No. 02-241

IN THE
Supreme Court of the United States

BARBARA GRUTTER
Petitioner,

v.

LEE BOLLINGER, *et al.*
Respondents,

and

KIMBERLY JAMES, *et al.*
Respondents.

On Writ of Certiorari To The
United States Court of Appeals for the Sixth Circuit

MOTION FOR ENLARGEMENT OF ARGUMENT TIME AND FOR DIVIDED ARGUMENT, OR IN THE ALTERNATIVE, FOR DIVIDED ARGUMENT

Respondents Kimberly James, *et al*., the student defendant intervenors in this case, hereby move the Court for an order enabling them to participate in oral argument. The students request ten minutes to present their distinct defenses of the affirmative action plan under challenge, and respectfully move the Court for enlargement of the time for oral argument by ten minutes per side, or, in the alternative, for division of the current thirty minutes allotted to the respondents.

1. In considering the constitutionality of affirmative action programs in higher education, members of this Court have recognized that countering racial bias and

discrimination in admissions criteria—particularly standardized test scores but also college grades—could stand as a basis for upholding the use of affirmative action policies. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell observed that a showing of bias in entry credentials could stand as an alternative basis for upholding affirmative action admissions programs. 438 U.S. at 306 n.43 (Powell, J.). In *DeFunis v. Odegaard*, 416 U.S. 312 (1974), Justice Douglas, dissenting from the Court's holding that the case was moot, concluded that law school affirmative action programs partially offset the bias of the LSAT against minorities and therefore did not violate the rights of white applicants. 416 U.S. at 344 (Douglas, J., dissenting). Until this case, however, the Court has never been presented with an abundance of largely uncontested evidence on the racial bias and discrimination contained in standardized test results and grades, and has therefore never had the opportunity to rule on affirmative action as a means and method to offset discrimination in what would otherwise be a thoroughly biased admissions process. As the Sixth Circuit Court anticipated in granting the students intervenor status, the University has presented no evidence on these questions and therefore University counsel is not competent to argue or answer questions on these matters. Without these proofs and arguments, the basis for the Court's deliberations must be substantially and decisively incomplete.

2. The Sixth Circuit panel that ordered intervention, granting the student respondents full party status, did so because it anticipated that the students would introduce evidence and arguments on the disparate impact of tests and grades, reasoning that such bias could be important to the constitutional determination involved in the case, and that the University respondents would not assert it as a defense. *Grutter v. Bollinger*, 188 F.3d

394, 401 (CA6 1999). At trial, the student respondents did indeed prove bias in admissions credentials by compelling and largely uncontested evidence.

3. The district court devoted a substantial portion of its opinion to the student respondents' arguments and conceded their force in part. PA 257a-292a.[1] Four of the judges in the Sixth Circuit's majority joined a concurrence relying largely on the students' proofs and arguments. PA 72a-73a, 78a-79a (Clay, J., concurring).

4. This case is the first one in the history of affirmative action litigation in which a full defense of affirmative action has been presented at trial by an integrated group of students – the real stakeholders in the matter at hand. The student respondents – 41 individually named black, Latino, Native American, Arab American, Asian American, other minority and white students and three pro-affirmative action coalitions, United for Equality and Affirmative Action (UEAA), Law Students for Affirmative Action (LSAA), and the Coalition to Defend Affirmative Action and Integration, and Fight for Equality By Any Means Necessary (BAMN) – have a profound interest in the outcome of the litigation. They called more witnesses than the other parties combined, including nationally prominent experts such as Duke University Professor John Hope Franklin and Harvard University Professor Gary Orfield.

5. At trial and summary judgment stages, the student respondents presented whole categories of critically important evidence omitted from the proofs in prior affirmative action cases, including comprehensive testimony on the following:

a) the nature and sources of racial bias on the LSAT;

[1] "PA" refers to the Petition Appendix; "JA" refers to the Joint Appendix.

b) the nature and sources of racial bias in college grades;

c) the sharp disparate impact of these two admissions criteria on black, Latino and Native American law school applicants;

d) the resegregation of higher education in California and Texas, jurisdictions where affirmative action has been eliminated, and the precipitous resegregation of legal education as a whole that would follow an adverse decision here;

e) conditions of stark inequality and segregation in K-12 education for black, Latino, and Native American young people;

f) the history of the nation's struggle for racial integration as against both de jure and de facto segregation;

g) the continuing necessity of affirmative action policies for Asian Pacific Americans and for women of all races; and

h) the professional success of and civic leadership provided by black and other minority attorneys admitted under affirmative action plans.

6. The student respondents present arguments in defense of the Law School's affirmative action plan that are distinct from those of the University respondents. In particular, they defend the policy on the basis that LSAT scores and grades are racially biased, arguing both

a) that the plaintiff has therefore failed to show different treatment by race of *similarly situated* individuals, since her proofs rest exclusively on comparisons across race of applicants with similar standardized test scores

and grades and therefore depend upon the false and disproved assumption that LSAT scores and grades are race-neutral; and

b) that the Law School's affirmative action plan is therefore necessary to serve the compelling state interest in offsetting what would otherwise be a rigid regime of unearned advantages for white applicants and of discrimination against black, Latino, and Native American applicants, that is, a strict racial double standard masquerading as equal treatment.

7. The students argue that the Law School's affirmative action program must be understood as a desegregation plan for the Law School and that affirmative action serves a compelling state interest in the integration of legal education and the legal profession. They emphasize that *Bakke* must be read in the context of *Brown v. Board of Education*, 347 U.S. 483 (1954), and that to invalidate the Law School plan would be to render both cases dead in practice. The students argue that if this Court strikes down the modest use of race as a factor in the University of Michigan Law School plan, then the longstanding right of government bodies to take conscious and voluntary action to end de facto segregation will be annulled, significantly altering the social character of our nation and the distribution of power between our branches of government.

8. In addition to making an independent record and independent arguments, the students support and amplify the University respondents' defense based on the diversity rationale articulated by Justice Powell in *Bakke*. Indeed, they have augmented that defense by presenting additional evidence to support it, including, for example, testimony establishing that half of the white students at the Law School have had little or no contact

of any kind with non-white people prior to attending Michigan. JA 213-214. The students presented ample evidence on the relationship between race and the achievement of intellectual diversity.

9. Only by participating in oral argument will the student respondents be able to clarify their position; address the Court's questions; and respond to the specious threshold arguments advanced by the petitioner to obstruct consideration of the merits of their defense.

10. The student respondents recognize that the Court does not lightly enlarge time or divide argument. They submit, however, that the exceptional importance both of the case and of their role to date strongly counsel against routine practice.[2] The outcome here will determine the character of American society for the foreseeable future. This is not a moment for false economies.

11. For all of these reasons, the students request that the Court enlarge the oral argument by ten minutes per side and grant them the additional ten minutes on respondents' side. The University respondents do not oppose this request. In the alternative, the students request that the Court assign them ten minutes of respondents' existing thirty minutes in which to make their case.

[2] The student respondents also recognize that under Rule 28 a motion to enlarge argument time ordinarily must be made within 15 days of the filing of the petitioner's merits brief. Here, prior practice in the litigation and prior discussion with counsel for the University respondents caused the students' counsel to believe that respondents would reach agreement on division of the existing thirty minutes and that the motion for enlargement would not be necessary. The students first learned from counsel that such an agreement was unlikely on February 26, and have prepared this motion as quickly as possible.

Respectfully submitted,

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