No. 02-571

In The Supreme Court of the United States

EBONY PATTERSON, *et al.*,

Petitioners,

v.

JENNIFER GRATZ AND PATRICK HAMACHER, AND LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there appellate court jurisdiction for a district court's Rule 54(b) certification that does not dispose of any legally cognizable claims for relief?

2. Can a compelling interest sufficient for strict-scrutiny review of racial classifications be an interest not articulated, and actually disavowed by, the party responsible for the classifications?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

FEDERAL STATUTES AND RULES

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

STATEMENT OF THE CASE

I. The Parties.

Respondents Jennifer Gratz and Patrick Hamacher were plaintiffs in the district court. They were appellees with respect to the appeal taken by the intervenors. They have filed a pending Rule 11 petition for certiorari (No. 02-516) arising out of the district court's January 30, 2001, order and February 9, 2001, judgment.

Respondents Lee Bollinger and James Duderstadt were at material times president of the University of Michigan, responsible to respondent Board of Regents of the University of Michigan, which operates the College of Literature, Science & the Arts ("LSA"), to which Gratz and Hamacher had applied for, and been denied, admission.

Petitioners Patterson, *et al.*, were intervenors in the district court and appellants with respect to the district court's Rule 54(b) certification entered March 21, 2001, which forms the basis for their Rule 11 petition.

II. The Proceedings Below.

Respondents Gratz and Hamacher commenced an action against respondents Lee Bollinger, James Duderstadt and the Regents of the University of Michigan (collectively "the University" or "the University defendants"). The complaint alleged that the University defendants had illegally discriminated against Gratz and Hamacher on the basis of their race in the consideration of their applications for admission to the LSA in 1995 and

1997, respectively. The complaint alleged violations of 42 U.S.C. §§ 1981, 1983, and 2000d.

The district court certified a class of plaintiffs, pursuant to Federal Rule of Civil Procedure 23(b)(2) in an opinion and order filed December 23, 1998. Patterson, *et al.* (collectively "intervenors" or "Patterson petitioners") were made parties to the case following an order of the Sixth Circuit reversing the district court's order denying intervention. *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (reversing orders denying intervention in both *Gratz* and *Grutter*).

The district court issued an opinion on December 13, 2000, and order on January 30, 2001, with respect to the cross-motions for summary judgment of plaintiffs and the University defendants. In that opinion and order, the district court granted plaintiffs' motion for partial summary judgment, declaring defendants' admissions system for years 1995-1998 unlawful (App. at 43a-48a[1]); granted defendants' motion for summary judgment with respect to their 1999 and 2000 admissions systems and plaintiffs' claim for injunctive relief, *id.* at 34a-43a; granted the motion of defendants Bollinger and Duderstadt for summary judgment on grounds of qualified immunity, *id*. at 48a-50a; and denied defendant Board of Regents' motion for summary judgment on grounds of Eleventh Amendment immunity, *id.* at 50a-54a. The January 30, 2001,

[1] Appendix citations are to the appendix filed with the pending *Gratz* petition for certiorari (No. 02-516).

Order also included a certification pursuant to 28 U.S.C. § 1292(b). App. at 58a. On February 9, 2001, the district court entered an order under Federal Rule of Civil Procedure 54(b) for entry of judgment with respect to the Section 1983 claims against the individual defendants, *id*. at 60a-62a; and a judgment to that effect was entered on the same day, *id*. at 63a-64a.

In a separate opinion filed on February 26, 2001, *id*. at 66a, and Rule 54(b) order filed on March 21, 2001, *id*. at 95a, the district court rejected the arguments of the intervenors for justifying the University defendants' racial preferences. The district court concluded that the intervenors had "failed to present any evidence that the discrimination alleged by them, or the continuing effects of such discrimination was the real justification for the LSA's race conscious admissions programs." *Id*. at 73a-74a (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 727 n.16 (1982)). The district court also concluded that the intervenors had failed to produce evidence of identified discrimination by the University in admissions, App. at 85a, or of "passive" participation by the University in the discrimination by others, *id*. at 86a. Finally, the district court rejected the intervenors' contention that the University's racial preferences in admissions could be justified by the alleged discriminatory impact of other admissions criteria. *Id*. at 86a-87a.

REASONS FOR DENYING THE WRIT

The Patterson petitioners provide many good reasons why this *case* (and that of *Grutter v. Bollinger* (No. 02-241)) presents issues of fundamental national importance

warranting review by the Court. Indeed, the petition includes some of the same arguments made by plaintiffs Gratz and Hamacher in their petition (No. 02-516). But the Patterson petitioners do not have a persuasive argument for issuing a writ of certiorari to answer the *question* that they present in their petition. Moreover, the manner in which the district court decided the case precludes the Patterson petitioners from filing any viable petition for certiorari. The only claim for relief decided by the district court for which the Patterson petitioners, intervenors in the case, have any arguably protectable interest or stake in the outcome is one on which the University – and hence the intervenors – were successful: Plaintiffs' request for an injunction with respect to the University's admissions policies. For that reason, as argued below, the Court's precedents prevent intervenors from filing a cross-petition, and they should not be permitted to accomplish effectively the same thing through the filing of a petition. This is all the more so because the district court erred as a matter of law in ordering entry of a separate final judgment under Federal Rule of Civil Procedure 54(b) with respect to the "claims" of the intervenors.

Denying the *Patterson* petition will not deprive those petitioners of the opportunity to raise the issues and arguments that they have raised below in defense of the University's admissions policies. This is so because, as respondents to the *Gratz* petition, the Patterson petitioners will be entitled to argue their distinct "remedial" justifications for affirming the district court's order denying plaintiffs' request for an injunction; under settled principles, they may argue for affirmance of the district court's order on grounds rejected or not relied upon by the district court.

Finally, even if there were a proper procedural basis for the filing of a petition by the Patterson petitioners, there are good reasons why the specific substantive question it presents does not merit granting the petition under the standards set forth in Supreme Court Rule 10. In arguing that the University's racial preferences in admissions can be justified by grounds not articulated by or motivating the University, the petitioners stake out a position that is completely at odds with settled law in the area of race-conscious remedies. Indeed, the intervenors can cite to no court decision anywhere (let alone a split among the lower courts) in support of their novel position that a proffered compelling interest need not be one that was articulated by the party adopting the preferences at issue. Additionally, this Court has rejected the kind of generalized, societal discrimination that constitutes much of what the Patterson petitioners offer in defense of the University's racial preferences. The petitioners have offered no "compelling reason" therefore, for granting their petition. *See* Supreme Court Rule 10.

Accordingly, respondents Gratz and Hamacher oppose the *Patterson* petition and respectfully request that it be denied.

I. There Is No Appellate Jurisdiction for the Intervenors' Appeal from the District Court.

As noted in their petition, the Patterson petitioners seek review of the judgment purportedly entered[2] in the

[2] Although the order of March 21, 2001, "ordered that final judgment is entered with respect to Defendant-Intervenors' claims," no such judgment was actually entered.

district court pursuant to Federal Rule of Civil Procedure 54(b) on March 21, 2001, "with respect to intervenors' claim that the University's use of race in admissions was justified as a remedy for the present effects of past and continuous discrimination." *Patterson* Petition at 2.

Plaintiffs opposed entry of a rule 54(b) judgment on the ground that the intervenors had no "claims" within the meaning of Rule 54(b) to dismiss. For the same reason, plaintiffs argued in their brief to the Sixth Circuit that the intervenors' appeal should be dismissed for lack of appellate jurisdiction. The *Patterson* petition now before the Court arises directly from the erroneous Rule 54(b) certification by the district court. That procedural defect alone should be sufficient reason to deny the petition.

The term "claim" has a precise legal meaning under the rules, a "cognizable claim for relief." *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7 (1980). *See also NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 291-92 (7th Cir. 1992) (Easterbrook, J.) (discussing distinction between a "claim for relief" and a "legal theory"). When a "claim" has been disposed of, judgment can be entered with respect to it; judgments do not get entered on "issues" or "affirmative defenses."

Plaintiffs do not have any "claims," *i.e.*, causes of action, against the intervenors. Likewise, intervenors have no "claims" against plaintiffs; they have only arguments and defenses asserted against plaintiffs' claims (causes of actions under 42 U.S.C. §§ 1981, 1983, and 2000d) against the University defendants. Accordingly, the district court

did not dispose of any "claims" by either plaintiffs or intervenors with respect to the other.[3] Instead, it resolved certain *issues* against the intervenors, an event which clearly did not satisfy the appealability standards of 28 U.S.C. § 1291. The fact that intervenors opposed plaintiffs' motion for summary judgment on some grounds that were not also urged by the University defendants, and that these grounds were not addressed in the district court's December 13, 2000, opinion, does not render the February 26, 2001, or March 21, 2001, orders into orders disposing of claims nor change anything with respect to the appealability of the March 21, 2001, order. This is the classic case, then, in which the requirements of Rule 54(b) have not been met, so the district court erred as a matter of law.

A district court by definition abuses its discretion when it makes an error of law. *Koon v. United States,* 518 U.S. 81, 100 (1996). Because the district court abused its discretion in certifying the March 21, 2001, order, under Rule 54(b), there is no appellate jurisdiction for the intervenors' separate appeal. *See* 10 Moore's Federal Practice, § 54.28[2] (Matthew Bender 3d ed. 1997); *see also, e.g.*, *Interstate Power Co. v. Kansas City Power & Light Co.*, 992 F.2d 804, 806 (8th Cir. 1993) ("If the Rule 54(b) determination is ineffective, however, we lack jurisdiction because there is no final district court order."); *Ebrahimi v. City of*

[3] It did, however, resolve plaintiffs' *claims* for damages against the individual defendants, which were therefore properly the subject of the district court's Rule 54(b) certification respecting those claims. It also resolved plaintiffs' claims for injunctive relief by dismissing them on summary judgment. To be clear, if the district court had granted some form of injunctive relief against the University, intervenors would have been able to appeal.

Huntsville Bd. of Educ., 114 F.3d 162, 165-68 (11th Cir. 1997); *Hogan v. Consolidated Rail Corp.*, 961 F.2d 1021, 1026 (2d Cir. 1992).

II. The *Patterson* Petition Is Superfluous.

If the petition in *Gratz* is granted, denying the *Patterson* petition will not deprive those petitioners of the opportunity to make their distinct "remedial" arguments in defense of the University's racial preferences. When the Sixth Circuit granted permission to appeal pursuant to 28 U.S.C. § 1292(b), following the district court's certification pursuant to that statute, appellate jurisdiction was vested over any question included within the order that contains the controlling issue of law. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204 (1996). Accordingly, there is appellate jurisdiction to consider issues and arguments raised by the intervenors in the district court in opposing plaintiffs' request for an injunction. Moreover, under well-settled principles, in arguing for affirmance of the district court's order denying plaintiffs' request for an injunction, the Patterson petitioners may urge reasons rejected or not relied upon by the district court. *See, e.g., Brown v. Allen,* 344 U.S. 443, 459 (1953) ("'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.'") (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

For these same reasons, the Patterson petitioners could not have filed a cross-petition to the *Gratz* petition. The Patterson petitioners were successful on the only claim in which they could have any cognizable interest as

intervenors,[4] *viz.,* plaintiffs' claim for injunctive relief. Although 28 U.S.C. § 1254 permits any party to seek a writ of certiorari, the Court has made clear that a successful party may not cross-petition; instead it can argue for affirmance on any ground raised in the court below. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 & n.8 (1994). The Patterson petitioners should not be permitted to circumvent this rule by labeling as a "petition" what is in effect an improper cross-petition. This is particularly so since the purported basis for the separate petition is the improper Rule 54(b) certification and appeal that followed from it. *See* discussion *supra* at 5-7.

III. There Is No Compelling Reason To Review the Question Presented by the Patterson petitioners.

Although the *Patterson* petition contains in the Question Presented references to both a "diverse student body" and "remedying past and present discrimination" as justifications for racial preferences in admissions, *Patterson* Petition at i, the petition leaves no doubt that it is directed primarily to the latter concern. The *Gratz* petition quite clearly has already presented the Court with the

[4] Although the Sixth Circuit reversed the district courts' orders denying intervention in this case and in *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (allowing intervention as a matter of right in both *Gratz* and *Grutter*), there are good reasons for concluding that in neither case do the intervenors have the kind of protectable interest required for intervention as a matter of right pursuant to Federal Rule of Civil Procedure 24(a). *See Grutter*, 188 F.3d at 401 (Stafford, J., dissenting). This is another valid reason for denying the *Patterson* petition.

question concerning whether an interest in "diversity" can justify racial preferences. What is different in the *Patterson* petition is the focus on "remedying past and present discrimination," and whether such a remedial interest can be a compelling one "whether or not the university articulates the remedial justification for the policy." *Id*.

The Patterson petitioners no doubt have framed the question as they have because the University has *not* articulated the effects of past or present discrimination by or at the University as a justification for its racial preferences in admissions. Quite to the contrary, the University has *disavowed* any reliance on the remedial justification proffered by intervenors. In the University's brief to the Sixth Circuit, for example, it made the point quite explicitly:

> Although Defendant-Intervenors [have] argued that 'LSA has a compelling interest in remedying the University's past and current discrimination against minorities,' the University has 'never justified [its] race-conscious admissions policies on remedial grounds,' and does not do so here.

University-defendants' brief at 3 n.2 (Appeal Nos. 01-1333, 01-1416, 01-1418).

This Court has repeatedly and consistently made clear that post-hoc rationalizations that did not actually motivate a party to adopt the racial or other discriminatory classifications to which heightened scrutiny applies cannot be used to justify those classifications. In the area of racial classifications, the leading case is *Shaw v. Hunt*, 517 U.S. 899 (1996). In that case, the Court invalidated the drawing of two predominantly minority voting districts by the North Carolina legislature. One of the dissenters on the Court would have upheld the redistricting plan on the

grounds, among others, that several reasons "may have motivated" the legislature to favor the creation of two minority districts. *Id.* at 941 (Steven, J., dissenting). However, the Supreme Court agreed with the district court's conclusion that the State had *not* been motivated by an interest in ameliorating past discrimination, noting that "[w]hile some legislators invoked the State's history of discrimination as an argument for creating a second majority-black district, the court found that these members did not have enough voting power to have caused the creation of the second district on that basis alone." *Id*. at 909. Based on this finding, the Court concluded that the remedial rationales proffered by the State did not and could not support its redistricting plan:

> [A] racial classification cannot withstand strict scrutiny based upon speculation about what "may have motivated" the legislature. To be a compelling interest, the State must show that the alleged objective was the legislature's "actual purpose" for the discriminatory classification . . . .

Id. at 908 n.4 (citing *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 730 & n.16 (1982)).

The case cited and relied upon by the Court in *Shaw* for the foregoing proposition is one that in fact arose in the university admissions context. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the Court struck down a university admissions system that excluded men from a nursing school. In litigation, the state justified its exclusionary policy on the ground that it was engaging in "educational affirmative action" by "compensat[ing] for discrimination against women." *Id.* at 727-28. However, the Court concluded that the exclusionary policy actually perpetuated stereotyped views of women and that

"although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective [was] the actual purpose underlying the discriminatory classification." *Id.* at 730; *see also id.* at 730 n.16 ("Even were we to assume that discrimination against women affects their opportunity to obtain an education or to obtain leadership roles in nursing, the challenged policy nonetheless would be invalid, for the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination.").

In *United States v. Virginia,* 518 U.S. 515 (1996), the Court again made clear in the educational admissions context that a governmental interest sufficient to justify gender discrimination must be one that actually motivated the state's discriminatory conduct. In that case, the Virginia Military Institute asserted that it had relied on educational diversity and the "pedagogical benefits" to some students of single-sex education. *Id.* at 535. The Court did not reach the question whether these stated interests were important governmental interests[5] that could justify gender discrimination because the Court found that the proffered justifications were not the state's "actual purposes" in excluding women from their school:

[5] Because both *Hogan* and *United States v. Virginia* involved gender discrimination, the Court applied an "intermediate" standard of review that requires the state to show that the challenged classification "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " *United States v. Virginia*, 518 U.S. at 533. The "strict" standard of scrutiny that must be applied to the University's race-conscious admissions policies in the present case is even more restrictive.

> Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.

Id. at 535-36 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 & n.16 (1975) ("'mere recitation of a benign [or] compensatory purpose' does not block 'inquiry into the actual purposes' of government-maintained gender-based classifications")); *Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977) (rejecting government-proffered purposes after "inquiry into the actual purposes").

The Patterson petitioners have offered no persuasive reason for the Court to undo these settled precedents. They cite to no split in the lower courts on interpreting the meaning of the precedents. In fact, they do not cite to a *single case* in which a court has accepted their view that the interest justifying a racial classification can be an interest not articulated by or motivating the party responsible for the classification. The lower courts instead have consistently adhered to the rule articulated in *Shaw v. Hunt* and the other cases discussed above. *See, e.g.*, *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 597 (3rd Cir. 1996) (in action challenging city ordinance creating subcontracting set-asides, Court holds that "[t]he party challenging the race-based preferences can succeed by showing . . . that the subjective intent of the legislative body was not to remedy

race discrimination in which the municipality played a role"); *Podberesky v. Kirwan*, 956 F.2d 52, 56 n.4 (4th Cir. 1992) (race-based scholarship could not be justified on diversity grounds where "it does not appear that [University] established the [scholarship] with this goal in mind"); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (Justice Department's identification of "compelling interests" supporting FCC affirmative action program held irrelevant; "[a]s the independent agency which promulgated the regulations in question, [FCC's] view of the government interest it was pursuing must be accepted").

The Patterson petitioners cite authority for the proposition that a governmental entity may be reluctant to produce evidence of its own past discrimination in justifying racial preferences. *See Patterson* Petition at 25. But it does not follow from this that anything other than the entity's actual motives must be shown to justify the preferences. If the University was reluctant to present evidence that its motives for the racial preferences were based on the effects of its past or present discrimination in admissions, the intervenors were free to present such evidence.[6] They presented none, as the district court found. App. at 73a-74a.

There are quite logical reasons why post-hoc rationales for racial preferences should not be able to justify the

[6] The Sixth Circuit's decision allowing intervention provided precisely that opportunity to the intervenors. The opinion does not, however, contain support for the proposition that the intervenors could rely on post-hoc rationalizations that did not motivate the University defendants.

preferences. Strict scrutiny, to which all such preferences must be subjected, requires both a compelling interest and a remedy that is "narrowly tailored" to achieve that interest. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). If a compelling interest could be one articulated after the fact, and by someone other than the party employing the preferences, it could only occur by chance that a remedy had been "narrowly tailored" to achieve the belatedly asserted compelling interest.

The Patterson petitioners argue that review on certiorari is warranted because they consider there to be "uncertainty, if not confusion, among the lower courts about the 'strong basis in the evidence standard' described" by this Court in *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500 (1989), and by the plurality in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). *Patterson* petition at 24. The petition cites to no cases where such "uncertainty" or "confusion" has been indicated. More importantly, however, the *Patterson* petition and the question it presents have little if anything to do with the strength of the evidentiary basis (which can be adequately assessed through granting the *Gratz* petition) underlying the University's racial preferences. Instead, they only divert attention away from the University's stated basis for adopting the preferences by focusing on justifications that the Patterson petitioners like better.

It is noteworthy also how unfocused are the issues that the Patterson petitioners have framed. Their Question Presented vaguely references "past and present discrimination at the university," *Patterson* Petition at i, without indicating any connection to discrimination in student *admissions*, which is what plaintiffs' complaint is all about. Much, if not all, of the argument and evidence

presented by the intervenors in the district court related to discrimination or racial incidents committed by individuals not under the control or authority of the University, or acts wholly unrelated to admissions decisions, or both. Petitioners have collected anecdotes, some stretching back decades before this action was filed, about campus housing policies and fraternity discrimination in the 1950s and 1960s, radio programming, racial epithets, and much else having nothing to do with admissions policies. They have made no coherent explanation of how such a disparate litany of events, incidents, and complaints unconnected to admissions decisions presents a question worthy of answer by the Court on a writ of certiorari. In its best light, the *Patterson* petition can be viewed as an attempt to urge the Court to adopt a rule that the lingering effects of generalized societal discrimination can be a compelling interest justifying racial preferences by a state actor. The Court's precedents foreclose that argument, *see*, *e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989), and the Patterson petitioners have not offered a good reason to reopen the issue.

The only arguments directed by the Patterson petitioners to the admissions policies of the University relate to the alleged "disparate" impact of admissions criteria on students from certain racial minority groups. As the district court noted, the "narrowly-tailored" remedy to any such criteria would be to remove them, not to add to them with racial preferences. App. at 88a. The issue is certainly not one that warrants review on certiorari.

Finally, it is worth reiterating that the *Patterson* petition presents the issues it raises for review in a very abstract way. Those petitioners, as intervenors, have no legally cognizable claims, and no claims have been made

against them. Not one of the intervenors has alleged that the University has acted unlawfully with respect to him or her or that the district court's opinion (which denied plaintiffs' claim for injunctive relief) makes it likely to do so. Respondents Gratz and Hamacher submit that under these circumstances it is not appropriate to issue a writ of certiorari to review a question that was not raised by either the parties asserting claims or the parties against whom those claims have been asserted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari by the Patterson petitioners should be denied.

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