No. 02-241

In The Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents,

and

KIMBERLY JAMES, *et al.*,

Respondents.

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

PETITION FOR REHEARING

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I. PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, petitioner Barbara Grutter respectfully petitions the Court for rehearing of its judgment and decision issued on June 23, 2003. The grounds for the petition are that the Court did not address or decide the second question presented in the petition for certiorari, which the Court granted on December 2, 2002, and that it did not reveal what standard of review the court of appeals should have employed or what standard of review the Court itself used. Rehearing is warranted because resolution of these unaddressed issues has important, outcome-determinative implications for the decision with respect to the lawfulness of the policy and practices at issue in this case and for future cases in which similar questions will arise.

II. DISCUSSION

The second question presented in the petition for certiorari related to the appropriate standard for reviewing on appeal the facts found by the district court after a 15-day bench trial in January and February 2001. The United States Court of Appeals for the Sixth Circuit held that the findings should be reviewed by it *de novo* because "constitutional facts are at issue." Pet. App. 9a (quoting *Womens' Med. Prof. Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir. 1997)). Petitioner had argued in the Sixth Circuit that the district court's findings could be set aside only if the court of appeals concluded that they were "clearly erroneous."

Because the Sixth Circuit reversed the district court's judgment under a *de novo* standard of review, the petition for certiorari presented the following question: "Should an appellate court required to apply strict scrutiny to governmental race-based preferences review *de novo* the district court's findings because the fact issues are 'constitutional' "? Pet. i. The Court granted the petition, *see* 123 S. Ct. 617 (2002), and the petitioner argued the issue in both its opening and reply briefs to this Court. *See* Pet. Br. 45-46; Pet. Reply Br. 19-20.

The Court held in this case that the admissions policies of the University of Michigan Law School ("Law School") are narrowly tailored to achieve an interest in a diverse student body. *See* Bench op. at 21-31. Because a narrow-tailoring analysis necessarily entails a review of the facts of a particular system of preferences, it is essential to ascertain how the facts are to be reviewed before an appellate court draws legal conclusions. The district court concluded, based on its findings of fact, that the Law School's use of racial preferences in its admissions policy was not narrowly tailored to achieve an interest in diversity. In at least four respects, the district court's findings bear directly on the narrow-tailoring analysis approved by the Court in this case and in prior cases. These judicially-established facts are:

1. The Law School "effectively reserve[s]" approximately 10% of each entering class for members of the preferred racial or ethnic groups, who are "insulated from competition" with applicants from the non-preferred groups (Pet. App. 249a).
2. The Law School's "haphazard selection" of which races were entitled to the preferences is not a "close fit" of means to ends (*id.* at 249a-250a).
3. The Law School failed to consider race-neutral alternatives before implementing its racial preferences (*id.* at 251-252a).
4. The Law School's policy places no durational limit on the use of racial preferences (*id.* at 247a-248a).

The Court's opinion does not identify the district court's findings as "clearly erroneous," and the court of appeals, as noted, did not purport to make that determination. Each of these facts is, as discussed below, incompatible with the Court's precedents on the requirements for narrow tailoring. That they are *all* true with respect to the Law School's policy, as found by the district court, leaves no room for a conclusion consistent with this Court's cases

that the Law School's use of racial preferences is narrowly tailored to achieve an interest in diversity.

Accordingly, if the district court's findings are not clearly erroneous, then one of two conclusions must follow: either the Law School's policies are not narrowly tailored to achieve a compelling interest in diversity, or the reversal of the district court's judgment has been upheld on the basis of some other unstated standard of review. In the event of the former, rehearing should be granted because it would change the outcome of the Court's decision upholding the Law School's use of racial preferences as narrowly tailored. If the latter is true, then rehearing should be granted so that the Court's opinion can be clarified on the question of the appropriate standard of review in cases such as this one. A rule of law that facts found by a trier of fact in constitutional cases should be reviewed *de novo* or under some standard other than the time-honored clearly-erroneous standard would be a dramatic departure from this Court's precedents and should not be permitted to arise in courts throughout the country from mere inference or speculation derived from the Court's silence and implicit action.

A. The Court's Requirements for Narrow Tailoring Are Not Met on the Facts Found by the District Court, Which Are Not, And Have Never Been Determined To Be, Clearly Erroneous.

1. The Law School's Quota: Insulating Seats from Competition

With respect to the first finding noted above, the Court's opinion holds that an "admissions program cannot use a quota system – it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" Bench op. at 22 (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 315 (1978) (Powell, J.)); *see also* Bench op. at 23 (noting that a "'permissible goal'" is one in which race is

considered as a "plus" factor "while still ensuring that each candidate 'compete[s] with all other qualified applicants' ") (quoting *Johnson v. Transporation Agency, Santa Clara*, 480 U.S. 616, 638 (1987)). The Court's opinion does not reconcile its holding that the Law School's admissions program meets this test with the district court's finding that in achieving its "critical mass," seats in the class for members of the preferred minorities are both "effectively reserved" and "insulated from competition." Pet. App. 249a. In so finding, the district court explicitly rejected the Law School's contention that "all applicants compete against one another." *Id.* at 248a; *see also id.* ("students of all races are not competing against one another for each seat"). This finding alone should suffice to meet the Court's definition of "quota" versus a permissible goal. Moreover, the district court also found that the Law School uses "race to ensure the enrollment of a certain minimum percentage of underrepresented minority students," *id.*, that it has an "essentially fixed minimum percentage figure" of seats for the preferred minority students, *id.*, and that it is "focus[ed] . . . carefully on admitting and enrolling a particular percentage of students from particular racial groups," *id.* at 249a. *See* Bench op. 22 ("Properly understood, a 'quota' is a program in which a certain fixed number *or proportion* of opportunities are 'reserved exclusively for certain minority groups.' ") (emphasis added) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (plurality opinion)).

The Court's opinion does not explain how or why the district court's findings are clearly erroneous. Under this standard, even if there is more than one permissible view of the evidence, "the factfinder's choice between them cannot be clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369 (1991). The district court was not limited to the express language of the Law School policy or the trial testimony of its admissions officers in deciding the factual question of whether the Law School reserved spaces in the class and insulated them from competition (although these, too, supported the findings). In addition, it had detailed admissions data and statistical evidence from which to make its findings. This Court's mere recitation of

some evidence (or arguments of counsel) to support a different view than that taken by the district court does not establish the district court's findings to be clearly erroneous. Applying that standard, which the Court should do on rehearing, the facts found by the district court meet the Court's definition of a quota and are reason to invalidate the policy on narrow-tailoring grounds.

2. The Law School's Arbitrary Classifications

The district court found that the Law School's racial classifications were "haphazard," and that "[n]o satisfactory explanation was offered" for granting a preference to Puerto Ricans born on the United States mainland, but not to those raised in Puerto Rico; or to Mexican Americans, but not to "other Hispanics." Pet. App. 250a. The Court's precedents make clear that arbitrariness and overinclusiveness or underinclusiveness of such classifications are fatal defects in the preferences. *See*, *e.g.*, *Croson*, 488 U.S. at 506 (noting the "random inclusion of racial groups" and the "gross overinclusiveness" of the preferences). The Law School's Bulletin for three of the years at issue (including the year for which Barbara Grutter applied) explicitly acknowledges the arbitrary classifications. *See* Pet. App. 200a-02a; App. 74, 84. Moreover, the Law School's admissions data, App. 127-55, confirm separate statistics kept for Mexican Americans and "other Hispanics" (as do the "daily reports," *see* Pet. Br. 43) as well as significantly different admissions probabilities between these groups.[1] Under the Court's precedents, these arbitrary classifications quite plainly do not "bear[ ] the hallmarks of

[1] While the Law School has in its briefs denied the existence of the separate classifications found by the district court, *see* Resp. Br. 49 n.79, it did not produce any evidence at trial rebutting the facts as found by the district court. The Law School's post-trial assertions of counsel are not evidence and are certainly not sufficient to support a conclusion that the district court's findings were clearly erroneous.

a narrowly tailored plan." Bench op. at 22. Thus, far from being clearly erroneous, the district court's findings are undisputed in the record on this point, which under the Court's precedents leaves no room for a conclusion that the arbitrary classifications are narrowly tailored.

3. The Law School's Failure to Consider Any Race-Neutral Alternatives Prior to Implementing Its Policy

The Court's opinion in this case unambiguously confirmed that "narrow tailoring . . . *require*[*s*] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." Bench op. at 27 (emphasis added). The district court explicitly addressed the consideration of race-neutral alternatives, finding as follows:

> A fifth and final factor the court must note in this connection is the law school's apparent failure to investigate alternative means for increasing minority involvement. . . . [T]he court heard very little testimony from the authors of the 1992 admissions policy, or from those who have been involved in administering it, as to whether the deans or the faculty at the law school itself have ever given *serious consideration* to race-neutral alternatives. . . . Even if these alternatives would not be as effective in enrolling significant numbers of underrepresented minority students, *the law school's failure to consider them* . . . prior to implementing an explicitly race-conscious system militates against a finding of narrow tailoring.

See Pet. App. 251a (emphasis added). In this regard, the district court made essentially the same finding as the determination of this Court in *Croson*. *See* 488 U.S. at 507 (set-aside program not narrowly tailored where "there does not appear to have been any consideration of race-neutral alternatives").

There has never been a determination that this finding of a failure to consider race-neutral alternatives

was clearly erroneous. It is amply supported by the record. No one testified, least of all anyone affiliated with the Law School, that it had considered race-neutral alternatives before employing its racial preferences. There was testimony and other evidence introduced at trial regarding race-neutral alternatives employed by *other* universities and law schools. In its opinion, the Court commended consideration of these experiments in race-neutral alternatives to institutions currently using racial preferences in admissions. *See* Bench op. 30. Yet there is no evidence in the record that the Law School has even contemplated, much less that it has "draw[n] on[,] the most promising aspects of these race-neutral alternatives." Bench op. at 30.

While this Court held that the Law School need not consider such alternatives as a "lottery" or lowering of overall admissions standards as a means of achieving diversity without discriminating on the basis of race, the Court's opinion makes clear that race-neutral alternatives must be considered. The district court's finding that none were considered by the Law School before implementing its policy is not clearly erroneous, and this Court's opinion did not explain it to be otherwise.

4. The Law School's Indefinite Consideration of Race: No "Sunset" Provision or "Periodic Review"

The Court in this case held that all race-conscious admissions programs must have a "termination point" and that "[i]n the context of higher education, the durational requirement can be met by sunset provisions" and "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." Bench op. at 30.[2] The district court found that "there is no time

[2] In positing that racial preferences in admissions should no longer be necessary in 25 years, the Court asserted that the number of "minority applicants with high grades and test scores has indeed

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limit on [the Law School's] use of race in the admissions process." Pet. App. 247a. Far from being clearly erroneous, there is nothing in the record to contradict the absence of a termination point. The written policy contains no durational limit, and it contains neither the "sunset" provision nor the "periodic reviews" called for by the Court's opinion. These facts, as found by the district court and readily observed from the written policy, are not contradicted by the Law School's mere assertion (once again made solely through argument of counsel in briefs or at oral argument, rather than through admissible evidence in the record) that it would "like nothing better than to find a race-neutral admissions formula" some day in the future. Bench. op. at 31 (quoting Resp. Br. at 34). More importantly, given the absence of testimonial or documentary evidence of *any* durational limits (even one of 25 years) on the Law School's use of race, it cannot plausibly be said that the district court's finding of no limits is clearly erroneous.

B. The Court's Decision Creates Substantial Uncertainty About the Correct Standard of Review in Cases Involving "Constitutional Facts."

The Sixth Circuit explicitly applied a *de novo* standard of review to the findings of the district court when it reversed its judgment. Pet. App. 9a. In affirming the judgment of the court of appeals, this Court neither addressed the appropriateness of the standard of review employed by the court of appeals nor explained what standard the Court used. The Court's silence on the issue is surprising given that the petition for certiorari directly

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increased." Bench op. 31. The Court cited not to evidence in the trial record on this point (there is none), but instead (and again) to arguments of counsel. *Id.* In fact, there is substantial research indicating that the test score "gap" remains the same or has even widened. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 20-21 (1998); *Amicus Curiae* Brief of the Center for New Black Leadership 11.

raised the issue in the second of the two questions presented; the Court granted the petition; and the petitioner briefed the issue in both her opening and reply briefs. The issue is not one that could be avoided as unnecessary to resolution of the case because the Court *had* to apply, and *did* apply, *some* standard of review in reaching its decision. But the opinion discloses nothing about what that standard of review was.

This reason alone should be sufficient to warrant granting the petition for rehearing. The Court's decision was widely anticipated and watched by courts, educational and other institutions, and individuals throughout the country. It will be looked to for guidance in any future case involving claims of discrimination by educational institutions or in those which achieving diversity will be offered as a justification for race discrimination in other contexts (*e.g.*, employment, contracting, jury selection, etc.). But the Sixth Circuit's rationale for applying *de novo* review was not limited to cases challenging racial preferences in discrimination cases; it has application to *all* cases involving "constitutional facts." In affirming the court of appeals, the Court's decision creates a fair implication that in any future case involving "constitutional facts" tried to a finder of fact, the standard of review on appeal is now *de novo*. In effect, there would be a trial at every judicial level to which a case is taken.

Before its decision in this case, the Court's jurisprudence in this area was clear: facts found in constitutional cases, including cases alleging discrimination, were to be reviewed under the clearly-erroneous standard. *See*, *e.g.*, *Hernandez v. New York*, 500 U.S. 352, 369 (1991). *Cf. Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985) (Title VII); *Pullman-Standard v. Swint*, 456 U.S. 273, 286-291 (1982) (same).[3] At a minimum, the Court's decision affirming

[3] As petitioner explained in her opening brief on the merits, *see* Pet Br. 46, the facts found by the district court were not mixed questions of law and fact, such as those that sometimes arise in the First Amendment area.

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the court of appeals has injected uncertainty where none existed before about the appropriate standard for reviewing facts found in constitutional cases. The potential confusion produced will not systematically advantage either the defenders of racial preferences and quotas or those who challenge them; it will simply create a greater incentive for every party who loses at the trial level to seek *de novo* review at the appellate stage. The Court should forestall inevitable confusion and litigiousness on this issue by granting the petition for rehearing and answering the second question that it accepted for review on petition for certiorari.

III. CONCLUSION

For all the foregoing reasons, petitioner respectfully requests the Court to grant her petition for rehearing.

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See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984). *See Hernandez v. New York*, 500 U.S. at 369 (rejecting argument that *Bose* and its progeny should be applied to alter the clearly-erroneous standard of review for claims of equal protection violations).

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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