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Nos. 02-241, 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER

v.

LEE BOLLINGER, ET AL.

JENNIFER GRATZ AND PATRICK HAMACHER

v.

LEE BOLLINGER, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE CENTER FOR THE ADVANCEMENT OF CAPITALISM AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for the Advancement of Capitalism ("CAC") is a District of Columbia corporation organized in 1998, and exempt from income tax under Section 501(c)(4) of the

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[1] CAC files this brief with the consent of all parties. The letters granting blanket consent have been filed concurrently in both cases. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

Internal Revenue Code. CAC's mission is to present to policymakers, the judiciary and the public analyses to assist in the identification and protection of the individual rights of the American people. CAC applies Ayn Rand's philosophy of Objectivism to contemporary public policy issues, and provides empirical studies and theoretical commentaries on the impact of legal and regulatory institutions upon the rights of American citizens.

The University of Michigan's admissions policies, and their disposition by this Court, is a subject of great interest to CAC and its supporters. A fundamental tenet of CAC's mission is the support of individualism as an organizing principle of society. The two cases at bar directly challenge individualism's applicability in the university setting, and as they represent acts of a state government, in the larger context of public action under the Constitution. For this reason, CAC maintains a critical interest in the outcome of both cases.

ARGUMENT[2]

In order to prevail, the University of Michigan must demonstrate that racial "diversity" in admissions is essential to the school's core educational mission. Without this demonstration, there is no compelling interest that justifies the University's violation of the Fourteenth Amendment. Based on the record, the University has not met this burden, and it will never be able to do so, because racial diversity itself is not relevant to education.

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[2] CAC does not wish to burden the court by restating legal arguments that are being argued sufficiently by others. Accordingly, we deliberately limit our argument to what we consider to be the neglected axis of this case, namely, whether "racial diversity" itself is a legitimate end and whether it can constitute a compelling interest that obviates the need to comply with the Equal Protection Clause of the Fourteenth Amendment.

Both cases turn on the definition of "diversity." The lack of precision in defining diversity hampers the University's case. Lee Bollinger, the University president, offered this explanation of diversity in a recent interview:

> "The basic idea is that students learn better when they're in an environment in which not everyone is just like them...The question of the bigness or smallness of the [race] factor is not the way to look at it. The question is: 'How much do you value educational diversity as a tool for your students?'"[3]

President Bollinger asserts diversity *qua* diversity is a value that must be upheld as part of the University's educational mission. Yet nothing in Bollinger's explanation, or any document filed by the University in these cases, offer a precise definition of what diversity is, and how it constitutes a value. In the decision below in *Grutter*[4], Judge Boggs noted in dissent that, in defining diversity, "we must be aware that the definitions of and the precise connotations of words are of crucial importance."[5] Neither the University nor the Sixth Circuit majority heeded Judge Boggs' warning. Consequently, this Court is now faced with resolving the conceptual paradox over diversity's true relationship to education.

The Law School admissions policy establishes two criteria to be considered in assessing diversity: race and experience. The undergraduate policy is far simpler, only dealing with race, and defining race in direct proportion to other factors. Both policies, however, rely on using an

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[3] *60 Minutes: Negative about affirmative action?* (CBS television broadcast, Dec. 15, 2002).

[4] 288 F.3d 732 (6th Cir. 2002).

[5] Id. at 774 (Boggs, J., dissenting).

individual's genetic lineage to assess their character and intellectual capacity. By definition, such a policy is racist.[6]

Yet President Bollinger says we should not "look at the bigness or smallness of race" in assessing race's importance. This is obfuscation, since Bollinger's undergraduate policy defines a very precise relationship: Race counts for 20 points out of the 105 minimum required for admission. By contrast, a perfect SAT score counts for 12 points, and an excellent personal essay counts for two.[7] It is impossible for the University to separate their rhetoric from the reality of their policy.

In the case of the Law School, the University offers a policy that approximates understanding of diversity without being precise:

> "There is a commitment to racial and ethnic diversity with special preference to the inclusion of students from groups that have been historically discriminated against...who without this commitment might not be represented in our student body in meaningful numbers. These students are particularly likely to have experiences and perspectives of special importance to our mission."[8]

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[6] As Ayn Rand observed in 1963, "Racism claims that the content of a man's mind (not his cognitive apparatus, but its content) is inherited; that a man's convictions, values and character are determined before he is born, by physical factors beyond his control. This is the caveman's version of the doctrine of innate ideas—or of inherited knowledge—which has been thoroughly refuted by philosophy and science. Racism is a doctrine of, by and for brutes. It is a barnyard or stock-farm version of collectivism, appropriate to a mentality that differentiates between various breeds of animals, but not between animals and men." AYN RAND, THE VIRTUE OF SELFISHNESS 147 (1964).

[7] *Gratz v. Bollinger*, No. 02-516, Pet. App. at 116a.

[8] 288 F.3d at 737.

The specific justification for using race to attain "diversity" was clarified by University counsel at oral argument before the Sixth Circuit in *Grutter*:

> "Our race matters and it matters across all sorts of economic classes. Race matters in the United States. If we had someone who was a black woman, who otherwise had an application that looked like Barbara Grutter, that would be a different person with different life experiences that would have a different contribution to our class."[9]

Race and experience are presented here as related factors. The defendants' inference is that individuals of the same race share experiences that impact their educational ability in the same way. But this conclusion is faulty and represents the University's fundamental error in its justification of race-based admissions.

Race is not a legitimate proxy for experience for two reasons. First, race is typically determined on the basis of one's biological parentage, yet biological parentage does not determine one's life experiences. One of the simplest examples of this point may be seen in the case of adoptions. Here, biological parents typically contribute less than adoptive parents to their children's life experiences. Thus, in the case of cross-racial adoptions, race becomes a misleading proxy, possibly masking enormous differences in applicants' life history. Second, for purposes of admission, the applicant's race is categorical, meaning that applicants with very different sets of biological parents and grandparents are treated equivalently. Here, too, race is a misleading proxy for experience because wide variations in lineage will not correlate with variations in experience. In a twist on the notorious "one drop rule", the University effectively expects

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[9] *Grutter*, Oral Arg. Trans. at 3 (6th Cir. Dec. 6, 2001).

that an applicant with one African-American grandparent and an applicant with two African-American parents will share the same life experiences, including the experience of racism and other adversities. This assumption is suspect, but its validation would be necessary to support the university's claim that its use of race provides a legitimate stand-in for assessing applicants' experiences.

We argue that race is wholly irrelevant to University admissions, and its use by the University of Michigan serves only to negate the importance of experiences that can be directly identified in *individuals*. Such experiences, however, are misvalued by the University, particularly in the Law School policy. In one passage from their policy, the Law School favorably cites the following experiences as contributing to "diversity": "an Olympic gold medal, a Ph.D. in physics, the attainment of age 50 in a class otherwise lacking anyone over 30, or the experience of having been a Vietnamese boat person." But consider the nature of "diversity" among these four cases. The common factor among them is not group membership, but achievement in some field or in an individual overcoming some specific adversity. Insofar as these present *individual values*, the University may properly consider them, and the University seems to recognize, at least implicitly, that there is no genuine substitute for individual achievement.

Yet race does in fact substitute for individual achievement in both the Law School and undergraduate admission policies. Race is given 1.67 times the weight of a perfect SAT score in undergraduate admissions, and 10 times the weight of an excellent essay. The message here is unmistakable—the University does not consider individual achievement a virtue on par with race.

Racial diversity thus becomes not just a proxy for achievement, but more important than it. The implications of this substitution are enormous. If allowed to stand, the admissions policies will act to undermine the very mission of the University of Michigan—education.

By elevating race over achievement and assigning people to racial groups, the University denies an important truth: students do not learn as social fragments, but as individuals. Ultimately, there is no collective mind; only individual minds can initiate and direct thought. Students certainly benefit from intellectual interaction with others, but such associations ought to take place voluntarily, on the basis of earned achievement and ability, rather than as a product of the state's racial engineering.

In contrast, the University's policy stands for the proposition that every applicant represents a fragment of some collective racial experience. This means that the diversity of experiences, ideas and backgrounds among applicants is effectively ignored as each individual is reduced to a color-coded cipher. The implication is that a black student does not represent himself and his mind alone, but rather some "collective consciousness" of all other blacks not attending the University. Not only is this burden unfair to the individual student, the whole concept runs contrary to the American theory of government. The state has no right to present students as unelected representatives of some racial group. Yet that is precisely the role every black, Latino, and Native American student at the University of Michigan is expected to fulfill.

Although the defendants argue that race-based admissions correct the past and present evils of racism, the only solution to the problem of racism is individualism. This principle is enshrined in the claim of the Declaration of Independence that "all men are created equal." This was not just a political statement, but a *metaphysical* claim: no one inherits any experiences. The implication is that the state—and its universities—cannot infer experience on the basis of biological parentage.

The issue here is whether "racial diversity" constitutes a compelling government interest. The petitioners and other *amicii* expend great energy arguing over the "compelling" aspect. But there is, at the heart of this case, the related

question of whether racial diversity itself is an actual "interest." We argue it is not. Racial diversity is, as Ayn Rand would call it, an "anti-concept," that is, "an unnecessary and rationally unusable term designed to replace and obliterate some legitimate concept."[10] In these cases, "racial diversity" obliterates the concept of equal protection, which requires equal treatment of individuals without regard to race, and seeks to replace the concept with the view that individuals are interchangeable racial fragments. Since "racial diversity" stands in direct opposition to the proper execution of the Equal Protection Clause of the Fourteenth Amendment without any redeeming educational value, it is clear that this "diversity" can not constitute a compelling state interest.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit in *Grutter v. Bollinger*, and the judgment of the District Court in *Gratz v. Bollinger*, should be reversed.

Respectfully Submitted,

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Dated: January 16, 2003.

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[10] AYN RAND, CAPITALISM: THE UNKNOWN IDEAL 183 (1967).