.A. Croson*, 488 U.S. at 498. Indeed, an interest founded on "underrepresentation" could quite readily justify measures

that extend until minority representation in the classroom "mirrors the percentage of minorities in the population as a whole." *Id*. It is a rationale that gives essentially unchecked authority to admissions officers to define what "diversity" or "critical mass" mean; which racial and ethnic groups, among many, are to be considered "underrepresented" or are to receive preferences; the size of the preferences or "plus"; and their duration. The only limitation would be a meaningless one, easily evaded – that the preferences must avoid the express form of a "fixed quota."

So defined, such an interest is at least as ill-defined and "amorphous" as an interest founded on remedying the lingering effects of societal discrimination or fostering role models for school children.[7] *Wygant*, 476 U.S. at 276 (plurality opinion). *See also Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1250 (11th Cir. 2001) (noting that interest in student diversity is "similar" to other interests rejected as compelling, including remedying effects of societal discrimination and providing role models). By accepting such a rationale as a compelling interest, "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences." *J.A. Croson Co.*, 488 U.S. at 505-06.

Enshrined as a compelling interest, diversity will instead give the Nation its first *permanent* legal justification for racial classifications. *See, e.g., Gratz v. Bollinger*, 122 F. Supp. 2d 811, 823-24 (E.D. Mich. 2000) (approvingly defining an interest in diversity as a "permanent and

[7] Indeed, many would argue (the intervenors, for example) that the same primary cause – societal discrimination – probably contributes to a felt shortage of minority role models and to the reduced academic performance of some minority students. It is reasonable to expect that remedying generalized societal discrimination and increasing the numbers of role models for minority school children would have positive educational effects. As this Court's precedents make clear, however, such reasoning in support of racial preferences could not pass muster under strict scrutiny.

ongoing interest" that "lives on perpetually"), *on appeal*, Nos. 01-1333, 01-1418, 01-1416). That justification, despite the language or label applied, will be one that is indistinguishable from an interest in simple racial balancing. *See Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344, 356 (D.C. Cir. 1998) (noting "how much burden the term 'diversity' has been asked to bear in the latter part of the 20th Century" and that "[it] appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ('affirmative action' has only a temporary remedial connotation) and as a synonym for proportional representation itself."); *Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998) ("Underrepresentation is merely racial balancing in disguise – another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.").

The absence of a limiting principle in the diversity rationale also raises the serious specter that it cannot logically be confined to the higher education context. As Judge Clay's concurring opinion demonstrates, diversity can be used to justify a response to the effects of historical discrimination. App. at 61a, 72a-73a. The Law School and some of its *amici* have sometimes justified diversity in education based on the segregated lives that students allegedly live prior to entering higher education and by the benefits that supposedly stay with students after they have graduated and joined the workforce.

If diversity is compelling in part because of what goes on *before* and *after* students enter higher education and because it is an antidote to societal discrimination and prejudice, it is hard to imagine why it should not also be sufficiently compelling to support racial preferences in other areas of American life. That is especially so – if it is deemed that racial diversity brings viewpoint diversity – where it can be persuasively argued that having "diverse" viewpoints is beneficial. The possibilities are numerous, including primary and secondary education, employment in management or public policy positions, and jury selection (where, for example, the Constitution guarantees a

defendant in a criminal proceeding a trial by a jury of his peers). Although this case does not directly raise these other issues, the answer (and the reasons for the answer) to whether diversity is a compelling interest in higher education are likely to have important implications outside the higher education context.

There is also a qualitative difference between using race to remedy past, identified instances of governmental discrimination and using it instead to achieve "diversity." When race is used in a narrowly-tailored manner to remedy past, identified discrimination, it is arguably done to right a specific wrong; to *further* the principle of equality by correcting injury done to the principle in defined instances. When, however, race is used to pursue an open-ended objective like "diversity," it is used in *spite* of the principle of equality to further an interest in – diversity. Covering the diversity rationale with arguments about "academic freedom" does not offer it legitimacy under the Constitution or the Nation's civil rights laws: This Court has never held that educational institutions have a First Amendment right to practice race discrimination in admissions. Such a conclusion would be anathema to the outcome and principles articulated in cases like *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *Runyon v. McCrary*, 427 U.S. 160, 175-77 (1976) (striking down admissions system that discriminated on the basis of race despite First Amendment rights asserted by school on behalf of parents), and *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-05 (1983) (upholding IRS revocation of tax-exempt status of university because of its racially discriminatory admissions system).

These important issues, about whether the Law School's preferences survive strict-scrutiny review under the Equal Protection Clause, and whether they violate federal civil rights statutes, Title VI (42 U.S.C. § 2000d) and 42 U.S.C. § 1981, are squarely presented by the first of the Questions Presented in the petition for certiorari.

In accepting review of the first Question Presented, it would be appropriate for the Court also to address the

second question: whether the Sixth Circuit properly conducted *de novo* review of the district court's findings of fact, made after a 15-day bench trial. It cited no authority for doing so in a case involving a district court's findings in a discrimination case. Although *de novo* review of findings in certain First Amendment cases has been found appropriate – where the legal characterization of specific speech is at issue – this Court has never held that findings in all cases involving "constitutional" facts are subject to *de novo* review.

CONCLUSION

For the foregoing reasons, Barbara Grutter respectfully requests the Court to grant her petition for certiorari.

Respectfully submitted,

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