No. 02-241

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 a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE STATES OF ALABAMA, DELAWARE, NEBRASKA, OKLAHOMA, OREGON, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WEST VIRGINIA, AND THE COMMONWEALTH OF NORTHERN MARIANA ISLANDS AS *AMICI CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This brief for *amici curiae* will address the following two questions presented in the petition for a writ of certiorari:

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"?

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.4, the State of Alabama, nine other States, and the Commonwealth of Northern Mariana Islands respectfully submit this brief as *amici curiae* in support of the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

INTEREST OF *AMICI CURIAE*

Amici curiae State of Alabama, nine other States , and the Commonwealth of Northern Mariana Islands submit this Brief in support of Petitioner Barbara Grutter because the States have a manifest interest in administering the admissions process for their institutions of higher education in accordance with the Constitution. More particularly, they have an interest in knowing whether and to what degree they may consider the race of applicants in attempting to create a diverse student body. In 1983, Justice Powell announced the judgment of the Court holding the special admissions program of the University of California at Davis Medical School unlawful in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1983). That program violated Title VI of the Civil Rights Act of 1964 because it allocated 16 of 100 places to disadvantaged minority applicants, thereby excluding non-minority applicants from consideration for those places. Justice Powell also expressed the view that a properly structured program that included consideration of race in an effort to attain a diverse student body was constitutional.

Since *Bakke* was decided, State universities and other selective educational institutions have proceeded with programs that consider race in an attempt to create a

diverse student body. When called on to review those programs, the courts of appeals have reached different conclusions regarding the binding effect of Justice Powell's opinion regarding the consideration of diversity. The courts of appeals have also reached different results in considering the admissions plans presented to them, even though those plans have common characteristics. The States believe that this Court's review of the questions presented in Grutter's Petition will produce a clear standard that can be applied uniformly throughout the country. Accordingly, the *amici* States submit this Brief in support of Petitioner Grutter.

Just as the courts of appeals are split on these fundamentally important issues, however, the *amici* States anticipate that the States may have different views of the merits of Grutter's claims. Accordingly, they will reserve any discussion of the result to be reached for briefs on the merits. That reservation should not, however, detract from the suggestion that review is warranted.

SUMMARY OF ARGUMENT

The courts of appeals are split on a question of fundamental importance. In addition, the courts of appeals cannot resolve that question on their own. Only this Court can provide the necessary authoritative guidance that will produce uniformity of analysis and predictability of results in the lower courts.

This Court should grant Grutter's petition and review the decision of the Court of Appeals for the Sixth Circuit. In that review, this Court should consider: (1) whether Justice Powell's opinion in *Bakke* is binding authority on the courts of appeals; (2) whether attaining a racially diverse student body is a compelling state interest that

will support the consideration of race in the admissions process for educational institutions; and, (3) assuming either that Justice Powell's *Bakke* opinion is binding or that diversity is a compelling state interest, how an educational institution can structure its admissions process so that it is narrowly tailored to serve the interest of attempting to create a diverse student body through the consideration of race.

ARGUMENT

The Petition of Barbara Grutter asks this Court to determine whether diversity is a compelling State interest that will support the consideration of an applicant's race in the process of evaluating applications for admission to selective educational institutions, and, if so, how a program may be structured to vindicate that interest. The outcome is of obvious interest to Grutter, who was denied admission to the University of Michigan Law School and has not enrolled elsewhere, and to other applicants for admission to selective educational institutions. The States that are responsible for the institutions that administer these admissions programs have an equally significant interest in the answer to those questions: They have an interest in administering those programs in accordance with the Constitution. They are now unable to do that with any consistency, however, because the courts of appeals have reached different conclusions regarding both the status of diversity as a State interest and the precision of the tailoring needed to vindicate that interest.

The process of resolving these fundamentally important issues begins with this Court's decision in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). There, this Court concluded that the admissions process for the University of California-Davis'

Medical School unconstitutionally considered race as a factor. In his opinion announcing the judgment of the Court, Justice Powell expressed the view that, while the program in question was unconstitutional, the consideration of race in an attempt to promote diversity in the student body could constitute a compelling State interest that a properly structured State program might vindicate. One way of determining the degree to which Justice Powell's discussion of diversity constitutes the holding of *Bakke* is by applying the test in *Marks* v. *United States*, 430 U.S. 188, 193 (1997) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." (internal quotation and citation omitted)). The application of that straightforward test has not been uniform. That lack of unanimity has produced different rules in different circuits.

More particularly, in *Bakke*, Justice Powell announced a judgment of the Court that affirmed the decision of the California Supreme Court insofar as that court held the University of California at Davis' Medical School admissions program invalid and directed that Bakke be admitted to that school but reversed that court's judgment insofar as it prohibited the school from considering race and ethnic origin in the admissions process. Justice Powell voted to reverse the California Supreme Court, but suggested that race could be considered to the limited extent that it helped to attain an ethnically diverse student body. 438 U.S. at 314–15 (opinion of Powell, J.). In making that suggestion, Justice Powell pointed to a Harvard College program that passed muster in his judgment. *Id*. at 316–18. In reversing the California Supreme Court in part, Justice Powell was

joined by four Justices, who, in an opinion written by Justice Brennan, contended:

> Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least where appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area.

438 U.S. at 325 (Brennan, J., concurring in the judgment in part and dissenting in part).

In affirming the California Supreme Court in part, Justice Powell was joined by four different Justices, who, in an opinion written by Justice Stevens, avoided the constitutional question and concluded that the University's program violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, explaining, "Race cannot be the basis of excluding anyone from participation in a federally funded program." 438 U.S. at 418 (Stevens, J., concurring in the judgment in part and dissenting in part). Justice Stevens also prefigured the present controversy, explaining:

> Four Members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment. *See* opinion of Justices Brennan, White, Marshall and Blackmun, *ante*, at 324-25. It is hardly necessary to state that only a majority can speak for the Court or determine what is the "central meaning" of any judgment of the Court.

438 U.S. at 408 n.1.

The split decision in *Bakke* appears to call for the application of the test in *Marks* to determine its "central meaning," but the courts of appeals do not agree on the

outcome of that test. As the Eleventh Circuit observes, "[T]here is no unanimity regarding the status of Justice Powell's *Bakke* opinion as binding precedent on the validity of student body diversity as an interest sufficient to justify race-based school admissions decisions." *Johnson* v. *Board of Regents of University of Georgia*, 263 F.3d 1234, 1249 n.13 (11th Cir. 2001). For its part, a majority of the Sixth Circuit, sitting *en banc*, concluded that Justice Powell's opinion is binding, albeit with a dissent. *Compare* Pet. App. 15a–17a & n.6 ("Justice Powell's opinion constitutes *Bakke*'s holding and provides the governing standard here.") with Pet. App. 106a ("[T]he better view is that *Marks* simply fails to extract from *Bakke* a holding on the constitutionality of the diversity rationale. Indeed, the very fact that one must struggle to find a way to fit the Court's *Bakke* writings into the *Marks* mold counsels against finding such a holding in *Bakke*.") The Ninth Circuit's analysis is consistent with the Sixth Circuit majority's, *see Smith* v. *University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001), while the Fifth Circuit concurs with the dissent. *See Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (2001); *cf. Hopwood* v. *Texas*, 84 F.3d 720 (5th Cir. 1996) (Politz, C.J., and six other Fifth Circuit judges dissenting from the denial of rehearing *en banc*). The Eleventh Circuit likewise states, "Simply put, Justice Powell's opinion does not establish student body diversity as a compelling interest for purposes of this case," before proceeding to review a University of Georgia program on the assumption that diversity can be a compelling interest. *See Johnson*, 263 F.3d at 1249.

Separate and apart from the battle over *Bakke*'s "central meaning," this Court's *Bakke* decision clouds the lower courts' analysis. In this case, the district court "conclude[d] that under the Supreme Court's post-*Bakke*

decisions, the achievement of such [racial] diversity is not a compelling state interest because it is not a remedy for past discrimination." Pet. App. at 243a; *see also id.* at 241a–243a (discussing, *inter alia*, *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1993), and *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995)). The Sixth Circuit rejected the contention that *Bakke*, insofar as it endorses diversity as a compelling state interest, has been implicitly overruled. Pet. App. at 21a (citing *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997)); *see also Wessmann* v. *Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (The Court might decide *Bakke* differently today, but "[i]t has not done so yet [and] we are not prepared to make such a declaration in the absence of a clear signal that we should."). Given this Court's guidance in *Agostini* counseling against the combination of separate concurring and dissenting opinions to derive the law, the courts of appeals can either apply *Marks*, which they have done inconsistently, or assume, without deciding, that "*Bakke* remains good law and that some iterations of diversity might be sufficiently compelling, in specific circumstances, to justify race-conscious actions." *See Wessmann*, 160 F.3d at 796. Only this Court can clear the legal decks.

These differing views on the meaning of *Bakke* are not of theoretical interest alone. Rather, the lower courts' understanding of *Bakke* generally correlates with whether they find the program before them to be constitutional. The Sixth Circuit upheld the constitutionality of the program before it, while the Fifth and Eleventh Circuits did not.[1] Moreover, other courts of appeals have reviewed

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[1] The Ninth Circuit observed that the University of Washington Law School had "encountered a peripeteia in its own state" in the form of state law. *Smith*, 233 F.3d at 1201. Accordingly, it did not decide whether the Law School's program was narrowly tailored.

race-based admissions programs and found them unconstitutional without undertaking to parse *Bakke*. For this reason, this Court should not grant review solely to determine whether Justice Powell's *Bakke* opinion is controlling. It should also consider two related questions: First, assuming that Justice Powell's opinion in *Bakke* is not controlling, whether diversity is a compelling state interest that will support the consideration of race; and, second, assuming that diversity is a compelling state interest, whether the University of Michigan Law School's program is narrowly tailored to serve that interest. The first is a predicate question that needs to be resolved, and the courts of appeals reach different conclusions regarding the constitutionality of similar programs.

In this case, the Sixth Circuit concluded that the University of Michigan Law School's program is constitutional. That program, which is "[d]rafted to comply with *Bakke*," Pet. App. at 25a, uses race as one of a number of "plus" factors in an effort to achieve a "critical mass" of under-represented minority students. Pet. App. at 8a. In contrast, the Eleventh Circuit struck down the University of Georgia's freshman admissions policy, holding that the policy was not narrowly tailored to achieve an interest in student body diversity which the court presumed to be valid. In pertinent part, the policy allocated a 0.5 point plus factor on an 8.15 point scale to non-white applicants. The court held that the policy was unconstitutional explaining:

> By mechanically and inexorably awarding an arbitrary "diversity" bonus to each and every non-white applicant at the TSI stage, and severely limiting the range of other factors that may be considered at that stage, the policy contemplates that non-white applicants will be admitted or advance further in the process at the expense of white applicants with greater potential to

> contribute to a diverse student body. This lack of flexibility is fatal to UGA's policy.

263 F.3d at 1254. In the Eleventh Circuit's view, it was not inflexibility alone, but arbitrary inflexibility that produced "real consequences" that was the problem. *Id.* at 1255.

Other courts of appeals have reached results like the Eleventh Circuit's. Those courts have presumed that diversity was a compelling state interest and concluded that admissions policies that considered the race of applicants were not narrowly tailored. *See Eisenberg* v. *Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); *Tuttle* v. *Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999); *Wessmann* v. *Gittens*. These decisions, each of which involves an educational institution with a selective admissions process, indicate that the rift between the Sixth and Ninth Circuits, on the one hand, and the Fifth and Eleventh, on the other, is a deep one.

The States and their selective educational institutions need guidance that only this Court can give. Many state educational institutions look to Justice Powell's endorsement of diversity for guidance and use that endorsement as the basis for considering race in the admissions process. The courts should not find those educational institutions to be on solid ground in some States and in quicksand in others. This Court should grant review and put all of the States on the same footing.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari and review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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