Received

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BARBARA GRUTTER,
for herself and all others similarly situated,

Plaintiff,

v.

LEE BOLLINGER,
JEFFREY LEHMAN, DENNIS SHIELDS,
AND THE BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN, and

Defendants.

-and-

KIMBERLY JAMES, ET. AL.

Intervening Defendants.
_____/

Civil Action No. 97-CV-75928
Hon. Bernard Friedman
Hon. Virginia Morgan

BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE

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INTEREST OF THE MICHIGAN ATTORNEY GENERAL

Amicus Jennifer M. Granholm is the Attorney General of Michigan. The Attorney General of Michigan is a constitutional officer elected by the people. Mich. Const. 1963, art. 5, § 21. In addition to her authority under Michigan's Constitution, federal courts have recognized that Michigan's Attorney General has broad statutory and common law authority to act on behalf of the people of the State of Michigan and to appear in any cause that may be of interest to the people generally. *State of Michigan v. C. R. Equipment Sales, Inc.*, 898 Supp. 509, 513-514 (W.D. Mich. 1995); *Humphrey v. Kleinhardt*, 157 F.R.D. 404, 405 (W.D. Mich. 1994). See Mich. Comp. Laws Ann. 14.28 and 14.101.

Among the issues to be decided in this case is whether the admissions policy of the University of Michigan Law School -- a policy that includes consideration of race and ethnic origin as one of a broad array of factors in making admission decisions -- is constitutional. That policy seeks to effectuate the University's best judgment that having a racially and ethnically diverse student body is essential to fulfilling its educational mission. Because Michigan law jealously guards against any interference with the educational autonomy specially conferred on Michigan's universities by constitution, this case is unquestionably of interest to the people of the State of Michigan and warrants the appearance of the Attorney General.

Moreover, it cannot seriously be disputed that providing an education to their citizens is one of the most important functions performed by state and local governments. The critical importance of protecting state control over education from encroachment by the federal judiciary where that control represents a constitutionally justifiable policy choice is an additional vital interest of the people of the State of Michigan the Attorney General seeks to uphold by filing this amicus brief.

INTRODUCTION

In the seminal case of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the United States Supreme Court held that a university's properly devised admissions program involving the competitive consideration of race and ethnic origin did not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 320, 328 (opinion of Powell, J., joined by Brennan, White, Marshall, and Blackmun, JJ.) Justice Powell's controlling opinion in *Bakke* examined each of the goals asserted by the university in defense of its use of race in its admissions process and concluded that only one -- obtaining the educational benefits that flow from a diverse student body -- was constitutionally permissible. *Id.* at 311-312 (opinion of Powell, J.)[1] In so ruling, Justice Powell relied on the Court's long-honored doctrine of "academic freedom," grounded in the First Amendment, and recognized the right of educational institutions to engage in academic decisionmaking with limited judicial interference based on the unique and vital role they play in a democratic society. *Id.* at 312-313 (opinion of Powell, J.)[2]

In this case, the University of Michigan Law School has devised an admissions policy that takes race and ethnic origin into account as one of many

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[1] A number of distinguished amici curiae have thoroughly addressed the point that enrolling a diverse student body is a compelling interest that institutions of higher education may further -- consistent with the Equal Protection Clause -- with an admissions program that considers race as one element to achieve that result. The Attorney General will not repeat those arguments in this brief, but rather recommends the able briefing of her fellow amici to this Court.

[2] Justice Powell's opinion is controlling with regard to its statements that rely on the First Amendment's protection of academic freedom because it garnered the support of four justices of the Brennan plurality. They noted that California law had vested plenary legislative and administrative power in the University of California's Board of Regents and that nothing in the Equal Protection Clause justified limiting the scope of their power to make academic choices. *Bakke*, 438 U.S. at 366, n. 42 (opinion of Brennan, J.)

factors in making admissions decisions and has done so based on its judgment that enrolling a racially diverse student body is essential to providing a quality legal education to its students. This amicus brief defends the University's right to make that academic choice and urges this Court to follow Justice Powell's controlling opinion in *Bakke* as an eminently sound and correct statement of constitutional principles.[3]

Additionally, this brief urges this Court to pay deference to the University's academic decisionmaking based not only on federal constitutional principles, but also based on Michigan's Constitution. Since 1850, Michigan's Constitution has conferred a unique status on public universities. Michigan has made the conscious choice to place authority over the operation of the University of Michigan in its Board of Regents and has consistently and strictly forbidden any encroachment on the university's educational autonomy. Mich. Const. 1850, art. 13, § 8; Mich. Const. 1963, art. 8, § 5. As Michigan law has afforded universities the same freedom to pursue their educational mission as has the federal law, this brief urges this Court to consider Michigan's Constitution as an additional basis for upholding the University's admissions policy choices in this case.

[3] This brief addresses only the legal question of whether institutional autonomy applies to the University's admissions choice. It is beyond the scope of this amicus brief to address the evidence presented in this case and whether the University's actual implementation of its admissions policy is narrowly tailored to meet its compelling interest in achieving a diverse student body.

ARGUMENTS

I.

THE UNIVERSITY'S CHOICE TO SEEK TO ATTAIN A DIVERSE STUDENT BODY TO ADVANCE ITS EDUCATIONAL MISSION FALLS WITHIN THE INSTITUTIONAL AUTONOMY AFFORDED BY THE FIRST AMENDMENT AND IS, THEREFORE, PERMISSIBLE UNDER THE FOURTEENTH AMENDMENT.

"[F]rom Thomas Jefferson onwards," the connection between education and the endurance of our democracy has been unquestionable. *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (opinion of Frankfurter, J.) The Supreme Court has consistently sounded the theme that education is of crucial importance to our political system and "fulfills a most fundamental obligation of government to its constituency." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978)). Among the primary purposes of education is to prepare "individuals for participation as citizens." *Id.* (citing *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)). Indeed, of all the functions served by state and local governments, "education is perhaps the most important." *Brown*, 347 U.S. at 493.

From this profound appreciation and respect for education in our democratic system has flowed a natural corollary of judicial deference to educational decisionmaking crystallizing in the doctrine of "academic freedom." The foundation for this doctrine was eloquently described by Justice Frankfurter in his concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), where he first enumerated the often-quoted "four essential freedoms" of a university:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

In *Sweezy*, the Court was called upon to decide whether the due process rights of Paul Sweezy, a lecturer at the university, had been violated when he was jailed for contempt after refusing on First Amendment grounds to cooperate with the State's investigation into subversive activities. In finding an invasion of Sweezy's liberties, Chief Justice Warren, who issued the decision of the Court, cautioned that the areas of political expression and "academic freedom" were areas in which "government should be extremely reticent to tread." *Id.* at 250. He explained that "[t]he essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth." *Id.* In his concurrence, Justice Frankfurter emphasized that a free society depends on free universities, meaning "the exclusion of governmental intervention in the intellectual life of a university." *Id.* at 262 (Opinion of Frankfurter, J.).

This same point was made later by Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 379, 482-483 (1965) where he premised protection for academic freedom on the First Amendment:

> In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read...and freedom of inquiry, freedom of thought, and freedom to teach... -- indeed, the freedom of the entire university community. ...Without those peripheral rights the specific rights would be less secure. (citations omitted) (emphasis added)

A decade after *Sweezy* was decided the doctrine of academic freedom became even more clearly grounded in the First Amendment in the case of *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). In *Keyishian*, the Court struck down a state statute that required faculty members to sign certificates stating that they were not

Communists. In balancing the State's interest in assuring its teachers were not "subversives" against the faculty's right to academic freedom, the Court spoke in broad terms recognizing that some areas of society should be free of excessive interference to function effectively:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." ... The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection."

385 U.S. at 603 (citation omitted).

Against this backdrop, Justice Powell's controlling opinion in *Bakke* is seen as a natural and principled application of the recurring constitutional thread that had been woven since *Brown v. Board of Education*. In ruling that the University of California's goal of attaining a racially diverse student body was constitutionally permissible, Justice Powell correctly relied on the academic freedom doctrine, noting that it had "long . . . been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) He also appropriately drew on the "four essential freedoms" of a university that were summarized in *Sweezy*, including the freedom "to determine for itself on academic grounds . . . who may be admitted to study," in concluding that "the freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.* In short, *Bakke* permits universities as separate autonomous entities to rely on First Amendment guarantees to protect their right (and freedom) to make academic

decisions.[4]

All these cases, taken together, serve to recognize the unique status of educational institutions in our democratic society and to counsel that courts should pay special deference to the expertise of those involved in academic decisionmaking to assure them the greatest chance for success in furthering their educational mission.

In the case of *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court made clear that academic freedom was a doctrine that applied not only to individuals, but to educational institutions as well, and to the University of Michigan in particular. In *Ewing*, plaintiff, who was dismissed from the university's accelerated medical school program based on a negative evaluation of his academic credentials, claimed he had a protectable property interest in continued enrollment. Even assuming such an interest, however, the Court, citing *Bakke*, *Keyishian*, and *Sweezy*, stated its "reluctance to trench on the prerogatives of state and local educational institutions" and acknowledged a "responsibility to safeguard their academic freedom" as a special concern of the First Amendment. *Id.* at 226 (citations omitted). The Court stressed that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students but also . . . on autonomous decisionmaking by the academy itself." *Id.* at 226 n. 12 (citation omitted).

Justice Powell's concurring opinion was even more explicit. He agreed fully with the Court's emphasis on the "respect and deference that courts should accord academic decisions made by the appropriate university authorities" and admonished that judicial review of academic decisions, including admission

[4] For a thorough discussion on academic freedom, institutional autonomy, and the attainment of a diverse student body, see Darlene C. Goring, Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body is a Permissible Exercise of Institutional Autonomy, 47 U. Kan. L. Rev. 491 (1999).

decisions, "is rarely appropriate." *Id.* at 230 (Opinion of Powell, J.)[5]

In these cases, the Supreme Court has charted a clear course that this Court should follow in evaluating the University of Michigan Law School's admissions policy in this case -- deference. Consistently, the Court has respected and deferred to the specialized judgments made by our educational institutions -- including judgments relating to the composition of a student body -- and has expressed its view that universities, not courts, are best entrusted with the crucial job of assuring that our Nation's "marketplace of ideas" continues to thrive.

Indeed, courts across the country, including the Sixth Circuit, have followed the doctrine of institutional academic freedom, or "institutional autonomy," embodied in these cases. *See, e.g., Lovelace v. Southeastern Massachusetts*

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[5] The Court in *Ewing* cited *Board of Curators of the University of Missouri v. Horowitz*, 436 U.S. 78 (1978), a case in which the Court upheld the university's dismissal of a medical student based on an evaluation showing poor performance. In so ruling, Justice Rehnquist writing for the Court acknowledged that academic decisions requiring an expert evaluation of cumulative information are "not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 90.

Explaining a possible underpinning of the court's deference to universities, one scholar has noted that the doctrine of institutional academic freedom may have its roots in common law academic abstention:

> The constitutional right of institutional academic freedom appears to be a collateral descendent of the common law notion of academic abstention. This heritage is made explicit in [*Ewing*], where the Court . . . suggests that these views recommend themselves as protection for academic freedom. And the 'four freedoms' of *Sweezy* reflect the kinds of university decisions courts have refused to review under common law principles. Institutional academic freedom can be viewed as academic abstention raised to constitutional status... .
> J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 Yale L. J. 251, 326-27 (1989) (footnotes omitted).

He goes on to summarize cases like *Horowitz* as counseling courts to appreciate "that universities proceed on assumptions different from society as a whole and that an insistence by courts on conforming to legal standards or procedures will likely destroy something uniquely valuable in higher education." *Id.* at 326.

University, 793 F.2d 419, 426 (1st Cir. 1986) (university's decision not to renew faculty member's contract for his alleged failure to inflate grades and to lower academic standards upheld, court emphasizing that university has a recognized right to govern its institution according to the "four essential freedoms" that superseded the individual faculty member's right to academic freedom); *Doherty v. Southern College of Optometry*, 862 F.2d 570, 576 (6th Cir. 1988) (affirming dismissal of plaintiff's breach of contract claim in a disability discrimination case because it "arises in an academic context where judicial intervention in any form should be undertaken only with great reluctance"); *Martin v. Helstad*, 578 F. Supp, 1473, 1482 (W.D. Wisc. 1983) ("[a]cademic institutions are accorded great deference in their freedom to determine who may be admitted to study at the institution").

There is, however, one exception, which warrants brief mention -- *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). In *Hopwood*, the Fifth Circuit ruled that the University of Texas Law School could not use race as a factor in its law school admissions to further its goal of achieving diversity in its student body. The Fifth Circuit explicitly rejected the university's reliance on Justice Powell's opinion in *Bakke*, stating "[it] is not binding precedent on this issue." *Id.* at 944. *Hopwood's* reasoning, however, is severely flawed and indeed, internally inconsistent, and this Court should not be misguided by it.

First, and perhaps most significantly, Judge Smith's opinion[6] in *Hopwood* offers so little considered analysis of the university's First Amendment institutional autonomy defense as to have virtually ignored it. In a short footnote, the panel dismisses the university's First Amendment right to assemble the student body of

[6] Judges Smith and DeMoss joined in the lead opinion, but Judge Wiener filed a special concurring opinion in which he disagreed with the panel's conclusion that diversity can never be a compelling governmental interest in a public graduate school, 78 F.3d 932, 962 (opinion of Wiener, concurring). He would have assumed without deciding that diversity is a compelling state interest and would have proceeded to then address the issue of whether implementation of the university's policy was narrowly tailored to meet its diversity interest.

its choice as "somewhat troubling," but then makes no attempt to refute it on any legal basis except to distinguish *Sweezy* as involving individual, not institutional, academic rights. 78 F.3d at 943, n. 25. On this point the panel makes no mention of *Ewing* and its explicit statement regarding institutional rights. Second, the panel inexplicably begins its analysis with a statement that, subsequent to *Bakke*, "Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications" and yet nowhere in its opinion are any such cases identified or analyzed. Indeed, only cases such as *Adarand Contractors, Inc. v. Pena*,[7] 515 U.S. 200 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) are discussed which the panel then characterizes as having implicitly "overruled" *Bakke*, despite the panel's own quotation of Justice O'Connor's concurrence in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986), in which she noted that a "state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." 78 F.3d at 945, n. 27 (emphasis added). Obviously, cases like *Croson* and *Adarand* (dealing with highway construction and government contracting) do not implicate the kind of constitutional protections appropriate in the educational context[8] and, accordingly, are of little value to this Court.

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[7] Further question about *Hopwood's* soundness is raised considering that *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990) (overruled by *Adarand* on other grounds) cites *Bakke* for the proposition that a diverse student body contributing to a "robust exchange of ideas" is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated.

[8] Judge Wiener's concurring opinion in *Hopwood* identifies this very flaw in the panel's opinion, concluding that "[t]his unique context [constructing an entering class at a public graduate or professional school], first identified by Justice Powell, differs from the employment context, differs from the minority business set aside context, and differs from the redistricting context; it comprises only the public higher education context . . . ." 78 F.3d at 965, n. 21.

Hopwood stands alone and should not be followed by this Court.

The "essentiality of freedom" in American universities is as self-evident today as it was in 1957 when *Sweezy* was decided. The First Amendment protects the University of Michigan Law School's admissions decisionmaking process against undue judicial interference and, accordingly, this Court, consistent with *Bakke* and the Fourteenth Amendment, should defer to the University's policy choice to attain a diverse student body in this case.

II.

THE UNIVERSITY'S CHOICE TO ENROLL A DIVERSE STUDENT BODY IS ALSO ENTITLED TO DEFERENCE UNDER ARTICLE 8, § 5 OF MICHIGAN'S CONSTITUTION.

Like the California educational system discussed in *Bakke*, (see footnote 2, *supra*) Michigan is one of the states that has devised its system of higher education based on an abiding conviction that university autonomy best serves the goal of educating its citizens.[9] Toward that end, Michigan's Constitution confers a unique constitutional status on its public universities and their governing boards. Specifically, art 8, § 5 of Michigan's Constitution vests plenary authority over educational matters in the University of Michigan's Board of Regents in the following provision:

> The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan . . . [The] board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. . . .

[9] In fact, the State of Michigan enacted our nation's first constitutional provision for the separate government of its state university (the University of Michigan) in 1850. Mich. Const. 1850, art 13, § 8. See *Byrne, supra* note 5, 99 Yale L.J. at 327-328.

This conviction that institutional autonomy is necessary to achieve quality education is based on more than faith; it is grounded in experience. Under Michigan's 1835 Constitution, the Legislature controlled and managed the University of Michigan, our State's first public university. Mich. Const. 1935, art. 10, § 5. This experiment failed, however, and prompted extensive debate about the future of the University at the Constitutional Convention of 1850. *Federated Publications, Inc. v. Michigan State University, Board of Trustees*, 460 Mich. 75, 85 (1999) (citing *Sterling v. Regents of the University of Michigan*, 110 Mich. 369, 374-378 (1896)). What emerged out of these debates was a consensus that the Legislature should be divested of its power and that control of the university should be placed in an elected board. Under this new system lead by a board of regents, the University thrived.[10] *Sterling*, 110 Mich. at 377. The regent system has been in place ever since, Mich. Const. 1963, art. 8, § 5, and the University of Michigan has continued to maintain its position as one of our country's finest educational

[10] Michigan's Supreme Court has described the status of university governing boards as:

> the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is coordinate with and equal to that of the legislature. *Board of Regents of the University of Michigan v. Auditor General*, 167 Mich. 444, 450 (1911) (quoted approvingly in *Federated Publications*, 460 Mich. at 84, n. 8.)

institutions.[11]

That the University enjoys full autonomy over educational matters is a matter that was unequivocally confirmed in the recent *Federated Publications* case. There, the Michigan Supreme Court held that the Legislature did not have the power to regulate open meetings for universities in the context of presidential searches without unconstitutionally infringing on their power to supervise their institutions. *Federated Publications*, 460 Mich at 78.

In so ruling, the Court reiterated the principle it had "long recognized" that legislative regulation that encroaches on the university's educational autonomy "must . . . yield to the university's constitutional power." *Id.* at 86-87. The Court observed that the constitution grants university governing boards authority over "'the absolute management of the University' and that the Court has 'jealously guarded' these powers from legislative interference." *Id.* at 87 (citing *State Board of Agriculture v. Auditor General*, 226 Mich. 417, 424 (1924) and *Board of Control of Eastern Michigan University v. Labor Mediation Board*, 384 Mich. 561, 565 (1971)). Although universities may be subject to certain state laws (such as the public employees relations act), even those laws "cannot extend into the university's sphere of educational authority. . . ." *Federated Publications*, 460 Mich. at 87-88. Similarly, even in the appropriations process, although the Legislature may attach

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[11] As explained by Professor Byrne:

> When Michigan constitutionalized institutional autonomy in 1850, it did so against a history of frustrating failures to establish respectable state universities in America. ...The legislature was perceived to manage the university for practical, political ends, rather than for long-term scholarly and educational objectives. The solution adopted -- the election for eight year terms of officials responsible only for university governance -- was an ingenious innovation, accommodating conflicting values and fostering a university known and admired throughout the world.

Byrne, supra note 5, 99 Yale L. J. at 328-329.

conditions to an appropriation, those conditions "cannot invade university autonomy." *Id.* at 88 citing *State Board of Agriculture*, 226 Mich at 425. In short, "[w]ithin the confines of the operation . . . of the University, it is supreme." *Id.* at 87 (citation omitted).

Certainly decisions regarding the composition of a university's student body are quintessentially within the educational sphere and may not be infringed under state law. Like *Sweezy's* "four essential freedoms," the decision regarding who may be admitted to study is, at its core, an academic one.

Accordingly, as prevails under principles of federal constitutional law, this Court should defer to the University's admissions choices in this case under principles of state constitutional law as well.

CONCLUSION AND RELIEF

Both the First Amendment of the federal constitution and article 8, § 5 of Michigan's Constitution confer on the University of Michigan a right as a separate autonomous entity to make academic choices with only limited judicial scrutiny. The importance of preserving that "essential freedom" of the university cannot be overstated. The University's choice to seek to enroll a diverse student body to provide the best educational experience for its students falls squarely within the protection afforded by the doctrine of institutional autonomy and should therefore be held constitutionally permissible by this Court.

For all the above reasons, the Attorney General urges this Court to uphold the University's choice to enroll a diverse student body as constitutionally permissible under the doctrine of institutional autonomy both as a matter of federal and state law.

Respectfully submitted,

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