No. 02-516

IN THE

Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,
PETITIONERS,

V.

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

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN CONDITIONAL OPPOSITION TO CERTIORARI BEFORE JUDGMENT

MARVIN KRISLOV
JONATHAN ALGER
UNIVERSITY OF MICHIGAN
Office of the Vice President and
General Counsel
4010 Fleming Admin. Bldg.
503 Thompson St.
Ann Arbor, MI 48109

JEFFREY LEHMAN
EVAN CAMINKER
UNIVERSITY OF MICHIGAN
LAW SCHOOL
625 South State Street
Ann Arbor, MI 48109

PHILIP J. KESSLER
LEONARD M. NIEHOFF
BUTZEL LONG
350 South Main, Suite 300
Ann Arbor, MI 48104

JOHN H. PICKERING
JOHN PAYTON
Counsel of Record
BRIGIDA BENITEZ
STUART DELERY
CRAIG GOLDBLATT
ANNE HARKAVY
DAVID MOLOT
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

MAUREEN E. MAHONEY
J. SCOTT BALLENGER
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether the district court correctly applied settled principles of *stare decisis* in determining that the University of Michigan's College of Literature, Science, and the Arts' admissions program is constitutional under this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

2. If this Court declines to give *stare decisis* effect to its decision in *Bakke*, whether the educational benefits that flow from a diverse student body to an institution of higher education, its students, and the public it serves, are sufficiently compelling to permit the school to consider race and/or ethnicity as one of the many factors in making admissions decisions through a "properly devised" admissions program.

3. Whether the current admissions processes of the University of Michigan's College of Literature, Science, and the Arts represent such a "properly devised" admissions program.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

BOOKS, ARTICLES & TREATISES

This case presents a challenge to the University of Michigan's College of Literature, Science, and the Arts' admissions program, which takes race and ethnicity into account as one of many factors in making admissions decisions. Respondents, the Board of Regents of the University of Michigan, Lee Bollinger, and James J. Duderstadt, hereby conditionally oppose the petition for a writ of certiorari before judgment.

Petitioners' challenge presents the same legal issues—in a factually distinct setting—as the petition for a writ of certiorari in *Grutter v. Bollinger*, No. 02-241. That petition presents the question whether the University of Michigan Law School's admissions policy is consistent with the requirements of the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964. The *Grutter* and *Gratz* lawsuits progressed on parallel tracks before different district court judges.

Appeals in both cases proceeded simultaneously, and were heard on the same day by the *en banc* Sixth Circuit. The court of appeals' opinion in the *Grutter* case, issued on May 14, 2002, states that an opinion in *Gratz* would be "forthcoming." *See Grutter* Pet. App. 4a n.2. That opinion has not yet issued.

Although this case—like *Grutter*—presents an issue of national importance, certiorari is not warranted in *Gratz* for the same reasons it is not warranted in *Grutter*. The identified division of lower court authority on the primary legal question presented—whether achieving the educational benefits of diversity is a compelling interest that justifies the consideration of race as a factor in admissions—is shallow, limited and undeveloped.

This case also faces the additional obstacle that it seeks certiorari before judgment in the court of appeals, which this Court's Rule 11 provides shall be granted only on a showing that the "case is of such imperative public importance as to justify the deviation from normal appellate practice and to

require immediate settlement in this Court." Petitioners hardly contend that this case satisfies that standard as a stand-alone petition. Rather, Petitioners point to a line of cases holding that certiorari before judgment may be appropriate once this Court has otherwise agreed to hear another related case presenting the same fundamental legal question.

On that point, Respondents agree that this Court should grant review in this case if (and only if) it also grants the petition in *Grutter*. In that event, the Court should limit its review to certain of the cases pending in the court of appeals, and in any event, limit its review to the first question presented, which involves the important legal question of the permissibility of the consideration of race as a factor in higher education admissions. The questions involving qualified immunity, the consideration of the defunct prior admissions systems, and the district court's exercise of its equitable authority to grant or deny injunctive relief, should remain in the court of appeals, for that court's consideration in the first instance.

To accomplish this, as described more fully below, if this Court grants certiorari in *Grutter*, it should also grant certiorari before judgment in *Gratz* either on the limited question of the constitutionality of the current admissions program of the College of Literature, Science, and the Arts, or in certain (but not all) of the *Gratz* appeals now pending in the court of appeals from the various decisions of the United States District Court for the Eastern District of Michigan (Duggan, J.).

STATEMENT OF THE CASE

Factual Background

1. Admission to LS&A. As a preeminent public institution of higher education, the University of Michigan has made an educational judgment that a student body that is broadly diverse, including with respect to race and ethnicity, is "an integral component of [the University's] mission"

because it "increase[s] the intellectual vitality of [its] education, scholarship, service, and communal life." Pet. App. 4a (internal quotations and citation omitted). Thus, to "facilitate the University's goal" of obtaining the educational benefits of diversity, the College of Literature, Science, and the Arts ("LS&A") considers race and ethnicity as one of many factors as it "strives to compose a class of students" that is broadly diverse. *Id.*

LS&A shares this commitment to obtaining the educational benefits of diversity with the University of Michigan Law School, but it implements its commitment through a differently-crafted admissions program, as it receives many thousands more applications per year than the Law School. At the time this litigation commenced, the Office of Undergraduate Admissions ("OUA") received and reviewed approximately 13,500 applications to LS&A—a figure that has since risen to over 17,000 applications per year. To promote consistency in the review of applications, while preserving admissions counselors' ability to exercise subjective judgment, OUA uses written guidelines, which are reviewed annually and altered periodically. These guidelines identify a range of factors, academic and otherwise, that help reveal a student's potential to contribute—individually, and in conjunction with classmates—to the educational environment at LS&A. Admission to LS&A is selective because thousands more students apply each year than can be admitted.

2. Current Admissions System. LS&A put its current admissions system into place in 1999. The district court describes that system as being in place through 2000, the most recent admissions season as of the time of the district court's decision. It remains in place today. Under this present system, one of OUA's approximately 20 professional admissions counselors individually reviews each application. Pet. App. 38a. Each counselor reviews all applications from an assigned geographic territory. *Id.* "There is no separate

review or assignment of under-represented minority applicants . . . ." *Id.* The counselors evaluate all applications based on the same set of factors identified in the guidelines. JA 1147.[1] LS&A does not employ quotas, numerical targets or goals for admission or enrollment of minority students. Pet. App. 34a-35a.

Counselors initially evaluate applications aided by a "selection index" worksheet listing factors the University believes important in composing a class. Counselors select a numerical value for each listed factor, up to a possible total of 150 points. JA 1118, 1147. Academic factors account for up to 110 points. Eighty points are available for academic GPA from tenth and eleventh grades, and 12 points are available for standardized test scores. *Id.* Every applicant from the same secondary school receives the same number of points—up to ten—to account for the academic strength of that school. *Id.* at 1118, 1148-49. In addition, counselors subtract up to four points for an applicant who chose a weaker curriculum when a stronger one was available, and add up to eight points for an applicant who selected more challenging courses. *Id.* at 1118, 1149-50.

Applicants receive up to 40 points for other factors that indicate an applicant's potential contribution to LS&A. *Id.* at 1118, 1150. They may receive 20 points for *one* of the following: membership in an underrepresented minority group,[2] socioeconomic disadvantage, attendance at a predominantly minority high school, athletics, or at the

---

[1] Citations to "JA" refer to the Joint Appendix filed in the court of appeals.

[2] LS&A considers African-Americans, Hispanics, and Native Americans to be underrepresented minorities for purposes of considering race or ethnicity in admissions. JA 1471. Because LS&A receives sufficient numbers of applications from students of other racial and ethnic groups, it can enroll meaningful numbers of such students without conscious consideration of race or ethnicity in the admissions process. *See id.* at 1445.

Provost's discretion. *Id.* at 1118, 1153-54. Reflecting the University's commitment both to state residents and to broader geographic diversity, counselors assign ten points for Michigan residency, six additional points for residency in underrepresented Michigan counties, and two points for residency in underrepresented states. *Id.* at 1118, 1150-51. Applicants receive one or four points for alumni relationships. *Id.* at 1118, 1151. The personal essay can earn up to three points. *Id.* at 1152. Based on an applicant's activities, work experience, and awards, counselors may assign up to five points for leadership and service, and five more points for personal achievement. *Id.* at 1118, 1152-53.

The counselor totals the points to calculate the selection index score, which is entered into OUA's database. That score sometimes, but not always, serves as the basis for the ultimate admissions decision. *Id.* at 1162.

The University recognizes that a selection index score may not always reflect an applicant's potential contribution to LS&A. Therefore, as part of counselors' complete review of application files, OUA asks counselors to identify applications that would benefit from review by the Admissions Review Committee ("ARC"), which evaluates more complex cases through an informal discussion format. *Id.* at 1161-62. A counselor may, in his or her discretion, "flag" an application for ARC discussion if the counselor determines that the applicant: (1) is academically prepared to do the work at LS&A; (2) has a selection index score above a certain level; and (3) possesses at least one of a variety of qualities or characteristics important to the University's composition of its freshman class, such as underrepresented race, ethnicity, or geography; high class rank; socioeconomic disadvantage; unique life experiences, challenges, circumstances, interests or talents; connections to the University community; or athletics. Pet. App. 39a-40a.

LS&A makes admissions decisions throughout the admissions season. Those decisions are generally executed

in one of two ways. *First*, the Enrollment Working Group ("EWG"), which monitors enrollment during the admissions season, sets selection index score parameters that are used in determining the admissions action—admit, defer, or deny—for all reviewed applications then pending in OUA's database. Decisions are made periodically, and EWG adjusts the parameters, when necessary, to pace admissions appropriately. *See* JA 1162. *Second*, flagged applications not admitted based on the EWG parameters are forwarded to the ARC, which decides whether to admit, defer, or deny, after the committee considers the applicant's entire file. *Id.*

3. Discontinued Admissions Programs: 1995-1998. The admissions programs used before 1999 differed from the current system in three ways that, taken together, the district court concluded were unlawful. The University has undisputedly eliminated all three practices. *Id.* at 1160, 1163.

First, before the selection index, counselors used "grids" to assist in making admissions decisions. Each grid's horizontal axis listed standardized test score ranges, and its vertical axis listed ranges of "GPA2"—an index incorporating multiple factors, including academic GPA, school strength, curriculum rigor, and exceptional leadership or extracurricular activities. Each grid cell listed admission action options. *Id.* at 436-39.

Between 1995 and 1997, OUA accounted in different ways for other factors—including Michigan residency, alumni status, and race—that the University considered important in the admissions process but that the grid structure did not already incorporate: by creating multiple grids, by listing different "action codes" within the same grid, and/or by including that factor in the GPA2 index. In 1995, OUA used four grids: (1) in-state non-minority applicants, (2) out-of-state non-minority applicants, (3) in-state minority applicants, and (4) out-of-state minority applicants. Pet. App. 33a. In 1996, OUA used only two grids (one for in-

state and legacy students and one for out-of-state students), and the cells listed two rows of "action codes"—one for underrepresented minorities and another for non-minorities. *Id.* In 1997, OUA again used two grids, but considered race in two ways: partly by factoring it into GPA2, and partly by accounting for it in the distribution of action codes. *Id.*

Second, in 1999, OUA eliminated the portion of the guidelines that permitted clerks to have rejection letters sent to some applicants with very low grades and scores without counselor review, while requiring counselor review for all applicants from certain groups, including athletes, private school students, and underrepresented minorities. JA 440-41, 1163. Despite the guidelines' language, however, the clerks generally forwarded all applications to counselors because they felt uncomfortable rejecting applicants without counselor input. *Id.* at 1457-58.

Third, in 1999, LS&A discontinued its use of so-called "protected seats" as an enrollment management technique for its rolling admissions process. *Id.* at 1163. The practice had been used because students from certain groups—such as minorities, ROTC candidates, recruited athletes, and foreign students—tended to apply later in the admissions season. *Id.* at 1478-79. Towards the end of each admissions cycle, EWG projected the number of applications expected from these groups, based on the number received the prior year, so OUA could pace admissions decisions to permit consideration of these anticipated applications before the class was filled. *Id.* at 1461-65. The groups for which EWG made projections were called "protected categories," and the projections were called "protected seats." Students from "protected categories" who applied late in the admissions cycle were not by any means guaranteed admission. To the contrary, OUA evaluated them in the same way, against the same criteria, as all other applicants, regardless of race. *Id.* at 1474-75.

4. Challenges to Enrolling Meaningful Numbers of Minority Students. LS&A vigorously recruits qualified minority applicants. Pet. App. 42a. It does so because in order to provide the educational benefits of racial and ethnic diversity to all students, learning environments must include meaningful numbers of minority students. JA 1834.

LS&A's year-round minority recruiting efforts include attending recruiting fairs in areas with substantial minority populations; hosting workshops for high school counselors; coordinating campus visits for minority high school juniors; corresponding with individual minority candidates; and hosting a Spring Welcome Day for admitted minority students. *Id.* at 1487-88. OUA also maintains an office in Detroit to recruit local high school students, most of whom are African-American. *Id.* at 1480-81.

Despite LS&A's efforts, recruiting alone is insufficient to enroll a student body with meaningful numbers of underrepresented minority students because the pool of qualified underrepresented minority applicants is significantly smaller than the pool of qualified non-minority applicants. Pet. App. 42a; JA 1441, 1492. In addition, intense competition with peer institutions for these highly sought-after students compounds the pool size problem by depressing the "yield"—the proportion of admitted students who choose to enroll. JA 1492, 3991-92. As a result of the small pool size, OUA ends up admitting virtually all qualified underrepresented minority applicants.[3] *Id.* at 1472-73, 1491-92.

---

[3] Plaintiffs' suggestion that the University has a current policy of admitting all qualified minority applicants is simply wrong. In their petition, plaintiffs quote from a memo created in 1995 (Pet. 5), well before the current admissions systems were implemented. Moreover, to the extent that prior admissions guidelines included language discussing the admission of all qualified minority students, it is undisputed that no such language appears in the 1999 or 2000 admissions guidelines. Pet. App. 113a; *see also id.* at 118a.

Indeed, even with these efforts, LS&A is only able to provide *some* of the educational benefits of diversity because meaningful numbers of minority students are not present in all significant learning contexts. *Id.* at 1836, 1917.

Without considering race and ethnicity in admissions, the proportion of admitted and enrolled underrepresented minority students would drop precipitously,[4] leaving most of LS&A's learning contexts with very few minority students, or none at all. *Id.* at 1876, 1916. Under those circumstances, the University could not obtain the educational benefits of diversity. *Id.* at 1836.

Procedural History

Plaintiffs Jennifer Gratz and Patrick Hamacher, both of whom are white, were unsuccessful applicants for admission to LS&A for the classes that enrolled in 1995 and 1997, respectively. On October 14, 1997, Plaintiffs brought this action on behalf of a class of similarly-situated applicants. The complaint asserted that the admissions policy of LS&A violates the Fourteenth Amendment's Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. §§ 1981, 1983. The plaintiffs sought declaratory and injunctive relief, and compensatory and punitive damages against the Board of Regents of the University of Michigan, as well as Lee Bollinger and James J. Duderstadt, both of whom are former presidents of the University of Michigan.

On February 5, 1998, a group of seventeen African-American and Latino students who applied, or intended to apply, for admission to the University of Michigan, along with Citizens for Affirmative Action's Preservation, a nonprofit organization that seeks to preserve opportunities in higher education for African-American and Latino students, moved to intervene as defendants in the case. The district

[4] Despite the expected dramatic drop in underrepresented minorities, only a slightly higher proportion of non-minority students would be admitted. *See id.* at 1876.

court denied the motion to intervene. The court of appeals reversed that denial on an interlocutory appeal (heard along with an appeal from the denial of intervention in *Grutter*). *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999).

By an order dated December 23, 1998, the district court certified a class, pursuant to Fed. R. Civ. P. 23(b)(2), of those applicants who applied for and were denied admission to LS&A and who "are members of those racial and ethnic groups, including Caucasian, that defendants treat less favorably on the basis of race in considering their application for admission." Pet. App. 3a & n.2. The district court also bifurcated the case into separate liability and damages phases. On September 26, 2000, the Sixth Circuit denied the University's petition for interlocutory review of the district court's certification order, pursuant to Fed. R. Civ. P. 23(f).

Following extensive discovery, on December 13, 2000, the district court issued an opinion granting, in part, cross motions for summary judgment. The district court concluded, following Justice Powell's opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), that the University of Michigan has a compelling interest in seeking to obtain the educational benefits that flow from a student body that is diverse in many ways, including with respect to racial and ethnic diversity. Pet. App. 27a-28a. In reaching that conclusion, the district court also determined that, through the unrebutted reports of nationally-renowned experts in history, sociology, psychology, and education, the University had presented "solid evidence" of the educational benefits of diversity. *Id.* at 22a-25a.

The district court noted, however, that "Justice Powell's opinion in *Bakke* fails to set forth any bright line regarding what constitutes a permissible consideration of race in admissions decisions," and that it "is often a thin line that divides the permissible from the impermissible." *Id.* at 34a. The district court concluded that the admissions programs in operation in 1999 and 2000 satisfied the requirements set

forth in *Bakke* and were therefore constitutional, whereas the systems in place from 1995 through 1998, taken together, "cross that thin line from the permissible to the impermissible." *Id.* (footnote omitted). The district court also granted the individual defendants' motions for summary judgment on qualified immunity grounds, holding that a reasonable official in the position of the individual defendants might not have known that the admissions systems in place from 1995 to 1998 would be found unconstitutional.

On January 10, 2001, the plaintiffs and defendants jointly requested that the district court, in connection with the entry of an order reflecting the conclusions set forth in its December 13, 2000 opinion, certify interlocutory cross-appeals pursuant to 28 U.S.C. § 1292(b). The district court, by order dated January 30, 2001, did so. On February 9, 2001, the district court also entered final judgment, pursuant to Fed. R. Civ. P. 54(b), in favor of the individual defendants who had prevailed on their qualified immunity defenses.

Following the district court's § 1292(b) certification of questions arising from its January 30, 2001 order, the plaintiffs and defendants each petitioned the court of appeals to permit the interlocutory appeals to proceed. By order dated March 26, 2001, the court of appeals granted the petition and cross-petition. Those appeals are pending in the court of appeals as Nos. 01-1416 and 01-1418. The plaintiffs also filed a notice of appeal, No. 01-1333, pursuant to 28 U.S.C. § 1292(a), with respect to the final order dismissing the claims against the individual defendants and denying the requested injunctive relief. Those three appeals were subject to consolidated briefing and argument in the court of appeals.

In a separate opinion, dated February 26, 2001, the district court rejected the arguments advanced by the intervening defendants that LS&A's consideration of race as a factor in admissions could be justified as a means to remedy the present effects of past discrimination. By order

dated March 21, 2001, the district court also separately entered final judgment under Fed. R. Civ. P. 54(b) with respect to the claims of the intervening defendants, thereby permitting those defendants to bring an interlocutory appeal from its summary judgment rulings. The intervening defendants filed a notice of appeal as to the district court's order rejecting their defenses. That appeal, No. 01-1438, was briefed separately from the other three appeals in *Gratz*, but argued along with those appeals.

All four appeals were argued before the *en banc* court of appeals on December 6, 2001—the same date that the court heard argument in *Grutter*. The court of appeals issued its decision in *Grutter* on May 14, 2002. In that opinion, the court of appeals noted that it would "address the challenge to the University of Michigan's admissions policy, *Gratz v. Bollinger*, Nos. 01-1333, 01-1416, 01-1418, 01-1438, in a forthcoming opinion." *Grutter* Pet. App. 4a n.2. The court of appeals has not yet decided the *Gratz* case.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED FOR THE SAME REASONS SET FORTH IN OPPOSITION TO CERTIORARI IN *GRUTTER*.

The Brief in Opposition in *Grutter*, submitted by Respondents the Board of Regents of the University of Michigan and its present and former officials, sets forth in detail the reasons this Court should not, at this time, grant certiorari to address the question whether institutions of higher education may consider race and ethnicity in admissions to obtain the educational benefits of diversity. Respondents in this case will not repeat the reasons set forth therein, but incorporate them by reference. Because the division of authority among the courts of appeals is shallow and undeveloped, it is unnecessary for this Court to intervene at this time.

II. IF THIS COURT DENIES THE PETITION IN *GRUTTER*, THE HIGH STANDARD APPLICABLE TO PETITIONS FOR CERTIORARI BEFORE JUDGMENT IS NOT MET.

If this Court denies the petition in *Grutter*, it follows *a fortiori* that this Court should deny this petition for certiorari before judgment. The standard for granting certiorari before judgment is very demanding. "A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. Rule 11.

Petitioners argue that, if this Court otherwise grants certiorari in *Grutter*, it should also grant this petition for certiorari before judgment because it is a related case presenting essentially the same legal issues. Assuming this Court denies the petition for certiorari in *Grutter*, however, nothing else even remotely suggests that Petitioners have met the rigorous standard set forth in Rule 11 and this Court's cases regarding certiorari before judgment.

Petitioners contend that because this is a class action lawsuit presenting issues of national importance, the Court should grant certiorari before judgment. Those reasons do not, however, distinguish this case from many other cases in which this Court appropriately awaits resolution in the courts of appeals before exercising its certiorari jurisdiction. Petitioners cannot and do not suggest that *Gratz* presents a *better* vehicle than *Grutter* for this Court to resolve the issues presented in the petition—either now or after judgment in the court of appeals. Thus, if this Court denies the petition for certiorari in *Grutter*, it should deny this petition as well.

III. IF THIS COURT DOES GRANT CERTIORARI IN *GRUTTER*, IT WOULD BE APPROPRIATE TO GRANT CERTIORARI HERE, LIMITED TO THE FIRST QUESTION PRESENTED IN THE PETITION.

If (and only if) this Court were to grant the petition in *Grutter*, Respondents agree that it would be appropriate to grant certiorari before judgment to determine whether the current LS&A admissions program is constitutional. This outcome can be achieved in either of two ways. The Court could restrict its grant of certiorari before judgment to the appeal that presents this question (No. 01-1418). Alternatively, if this Court grants certiorari before judgment with respect to all four of the appeals pending in the court of appeals, it would be appropriate for this Court to issue an order limiting its grant of certiorari to the question of whether the current LS&A admissions system is constitutional.

Review of the other questions presented before judgment in the court of appeals is unwarranted, and would add unnecessary complexity to the briefs, argument, and decision of these cases. The application of the legal principles this Court may announce to the prior admissions systems—as well as the other questions presented in the petition that are by no means independently certworthy—are more properly left for consideration in the first instance by the court of appeals.

Respondents thus respectfully submit that if this Court grants certiorari in *Grutter*, it should grant the petition for certiorari before judgment to hear some, but not all, of the cases now pending in the court of appeals. Because "what the Supreme Court is asked to do by way of granting certiorari before judgment is to render the kind of judgment on the merits of the appeal that the court of appeals could have rendered," Robert L. Stern et al., *Supreme Court Practice* 76 (8th ed. 2002), and because the instant petition for certiorari before judgment relates to four separate cases

that are pending in the court of appeals, each of the four pending appeals is addressed separately. *See Hohn v. United States*, 524 U.S. 236, 241-44 (1998) (noting that a "case" is "in" the court of appeals when a notice of appeal is filed and a docket entry created).

No. 01-1418. This is the plaintiffs' interlocutory appeal, for which leave was granted under 28 U.S.C. § 1292(b), challenging the district court's conclusion that the current operation of the LS&A admissions process (beginning in 1999) complies with applicable constitutional standards.

In the event this Court grants certiorari in *Grutter*, Respondents agree that certiorari before judgment would be appropriate in this appeal. As Petitioners note, once this Court has granted certiorari in a particular case, it sometimes grants certiorari before judgment to hear other cases then pending in the lower courts presenting the same or related questions of law arising on different facts. *See* Pet. 15 (citing cases); *see also* Stern, *supra*, at 262 & n.65 (citing thirteen such cases); *cf. Clinton v. New York*, 524 U.S. 417, 455 (1998) (Scalia, J., joined by O'Connor, J., dissenting) (arguing that the Court had appellate jurisdiction over one appeal under statute providing for expedited appeal to Supreme Court as of right, but not in a second related case, and suggesting that "[i]n light of the public importance of the issues involved, and the little sense it would make for the Government to pursue its appeal against one appellee in this Court and against the others in the Court of Appeals, the entire case, in my view, qualifies for certiorari review before judgment").

As Petitioners note (Pet. 15), if this Court were to grant the petition in *Grutter*, hearing both cases would provide the Court an opportunity to resolve these important legal questions in the context of a broader range of factual circumstances faced by colleges and universities than would be possible if the Court granted certiorari in only one case.

The two cases are certainly related. They have proceeded on parallel tracks in district court and in the court of appeals. The Board of Regents of the University of Michigan is the principal defendant in both cases. These two separate but related cases involve two factually distinct admissions systems, one involving a small and extremely selective graduate program (similar in structure to those put in place, after *Bakke*, by many small and selective colleges and graduate programs), and another involving admissions to a large, selective public university that is required to consider tens of thousands of applications each year. Hearing them together would allow this Court an opportunity to provide more helpful guidance to lower courts and to colleges and universities charged with complying with this Court's decisions than would be possible if only one admissions system were before the Court.

No. 01-1416. This is the defendants' interlocutory appeal, for which leave was granted under 28 U.S.C. § 1292(b), challenging the district court's determination that the LS&A admissions systems, in place from 1995 to 1998, taken together, were constitutionally impermissible.

Because the University of Michigan undisputedly no longer employs the admissions systems at issue in this appeal, Respondents do not believe this Court should sit as a court of review, in the first instance, to hear an appeal from the district court's determination. If this Court were inclined to grant certiorari at this point to decide whether and how colleges and universities may consider race in admissions to achieve the benefits of diversity, the *Grutter* case and the appeal in No. 01-1418 would provide ample opportunity for this Court to resolve the question in the context of admissions systems that are currently in force. There is no reason why this Court should exercise its rare certiorari before judgment authority to apply the rule of law that would emerge from these cases to admissions processes that the University discontinued four years ago. *See, e.g., Texas v.*

Hopwood, 518 U.S. 1033, 1034 (1996) (mem.) (statement of Ginsburg, J., joined by Souter, J., with respect to the denial of certiorari) (observing, in connection with the denial of certiorari, that "the 1992 admissions program [at the University of Texas Law School] has long since been discontinued and will not be reinstated.") (internal quotations and citation omitted).[5]

If this Court does otherwise grant certiorari in these cases, the appeal presenting the question involving discontinued admissions systems should properly remain in the court of appeals, left for that court's resolution following this Court's disposition of these cases.

No. 01-1333. Prior to the court of appeals' decision to accept the district court's § 1292(b) certification, plaintiffs filed an appeal as of right with respect to (a) the district court's final order, pursuant to Fed. R. Civ. P. 54(b), granting judgment on qualified immunity grounds in favor of the individual defendants who had been sued for damages in their individual capacities, and (b) the district court's summary judgment ruling denying plaintiffs' request for an injunction.

Plaintiffs' challenge to the district court's qualified immunity ruling is wholly fact-bound and unworthy of this Court's review—least of all before judgment in the court of appeals. The petition does not identify any disagreement among the lower courts on any question of law relating to qualified immunity standards. Under these circumstances, it would certainly be inappropriate to leapfrog the court of appeals in order to resolve the application of settled qualified

---

[5] While the petition relies heavily on a stipulation that Petitioners assert equates the prior and current admissions systems (Pet. 9), in fact the stipulation addressed the change only from the "grids" to the "selection index," and did not relate to the use of "protected seats" or other aspects of the prior admissions systems that the district court found constitutionally problematic. Indeed, the district court did not adopt Petitioners' interpretation of the stipulation. Pet. App. 34a & n.16.

immunity principles to the facts of this case. Certiorari before judgment should therefore be denied, with the question of the correctness of the district court's qualified immunity ruling left for consideration in the first instance in the court of appeals, following any decision by this Court on the merits.

In addition, certiorari before judgment with respect to this appeal would also be improper because the jurisdiction of the court of appeals was not properly invoked. Plaintiffs did not seek preliminary injunctive relief in the district court. For that reason, § 1292(a)(1)'s exception to the final judgment rule does not apply. *See Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966) (district court's order denying plaintiff's motion for summary judgment based on the existence of triable facts was not appealable under § 1292(a)(1)); 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3924.1, at 156 (1996) (suggesting that § 1292(a)(1) should be confined "to appeals from orders dealing with explicit requests for preliminary relief"). No other basis for appellate jurisdiction over the district court's order denying plaintiffs' request for injunctive relief is presented.

Even if the court of appeals has appellate jurisdiction over this aspect of plaintiffs' appeal, there is no reason this Court should hear that appeal in the first instance. Plaintiffs ask this Court to resolve the question whether the district court, having concluded that the LS&A's current admissions system was lawful while its prior admissions systems were not, erred in declining to enjoin defendants from reinstituting its prior admissions systems. This unexceptional exercise of the district court's traditional authority to grant or withhold equitable relief in view of all of the facts and circumstances presents no question of general applicability warranting this Court's review.

Thus, because the qualified immunity question is wholly fact-bound, and because the challenge to the district court's

denial of injunctive relief is not certworthy and rests on a questionable jurisdictional foundation, certiorari before judgment should be denied in appeal No. 01-1333.

No. 01-1438. This appeal was filed by the intervening defendants from the district court's order rejecting the argument that the LS&A admissions system could be justified as a remedy for the present effects of alleged past discrimination. The intervening defendants, who are also Respondents herein, have separately filed a petition for a writ of certiorari before judgment, No. 02-571, in which certiorari is sought on the same remedial question.[6] If (and only if) certiorari is granted in *Grutter*, Respondents the Board of Regents of the University of Michigan, Lee Bollinger, and James J. Duderstadt do not oppose the request (either as advanced by the Petitioners herein, or by the intervening defendants as Petitioners in this Court in case No. 02-571), for certiorari before judgment seeking review in this Court of that remedial question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari before judgment should be denied.

If this Court grants certiorari in the related case of *Grutter v. Bollinger*, No. 02-241, however, the petition for a writ of certiorari before judgment in this case should be granted, limited to the plaintiffs' § 1292(b) appeal (No. 01-1418). The petition for certiorari before judgment should be denied as to the plaintiffs' § 1292(a)(1) appeal (No. 01-1333) and the defendants' § 1292(b) appeal (No. 01-1416). If this Court grants certiorari before judgment with respect to any of these appeals, Respondents do not oppose the petition seeking certiorari before judgment to hear the questions

[6] The petition in *Patterson*, No. 02-571, also purports to present the question whether the University's consideration of race may be justified as serving the compelling interest of achieving the educational benefits of diversity. Because that question is fully before the Court in connection with this petition, it need not be independently considered in *Patterson.*

presented in the intervening defendants' appeal (No. 01-1438).

Alternatively, if certiorari is granted in *Grutter*, and if this Court does not act separately on the petition with respect to each of the separate cases now pending in the court of appeals, it should issue an order limiting its review to the question of whether the current LS&A admissions program is constitutional.

Finally, if certiorari before judgment in this case is granted, Respondents respectfully suggest that this Court enter its order granting certiorari in this case and in *Grutter* on the same date, and provide that the cases each be set for one hour of argument on the same day.

Respectfully submitted,

MARVIN KRISLOV
JONATHAN ALGER
UNIVERSITY OF MICHIGAN
Office of the Vice President and
General Counsel
4010 Fleming Admin. Bldg.
503 Thompson St.
Ann Arbor, MI 48109

JEFFREY LEHMAN
EVAN CAMINKER
UNIVERSITY OF MICHIGAN
LAW SCHOOL
625 South State Street
Ann Arbor, MI 48109

PHILIP J. KESSLER
LEONARD M. NIEHOFF
BUTZEL LONG
350 South Main, Suite 300
Ann Arbor, MI 48104

JOHN H. PICKERING
JOHN PAYTON
Counsel of Record
BRIGIDA BENITEZ
STUART DELERY
CRAIG GOLDBLATT
ANNE HARKAVY
DAVID MOLOT
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

MAUREEN E. MAHONEY
J. SCOTT BALLENGER
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004

Counsel for Respondents

OCTOBER 2002