ORIGINAL

No. 18-1105

IN THE

Supreme Court of the United States

SAMUEL PIERCE,

Petitioner,

v.

YALE UNIVERSITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should overrule its holdings in *Regents of the University of California v. Bakke* and *Grutter v. Bollinger* that professional school admissions decisions are constitutionally protected expression.

PARTIES TO THE CASE

The parties to the case are Samuel Pierce, Petitioner and Yale University, the Trustees of the University of Pennsylvania, and the American Association of Medical Colleges, Respondents.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel Pierce respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The case is numbered 19-7006 in the United States Court of Appeals for the District of Columbia Circuit. This case is numbered 17-cv-2508 in the United States District Court for the District of Columbia and is before The Honorable Christopher R. Cooper. Judge Cooper's Opinion granting Respondents' Motion to Dismiss is reproduced in the appendix.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) to review a case in a United States Court of Appeals. The Petition is timely according to 28 U.S.C. §2101(e) because the Court of Appeals has not yet issued a judgment.

STATEMENT OF THE CASE

Petitioner Samuel Pierce alleged that American Association of Medical Colleges, the University of Pennsylvania, Yale University, and their co-conspirators have colluded to restrain trade in a manner prohibited under Section 1 of the Sherman Act by agreeing that each medical school would promptly communicate to the others the name of any student accepted by a group school, and agreeing to other associated restraints which force students to choose one particular school by an arbitrary date. According to the complaint, schools can then use the knowledge that no competition exists for a student in setting net tuition. The challenged agreement also allows a school

to admit additional students only if the ones it has already accepted have other offers. As a result, there are fewer acceptances overall and fewer choices of schools for prospective students; conversely, less choice for students enhances schools' ability to enroll students most attractive to their institutional aesthetic. (App. 3a).

The District Court found that the agreement among competing medical schools plausibly detailed disruption of market forces which could give rise to a legally sufficient Sherman One claim, if the agreement involves "trade or commerce". But the District Court decided it does not. The District Court cited *Selman v. Harvard Med. Sch.*, 494 F.Supp 603 (S.D.N.Y.) aff'd 636 F.2d 1204 (2nd Cir. 1980), which concluded: "the Supreme Court recently stated that the 'freedom of a university to make its own judgments includes the selection of its student body.'" *Id.*, quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, S., concurring). (App. 13a). Petitioner filed a timely appeal and now respectfully requests this Court grant certiorari to decide whether this holding in *Bakke*, later expressly made the holding of the Court in *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003), should be overruled.

REASON FOR GRANTING THE PETITION

I. THE INVOCATION OF SUPREME COURT RULE 11 IS APPROPRIATE WHERE SUPREME COURT PRECEDENT IS GRIEVOUSLY WRONG AS IT IS IN *BAKKE* AND *GRUTTER*

The Court's jurisprudence with regard to higher education admissions first went off track in Part IV-D of Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring). While Justice Powell wrote only for himself, the Court decided to adopt *Bakke* "wholesale" in *Grutter v. Bollinger*, 539 U.S. 306, 357 (2003) (Thomas, J., dissenting).

"Justice Powell grounded his analysis in the academic freedom that 'long has been viewed as a special concern of the *First Amendment*.'" *Grutter v. Bollinger*, 539 U.S. 306, 324 (quoting *Bakke*, at 312). But from the beginning, the idea that selection of students is the type of expressive activity the authors of the First Amendment had in mind was dubious. Justice Frankfurter's broad theoretical brush in *Sweezy v. New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring) might find some logical application if anywhere in a medieval scenario where a tutor chose one particular tutee with whom to collaborate. At the other extreme, universities' exercise of 'academic freedom' in admitting students to undergraduate and professional programs cannot be in the same realm as constitutionally protected speech because individual faculty do not even personally supervise these students. Because these are entry-level programs, there is no nexus between qualifications of prospective students and faculty's scholarship in particular areas. Professional students like medical and law students arrive

having majored in a wide variety of different subjects, and the evaluation of their applications frequently involves consideration of such noncognitive traits as whether the applicant's parent attended the institution. *Grutter*, at 368 (Thomas, J., dissenting).

The essence of student admissions would seem to be a far more banal one than *Bakke* and *Grutter* portray. As the Third Circuit majority described in *United States v. Brown*, 5 F.3d 658, 667 (3d. Cir. 1993), a non-profit's reputational interests in its students' characteristics – part of its aesthetic, as Justice Thomas refers to it in *Grutter* – are the antitrust equivalent of profit maximizing business's free cash flow. The Court does not explain in *Bakke* and *Grutter* how faculty are supposed to exercise their "academic freedom" either, other than to use the euphemisms "diversity" and "critical mass" to describe a "sham to cover a scheme of racially proportionate admissions." *Grutter*, at 347 (Scalia, J., dissenting). This is the decidedly anti-intellectual system the supposed constitutional right to "academic freedom" protects from legal scrutiny.

Granted, universities may believe recruiting students who will serve as advocates for an institution's politics is an effective manner of influencing public debate. See, e.g., Caleb Parke, Yale Law School Professors Cancel Class as Students Protest Kavanaugh Nomination, https://www.foxnews.com/us/yale-law-school-professors-cancel-class-as-students-protest-kavanaugh-nomination (Dated September 24, 2018). But, this means of expression was not one envisioned by the authors of the First Amendment; quite the contrary, it greatly offends the values which actually were salient when the Bill of Rights was drafted, by inherently "chill[ing]" the speech of political

enemies"—those who would disagree with faculty. *Timbs v. Indiana*, 586 U.S. __ (2019) slip op. at 6. To the extent the Constitution is concerned at all with higher education admissions, surely the rights of prospective students are also protected.

Universities should no longer be able to avoid laws of general applicability based on the flawed doctrine in *Bakke* and *Grutter* transmuting student admissions into a form of expressive speech. The Court should clarify that there is no special right to "academic freedom" beyond the rights guaranteed to all. The Court should not be afraid to exercise its power to grant certiorari simply because the Court of Appeals has not yet issued a judgment in this case. The Court recently recognized certiorari before judgment's appropriateness under certain circumstances on February 15, 2019 in *Dept. of Commerce et al. v. New York et al.*, 586 U.S. ___ (2019), and Petitioner respectfully submits that this case presents another such circumstance where this uncommon procedure is proper, one where Supreme Court precedent is manifestly unjust. Without the dark cloud of *Bakke* and *Grutter* overhead, the District of Columbia Circuit could fairly consider Petitioner's appeal on remand.

CONCLUSION

For the reasons above, this Court should grant this petition for certiorari before judgment.

Respectfully submitted,

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February 22, 2019

APPENDIX