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

No. 02-1516

JENNIFER GRATZ AND PATRICK HAMACHER
Petitioners,
v.
LEE BOLLINGER, *et al.*,
Respondents.

On Writ Of Certiorari Before Judgment
to the United States Court Of Appeals
for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF REASON FOUNDATION IN SUPPORT OF PETITIONERS

Martin S. Kaufman
Counsel of Record
ATLANTIC LEGAL FOUNDATION, INC.
150 East 42nd Street
New York, New York 10017
(212) 573-1960

Counsel for *Amicus Curiae*

January 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

Page

MISCELLANEOUS (cont'd)

TABLE OF AUTHORITIES (cont'd)

Page

MISCELLANEOUS (cont'd)

QUESTION PRESENTED

Does the University of Michigan's use of racial preferences in undergraduate and law school 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?

INTEREST OF *AMICUS CURIAE*

Amicus curiae Reason Foundation is a national research and educational organization that explores and promotes the values of rationality and freedom as a basic underpinning of a good society and it seeks to foster an understanding of and appreciation for the limits of conscious planning in complex social systems. It supports the rule of law, private property, and limited government, and promotes individual responsibility in social and economic interactions, relying on choice and competition to achieve the best outcomes. Reason Foundation advocates policies and attitudes that link individual actions to personal outcomes and to correct the public perception that government intervention is the appropriate or efficient solution to most social problems. It is a not-for-profit corporation which has tax-exempt status under Internal Revenue Code section 501(c)(3).[1]

---

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared or written, in whole or in part, or funded or produced by any person or entity other than *amicus curiae* or its counsel.

SUMMARY OF ARGUMENT

There is no persuasive evidence that racial and ethnic preferences in college and law school admissions to achieve "diversity" improves the educational performance of either the minority student students or non-minority students. The evidence relied on by the courts below was seriously flawed and based on subjective criteria and measures prone to serious error.

Objective measures of academic performance show that minority students admitted under preference programs do not do well academically, and may indeed suffer because of there l;ack of preparation to compete academically at institutions which admit them because of preferences.

Because there is no evidence of educational benefit from preference policies in college and university admissions, the university has failed to meet its burden of showing a compelling interest in imposing race-conscious admissions policies that discriminate against certain groups and individuals on the basis of race or ethnicity.

PRELIMINARY STATEMENT

There are two different admissions programs at issue in the lawsuit that this Court is considering in these cases.

The first is the undergraduate liberal arts school's program. The undergraduate school bases admissions decisions on a 150-point scale. And the scale, for example, awards up to 80 points for the highest grade point average an applicant can earn, 12 points for a perfect SAT score, 10 points for the quality of the high school the applicant attends, and three points if the applicant

submits an outstanding essay. Twenty points are given automatically if the applicant is a member of what's called a under represented racial or ethnic minority, which, for the purpose of the University of Michigan means African American, Hispanic or Native American. Twenty points generally constitutes about 20 percent of what is needed to be admitted – 100 points is sufficient for admission – so the 20 points awarded solely based on race is often the decisive factor.

The result is that a substantial number of minority students with grades and averages substantially lower than many non-minority students are admitted. The only basis for the classification is race or ethnicity. It is a racial classification.

The law school program is different. It has established what it calls a target of a "critical mass" of minority students, and the target is basically between 10 and 12 percent. The LSAT scores and undergraduate grade point average necessary for admission is effectively adjusted in order to meet that numerical target. This means that students are being selected or rejected based primarily on the color of their skin

Both of these programs are *de facto* quota programs. At their core, the University of Michigan's policies amount to a quota system that unfairly rewards or penalizes prospective students based solely on their race. The University of Michigan's admissions policies, which award students a significant number of extra points based solely on their race, and establishes numerical targets for incoming minority students, are unconstitutional.

ARGUMENT

I. THERE IS NO PERSUASIVE EVIDENCE THAT RACIAL PREFERENCES IN ADMISSIONS IMPROVE EDUCATIONAL QUALITY AND THEREFORE SERVES A COMPELLING INTEREST

We assume, for the purposes of argument, that the qualities that make an applicant deserving of admission to a selective university may not be always be measured by "objective" standards such as SAT scores or high school or undergraduate grades. But neither can they be judged simply on the basis of skin color, either as a matter of constitutional law or as a matter of pedagogical theory.

Although tests and grades have had a dominant role in admissions decisions, they have never been considered alone. Selective universities regularly admit, or even recruit, candidates with unimpressive grades or test scores, but with brilliant achievements outside school, such as in music, civic activities or sports. Motivation, curiosity, originality and the capacity to think independently are important components of "merit."

But affirmative action programs in general, and Michigan's in particular, do not focus on those other qualities that are important to educational and life success, and they have been thoughtlessly and mechanically applied. Many institutions with "diversity" goals fail to look carefully at each applicant and are concerned only with making the numbers show that they have not been discriminatory. In the way the Law School and the undergraduate college at Michigan apply their "diversity"

program, any African American, Hispanic or Native American candidate who meets minimum standards substantially lower than those demanded of White or Asian American applicants is "good enough." This reveals a pernicious racism[2] under a liberal veneer. It leads, in fact, to the result about which Justice Powell expressed concern in *Regents of the University of California v. Bakke*, 438 U.S. at 298 (1978), that "[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's worth." (citing *DeFunis v. Odegaard,* 416 U.S. 312, 343 (1974) l worth.") (Douglas, J., dissenting)).

Are the practitioners and defenders of affirmative action themselves not convinced that merit, if defined without regard to skin color or ethnicity, is equally distributed throughout the population? One could reach this erroneous conclusion only if one believes that a numerical formula, whether it be called a quota or "critical mass," defines merit.

The defense of affirmative action cannot rest on an ideology that celebrates diversity for its own sake. A legitimate and constitutionally appropriate approach would protect applicants against prejudice that creates real disadvantages for certain minority applicants (*i.e.* remedying past or present

---

[2] The statement of the university's counsel during oral argument before the circuit court that a Black woman with the same grades and LSAT scores as Barbara Grutter would be a "different person" (Transcript of Oral Argument at 38, *see* 288 F.3d 732 at 790 (Boggs dissenting)) is either a tautology – since every individual is "different" from any other (including an "identical" twin) or itself a statement based on racial stereotyping, betraying the belief that skin color determines ability or character.

discrimination), but the university has eschewed that argument, probably because it cannot prove, or does not wish to admit, that discriminated on the basis of race or ethnicity. The awarding of "points" for group membership, however, corrupts the capacity of institutions to assess each individual's potential.

If colleges and universities were to redefine merit in all its complexity, but with the same standards and expectations applied uniformly to all applicants, the student body at competitive schools could reflect the diversity in the population, without playing a "numbers game."

The burden of proving that the racial classification is narrowly tailored to meet a compelling governmental interest lies with the state actor. The party defending the plan bears the burden of producing evidence that the plan is constitutional. *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *Adarand v. Pena,* 515 U.S. 200 (1995). Mere recital of a compelling governmental interest is not enough to satisfy the University's burden under the strict scrutiny standard. Instead, the state must provide a "strong basis in evidence for its conclusion" that its use of race is compelling. *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 277 (1986) (plurality opinion); *Croson,* 488 U.S. at 500. The rationales and evidence advanced by the University and its *amici,* and relied on by the district court, do not satisfy this heavy burden.

In this case, the University does not claim that its admissions policies, which indisputably favor certain minorities, are "remedial." Rather, its sole rationale is that it seeks to

achieve "diversity" in the student body because "diversity" has educational benefits to all students.

The court of appeals in *Grutter* and the district court in *Gratz* relied almost entirely on Patricia Gurin, "Reports submitted on behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education," 5 MICH. J. RACE & LAW 363, 364 (1999) (hereafter "Gurin") to find that student racial diversity results in educational benefits. See *Grutter*, 288 F.3d 732, 760 and *Gratz*, 122 F.Supp.2d 811, 822.

The methodology and conclusions of Professor Patricia Gurin do not withstand scrutiny.[3] Among the many methodological flaws in the Gurin study are the following:

(1) Gurin never actually measured racial diversity at the University of Michigan;
(2) Gurin's "learning outcomes" are not true educational outcomes;
(3) The effects purportedly associated with racial diversity were either nonexistent or extremely small;
(4) Gurin did not ascertain how much diversity is necessary to achieve the purported educational benefits, or how educational outcomes would be affected by marginal changes in racial diversity.

---

[3] *See,* Thomas Wood & Malcolm Sherman, "Is Campus Racial Diversity Correlated with Educational Benefits?" in RACE AND HIGHER EDUCATION (at http://www.nas.org/rhe.html).

Gurin's research, moreover, does not support her claims.[4] Gurin's "Learning Outcomes" and "Democracy Outcomes" do not objectively measure actual educational benefits. Gurin used what she calls "learning outcomes" and "democracy outcomes" as proxies or surrogates for educational benefits. Her measures of educational benefits include students' self-evaluations of their "Social historical thinking," "Complex thinking," and "Intellectual engagement." (Gurin Rep. App. C, at 19). These measures depend largely on self-evaluations and are inherently subjective, both as to the content of the category and the student's evaluation of his or her capability . These variables measure, at most,

---

[4] Moreover, the Gurin Report's serious methodological flaws would still preclude reliance on its results. Gurin's statistical study is flawed in most major scientific aspects – research design and method, measurement, sampling, statistics, and statistical interpretation. In the statistical social sciences, failure to satisfy minimally the conditions of any one of these dimensions invalidates the conclusions. According to two scholars who critically reviewed Gurin's report,

> There are many design, measurement, sampling, and statistical flaws in this study. The statistical findings are inconsistent and trivially weak. No scientifically valid statistical evidence has been presented to show that racial and ethnic diversity in a school benefits students.

Robert Lerner and Althea Nagai," A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger," May 7, 2001, (at http://www.ceousa.org) (hereafter Lerner & Nagai) at 1. Indeed, the flaws in Gurin's work are so manifest that it probably should not have been admitted as "expert" evidence under the standards articulated by this Court in *Daubert v. Merrell-Dow Pharmaceuticals*, 509 U.S. 579, 593-594 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). One fatal flaw is that many of Gurin's measures of educational benefit are so subjective and so artificial that they cannot be tested. To the extent that her methods and conclusion have been subjected to peer review, they have been soundly criticized.

whether students believe they engage in complex or "historical" thinking, but not whether they are in fact capable of it.[5] These "measurements" are questionable proxies for measurable educational benefits.

Gurin's data includes accepted and measurable indicia of academic achievement, such as grades[6], dropout rates, admission to graduate school, and performance on seven standardized tests, *see* Alexander W. Astin, WHAT MATTERS IN COLLEGE? 188-99, 218-20 (1993), but Gurin uses only one of those measures – self-reported grades -- in her analysis. (Gurin Rep. App. C at 14-15), and, Gurin finds no statistically significant or consistent results for this variable. (Gurin Rep. App. C at 38). Gurin finds no consistent link between her proxies for racial diversity and the only objective measure of academic achievement in her study.[7]

---

[5] Self-assessments, such as those Gurin uses to measure educational benefits are of doubtful accuracy. Justin Kruger & David Dunning in "Unskilled and Unaware of it. How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self Assessments," 77 J. PERSONALITY & SOC. PSYCHOL. 1121, 1123-24 (1999) found that those who were most confident of their abilities are often the least able.

[6] Gurin used self-reported grades, which are, of course, more error prone than grades reported on college transcripts. If privacy was a concern, Gurin could have obtained and used redacted or number-coded transcripts to protect the identity of individual students. Use of self-reported grades very likely increased the rate of error.

[7] Gurin looked for 24 possible correlations between her proxies for student racial diversity and grades. Gurin reported statistically significant results for only six, but for the other 18, Gurin is unable to demonstrate any relationship. The six factors for which there are statistically significant results indicate that her "diversity" measures have little impact on grades -- very large increases in these measures lead to extremely small changes in grades. *See id.* App. D at 2. Moreover, Gurin's results are inconsistent with

(continued...)

Gurin fails to show that racial and ethnic-studies courses increase academic achievement. She shows, rather, that such courses sometimes affect students' "feelings" regarding the value of complex thinking; but "feelings" do not measure academic ability.

In WHAT MATTERS IN COLLEGE?, Professor Astin, a supporter of racial preferences, tested the effects of student racial diversity in the student body on grades, dropout rates, and performance on seven standardized tests, using the same database that Gurin used. *Id*. at 188-90 (grades), 191-93 (dropout rates), 199-220 (standardized tests). Astin noted that academic outcomes "are generally not affected" by racial composition of the peer environments and measures of minority enrollment, and that any effects found "are very weak and indirect," *id.* at 362. Astin recently conceded that the claim that more diverse campuses better educate their students "is yet to be convincingly demonstrated,"' and that "The research still needs to be done that would demonstrate that link." *See* Peter Schmidt, "Debating the Benefits of Affirmative Action," THE CHRONICLE OF HIGHER EDUCATION, at A25 (May 18, 2001).

There is evidence more direct than Gurin's constructs that shows that "diversity" as implemented by the defendants in this case on the basis of race, does not lead to improvement in standard measures of academic success. Robert Lerner and

---

7(...continued)

one another, or with any theory of the beneficial effects of student racial diversity adopted by the district court. Gurin acknowledges the "ambiguity" of her finding that increases in "diversity courses" correlate with *lower* grades for blacks but, to a minimal extent, with higher grades for Hispanics and whites. (Gurin Rep. at 38).

Althea Nagai, in A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger, May 7, 2001, (available at http://www.ceousa.org) used the numerical results of Prof Gurin's statistical analyses to see whether the presence of the "diversity indicators" used by Professor Gurin predicted higher college grade-point averages for students in various racial and ethnic groups. Lerner & Nagai at 40. Like Astin, they found that "diversity indicators" were not associated with higher grades. To the extent that differences could be detected, "diversity" activities correlated with lower grades for blacks and Hispanics, as Gurin concedes.

Lerner and Nagai also examined whether Gurin's "diversity indicators" predicted that students would go on to earn higher degrees: again, the association was negative – it correlated with a reduced likelihood of graduation for black students, *id.* at 40-41. Lerner and Nagai found that academic success, as measured by the objective standards of undergraduate grades, graduation rates, and admission to graduate school, correlated strongly with a student's high school grades and SAT scores, *id.*

II. THERE ARE UNINTENDED CONSEQUENCES WHICH HARM MINORITY STUDENTS ADMITTED UNDER "DIVERSITY" PREFERENCES

A. The "mismatch" between minority applicants and the school to which they are admitted.

Racial double standards "mismatch" minority students with institutions, placing them in competitive academic settings for which they are ill-prepared. *See also* Thomas Sowell, BLACK EDUCATION: MYTHS AND TRAGEDIES (1972), particularly Part II,

Black Students in White Colleges. More recent accounts documenting the costs of preferential policies, based partly upon the personal experiences of the authors, are found in, *e.g.*, Stephen L. Carter, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991), Shelby Steele, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990), and Shelby Steele, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA (1998). Statistical evidence supporting this proposition is provided in Stephan Thernstrom & Abigail Thernstrom, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 386-422 (1997).

William G. Bowen and Derek Bok, in their widely-hailed (by supporters of race-preference admissions) work THE SHAPE OF THE RIVER, LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (hereafter "Bowen & Bok") acknowledge that at the selective schools they studied, 6.3% of the whites failed to get a bachelor's degree (from any school), as compared with 20.8% of the African Americans. *See* Bowen & Bok at 376, table D.3.1. The black dropout rate was 3.3 times that of white students.[8]

---

[8] National Collegiate Athletic Association (NCAA)publishes an annual report on graduation rates for large schools with a major commitment to intercollegiate athletics like Michigan. The NCAA's 1998 report indicates that 40% of the black freshmen who enrolled in an NCAA Division I school in 1991-92 had earned a bachelor's degree by 1998, while 58% of whites earned a degree. Thus the white dropout rate was 42%, while the black rate was 60%, or 43% higher. See Nat'l Collegiate Athletic Ass'n, 1998 NCAA Division I Graduation-Rates Report 626 (Marty Benson ed., 1998).

At the University of Michigan at Ann Arbor itself, the graduation rates for students entering in 1995-1996 was: for white male students, 85%, white females 91%; for Asian males 84% and for Asian females and 91%; for black males was 52%, for black females 67%, for Hispanic males 67% and for Hispanic females 76%, for American Indian males and females it was 61%.[9] At UM, the dropout risk for black males was 48%, more than three times that of white males; for black females it was 24%, almost three time that for white females.

Recent data from the American Council on Education points in the same direction: 41% of white students at NCAA Division 1 schools failed to graduate within six years of enrollment, while 62% of African American students and 54% of Hispanic students failed to graduate in six years. American Council on Education, "Minorities in Higher Education 2001-2002: Nineteenth Annual Status Report," Figure 9 (2002). In the period 1990-1999 undergraduate enrollment of whites declined by 5.1%, while enrollment of African Americans increased by 28.2% and of Hispanics increased by 67.3%; professional school enrollment of whites declined 0.8%, enrollment of African Americans increased 41.5% and enrollment of Hispanics increased 89.8% in that same period. *Id.*, Figure 6. Is there a correlation between increased minority enrollment and high minority dropout rates?

The cumulative grade point averages (GPAs) of the black students at the twenty-eight schools in their sample put them at

---

[9] These data are found on the website of the Chronicle of Higher Education, http://chronicle.com/stats/ncaa/2002/inst_results.php3.

the twenty-third percentile of the class. Bowen & Bok at 72-86. The twenty-third percentile figure includes many African American students who met the regular academic requirements for admission and received no racial preference --about half of the black undergraduates included in the database[10] Bowen and Bok used, the authors estimate. Bowen & Bok at 350 table B.4.

The average rank in class for black students is appreciably lower than the average rank in class for white students within each SAT interval, one indication of a troubling phenomenon sometimes called "underperformance." For example, black students with the same SAT scores as whites tend to earn lower grades. Bowen & Bok at 77.

Diversity policies such as Michigan's undergraduate admissions system have the effect of taking in black and Hispanic students with lower high school grades and SAT scores than white or Asian students who are accepted, and some who are rejected. Lerner and Nagai have shown that preferentially admitted students with poorer high school credentials can be expected to do less well than the students who would have been admitted in their place under a race-blind admissions policy. Michigan's diversity policy takes in students who are at high risk of academic difficulty and who are at considerable risk of dropping out. Lerner & Nagai at 40-41. There no discernible countervailing benefit: diversity does not improve the performance of other students.

---

[10] The database is called "College and Beyond" or "C&B." The database was assembled by the Mellon Foundation in the years 1995 to 1997, and contains data on approximately 30,000 students who began their studies at one of 28 leading colleges and universities in 1976 and more than 32,000 who started at the 28 schools in 1989.

B. Preferences and professional success.

We know from the facts of this case that some graduate and professional schools also have race- and ethnicity-conscious admissions criteria. This is widespread: in a study of more than 27,000 students who entered 163 American Bar Association (ABA) approved law schools in the fall of 1991, Linda F. Wightman calculated that only twenty-four African Americans would have been admitted to any of the top eighteen law schools if the decisions had been made solely on the basis of college grades and LSAT scores. Because of preferences, 420 black students were admitted to those law schools, 17.5 times as many. *See* Linda F. Wightman, "The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions," 72 N.Y.U. L. REV. 1, 30 table 6 (1997) (hereafter "Wightman").[11]

Disproportionate numbers of African-American law school graduates fail the bar examinations, which are graded on a color-blind basis. For example, 57% of the blacks taking the California bar exam for the first time in 1997 failed, 2.5 times the proportion among whites (23%); in New York the disparity was even wider in 1992 – 63% of African Americans failed, more than triple the white figure (18%). *See* Stephan Thernstrom, "Diversity

---

[11] More recent statistics show the same trend. In the national applicant pool of approximately 70,000 students who applied to law school for the class entering in the fall of 1997, there were just 16 blacks who scored 164 or better on the LSAT (92.3 percentile) and had a college GPA of at least 3.50. Some 2646 white applicants, 165 times as many, had equal academic credentials. *See* John E. Morris, "Boalt Hall's Affirmative Action Dilemma," AM. LAWYER., Nov. 1997, at 7.

and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's 'The Threat to Diversity in Legal Education,'" 15 CONST. COMMENTARY 11, 32 (1998).

Wightman distinguished black law students who owed their admission to racial preferences from those who did not, and found that more than a fifth of the former failed to graduate. See Wightman, *supra*, at 36 table 7. Twenty-seven percent (27%) of those African Americans who were admitted as a result of preferences and who graduated law school were unable to pass a bar exam within three years of graduation, a failure rate nearly three times that for African Americans who were admitted under regular standards and almost seven times the white failure rate. Wightman, *id*. at 38 table8. Thus, 43% of the black students admitted to law school on the basis of race fell by the wayside, either dropping out without a degree or failing to pass a bar examination. *See* Stephan Thernstrom, *supra*, at 40 tbl. 5 (1998) and Wightman, *supra*, at 36, table 7 and at 38 table 8.[12]

Beth Dawson, *et al.*, "Performance on the National Board of Medical Examiners Part I Examination by Men and Women of Different Race and Ethnicity," 272 JAMA 674, 675 and table 1

---

[12] *See also* Clyde W. Summers, "Preferential Admissions: An Unreal Solution to a Real Problem," 1970 U. TOL. L. REV. 377. Many minority students, Summers notes, have "social and psychological problems" that are "acute" in the law school environment "even under the best of circumstances. Those problems are multiplied if the student is not prepared to compete academically on even terms with other students because society has cheated him in his educational and cultural opportunities." *Id*. at 385. Summers further spells out the costs to minority students. *See id*. at 395-97. It does not increase the number of black attorneys if selective law schools to admit African Americans under distinctly lower standards and those students flunk out or fail to pass the bar exam.

(1994), report that in 1988 51.1% of black medical students failed the required Part I exam given by the National Board of Medical Examiners. The white failure rate was only 12.3%.. This glaring disparity, the authors found, was almost entirely attributable to preferential admissions policies. Black students with strong academic credentials were as likely to pass as whites; but a high proportion of African Americans entered medical school without strong credentials, thanks to racial double standards in admissions, and thus did not perform well. *Id*.

Results of National Board of Medical Examiners tests measuring the competence of physicians in their field of specialization also show significant racial disparities . A RAND Corporation study of a national sample of the medical school graduating class of 1975, including 715 graduates who were classified as minorities, 80.2% of them African Americans, found that only 48% of minority physicians were able to qualify as board-certified in their specialty within seven years of graduation, as compared with 80% of whites and Asians. *See* Steven N. Keith, *et al.*, Assessing the Outcome of Affirmative Action in Medical Schools: A Study of the Class of 1975 at 36, table 27. (RAND Corp. Series No. R-3481-CWF, 1987). The "minority" category in the study consisted of African Americans, Hispanics, and American Indians. Asian Americans were not considered members of a minority group.

The likelihood that minority physicians would pass the specialty boards depended largely upon their academic records before they reached medical school. Fully 83% of those in the top category on an "undergraduate performance index" based on college grades and MCAT scores passed Part II; in the second

category, 75% became board-certified; in the third, 56%; in the fourth, 47%; and in the lowest group, a mere 32% qualified. *Id*.

Minority students with weak undergraduate records who had been given a preference in the admissions process were still conspicuously behind after leaving college. These students who failed to graduate or failed their professional qualifying exams are casualties of preferential policies, just as are non-minority applicants who were denied admission because of a preference for minority candidates.

Since 1992, all colleges have been required by federal law to compile annual statistics about crime on their campuses and to provide them to their students and staff members. See 20 U.S.C. sec. 1092(f). Are they not under at least a moral obligation to disclose the statistics about dropout rates and underperformance to the very minority candidates they purport to benefit by giving them racial preferences in the admissions process?

C. Preferences and Stigma.

The combination of significantly higher dropout rates and underperformance may perpetuate stigmatizing myths about black academic talent, fulfilling, ironically, Justice Powell's warning in *Bakke*, 438 U.S. at 298, that "[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.") (citing *DeFunis v. Odegaard,* 416 U.S. 312, 343, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (Douglas, J., dissenting)).

The deeper problem with racial preferences is that its adherents assign people to racial categories and assume that it is legitimate to offer them different opportunities depending upon the category to which they have been assigned. It does not matter that a spectacular white applicant is rejected because the school has "too many" whites already; the young man or woman who is turned down should feel the consolation that the white race is very well represented at that school already.

In actuality, it is individuals, not groups, who suffer from discriminatory treatment, and it does not matter whether the class being discriminated against is a narrow or a broad one. Indeed, it appears that the “beneficiaries” of preferences also suffer because they are unprepared to compete in the environment into which they have been admitted, or because, even if they are qualified, they are stigmatized because they are seen as being a member of a group that has been given a preference.

CONCLUSION

College and universities which use racial and ethnic criteria for granting preferences in admission do not serve the interests of minority students or non-minority students. These preference policies do not serve a "compelling interest" and therefore violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1981.

The judgment of the United States Court of Appeals for the Sixth Circuit in Grutter, and the order of the United States District Court for the Eastern District of Michigan should be reversed.

January 16, 2003

Martin S. Kaufman
Counsel of Record
ATLANTIC LEGAL FOUNDATION, INC.
150 East 42nd Street
New York, New York 10017
(212) 573-1960

Counsel for *Amicus Curiae*
Reason Foundation

Of Counsel
Manuel S. Klausner