Nos. 02-241 & 02-516

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.

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

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

BRIEF OF THE HAYDEN FAMILY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Rev. Dr. J. Carleton Hayden, Ph.D. is an ordained Anglican Episcopal priest, and professor of Afro-American History and Anglican Episcopal Church History at Howard University. The *raison d' être* of Father Hayden's ministry is Christian compassion and fundamental fairness within the American society and the world. Thus, Father Hayden supports the respondents University of Michigan admission programs for undergraduate and law school.

SUMMARY OF ARGUMENT

The cases of *Grutter v. Bollinger*, No. 02-241 and *Gratz v. Bollinger*, No. 02-516 demonstrate the appropriate and legal consequences when a State university protects the Fourteenth Amendment rights of individual applicants whilst realizing its inferred First Amendment right of a diverse student body. As these cases demonstrate, the University of Michigan program complies with the precedent of *University of California Regents v. Bakke*, 438 U.S. 265 (1978), where a State may consider the race of any applicant under a properly devised admission program involving the competitive consideration of race and ethnic origin. All citizens of every race and ethnic background are scored and considered for all available seats for admission into the University of Michigan. The University of Michigan

[1] The parties have consented to the filing of this brief. In conformity with Supreme Court Rule 37.6, *amicus* states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation of the brief.

considers the qualifications, quantitative and extracurricular, and every candidate's potential for contribution to educational diversity. The implied First Amendment right of academic freedom of a university includes the right, among other things, to admit. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). The University of Michigan's admission program was narrowly tailored to serve its compelling interest in achieving a heterogenous student population; therefore, the university's consideration of race and ethnicity in its admissions decisions did not violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. U.S.C.A. Const. Amend. 14; Civil Rights Act of 1964, § 601, *et seq.*, as amended, 42 U.S.C.A. § 2000d, *et seq.*, and 42 U.S.C. § 1981.

ARGUMENT

THE UNIVERSITY OF MICHIGAN'S UNDERGRADUATE AND LAW SCHOOL ADMISSIONS PROGRAM COMPLIES WITH *BAKKE*, THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (42 U.S.C. § 2000d), AND 42 U.S.C. § 1981.

I. THE UNIVERSITY OF MICHIGAN ADMISSIONS PROGRAM FOLLOWS THE PRECEDENT OF *UNIVERSITY OF CALIFORNIA REGENTS V. BAKKE*, 438 U.S. 265 (1978).

The University of Michigan's undergraduate admission plan rates applicants on a 150-point scale, with as many as 110 points earned for academic standards, and a total maximum of 40 points for other factors. The academic considerations are grade point average, school,

curriculum and ACT/SAT score, which constitute one group of factors. The non-academic factors are geography, alumni relationship, essay, personal achievement, leadership and service, socioeconomic disadvantage, underrepresented racial/ethnic minority, men in nursing, scholarship athlete, and provost's discretion.

The following chart articulates the University of Michigan scoring program on undergraduate admissions. The chart bifurcates the two categories, academic and non-academic, and assigns the scoring points which the University of Michigan employs:

(CHART 1:)
SCORING ADMISSIONS

The University of Michigan's admissions plan rates undergraduate applicants on a 150-point scale, with as many as 110 points earned through academic factors

Academic factors	**Points**
GPA	40 to 80
School	0 to 10
Curriculum	-4 to 8
ACT/SAT score	0 to 12
Sub group 1	**(Total maximum 110 points)**

Other factors	**Points**
Geography	2 to 16
Alumni	1 to 4
Essay	1 to 3
Personal achievement	1 to 5
Miscellaneous (one of the following):	
Socioeconomic disadvantage	20
Underrepresented racial/ ethnic minority	20
Men in nursing	5
Scholarship athlete	20
Provost's discretion	20
Sub group 2	**(Total maximum 40 points)**

Subgroup 1 score + Subgroup 2 score = Selection Index

(Total maximum = 150)

The second chart is a more analytical breakdown of the University of Michigan scoring program on undergraduate admissions. It provides greater insight into how the program complies with Justice Powell's majority opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

(CHART 2:)
SCORING ADMISSIONS

GPA Score	Points
2.0	**40**
2.1	**42**
2.2	**44**
2.3	**46**
2.4	**48**
2.5	**50**
2.6	**52**
2.7	**54**
2.8	**56**
2.9	**58**
3.0	**60**
3.1	**62**
3.2	**64**
3.3	**66**
3.4	**68**
3.5	**70**
3.6	**72**
3.7	**74**
3.8	**76**
3.9	**78**
4.0	**80**

HIGH-SCHOOL QUALITY

Score	Points
0	**0**
1	**2**
2	**4**
3	**6**
4	**8**
5	**10**

DIFFICULTY OF CURRICULUM

Score	Points
-2	**-4**
-1	**-2**
0	**0**
1	**2**
2	**4**
3	**6**
4	**8**

TEST SCORES

ACT	SAT1	Points
1-19	400-920	**0**
20-21	930-1000	**6**
22-26	1010-1190	**10**
27-30	1200-1350	**11**
31-36	1360-1600	**12**

Points (maximum of 40)
GEOGRAPHY
10 Michigan Resident
6 Underrepresented Michigan county
2 Underrepresented state
ALUMNI
4 Legacy (parents, step-parents)
1 Other (grandparents, siblings)
ESSAY
1 Very good
2 Excellent
3 Outstanding
PERSONAL ACHIEVEMENT
1 State
3 Regional
5 National
LEADERSHIP AND SERVICE
1 State
2 Regional
5 National

MISCELLANEOUS (choose one)
20 Socioeconomic disadvantage
20 Underrepresented racial/ethnic minority identification for education
5 Men in nursing
20 Scholarship athlete
20 Provost's discretion

At the University of Michigan Law School there is no quota system. High grades and standardized test scores increase an applicant's chances for admission into the University of Michigan Law School. *Grutter v. Bollinger, et al.*, 288 F.3d 732, 736 (6th Cir. 2002). The University of Michigan considers, along with the rigor of an applicant's courses, recommendations and essays for admission into their law school.

For the University of Michigan Law School, "it is true that black applicants were admitted at much higher rates than white applicants with similar grades and test scores. But, that fact does not prove that affirmative action imposes a substantial disadvantage on white applicants." *Grutter*, 288 F.3d at 767. The objective statistics "show that rejected white applicants have every reason not to blame their misfortune on affirmative action. In selective admissions, the competition is so intense that even without affirmative action, the overwhelming majority of rejected white applicants still wouldn't get in." *Grutter*, 288 F.3d at 768.

Therefore, the admission formula for the law school is absolutely **not** a quota.

> The Law School drafted its admissions policy to comply with the Supreme Court's opinion in *Bakke*. Adopted by the full faculty in 1992, the policy states that the Law School's "goal is to admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year." *Grutter*, 288 F.3d at 735-736.

Race and ethnicity can be a reasonable factor in the University of Michigan's legitimate efforts to secure a diverse student body; moreover, in the case at bar it is indeed not the only factor.

> It further provides that the Law School "seek[s] a mix of students with varying backgrounds and experiences who will respect and learn from each other." As part of the Law School's policy of evaluating each applicant individually, its officials read each application and factor all of the

> accompanying information into their decision. *Grutter*, 288 F.3d at 736.

The University of Michigan Law School protects the individual Fourteenth Amendment rights of applicants, whilst achieving its inferred First Amendment right of a diverse student body.

The University of Michigan complies with the precedent of *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Pursuant to the doctrine of *stare decisis*, this Honorable Court must take judicial notice of the well-reasoned precedent of *Bakke*. Mr. Justice Powell concluded in *Bakke* that a State may consider the race of any applicant under a properly devised admission program involving the competitive consideration of race and ethnic origin. *Bakke*, 438 U.S. at 320. Mr. Justice Powell writes the following:

> . . . the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed. *Bakke*, 438 U.S. at 320.

The University of Michigan admissions program legitimately serves the State by the proper consideration of race and ethnic origin within the State's substantial interest. Conversely, the University of California admissions program in the 1970s was a quota system; therefore, Mr. Justice Powell wrote the following as to the University of California program:

> In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class. *Bakke*, 438 U.S. at 319-320.

The University of Michigan admissions program is the ideal system which Mr. Justice Powell envisioned and whose intellectual legacy created. All citizens of every race and ethnic background are scored and considered for all available seats for admission into the University of Michigan. The University of Michigan's admissions program considers qualifications, quantitative and extracurricular, and every candidate's potential for contribution to educational diversity. Mr. Justice Powell provides clear guidance in this area, and articulates the following analysis:

> . . . race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely

> to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. *Bakke*, 438 U.S. at 317.

The University of Michigan admissions program is within the approval of Mr. Justice Powell's legal analysis of appropriate consideration of race, while protecting individual freedoms from State infringement.[2] Thus, to overturn the University of Michigan admissions program is to set aside a quarter century of law established in *Bakke*, 438 U.S. at 265. Moreover, such a drastic overturn of settled precedent would undermine the intellectual legacy of not only a brilliant jurist, Mr. Justice Powell, but a kind and decent lawyer of high integrity. For this reason, petitioner's arguments, *sub judice*, are extreme.

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[2] "Although a university must have wide discretion in making sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded." *Bakke*, 438 U.S. at 314.

II. THE UNIVERSITY OF MICHIGAN ADMISSIONS PROGRAM IS "NARROWLY TAILORED" TO MEET A "COMPELLING GOVERNMENT INTEREST" AS DEFINED IN *UNIVERSITY OF CALIFORNIA REGENTS V. BAKKE*, 438 U.S. 265 (1978).

Supreme Court decisions have suggested consideration of race-neutral means as necessary to satisfy the narrowly tailored component of strict scrutiny. *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 507 (1989). "In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies." *United States v. Paradise*, 480 U.S. 149, 170 (1987). However, there is a difference between government contracts in *Croson* and university admissions in *Bakke* in regard to consideration of race and ethnicity. Education is unique and different from employment, minority business contracts and re-districting.

> This unique context, first identified by Justice Powell, differs from the employment context, differs from the minority business set aside context, and differs from the re-districting context; it comprises only the public education context and implicates the uneasy marriage of the First and Fourteenth Amendments. *Grutter v. Bollinger*, 288 F.3d 732, 749-750 (2002).

The University of Michigan admissions program is "narrowly tailored" to meet a "compelling government interest" as discussed in *Bakke*, 438 U.S. at 314-315. Mr. Justice Powell asserts that diversity which furthers a compelling State interest encompasses many factors and considerations of which race is a single consideration.

> The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. *Bakke*, 438 U.S. at 315.

As aforementioned, Mr. Justice Powell found the University of California program in the 1970s to be a quota[3] and violative of individual protections. Here, *sub judice*, a quarter century later, the University of Michigan protects individual rights whilst furthering a compelling State interest to achieve a heterogenous student population by consideration of a broad array of qualifications and characteristics of which race or ethnic origin is but a single though important element. Mr. Justice Powell articulates the importance of ethnic diversity while protecting individual constitutional rights as follows:

> Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. *Bakke*, 438 U.S. at 314.

Here, *sub judice*, where the University of Michigan attains the goal of a heterogenous student body while protecting individual constitutional rights, the university advances the ideal of academic freedom. The ideal of

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[3] "Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Bakke*, 438 U.S. at 315.

academic freedom is implied within the First Amendment.[4] A university has the freedom to make its own judgments on education of its students, and includes selection of its students. Indeed, it is the business of the university to create an appropriate environment conducive to learning.

In *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (concurring in result), Mr. Justice Frankfurter articulated four essential freedoms that constitute academic freedom. Those four essential freedoms are, *inter-alia*: (1) who may teach; (2) what may be taught; (3) how it shall be taught; and (4) who may be admitted to study.[5] It is the freedom of who may be admitted that is the question, *sub judice*; and, so long as an applicant's individual constitutional rights are protected, in turn a State university has a First Amendment right to achieve student diversity. *Bakke*, 438 U.S. at 312.

In the case at bar, where the University of Michigan has protected individual constitutional rights, it must in

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[4] "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 438 U.S. at 312.

[5] "Mr. Justice Frankfurter summarized the 'four essential freedoms' that constitute academic freedom:

> 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (concurring in result)."

See *Bakke*, 438 U.S. at 312.

turn be accorded the First Amendment right to select those students who will contribute to a diverse student body. *Bakke*, 438 U.S. at 313.

III. THE JUXTAPOSITION OF JUSTICE POWELL'S OPINION IN *BAKKE* TO JUSTICE O'CONNOR'S DISSENT IN *METRO BROADCASTING, INC. V. FCC*, 497 U.S. 547, 623 (1990).

In *Metro Broadcasting, Inc. v. Federal Communications Commission, et al.*, 497 U.S. 547 (1990), the Court was concerned with minority ownership programs of the Federal Communications Commission (FCC), not only as remedies for victims of discrimination, but also to promote programming diversity as mandated by Congress.

Justice O'Connor's dissent in *Metro* does not conflict with the analysis of Justice Powell's majority opinion in *Bakke*. In *Metro*, Justice O'Connor's dissent was reasoned on the FCC's ability to develop programming that reflects underrepresented minority interests via race-neutral means. Justice O'Connor's dissent in *Metro* concludes that the FCC programs of minority interests consideration "cannot survive even intermediate scrutiny because race-neutral and untried means of directly accomplishing the governmental interest are readily available." *Metro*, 497 U.S. at 622. On the other hand, Justice Powell's majority opinion in *Bakke* reasoned that a State university admission program which protected individual rights whilst furthering a compelling State interest to achieve a heterogenous student population by an array of qualifications and characteristics is constitutional. *Bakke*, 438 U.S. at 315. Thus, FCC regulation of the finite electromagnetic spectrum is distinguished factually from a university's legitimate efforts to realize a diverse student body.

The juxtaposition of Justice O'Connor's dissent in *Metro* to Justice Powell's majority opinion in *Bakke* is quite easily reconciled. Indeed, Justice O'Connor's dissent in *Metro* does not disturb Justice Powell's majority opinion in *Bakke*. There is a profound difference between government contracts and/or licenses, *vis a vis* admissions into universities. It is one thing for the government to provide consideration of race for FCC license and diversity, and quite another for mere consideration for admission into a university. There is a difference in government contracts in *Croson* and university admissions in *Bakke* relative to consideration of race.

Justice Powell reasoned that student diversity which furthers a compelling State interest encompasses many factors and considerations of which race is a single consideration. *Bakke*, 438 U.S. at 315. State universities, as aforementioned, have an implied First Amendment right as to whom they admit regarding achievement of a diverse student body. *Sweezy*, 354 U.S. at 263. It is an intellectual freedom of academic choice as to who is admitted into the university which is the question, *sub judice*. Thus, so long as an applicant's individual constitutional rights are protected, in turn the University of Michigan has an implied First Amendment right to achieve student diversity in the legitimate interests of educational advancement. *Bakke*, 438 U.S. at 312, and *Sweezy*, 354 U.S. at 263.

CONCLUSION

For the foregoing reasons this Honorable Court must rule in favor of respondents, University of Michigan, on all issues, and affirm the decisions below.

Respectfully submitted,

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