No. 02-241

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE NEW YORK STATE BLACK AND PUERTO RICAN LEGISLATIVE CAUCUS

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INTEREST OF AMICUS CURIAE

The Black and Puerto Rican Legislative Caucus is an unincorporated association of elected officials who serve in either the New York State Assembly or the New York State Senate. The legislative districts that these officials represent consist predominately of people of color, including African-American and Afro-Caribbean residents, as well as many people described by United States census data, as "Hispanic" even though the largest group within that designation are members of the Puerto Rican community. The interest of the Caucus in this case is based on the fact that historically members of their districts have been excluded from equal opportunity for higher education.

The Caucus is committed to the principle that continued access to higher education for people of color, including access as a result of affirmative action programs, is a critical vehicle for alleviating poverty, strengthening the economies of their communities and for civic empowerment. The Caucus believes that the current mechanisms for affirmative action in higher education, including flexible use of standardized tests must be maintained to preserve equal educational opportunity.

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[1] The written consent from both parties to the filing of this brief is on file with the Court and therefore is not attached. Counsel for the Black and Puerto Rican Legislative Caucus participated in the authoring of this. No person or entity other than the *amicus curiae* its members or its counsel made any monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Petitioner asserts a novel claim that the white majority can be deprived of its Constitutional protections when a small number of equally credentialed minority candidates are accepted in a law school publicly committed to including qualified members of previously excluded and currently underrepresented racial and ethnic groups. Statistical results embodying a preference for the majority are offered as proof of the majority's harm. Acceptance of the statistical criteria would result in a permanent under-representation or exclusion of minority applicants.

It is likely that candidates from these minority groups who apply with credentials that are equal to white majority applicants are actually better candidates. The Law School Admission Test (LSAT) and Undergraduate Grades (UGA) used to identify equally credentialed applicants incorporate persistent biases against members of underrepresented minority groups. The LSAT has a persistent gap among applicants with equal grades from the same colleges that remains unexplained by the testing experts. Test scores can also be adversely affected by candidates' unconscious reaction to widespread stereotypes disparaging the intellectual abilities of minority group members.

It is important for this Court to affirm the propriety of a state law school policy to actively seek, identify, recruit and enroll members of previously excluded and currently underrepresented racial and ethnic groups. Admissions officials should be free to exercise their experience and judgment in evaluating numerical data in the context of all relevant information. The admission of equally qualified members of racial and ethnic groups should contain no stigma of inferiority.

ARGUMENT

I

The Court Must Reject Petitioner's Argument That the Only Constitutionally Permissible Means to Admit Students From Different Racial or Ethnic Backgrounds is Through Rigid Adherence To an Odds Ratio Formula That Permanently Disadvantages Already UnderrepResented Minority Groups.

1. Petitioner Asserts a Novel Claim that Reverse Discrimination Can Occur Among Equally Credentialed Candidates.

Prior cases involving race conscious admissions have been conducted on the unexamined premise that less qualified minority applicants were the beneficiaries of the program, and that there could be no racial preference were minority applicants shown to be equally qualified with white applicants. *Defunis v. Odegaard*, 416 U.S. 312, 335 (1974)(Douglas, J., dissenting)("My reaction is that the presence of an LSAT is sufficient warrant for a school to put racial minorities into a separate class in order to better probe their capacities and potentials."); *Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265, 306 n. 43 (1978)(Opinion of Powell, J.) ("Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all.")

Yet this case involves an appeal of a district court rejection of race conscious admissions based on a finding

that "Native American, African-American, Mexican American and Puerto Rican applicants have been admitted in significantly greater proportions than Caucasian applicants with the same or similar undergraduate GPAs and LSAT scores." *Grutter v. Bollinger,* 137 F.Supp.2d 821, 841 (E.D. Mich. 2001). "The issue in this case is whether similarly situated applicants are treated differently because of their race, and this question can be answered by examining cells in which some applicants are accepted and others rejected so that the differences in the admissions rates can be calculated." *Id.*

This brief addresses what it means to treat similarly situated applicants of different races in a constitutionally equitable way. It examines the nature of proof offered by Petitioner and concludes that it fails to prove racial discrimination against rejected white applicants but rather is designed to and has the effect of stigmatizing underrepresented groups as intellectually inferior. Part of its vehicle for analysis is the composite applicant developed by the dissent in the Sixth Circuit Court of Appeals. "An African-American applicant who comes to the Law School by way of Choate and Harvard" *Grutter v. Bollinger,* 288 F.3d 732, 791 (6th Cir. 2002)(Boggs, dissenting). "[A] conventionally liberal (or conventionally conservative) black student who is the child of lawyer parents living in Grosse Pointe, just like the previous ten white admittees,"*Id.* at 790-1. "Next-door neighbors in Grosse Pointe, separated only by 30 yards and the color of their skin," *Id.* at 807. "When it comes to a choice... the black student will be given a diversity preference." *Id.* at 791.

2. Petitioner Offers an Unusual Statistical Proof That Capitalizes on Majoritarian Privilege to Produce Seemingly "enormous" Racial Preferences.

The statistical method offered by Petitioner is the Odds

Ratio[2] Counsel for petitioner describes it as "another standard statistical measure used in science, medicine, and discrimination cases." Brief for Petitioner p. 8. The three pages of trial testimony provide references to science and medicine[3] but not discrimination cases. The brief provides no such references.

Petitioner's statistical expert "calculated the odds of admission for Caucasian applicants and compared them with the odds of admission for applicants of other races in order to calculate the "relative odds of acceptance" for each racial group." 137 F.Supp.2d at 836-7. In 1995-2000, the relative odds of acceptance for African-Americans were 257.93, 313.59, 53.49, 132.16, 206.45 and 443.26. *Id.* n. 20. The District Court noted "For perspective, attaining a relative

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[2] Petitioner's statistician is quick to distinguish the odds ratio from percentages. 2 Tr. 75. He considered a hypothetical example with two groups, one with an acceptance rate of 99 percent, the other with an an acceptance rate of 90 percent. The first group enjoys an odds ratio advantage of 11. "The probability of acceptance is close, and the probability of denial is quite different. ...[I]f you look at the chances of denial, it's one percent versus ten percent which is quite discrepant." 2 Tr. 124-5. Yet a group with an an acceptance rate of 99.9 percent enjoys an odds ratio of 111 over the group with the 90 percent acceptance rate. 2 Tr. 152. While the different chances for acceptance in a group accepted 99 percent of the time or in a group accepted 99.9 percent of the time have no practical significance, this situation produces a much larger odds ratio because of the much larger group of rejected applicants. 2 Tr. 154. This problem is most likely to occur when the size of the two groups are wildly different.

[3] "[E]stimated relative odds" were mentioned in relation to "Sammy Sosa's batting average, ...a clinical study... comparing the new drug or new device to a standard therapy or a drug. ...We would use our individual cells, in this case would be hospitals....Dick Cheney's angioplasty, using a stint. ... [T]he relative odds of heart disease versus no heart disease for someone, say, receiving Aspirin is about 1.3, 1.4. So relative odds that might be small numbers greater than one are common. ...I can think of a medical example ... historical data of people who were at very low blood pressure, very low cholesterol, and their chance of a heart attack, or heart disease, showing itself..." 2 Tr. 66-9

a medical study. That is, a drug that doubled or tripled the odds of cure would be of great value. Double and triple digit relative odds are simply enormous!" *Id.* 837. "At trial Dr. Larntz characterized his relative odds figures as 'enormous' and as showing that a 'tremendous advantage' was given to applicants from these minority groups in each of the years in question. "*Id.*[4] As presented to this Court, African American applicants in 1995 enjoyed an overall preference expressed as an odds ratio of 513.29. compared to white applicants controlling for grades, test scores, and several other factors." Brief for Petitioner 9.

The difference between petitioner's claim and previous conceptions of equitable race conscious admissions can be clarified by two tables displaying admission and rejection data for students with equal college grades and LSAT scores, grouped into White/Majority and Black/Minority categories. Previous challenges have implicitly assumed that selection of Black/Minority applicants with credentials equal to white applicants would pose no Constitutional problem. Yet petitioner explicitly claims that race conscious decisions among equally qualified applicants is at the heart of the Constitutional violation. The claim accepts the disproportionate White /Majority advantage in total applications to the law school and presses the numerical advantage to unprecedented lengths by insisting on a standard of fairness embodied in the odds ratio statistic.

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[4] The basis for these overall odds of acceptance of each year were "admissions data provided by the law school. This data consists of the 'admissions grids' for each of the years in question (1995-2000). ... These grids show the number of applicants and the number of admittees for all combinations of undergraduate GPA and LSAT score. ...The law school compiled one admissions grid for all applicants, as well as separate grids for various racial groups." 137 F.Supp.2d at 836.

The operation of the odds ratio on admissions data is exemplified in Tables 1 and 2.

Table 1

EQUAL ADMISSION TOTALS

	White/Maj.	Black/Min.	
Accepted	1	1	**Odds Ratio: 54** [5]
Accepted	1	1	**Odds Ratio: 39**
Accepted	2	2	**Odds Ratio: 21**
Accepted	3	3	**Odds Ratio: 13**

EQUAL ODDS RATIOS

	White/Maj.	Black/Min.	
Accepted	2	2	**Odds Ratio: 21**
			1996 3.00-3.24
	159-160		
Accepted	2	3	**Odds Ratio: 21**
			1996 3.75-4.00
	156-158		
Accepted	3	3	**Odds Ratio: 13**
			1998 3.50-3.74

[5] To make this comparison... calculate the odds of admission for Caucasian applicants and compare them with the odds of admission for applicants of other races in order to calculate the "relative odds of acceptance" for each racial group. Caucasians were the "comparison group" — that is, each group's odds of acceptance were calculated relative to those of Caucasians. Relative odds, or an "odds ratio," greater than 1.0 would indicate that a member of the racial group in question has a greater chance of admission than does a Caucasian applicant. Relative odds less than 1.0 would indicate the opposite. "For perspective, attaining a relative odds of 2 or 3 for cure of a disease is often the goal of a medical study. That is, a drug that doubled or tripled the odds of cure would be of great value. Double and triple digit relative odds are simply enormous!" 137 F.Supp.2d at 836-7.

	151-153		
Accepted	1	2	**Odds Ratio: 13**
			1997 3.50-3.74
	151-153		

Table 1 includes cells containing candidates with comparable LSATs and GPAs. An equal number of White/Majority and Black/Minority candidates are admitted in the four top cells. For comparison, two other cells have the same Odds Ratio.

These situations approximate the analogy that has driven the judiciary's evaluation of race conscious admissions. Justice Powell quoted the Harvard plan with approval that acknowledges "the race of an applicant may tip the balance in his favor" *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 at 316 (1978)(Opinion of Powell, J.). Judge Boggs notes that "A seesaw with roughly equivalent children on either end can be 'tipped' from one side to the other with a small weight." 288 F.3d at 799 (Boggs, dissenting). Judge Gilman observes "For example, in differentiating between two applicants with essentially equal LSAT scores and GPAs, where one is Caucasian and the other African-American, I have little doubt that favoring the under-represented African-American applicant would pass constitutional muster if educational diversity is recognized as a compelling government interest. This would clearly fall within the scope of what I believe Justice Powell had in mind when discussing the appropriate use of a 'plus' for diversity in Bakke." 288 F.3d at 817-8 (Gilman, dissenting).

Table 2 documents the basis the for claim of the Center for Individual Rights that the Constitution has been violated. The odds ratio reminds us that there is never a cell in which there are an equal number of Majority/White and

Minority/Black applicants.[6] For example, in the first cell of Table 1 and 2, one Majority/White and one Minority/Black is accepted in 1995, but since 54 equally credentialed Majority/White candidates were rejected, the only Minority/Black accepted would have to be matched by 54 equally qualified Minority/Black candidates who were rejected in order to secure enrollment under an equal odds scenario. In comparison, the second cell-with the same credentials as 1996-also has accepted one candidate from each group, but since only 39 White /Majority applicants were rejected, the Black/Minority applicant need only find 39 equally credentialed rejected Black/Minority candidates to be in compliance with an equal odds regime.

Petitioner measures the extent of the preference for accepted Black/Minority candidates by the number of equally credentialed rejected White/Majority candidates. Tipping the scale that Petitioner has constructed is much harder than anything Justice Powell may have imagined.

Table 2

EQUAL TOTAL ADMISSIONS

	Actual Decisions		**Hypothetical Equal Odds Ratio**	
	W/Maj.	B/Min.	W/Maj.	B/Min.
Accepted	1	1	1	1
Rejected	54	1	54	54
			Odds Ratio: 54	
Accepted	1	1	1	1
Rejected	39	1	39	39

[6]Counsel for petitioner explain the odds ratio to this Court with an example of 10 students from one group and 10 from another. Pet. Br. 8 fn. 5. Yet such an evenly balanced cell does not exist in the data. For example, in 1995, 10 African American applied with GPAs between 3.25 and 3.49 and LSATs between 156 and 158. However 51 white applicants had comparable grades and test scores. Exhibit 137.

			Odds Ratio: 39	
Accepted	2	2	2	2
Rejected	21	1	21	21
			Odds Ratio: 21	
Accepted	3	3	3	3
Rejected	26	2	26	26
			Odds Ratio: 13	

EQUAL ODDS RATIOS

	Actual Decisions		**Hypothetical Equal Odds Ratio**	
	W/Maj.	B/Min.	W/Maj.	B/Min.
Accepted	2	2	2	2
Rejected	21	1	21	21
			Odds Ratio: 21	
Accepted	2	3	2	3
Rejected	14	1	14	21
			Odds Ratio: 21	
Accepted	3	3	3	3
Rejected	26	2	26	26
			Odds Ratio: 13	
Accepted	1	2	1	2
Rejected	26	4	26	52
			Odds Ratio: 13	

Given counsel's current claim that African Americans enjoyed an odds ratio of 513.39 to one, this means that 513 African-Americans must be rejected for even one African-American to the accepted.[7] As only 404 African-Americans applied to the University of Michigan in 1995, not a single one would have been admitted without resulting in an odds ratio in favor of African Americans. In 1997, the odds ratio

[7]As explained by petitioner's statistician, "a relative odds of 81, ... What does that correspond to? How many M & M's do I have to dump in to ... make that the relative odds of 81? Well, I've already got one in here, right. So in order to get a relative odds of 81, what I have to do is ... dump in 80 more." 2 Tr. 78-9.

in favor of African Americans is reported as 53.49. Thus, the 320 African-American applicants would be allowed a maximum of 6 acceptances before an odds ratio in favor of African-Americans occurred. Exhibit 137.[8]

3. The Highest Odds Ratios Occur Among Candidates With the Highest Credentials.

In 1995, 114 white applicants with the highest combination of college GPA and LSAT scores were accepted and 7 were rejected. The lone black applicant in this cell was also accepted, Exhibit 137. While the University of Michigan Law School accepted these students as a first step in enrolling a racially integrated law school class, Petitioner's statistician saw an infinite odds ratio in favor of the lone black applicant.[9] All 7 rejected white applicants are invited to claim that their place in the law school class was taken by this one black student. *Compare,* 288 F.3d at 809 fn. 40(Boggs, dissenting) "[T]en people are each deprived of a one-tenth chance of admission because of race." Eliminating the odds ratio of infinity requires that the lone black student be rejected. 3 Tr. 23-4. When one of the white students is accepted in place of the black student, the other 6 white students have the satisfaction of knowing that, although they did not earn admission to the law school class, at least another white student did.

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[8]Similarly, when 41 of 98 Mexican American applicants were accepted, Petitioner attributes a 183.81 odds ratio in their favor. The 14 out of 45 Native Americans admitted apparently enjoyed an odds ratio of 116.98 in their favor, as did the 5 of 20 Puerto Ricans admitted with an odds ratio of 73.26. Brief for Petitioner, p. 9.

[9] The odds ratio is calculated by dividing the number of accepted candidates by the number of rejected applicants for each group and then dividing the resulting ratios for each group. When one group has no rejected members, dividing by the zero rejected applicants results in an infinite odds of acceptance for that group, compared to a group with some accepted and rejected applicants. 2 Tr. 52.

Similarly, in 1995, when the one black student in the highest GPA group of 3.75 and above, with an LSAT of 156-158 is accepted, but 43 of the 47 white applicants in the cell are rejected, that black applicant enjoys an infinite odds of acceptance compared to the white applicant group, even though only one black was admitted and four whites were admitted. Exhibit 137. This occurred in cell after cell, as the only one, two or three black applicants in a cell were accepted, while some white applicants were accepted and other rejected. 3 Tr. 138. In 1995, 1996, 1997 the most common infinity odds ratio occurred when one African American applied and one was admitted. In any year, only two or three cells contained more than four African American applicants in an "infinity" estimate. Exhibit 137.[10]

While the Law School is concentrating on who is accepted into the law school, Petitioner focuses on the rejected white applicants. The more rejected white applicants there are, the greater the cry of unfairness that a single black student took a space in the law school that could have been filled by an equally qualified white. Whether it is in the cell with the highest combination of UGPA and LSAT, or in a cell with more modest grades and test scores, the odds ratio confers a permanent preference for white applicants when compared to blacks with the same credentials, not because they are more qualified, but because they are more numerous.

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[10]Detailed inspection of the admission grids does not disclose individual cells with odds ratios comparable to the numbers cited above. In fact, in one year's comparison in which Michigan residency is also compared, the 240 cells yielded only 12 cells that had odds ratios with numerical values. In contrast, 52 cells had odds ratios of infinity. 2 Tr. 142-3.

The dissent also focuses on the harm done to rejected white applicants, "in any selection process in which the applicants *who do not benefit* from affirmative action greatly outnumber those who do," 288 F.3d at 809 fn. 40 (Boggs, dissenting)., quoting Goodwin Liu, *The Myth and Math of Affirmative Action*, Wash. Post B1 (April 14, 2002).citing 288 F.3d at 767 (emphasis added in dissent). Yet the dissent fails to acknowledge that Grutter's entire claim of harm is itself based on mathematics that incorporate a special attention to the rejected applicant from the white majority group. The dissent invites the white students in Grosse Pointe to look over the fence at the one black student who was admitted when a large number of equally credentialed white students were rejected. *Id.* Petitioner's statistics and the dissent's jurisprudence combine to ensure that such a scenario could never reoccur. To avoid an infinite odds ratio and to ensure that no rejected white student has any harm whatsoever, the lone black applicant will be rejected.

By focusing on admissions, rather than matriculation, petitioner asserts a majority privilege that individual white students applying to several law schools can enjoy at each law school. Such students need not even collect their reward of admission for the African-American to suffer the certain harm of being rejected simply because the applicant belongs to a minority group. In 1995, 668 whites were accepted, of whom 216 enrolled at the University of Michigan Law School, including 53 of the 270 whites accepted with LSAT scores above 170. As only 106 African-Americans were accepted that year, the 217 accepted whites with LSATs above 170 who did not matriculate would more than double the entire cohort of accepted African-Americans without ever appearing in Ann Arbor. Exhibit 137.

The problem does not lie simply in the size of the odds ratios, but rather in the concept of equality incorporated into the odds ratio. The lone African-American from Grosse

Pointe, or the lone African-American in the top cell of GPA and LSAT will face automatic rejection if any white applicants in the cell are rejected, for to do otherwise would to confer an infinite odds ratio in favor of the African-American who is accepted. Each lone African-American in other cells will face the same tyranny of the majority. In fact, for all practical purposes, petitioner implicitly assumes that an equally qualified African-American should never be admitted when there is a white applicant with similar numerical credentials that is rejected.

According to the University's statistical expert, the acceptance rate for all minority students could be expected to drop from the actual rates of 26 to 31 percent per year to an estimated 4 to 10 percent per year in a purely probabilistic model, assuming that all the minority applicants that actually applied between 1995 and 200 would continue to do so in the absence of announced affirmative action policies and programs. 137 F.Supp.2d at 842.

Prior opinions consider tipping a scale for race conscious admissions, but do not consider the situation of vastly different numerical groups. When the black applicant with the top grades and test scores is admitted, does that student have to tip the balance against each of the seven rejected white applicants? In the 1995 cell with 10 African American applicants, but 51 white applicants, does each black applicant have to tip the balance against all 51 white applicants? Exhibit 137. Once one African American has accomplished this feat, are all 51 white applicants then immune from being tipped by yet another equally credentialed black applicant? If all 10 black applicants manage to tip the balance, does their collective success render each of their admissions suspect?

The odds ratio takes us from the parlor game of two equally qualified candidates for a single spot to the reality of

an admissions office with between 3,429 and 4,147 applications annually between 1995-98. All candidates are never directly compared with all other candidates, as the end-of-year grid allows. Admission officials may be on the lookout for a highly qualified applicant from an underrepresented group. Once one is found, the search does not stop. If all such applicants prove to be attractive candidates after the complete file is reviewed, their initial flagging does not render the admission an impermissible racial preference.

II

The University of Michigan Law School Did Not Violate the Rights Of White Applicants When They Accepted Members Of Minority Groups Who Had Slightly Lower LSAT Scores Than Other Applicants In The Same Cell

The purpose of affirmative action programs has always been to change the composition of American institutions from a status of racial exclusion, to one of integration and inclusion. (See "Toward An Understanding of Bakke" Clearinghouse Publication 58, May 1978, Statement by the United States Commission on Civil Rights on Affirmative Action" [Issued July 1, 1977] at 173). While the prohibitions against discrimination insure that the nation will not revert back to the days legal segregation, it was and still remains the goal of affirmative action to produce results that mere neutrality may not achieve. President Johnson, an early supporter of affirmative action described the goal as "... the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact *and equality as a result.*" (emphasis added) Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights, 2 Pub. Papers 1965 635, 636 (1966).

This brief may be rare in its focus on equally qualified candidates. Affirmative action has been confused with a preference for the less qualified. In this case, the average grades and test scores of various groups have been displayed. 137 F.Supp.2d at 864, 288 F.3d. at 796-7 The district court found that "members of underrepresented minorities would not be admitted in significant numbers unless race is explicitly considered. This is due to the fact that members of these groups, on average, have lower LSAT scores and lower undergraduate GPAs as compared to other applicants (i.e., Caucasians and Asians), so that comparatively few would be admitted in a system where admissions decisions were based on "the numbers." 137 F.Supp.2d at 840.

Yet the proof offered was that minority students were given a preference compared to students with equal credentials, as there were so many more such applicants from the white group. Such a preference among equally credentialed applicants need not lead to a difference in the average credentials of the two groups.[11]

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[11] *Compare* "[r]eports that black students were admitted with test scores that were a full standard deviation lower than the white students in the class. ...prove to be quite misleading when used to postulate the consequences of race as a factor in the admissions decisions." Linda F. Wightman, *Are Other Things Essentially Equal? An Empirical Investigation of the Consequences of Including Race as a Factor in Law School Admissions,* 28 Sw.U.L.Rev. 1, 42 (1998). So to, differences in average college grades occur even though "Among African-Americans, 417 of the 418 admitted students in these years [1995-98] had GPAs that were comparable to the GPAs of admitted Caucasian students....From the available data, it is possible that the applicant with the highest GPA in each of the four years was an African-American or Mexican American, whereas the lowest GPA in three of four years may belong to a Caucasian." David. M. White, *The Requirement of Race-Conscious Evaluations of LSAT Scores for Equitable Law School Admissions*, 12 La

1. The University of Michigan Law School Was Justified In Accepting Minority Applicants with Equal College Grades from the Same College That Have Perennially Experienced Unexplained, Significant Score Gaps Compared To White Applicants

The District Court has made note of seemingly large gaps in LSAT scores. "In the 1995 entering class, white students had a median LSAT score of 167,... while the corresponding figures were 155 ... for African American students, and 159 ... for Mexican American students. 137 F.Supp.2d at 833 "Averaging the figures over the six years, one sees that the point gap between the Caucasian LSAT score was 6.8 for Native Americans, 9.6 for African Americans, 7 for Mexican Americans, and 7.6 for Puerto Ricans. 137 F.Supp.2d at 864 n. 56.

Yet these gaps are almost identical to gaps found when applicants are matched according to undergraduate grades and undergraduate institution. "Even among applicants who attend the same undergraduate institution and have the same undergraduate GPA, the LSAT gap as compared to white applicants is 4.0 points for Native Americans, 6.8 points for Hispanics, and 9.2 points for African Americans. See Exhibit 223." 137 F.Supp.2d at 862. 11 Tr. 147- Expert report of David White, reprinted as D. White, The Requirement of Race-Conscious Evaluations of LSAT Scores for Equitable Law School Admissions, 12 La Raza L.J... 399, 406 (2001). Kidder, Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students, 89 Cal.L.Rev... 1055, 1068-76 (2001). This gap

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Raza L.J. 399 at 403.

remains even when students are further matched by undergraduate major. 11 Tr. 150-1 Exhibit 224. Kidder, Id. at 1076-9.[12]

This gap has remained for "[a]t least 25 years." 11 Tr. 133. Kidder, Id. at 1082-85 reviewing J. Gannon, College Grades and LSAT Scores: An Opportunity to Examine the "Real Differences" in Minority-Non-minority Performance, in Towards a Diversified Legal Profession 272 (David M. White ed., 1981). It "shows no signs of abating." White, Id. at 406. "The general notion that the LSAT discriminates against highly qualified minority students with excellent GPAs [is] well understood among admission officials who spend long hours poring over files. While the precise dimensions of the gap presented in the study were not common knowledge, the pervasiveness of the LSAT gap affecting minority students with high GPAs was not news to admissions officials." White, Id., at 417. "[O]ver the last 20 to 25 years admissions officers have recognised that there is this independent gap, and it's part of the folklore of admissions, so that people recognize that this gap is part of the evaluation process." 11 Tr. 159.

The members of the judiciary who are first learning about this persistent gap may find it "enormous" 137 F.Supp.2d at 837, 841, but to substitute this first impression for the experience and judgement of admission officials is completely inappropriate. To label minority students as less qualified on the basis of this widely known persistent gap is judicially originated stigmatisation. Instead, the Court should recognize "that the Law School Admission Council had no explanation for the gap." 11 Tr. 159.

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[12]College grades may themselves reflect discriminatory grading practices. 9 Tr. 67-8, 139, 141, 10 Tr. 77, 96-9,

The District Court entertains the notion that a "solution may be to relax, or even eliminate, reliance on the LSAT," 137 F.Supp.2d at 870. Yet the suggestion does not make prior admissions decisions constitutionally suspect. Nor should minority students who are the longstanding victims of the unexplained gap be required to wait the restructuring of the entire admissions system before being admitted to law schools in large numbers. "While the ABA does require law schools to 'require all applicants to take an acceptable test,' such as the LSAT, it does not require that law schools give the test results any particular weight." 137 F.Supp.2d at 871. Such a nuanced and perfectly justifiable use of the LSAT appears to have occurred at the University of Michigan Law School in this case. "[T]o argue otherwise is really to argue that you ought to take the predicted first-year GPA and just use it as an absolute cut, that is, everybody above some level gets in, everybody below it doesn't get in. But that's never been true. I mean, nobody ever was foolish enough to use that way." 8 Tr. 55. Limiting the law schools ability to use the LSAT in a varied and proper manner in the admissions process will only force an increased reliance on the test far beyond its design and advised use. The persistence of lawsuits claiming "reverse discrimination" on the basis of test scores has actually increased reliance on the tests. "[R] recently there has been this concerted attack on affirmative action which has the effect of if it succeeds of requiring people to make admissions decisions based purely on numbers." 8 Tr. 69.

2. Differential Test Scores and Grades Between Highly Qualified Minority and Majority Applicants Have Been Found To Reflect Minority Students' Unconscious Response to the Lingering Racial Stereotype That Members of Minority Groups Are Less Intellectually Gifted.

The University of Michigan Law Schools admissions program did not operate to prefer the less qualified in pursuit of its goal of race conscious inclusion. In selecting among many highly qualified applicants the admissions office was justified in it flexible approach in the use of the LSAT. Scientific studies, including those offered at trial argue that the average difference in LSAT scores between White and minority test takers may be based in part on stereotype threat experienced by minority test takers. This term describes the psychological reaction of minority test takers, who in addition to trying to perform well on the test instrument also find themselves trying to perform well enough to overcome the societal stereotype of Black intellectual inferiority. Despite real progress in racial attitudes in the country, nineteenth century theories of limited Black intelligence have had resurgence and are well known in our popular culture. (*See* Charles Murray and Richard J. Hernstein "Race Genes and IQ-An Apologia" New Republic, October 31, 1994)

Evidence in the record indicates that this stereotype has infected the very measures used to label applicants as equally qualified or less qualified. Both undergraduate grades and norm referenced multiple choice tests can reflect an artificially depressed performance by students who belong to a group that is subject to such a negative stereotype. Such reduced performance does not indicate a lower ability, but reflects psychological, and physiological, responses to the threatening situation that result in reduced performance measures. Even most fairly constructed tests cannot be interpreted without knowledge of the identity of the test taker.

Stanford psychology professor Claude Steele explained "based on long-standing research, including work done in my own laboratory over the past 10 years, showing that experiences tied to one's racial and ethnic identity can

artificially depress standardized test performance. Importantly, these effects go beyond any effects of socioeconomic disadvantage, affecting even the best prepared, most invested students from these groups who often come from middle-class backgrounds. " expert report of Claude M. Steele, 1 reprinted in 5 Mich.J.Race&L. 439 (1999). "My research, and that of my colleagues, has isolated ...a factor we call stereotype threat. This refers to the experience of being in a situation where one recognizes that a negative stereotype about one's group is applicable to oneself. When this happens, one knows that one could be judged or treated in terms of that stereotype, or that one could inadvertently do something that would confirm it. In situations where one cares very much about one's performance or related outcomes — as in the case of serious students taking the SAT — this threat of being negatively stereotyped can be upsetting and distracting. Our research confirms that when this threat occurs in the midst of taking a high stakes standardized test, it directly interferes with performance." 137 F.Supp.2d at 867 citing Steele Report, p. 7. Compare Steele, C.M., Aronson, J. Stereotype threat and the intellectual test performance of African Americans, 69 J. Personality & Social Psychology, 797(1995), 9 Tr. 45. "Stereotype threat follows its targets onto campus, affecting behaviors of theirs that are as varied as participating in class, 9 Tr. 25, 31 seeking help from faculty, 9 Tr. 26, 105, 139-141, 10 Tr. 83-4, 96-97, contact with students in other groups, 9 Tr. 138, 185, 10 Tr. 98, and so on. And as it becomes a chronic feature of one's school environment, 9 Tr. 37, 88, 140, 153, 156-6; 10 Tr. 75 it can cause what we have called "disidentification"; the realignment of one's self-concept and values so that one's self-regard no longer depends on how well one does in that environment. Disidentification relieves the pain of stereotype threat by breaking identification with the part of life where the pain occurs, which necessarily includes a loss of motivation to succeed in that part of life." Steele, p. 5. Steele, C.M. A

Threat in the Air; How Stereotypes Shape Intellectual Identity and Performance. 52 American Psychologist 613(1997). 9 Tr. 100, 145.

"[T]he detrimental effect of stereotype threat on test performance is greatest for those students who are the most invested in doing well on the test....Across our research, stereotype threat most impaired students who were the most identified with achievement, those who were also the most skilled, motivated, and confident--*the academic vanguard of the group* (emphasis added) more than the academic rearguard. "Steele, p. 5. Steele, C.M., Aronson, J., Stereotype threat and the test performance of academically successful African Americans. in C. Jencks & M. Phillips, The Black-White Test Score Gap 401-427(1998). "The characteristics that expose this vanguard to the pressure of stereotype threat is not weaker academic identity and skills, but stronger academic identity and skills. They have long seen themselves as good students, better than most other people. But led into the domain by their strengths, they pay an extra tax on their investment there, a "pioneer tax," if you will, of worry and vigilance that their futures will be compromised by the ways society perceives and treats their group." Steele, p. 6. Steele, C.M. Race And The Schoolings Of Black Americans. The Atlantic Monthly 68-77(April, 1992). "Recent research from our laboratory shows that this tax has a physiological cost. Black students performing a cognitive task under stereotype threat had elevated blood pressure. " Steele, p. 7. James Blascovich, Spencer, S., Quinn, D., Steele, C.M. African-Americans and high blood pressure: The role of stereotype threat, 12 Psychological Sciences 225(2001), 9 Tr. 18, 23, 25, 70

"Being a minority student from the middle-class is no escape from stereotype threat and its effect on standardized test performance or performance in higher education more

generally. ...It is investment in the domain of schooling--often aided by the best resources and wishes of middle-class parents--that can make one, at the point of reaching the difficult items on the SAT, experience the distracting alarm of stereotype threat. " Steele, p. 6. "A similar scenario could be described for many Hispanic groups in this society and for American Indians (especially those living on reservations). " Steele, p. 6 Gonzales, P.M., Blanton, H., Williams, K.J. The effects of stereotype threat and double-minority status on the test performance of Latino women, 28 Personality and Social Psychology Bulletin 659(2002).

The District Court dismissed Dr. Steele's report because "he does not indicate when the experiment was done, how many students participated, whether the results were tested for statistical significance, or whether the results were published and subjected to peer review. " 137 F.Supp.2d at 867, although Steele, (1997) and Steele & Aronson, (1995) were two peer reviewed articles included in the References consulted, as well as Jencks & Phillips (1998). In contrast, Clark D. Cunningham et al., Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs, 90 Geo.L.J. 835 (2002) summarized stereotype threat research and concluded "[S]stereotype threat theory is now widely accepted within the field of psychology. Id. at 839.

The University of Michigan Law School was perfectly justified in admitting minority applicants who may have been affected by stereotype threat, but whose records demonstrated ample evidence of high qualifications for admissions to the law school. There is no evidence in the record showing that their failure to apply this same differentiation to all applicants was in error.

3. The Affirmative Action Admission Policies At the University of Michigan Law School Do Not Impose Any Stigma On The Students Admitted Under Its Auspices

Members of this Court have expressed reservations about affirmative action on the supposition that the programs somehow intensify a stigma on persons of color. "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." Regents of University of California v. Bakke, 438 U.S. 265, at 298 (1978)(Powell, J). "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." City of Richmond v. J.A. Croson Co., 488 U.S. 469, at 493 (1989)(O'Connor, J.)."'[A] statute of this kind inevitable is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.'" Id. at 517 (Stevens, J.)(quoting Fullillove v. Klutznick, 448 U.S. 448 (1980). Compare 9 Tr. 43, 10 Tr. 95-6, 98.

The record proves that affirmative action programs need not result in a negative experience for the beneficiaries of that program. Part of a successful affirmative action program involves the message it sends. "[A]nother one of the resources of Harvard, the assumptions that they make, and just this whole philosophy that we don't make mistakes, if we bring you in here, you're good enough to graduate and you will excel, and that's a different institutional orientation than at some places where the notion is one of, well, to be truly prestigious academically we have to have a high body count, that is, our prestige is predicated upon the number of students we flunk out, and not the number that we graduate. " 9 Tr.

163-4. The effects of this approach have contributed to schools like Harvard almost eliminating disparities in the graduation rate between Black and White students. (See Journal of Blacks in Higher Education, "Closing the Gap" Fall, 2002)

Conclusion

This case should be decided as it was pled and proved. The Court should reaffirm the presumption of inclusion reflected in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution and the various policies and rules enacted to guide the development of affirmative action programs. Qualified members of groups previously enslaved or conquered by the United States continue to deserve the protections afforded by those Amendments and policies. Some statistical anomalies may occur when these highly qualified applicants are admitted, but they do not rise to the level of a constitutional infirmity.

Evidence in the record indicates that adoption of the equal odds ratio standard for non-discrimination will permanently exclude the vast majority of minority applicants to law schools and leave those few admitted students as perennial pioneers amid white majority privilege. Affirmative action to ensure inclusion of these previously excluded and presently under-represented groups is still necessary. Both statistics and everyday experience indicate that the day has not yet come when the social conditions that gave rise to affirmative action as national policy have been ameliorated. Even those individual members of these groups who have attained the highest economic, political, and legal standing cannot escape their identity or the negative stereotypes that continue to be imposed on their identity. In particular, the stigma that entire racial and ethnic groups are intellectually inferior has preceded current affirmative action

programs and has been proven to continue and even intensify when such programs are eliminated.

Respectfully submitted,

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