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,

Respondents.

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

BRIEF OF KING COUNTY BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The King County Bar Association ("KCBA") is a non-profit, non-partisan voluntary bar association in King County, Washington. It has a membership of more than 5,000 lawyers in King County, Washington, which encompasses the Seattle metropolitan area. The KCBA respectfully submits this brief as *Amicus Curiae* to provide the Court with information about the impact of Washington anti-affirmative action Initiative 200 on efforts to achieve ethnic diversity in the legal profession. The experience of the University of Washington and other law schools where affirmative action has been abandoned shows that ethnic diversity cannot be achieved without race-sensitive admissions processes. The compelling interest in achieving ethnic diversity recognized in this Court's precedents continues to exist. The KCBA urges the court to follow precedent and uphold affirmative action as a necessary and appropriate role of government.[1]

The KCBA was organized in 1886 for the purposes of condemning and censuring attorneys who participated in anti-Chinese riots.[2] Since then, the KCBA has continued to work at improving the administration of justice and reforming substantive law in the public interest. A critical fundraising mission of the King County Bar Foundation

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[1] Consent to file *Amicus* briefs from all Parties is on file with the Court. No counsel for a party authored this brief in whole or in part. No one other than the *Amicus Curiae*, and its members (including counsel who prepared this brief on a pro bono basis) made a monetary contribution to the preparation or submission of the brief Rule 37(6).

[2] *See* Marc Lampson, *From Profanity Hill: King County Bar Association's Story* ("Lampson") 23 (1993).

("KCBF")[3] is to finance scholarships and other programs with the goal of making courtrooms and law offices reflect the ethnic diversity of the community they serve.[4] The KCBF is the single largest individual contributor to minority law student scholarships in Washington State.[5] In addition, the KCBF sponsors recruitment events, including one designed to encourage students at minority high schools in the Seattle area to attend law school.[6]

In 1998, voters in Washington State passed Initiative 200. The initiative provides that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[7] Thereafter, Washington's only state-run law school, the University of Washington, was forced to abandon admissions policies previously relied on to achieve an ethnically diverse law student population. In post-Initiative 200 Washington, privately funded scholarships and creative recruitment efforts have become the only means to attract the best and brightest minority students to the University of Washington School of Law.

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[3] The KCBF is the fundraising arm of the KCBA.

[4] *See* http://www.kcba.org/foundation/scholarship.htm.

[5] *See* http://www.kcba.org/foundation/scholarship.htm.

[6] This event, called the "Future of the Law Institute," introduces high school students to the law, inspires interest in pursuing law-related education and careers, and provides information and resources regarding how to get from high school to law school.

[7] RCW 49.60.400(1) (formerly Washington Initiative 200).

Efforts to increase the numbers of minority lawyers in Washington have been severely impaired by Initiative 200.[8] Despite vigorous efforts from the KCBA, other organizations of lawyers, private law firms, and the faculty and administration of the University of Washington School of Law, Initiative 200 has been a devastating setback in the struggle to achieve ethnic diversity.[9] The KCBA respectfully asks the Court to consider the impact its decision will likely have on state law schools.

The KCBA urges the Court not to adopt measures that would constrain efforts to create a legal community that reflects the ethnic diversity of its clients. This Court should recognize a compelling governmental interest in promoting diversity within the legal profession and allow state law schools to consider race as a factor during admissions in order to achieve that interest.

ARGUMENT

To survive review under the Equal Protection Clause, a law school's consideration of race and ethnic origin in its admissions process must (1) serve a compelling state interest and (2) be narrowly tailored to achieve that interest.[10] While this heightened standard of review must be applied to the law school's admissions process, this Court has explicitly "dispel[led] the notion that strict

[8] *See infra*, Part II.

[9] *See infra* Note 46 and accompanying text.

[10] *See Adarand Constructors v. Pena*, 515 U.S. 200, 227, 114 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

scrutiny is 'strict in theory, but fatal in fact'" and recognized that the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[11]

I. Promoting Diversity in the Legal Profession Is a Compelling Governmental Interest.

As Justice O'Connor recognized in *Wygant v. Jackson Board of Education*,[12] the Supreme Court has already declared "a state interest in the promotion of racial diversity . . . sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."[13] In *Regents of University of California v. Bakke*,[14] a majority of the Court held that "race may be taken into account as a factor in an admissions program" but ultimately struck down the University of California's use of a "quota" or "set aside" system because it was "not a necessary means toward that end."[15]

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[11] *Id.* at 237.

[12] 476 U.S. 265, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986).

[13] *Id.* at 286 (O'Connor, J., concurring) (citing *Regents of University of California v. Bakke*, 438 U.S. 265, 311-315, 98 S. Ct. 2733, 57 L. Ed. 2d. 750 (1978)).

[14] 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d. 750 (1978).

[15] *Id.* at 297 n. 36, 316-317.

A. The *Bakke* Holding.

The precise contours of the *Bakke* holding have been a subject of intense debate. The Sixth Circuit properly concluded that Justice Powell's decision in *Bakke* is controlling in this case.[16] Four members of the *Bakke* Court, Justices Brennan, White, Marshall, and Blackmun, applied intermediate scrutiny and upheld the University's consideration of race in its efforts to remedy the effects of societal discrimination.[17] Another four Justices (Stevens, Burger, Stewart, and Rehnquist) avoided the constitutional question and concluded that the University's practices violated Title VI of the Civil Rights Act of 1964.[18] Justice Powell cast the deciding vote, breaking the 4-4 split.

Justice Powell's opinion, announcing the judgment of the Court, concluded that "the interest of diversity is compelling in the context of a university's admissions program" because "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[19] In support of this position, Justice Powell reasoned:

> Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background – whether it be ethnic, geographic,

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[16] *See Grutter v. Bollinger*, 288 F.3d 732, 741 (6th Cir. 2002).

[17] *Bakke*, 438 U.S. at 311-12.

[18] *Id*. at 418 (Stevens, J., concurring in part, dissenting in part).

[19] *Id.* at 438 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S. Ct. 675, 683, 17 L. Ed. 2d 629 (1967).

> culturally advantaged or disadvantaged – may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.[20]

This observation is equally, if not more, relevant in the context of legal education. Quoting *Sweatt v. Painter*,[21] Justice Powell noted that, "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts."[22] In a portion of the opinion joined by four other Justices, Justice Powell ultimately concluded that "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."[23]

Justice Powell's rationale that the interest of diversity is compelling in the higher education context constitutes the holding of the *Bakke* Court.[24] In *Marks v. United States,* this Court held that in a fragmented decision like *Bakke*, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[25] In *Bakke*, Justice

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[20] *Id.* at 314.

[21] 339 U.S. 629, 634, 70 S. Ct. 848, 94 L.Ed. 1114 (1950).

[22] *Bakke*, at 314 (quoting *Sweatt*, 339 U.S. at 634).

[23] *Id.* at 320.

[24] *Marks v. U.S.,* 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

[25] *Id.* at 193.

Powell's opinion clearly provides the narrowest grounds on which the five Justices concurring in the judgment agreed. Justice Powell's rationale is narrower than the rationale set forth in Justice Brennan's opinion because Justice Powell applied strict scrutiny, requiring that the consideration of race be necessary to achieve a compelling governmental interest whereas Justice Brennan applied intermediate scrutiny, requiring only that the racial classifications "serve important governmental objectives and . . . be substantially related to achievement of those objectives."[26] Because race could be considered under a wider range of cases under intermediate scrutiny than under strict scrutiny, the Sixth Circuit correctly concluded it was "bound by Justice Powell's *Bakke* opinion."[27]

B. The Supreme Court Should Adhere to Justice Powell's Opinion in *Bakke*.

As Justice O'Connor has noted, "The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit."[28] Because "respect for precedent is, by definition, indispensable," the Supreme Court will decide to overrule a prior case only when the

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[26] *Id.* at 359 (Brennan, White, Marshall, Blackmun, JJ., concurring in part, dissenting in part). *See also Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) (recognizing that Justice Powell's rationale "may be viewed as more stringent than that suggested by Justices Brennan, White, Marshall, and Blackmun").

[27] *Grutter*, 288 F.3d at 742; *see also, Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

[28] *Planned Parenthood v. Casey*, 505 U.S. 833, 854, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

prior ruling has become practically unworkable or when the "facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification."[29]

Circumstances which would justify overruling the Court's decision in *Bakke* are not present. The underrepresentation of minorities in the legal profession continues to be a significant problem. A recent study conducted by the ABA Commission on Racial and Ethnic Diversity in the Legal Profession found that minority representation among law partners remains less than 3% in most cities, that minority representation among general counsel in the Fortune 500 is 2.8%, and that in 1999, the total number of minority law graduates in the United States dropped for the first time since 1985.[30] *Bakke's* recognition of diversity as a substantial governmental interest in the higher education context has not been shown to be either unworkable or insignificant. Thus, as was the case when *Bakke* was decided, diversity remains a compelling governmental interest in the higher education context, particularly as it relates to the legal profession.

This Court recently recognized the continuing vitality of Justice Powell's opinion in *Bakke*. In *Wygant*, citing Justice Powell's opinion in *Bakke*, Justice O'Connor noted that "racial diversity" was a compelling state interest in the higher education context.[31] And, in *Metro Broadcasting, Inc.*

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[29] *Id.* (citations omitted).

[30] *Miles to Go 2000: Progress of Minorities in the Legal Profession*, ABA Commission on Racial and Ethnic Diversity in the Profession (2002).

[31] *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring).

v. FCC,[32] this Court quoted Justice Powell's opinion in *Bakke* for the proposition that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated."[33] As noted by the Ninth Circuit in *Smith v. University of Washington Law School*,[34] since its decision in *Bakke*, the Supreme Court "has not returned to the area of university admissions, and has not indicated that Justice Powell's approach has lost its vitality in that unique niche of our society."[35]

C. Applying *Bakke*, This Court Should Recognize a Compelling Governmental Interest in Promoting Diversity in the Legal Profession.

The *Bakke* decision's declaration that diversity is a compelling governmental interest in the higher education context encompasses not only an interest in promoting diversity within the student body, but also an interest in promoting diversity within the profession which students enter into upon graduation. *Bakke's* finding of a compelling governmental interest was premised in large part on the recognition that the physicians graduating from the school would "serve a heterogeneous population" and that the consideration of race in the admissions context would "better equip [the University's] graduates to render with

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[32] 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990).

[33] *Id.* at 568.

[34] 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

[35] *Smith*, 233 F.3d at 1200.

understanding their vital service to humanity."[36] Thus, *Bakke* recognizes a compelling interest that extends beyond enhancement of the educational experience to an enhancement of the vital services to be provided by graduates of professional programs.

Lawyers, like physicians, serve a heterogeneous population and provide a vital service to society. Diversity within the legal profession undoubtedly enriches the profession's ability to provide vital legal services to Americans of all races and ethnicities. Thus, the consideration of race in the law school admissions context not only serves the compelling governmental interest in achieving diversity within the student body, but also the compelling governmental interest in achieving diversity within the legal profession.

The KCBA, like other bar associations around the country, has recognized the fundamental importance of achieving diversity within the legal profession. The KCBF created the Diversity Coalition in January 2002.[37] This Coalition is comprised of representatives from the King County Superior Court, the Washington State Court of Appeals, the University of Washington and Seattle University law schools, the Loren Miller Bar, the Asian Bar Association of Washington, the Northwest Indian Bar, the Washington State Hispanic Bar, the Korean American Bar Association of Washington, and the Southeast Asian Bar Association.[38] The Coalition's mission is to increase ethnic

[36] *Bakke*, 438 U.S. at 314.

[37] http://www.kcba.org/foundation/whatsnew2.htm.

[38] *Id.*

diversity in the legal profession so that our courtrooms and law offices better reflect the communities they serve.[39]

Washington State Courts have also recognized the need for increased diversity in the legal profession. The Washington State Supreme Court has created the Washington State Minority and Justice Commission to evaluate and eliminate racial and ethnic bias within the court system.[40] The Commission has explicitly recognized that racial and ethnic bias within the system can be diminished by promoting diversity within the judiciary.[41] The importance of achieving diversity in the legal profession cannot be overstated. Therefore, as an alternative to recognizing a compelling governmental interest in achieving a diverse student body, we strongly urge this Court to find a compelling governmental interest in promoting diversity within the legal profession.

II. The Compelling Governmental Interest in Diversity Cannot Be Achieved Without Race-Sensitive Admissions Processes.

The United States, in its brief as *Amicus Curiae* supporting the petitioner, recognizes that "[m]easures that ensure diversity, accessibility and opportunity are important components of a government's responsibility to its citizens" but argues that race-neutral admission policies adequately achieve the goal of achieving racial diversity in

[39] *Id.*

[40] http://www.courts.wa.gov/mjc/

[41] *Id.*

the higher education context.[42] While the KCBA certainly wishes that were the case, data about the demographics of public law schools in states that have abandoned race-sensitive admissions lead to the opposite conclusion.

The KCBA and the University of Washington School of Law have experienced firsthand the impact that race-neutral admissions policies have on the racial diversity of both the law school student body and the local bar. In 1998, Washington voters passed Initiative 200. The initiative provides that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[43] As a result of Initiative 200, the University of Washington School of Law ceased using race as a "plus factor" in admissions decisions.[44]

In the aftermath of Initiative 200, the citizens of Washington have learned firsthand that ethnic diversity cannot be achieved without race-sensitive admissions policies. Despite Herculean efforts by the KCBA, other private groups, and the University of Washington itself to recruit minority law students, minority enrollment dropped precipitously after passage of the initiative. On average, during the six years preceding passage of the

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[42] Brief of the United States, *Amicus Curiae* at 10, filed January 2003, *Grutter v. Bollinger* (No. 02-241) (U.S.).

[43] RCW 49.60.400(1) (formerly Washington Initiative 200).

[44] Richard McCormick, *Maintaining Diversity at the University of Washington after Initiative 200*. (http://www.washington.edu/ president/ 05_ 99-Maintaining_Diversity_at_the_UW_After_ Initiative_ 200.htm) (1999).

initiative, Native Americans, Hispanic Americans, and African-Americans made up 15.3% of the entering law school class.[45] On average, during the four years since passage of the initiative, members of these ethnic groups have made up only 7.7% of the entering class.[46] Law schools in California and Texas, the two other states where public law schools no longer use race as a "plus-factor" in admissions have had similarly devastating losses in minority enrollment.[47]

The empirical experience of states such as Washington that have ceased using race as a law school admissions "plus-factor," but dramatically stepped up recruiting and scholarship efforts, is sobering. If this Court were to abandon *stare decisis* and make the anti-affirmative action policies of Texas, California, and Washington the law of the land, there is little doubt that our nation's law schools would return to a state of de facto segregation.

[45] University of Washington School of Law Office of Admissions; *ABA Guide to Approved Law Schools* (eds. 1995-2002).

[46] *Id.*

[47] Jason Marks, *Legally Blind? Reevaluating Law School Admissions at the Dawn of a New Century,* 2002 J.C. & U.L. 117 and 117 n. 34 (2002).

CONCLUSION

For these reasons, this Court should uphold the legal principles set forth in *Bakke*,[48] and affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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[48] 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d. 750 (1978).