ORIGINAL

No. 20-63

In The

Supreme Court of the United States

SAMUEL PIERCE,

Petitioner,

v.

YALE UNIVERSITY ET AL.,

Respondents.

On Petition For A Writ Of Certiorari 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

Prospective university students starting in the fall of each year are customarily asked to finally decide on a single choice school on May 1 and schools have agreed amongst themselves not to poach students committed to another school thereafter. Medical schools have taken it further by utilizing a collective admissions process and electronic check that ensure students are committed to only one school. Medical schools' processes and electronic systems also allow schools to view each other's admissions decisions in real time. The Petitioner, a past medical school applicant, brought suit alleging these restraints violate the Sherman Act. The District Court recognized that in any other context the anticompetitive nature of the restraints would give rise to a legally sufficient claim, but looked to the doctrine announced in *Bakke* and *Grutter* to conclude student admissions in higher education are noncommercial and beyond the power of the courts to supervise. The Court of Appeals affirmed.

The question presented is:

1. Whether this Court should overrule its holdings in *Bakke* and *Grutter* that admission of students to professional schools is 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 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 per the Court's March 19, 2020 order regarding filing deadlines.

RELEVANT CONSTITUTIONAL PROVISION

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

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.

The District Court concluded 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 concluded, citing back to Justice Powell's opinion in *Regents of the University of California v. Bakke* (later expressly made the holding of the Court in *Grutter v. Bollinger*), that universities' decisions regarding how many and which students to enroll are noncommercial because they constitute constitutionally protected expressions of academic freedom. Petitioner filed a timely appeal and, after holding oral argument, the Court of Appeals affirmed. Petitioner now respectfully requests this Court grant certiorari to decide whether this holding in *Bakke* and *Grutter* should be overturned.

REASON FOR GRANTING THE PETITION

I. Supreme Court Precedent is As Grievously Wrong As It Could Possibly Be In *Bakke* and *Grutter*, and *If the Court does not Speak Out on this case, there is little hope Bakke* and *Grutter will ever be overturned*

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). 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 *Regents of the University of California v. Bakke*, 438 U.S. 265, 312-314). 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) might find some logical application in some hypothetical scenario where a tutor chose one particular tutee with whom to collaborate on a particular research question in a particular subfield. On the other hand, 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 where students arrive without any experience assumed, there is no nexus between qualifications of high school/pre-professional 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, not studying in any particular sub discipline.

The essence of student admissions would seem to be instead a commercial one. As the Third Circuit majority described in *United States v. Brown University*,

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. And even if universities are not strictly profit-maximizing, admission of students is largely driven by cash flow considerations. For example, in *United States v. Meredith*, 19-cr-10075 (D. Mass. February 28, 2019), the defendant obtained "money and property, to wit, admission to Yale University" by means of a fraud which deprived Yale of the opportunity to trade admission for an even more astronomical sum paid. Without a doubt, schools serve only their own narrow interests in their admissions schemes. Days after the Court of Appeals affirmed the dismissal of this case, the government filed a much less detailed complaint about the far less restrictive restraints undergraduate programs have been using to harm competition in *United States v. National Association for College Admission Counseling*, 19-cv-03706 (D.D.C. December 12, 2019).

The actual interests the First Amendment protects – such as free expression of unpopular ideas – are ill-served by the right described in *Bakke* and *Grutter*. The inevitable result of the balance tipping so heavily in the direction of deference to faculty to the total derogation of students' own expressive interests is a scholastic environment completely free of competing ideas as viewpoints of selected students converge with faculty viewpoints. Yale Medical School's staged all-school demonstrations referenced in the Petitioner's

complaint are not expressions of support of particular legislation, but are actually histrionics which express little other than disdain for viewpoints differing from Yale's. This is hardly an isolated example of Yale weaponizing its chosen students in service of its partisan point of view. See, e.g., https://www.foxnews.com/us/yale-law-school-professors-cancel-class-as-students-protest-kavanaugh-nomination (Dated September 24, 2018). However effective selection of like-minded students may be in propagating the beliefs of faculty, 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.

If the Court declines to speak out on this case, the free market nature of higher education where schools compete for students will be radically transformed. But equally concerning, the ghastly system of racial discrimination will persist, likely for generations as so few will have the courage to challenge the Court's grave mistakes in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter*. Truly, the Court got it completely backwards. A simple point or quota system is far preferable to the heinous exercise of admissions officers carefully considering each applicant's exact ethnic background. This "individualized" process of considering race that the Court disappointingly blessed in *Grutter* has too many intractable questions to be left intact. For example, how are universities to weigh African American racial identity versus Italian American? Are a "critical mass" of students of both of these

heritages vital to the educational experience? If so, how is the number calculated? Is there any consideration at all given to how many admissions may be left after all the critical masses are assembled, particularly in a class of 80 students?

If ever the stark realities of this case could be seen as a national emergency, now would be the time. At a time when Americans have been ordered locked in their homes because of a shortage of physicians, the antitrust conspiracy to reduce medical school class sizes at issue in this case is flagrant. Worse, the physicians who have been trained recently are in many cases poorly qualified, while others like the Petitioner with perfect Medical College Admissions Test scores are shunned as being likely to create "disparities." Worse still, the physicians who have been trained recently uniformly agree with faculties' viewpoints, having been chosen for that reason to the exclusion of those who based on their race might be Republicans. Unsurprisingly, medical "experts" have not hesitated to push for a near complete shutdown in travel and commerce, opposed as they are to the use of fossil fuels.

Universities should no longer be able to avoid regulation based on the flawed doctrine in *Bakke* and *Grutter* transmuting student admissions into a form of expressive speech. Though this case is perhaps too controversial for a Court that might prefer to stay out of the limelight, this Court should not be afraid to exercise its power to grant certiorari to consider whether to overrule *Bakke* and *Grutter*. The stakes are simply too high to ignore this Petition. The high cost of

bringing a case this far is prohibitive for most students, and there is no telling when this Court will have another opportunity to right its worst wrong.

CONCLUSION

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

Respectfully submitted,

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