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

REPLY BRIEF

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I. INTRODUCTION

The "conditional" opposition of respondents Lee Bollinger, James Duderstadt, and the Board of Regents of the University of Michigan (collectively "University" or "University respondents") to the Rule 11 petition of Jennifer Gratz and Patrick Hamacher actually indicates substantial agreement between the parties on some important points. Thus, although opposing a grant of certiorari for the same reasons given by respondents in *Grutter v. Bollinger* (No. 02-241), the University agrees with petitioner that if one of the cases is accepted for review, there are compelling reasons for granting review in the other, and that, in particular, these reasons are sufficiently compelling to warrant issuance of a writ before judgment under Rule 11 in *Gratz*, if the petition in *Grutter* is granted.

Respondents' opening argument – that the petition should be denied for the same reasons given by respondents in opposing the petition in *Grutter v. Bollinger* – suffers from all the same weaknesses and fallacies identified in petitioner Grutter's reply to the opposition brief in that case. Just as respondents have not repeated all of their arguments in their conditional opposition, petitioners will not here burden the Court with a repetition of the reasons why the respondents are quite demonstrably wrong in arguing that the "division of lower court authority on the primary legal question presented . . . is shallow, limited and undeveloped." Brief in Conditional Opposition at 1. Instead, petitioner refers the Court to the arguments and authorities contained in their reply to the opposition brief in *Grutter*.

Most of the remainder of the oppositional portion of the University's brief is taken up with arguments regarding the appropriate scope of the Court's review in the event it grants the petition. Specifically, the University seeks to shield from review the lawfulness of the admissions policies in effect from 1995 to 1998, which includes years in which the two named plaintiffs applied, and were rejected for admission, by the University; whether the district court should have denied plaintiffs' claim seeking to enjoin the use of those policies; and whether the individual defendants are entitled to summary judgment on qualified immunity grounds. The University's arguments are based on erroneous factual and legal premises and are unpersuasive for other reasons as well. For the reasons discussed below, petitioner submits that it would be appropriate for the Court to issue a writ to answer all the questions presented in the petition.

II. ARGUMENT

A. The Questions Presented Arise From One Case in the Court of Appeals, Not Four.

The University premises much of its argument in opposition on a strange and novel theory that there are four separate "cases" pending in the court of appeals and that the issues presented in the petition arise from some, but not all, of these "cases." *See* Brief in Conditional Opposition at 14-15. It gives no authority for the first part of this proposition except for citing to the uncontroversial point that a "case" is "in" the court of appeals when a notice of appeal is filed and a docket entry created. *See id.* at 15. The question of *when* a case is "in" the court of appeals, an important one because of the jurisdictional requirements of 28 U.S.C. § 1254(1), is, however, quite

different from the question of whether multiple consolidated appeals from the same district court case make for multiple "cases" in the court of appeals. For reasons discussed in the next section below, the answer to the second question is a purely academic (and hence unnecessary) one in the consideration of this petition because all the questions presented in it arise independently from both the appeals filed by petitioner and docketed in the court of appeals, whether they constitute one or more "cases."

Not only have respondents failed to cite appropriate authority for their *ipse dixit* proposition that the petition arises from multiple cases, the rule they suggest is quite counter-intuitive. A case commences, of course, with the filing of a complaint. Although many district court rulings might follow from the filing of that complaint, it would be eccentric to consider that each ruling means that another "case" has been thereby created and decided. To be sure, rulings in the course of various stages of the proceedings may lead to multiple appeals at different times during the pendency of the case, each one creating a new basis for review on certiorari. But those are not the circumstances in which the University is characterizing the petition here as arising from multiple "cases." These proceedings do not even present the more complex scenario of counterclaims filed in response to a complaint, or multiple complaints consolidated for consideration by the district court. Instead, the orders and judgment in the district court from which various appeals were taken all derived indisputably from *one* case commenced by Gratz and Hamacher. It follows that the one case did not become multiple cases

merely because more than one party filed a notice of appeal in the same court of appeals.[1]

B. There Is Appellate Jurisdiction For Review of the District Court's Order Denying an Injunction.

The University's erroneous argument about multiple "cases" in the court of appeals leads to its next two arguments: (1) that plaintiffs' appeal of the district court's order denying an injunction did not properly invoke the jurisdiction of the court of appeals; and (2) that there is "[n]o other basis for appellate jurisdiction over the district court's order denying plaintiffs' request" for an injunction. Brief in Conditional Opposition at 18. The University is wrong on both counts.

The second of these two assertions is especially disingenuous. The district court denied plaintiffs' request for an injunction in the January 30, 2001, Order. Petitioners appealed that order pursuant to *both* 1292(a)(1) and 1292(b); thus, even if defendants were correct about the propriety of using 1292(a)(1), the propriety of the district court's denial of an injunction was nonetheless in the court of appeals. The certification of an order under Section 1292(b) brings the entire order before the court of appeals.

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[1] It is instructive to note that in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), the Sixth Circuit issued one decision, although there were two appeals filed and docketed: by the Law School respondents and the intervenors in that case. It would be quite illogical to suggest that the Sixth Circuit in *Grutter* decided two "cases," and it is just as nonsensical to suggest the same thing with respect to the district court's rulings in *Gratz*.

28 U.S.C. § 1292(b) (authorizing district court to certify *orders* for appeal, and giving courts of appeals authority to permit appeals from *orders*); *see also, e.g., Yamaha Motor Group v. Calhoun*, 516 U.S. 199, 205 (1996) ("appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court{dots4}[T]he appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'"); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997) (jurisdiction pursuant to Section 1292(b) not limited to certified question, but rather entire order).

Indeed, in the Sixth Circuit, defendants made precisely the same argument about the propriety of review of the denial of injunctive relief under Section 1291(a)(1), but nonetheless conceded that granting the cross-petitions for permission to appeal under § 1292(b) would "avoid and *render moot* [that] jurisdictional question." Defendants' Statement Respecting Interlocutory Appellate Jurisdiction (served March 14, 2001), p. 9 (emphasis added). The Sixth Circuit *did* grant the cross-petitions, and, accordingly, by defendants' own words, any question about whether the appeal of the district court's denial of injunctive relief is moot.

The foregoing also renders moot, then, the University's first argument – that plaintiffs' appeal of the denial of injunctive relief (No. 01-1333) did not invoke appellate jurisdiction. In any event, the argument is erroneous. The University's reliance on *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966), for the proposition that an interlocutory appeal may not be taken from a

permanent injunction is thoroughly misplaced. The Court in that case explained that appellate jurisdiction was lacking because the order appealed from was a pretrial order having nothing to do with the merits of the case. *Id.* at 25 ("We take the . . . view [that the order may not be appealed] not because 'interlocutory' or preliminary may not at times embrace *permanent injunctions*, but because the denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim.") (emphasis added).

Moreover, the Court has recognized that an interlocutory appeal from an injunction is appropriate where the denial of the plaintiffs' request for injunctive relief has "serious, perhaps irreparable consequences." *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981). Plaintiffs' claims and request for injunctive relief easily satisfy this test because they arise from deprivations of constitutional rights. *See Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (First Amendment rights). *See also* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1, at 161 ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

C. There Are Compelling Reasons to Review All the Questions Presented in the Petition.

Because there is appellate jurisdiction to review the district court's order denying injunctive relief, all that remain of the University's conditional opposition are its arguments that the Court should in its discretion decline to review the lawfulness of the 1995-1998 admission

systems and the judgment in favor of the individual defendants on qualified immunity grounds. There are compelling reasons, however, for encompassing these issues in a writ of certiorari. First, the University's description of the 1995-1998 admissions systems as "defunct" does not address whether the district court should have dismissed on summary judgment a claim for an injunction with respect to them. As argued in the petition, a party's voluntary cessation of illegal conduct, especially when produced by litigation, is not a basis for denying injunctive relief. *See* Petition at 29. The University still vigorously defends the mechanical racial preferences for years 1995-1998, with its use of protected seats for select racial minorities and explicit double standards contained in separate "grids" for making admissions decisions.

Moreover, the parties have stipulated as a factual matter that the current admissions system (the one in effect for the 1999-2000 admissions cycles) is substantively the same with respect to the consideration of race as the 1995-1998 admissions systems. The University points out that the district court found a material distinction between the 1995-1998 and 1999-2000 admissions systems, but the district court's *legal* conclusion distinguishing between the systems (which is one of the reasons justifying issuance of a writ in the first place) does not change the *undisputed fact* that the "substance" of how race and ethnicity are considered in admissions did not change.[2] *See*

[2] The University contends that it no longer has a policy of admitting all "qualified" minorities. *See* Conditional Opposition at 8 & n.3. This contradicts undisputed evidence in the record from a senior admissions official who testified that the 1999-2000 systems did not depart from this policy. *See* JA-85-87 (deposition testimony of Marilyn

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Joint Summary of Undisputed Facts Regarding Admissions Process, JA-4099. Moreover, the undisputed evidence was that the University calculated the numerical-based "selection index" to replicate the results obtained with the 1995-1998 admissions systems. *See* JA-333, 365-66, 375, 700-03, 931. Hence, the systems are two sides of the same coin, and a consideration of the policies in the latter period is assisted by reference to the systems it was derived from and vice versa.

Finally, the Court should also review the district court's judgment in favor of the individual defendants on qualified immunity grounds. It is quite incomprehensible how admissions systems that the district court found to be a "clear" instance of a "functional equivalent of a quota system," App. at 45a, did not violate "clearly" established rights of plaintiffs, *id.* at 48a-50a. Review hardly presents a "fact-bound" question, Brief in Conditional Opposition at 18. If it were fact-bound, the district court presumably would have denied the individual defendants' motion for summary judgment. Rather, qualified immunity here

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McKinney). Moreover, since the later system (using the selection index) was statistically designed to replicate the admissions outcomes produced in 1995-1998, it was hardly necessary for the selection-index guidelines to state explicitly what the system accomplished by design. Finally, for these reasons it is a disingenuous quibble for the University to distinguish between the "effect" that its policies have of admitting all "qualified" minorities it deems "underrepresented," and an explicit policy to achieve this end. The University does not argue that the results produced by its current policies – admission of "virtually all qualified underrepresented minority students," Brief in Conditional Opposition at 8 – are a matter of chance or coincidence. Rather, the results are, of course, the product of policies intentionally designed to achieve racial and ethnic "diversity."

presents an important question of what legal conclusions should have followed from the undisputed facts.

III. CONCLUSION

For all the foregoing reasons, petitioner respectfully submits that a writ should issue.

Respectfully submitted,

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