Nos. 02-241, 02-516

In The Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, et al.,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, et al.,

Respondents.

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

BRIEF *AMICI CURIAE* HUMAN RIGHTS ADVOCATES AND THE UNIVERSITY OF MINNESOTA HUMAN RIGHTS CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Human Rights Advocates and the University of Minnesota Human Rights Center submit this brief *amicus curiae* in support of Respondents.[1] The parties have granted permission for the filing of all *amicus curiae* briefs and the consent letters have been lodged with the Clerk of this Court. Human Rights Advocates is a non-profit California corporation founded in 1978 with national and international membership. It has Special Consultative Status in the United Nations. It endeavors to ensure that the most basic protections are afforded to everyone, and has submitted briefs in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue. Examples of amicus briefs that Human Rights Advocates has filed include those in the following cases: *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2nd Cir. 1985); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *In Re Stanford, cert. denied*, 123 S. Ct. 472 (Mem), *dissenting opinion* (2002).

The University of Minnesota Human Rights Center was inaugurated December 1988 on the occasion of the fortieth anniversary of the Universal Declaration of Human Rights. The principal focus of the Human Rights

[1] Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity other than *Amici Curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

Center is to help train effective human rights professionals and volunteers. The Human Rights Center assists human rights advocates, monitors, students, and educators.[2]

Amici would like to take the opportunity to inform this Court of the applicable treaty standards, as well as the constitutional standards involved in this case.

BRIEF AMICUS CURIAE SUMMARY OF THE ARGUMENT

In the interest of achieving a diverse student body, the University of Michigan Law School's ("Law School") admission policy allows for consideration of factors which "may help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Grutter v. Bollinger*, 288 F.3d 732, 736 (6th Cir. 2002). The Court of Appeals for the Sixth Circuit correctly applied the law in upholding the Law School's admission policy. A reversal of this decision would conflict with U.S. treaty obligations. The Court of Appeals opinion reversed the trial court's decision and vacated the injunction prohibiting the Law School from considering race and ethnicity in its admissions decisions. The Court of Appeals upheld the Law School's admissions policy and found it to be virtually identical to that approved by the Court in *University of California v. Bakke,* 438 U.S. 265, 98 S. Ct. 2733 (1978).

[2] Positions of the Human Rights Center do not necessarily reflect the views of the Regents of the University of Minnesota.

Grutter, 288 F.3d at 747. The court found that the Law School has a compelling interest in achieving a diverse student body and that this is permissible under *Bakke*, so long as race and ethnicity are used only as positive factors in the admissions process and quotas are not used. *Id.* at 745-46. *Amici* concerned that a reversal of the Court of Appeals decision would be contrary to the United States' treaty obligations which are now part of the Law of the Land under the Supremacy Clause of the United States Constitution.[3]

Amici would like to bring to the Court's attention the treaty standards applicable to this case under the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), *opened for signature* March 7, 1966, 660 U.N.T.S. 195 (*entered into force* January 4, 1969; *entered into force for the United States* November 20, 1994), and the International Covenant on Civil and Political Rights (Civil and Political Covenant), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* March 23, 1976; *entered into force for the United States* September 8, 1992). In turn, *Amici* urge this Court to interpret the policy in question so that it conforms to obligations under those duly ratified treaties. A decision to the contrary could impair the ability of local and state governmental entities to institute measures designed to meet obligations under the treaties and the United States Constitution. Hence, it is critical that this Court consider the treaty obligations

[3] Since no opinion has been issued in *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *amici* have focused their comments on the *Grutter* case. However, the treaty standards are applicable to the *Gratz* case as well.

when construing the application of the constitutional standards applicable to this case.

ARGUMENT

I. Treaty Provisions are the Supreme Law of the Land Under the U.S. Constitution

Under the United States Constitution Article VI, section 2 of clause 2, "all treaties made or which shall be made, under the authority of the United States shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution or Law of any State to the contrary notwithstanding." U.S. CONST. art. VI, § 2, cl. 2. When a treaty and state law conflict, the treaty controls. *See Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *see also Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (concluding that the validity of a treaty was not undermined by a possible infringement on states' rights under the Tenth Amendment unless it violated an express prohibition of the Constitution). Also, courts should construe treaties "in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924). In this case, there is no conflict between the treaty and the state practices being challenged. Also, there is no conflict with any express provisions in the Constitution.

The United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force for the United States on

November 20, 1994. 140 CONG. REC. S7634 (June 24,1994). As of December 9, 2002, 167 states have become parties to the Race Convention and pledged to eradicate racial discrimination within their borders. *See* the United States High Commissioner on Human Rights status of treaty ratifications (last modified Dec. 9, 2002), available at http://www.unhchr.ch/pdf/report.pdf. Previously, the United States had become a party to the International Covenant on Civil and Political Rights on September 8, 1992. 138 CONG. REC. S4781-84 (April 2, 1992). The United States is now one of 149 countries that are parties to that treaty. *See* the United Nations High Commissioner on Human Rights status of treaty ratifications (last modified Dec. 9, 2002), available at http://www.unhchr.ch/pdf/report. pdf.

The Race Convention and the Civil and Political Covenant, as ratified treaties, are the Supreme Law of the Land. The United States is now bound to protect the rights enumerated in those treaties. Both treaties establish committees to monitor compliance with treaty provisions. Under the Race Convention, this body is called the Committee on the Elimination of Racial Discrimination. Race Convention, art. 8-15. The enforcement body established by the Civil and Political Covenant is the Human Rights Committee. Civil and Political Covenant, art. 28-45.

II. A Reversal of the Decision of the Sixth Circuit Would Impair the Ability of State and Local Governmental Entities to Institute Measures Designed to Meet U.S. Treaty Obligations

The Race Convention and the Civil and Political Covenant elaborate on the basic principles of equality and

nondiscrimination. The Race Convention focuses specifically on discrimination and thus addresses a wide range of categories of rights in which discrimination is prohibited. It provides that State Parties to the treaty must attempt to prohibit and to eliminate racial discrimination and to guarantee the equal right to enjoyment of civil and political rights. Race Convention, art. 5. Furthermore, it contains very specific provisions mandating affirmative action programs to remedy discrimination and provides that such actions shall not be deemed discrimination. Race Convention, art. 2(1).

The critical definition of racial discrimination is set forth in Article 1(1) of the Race Convention:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The Race Convention, however, also provides an exception for special measures that are "taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights or fundamental freedoms. . . ." art. 1(4). This is an exception designed for affirmative action programs and for other measures states may take to further the aims of the treaty.

The Race Convention outlines the fundamental obligations of State Parties to take steps to erase discrimination within their borders and obligates States Parties to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms. . . ." Race Convention, art. 2(1). It also requires State Parties to ensure protection of rights within social, economic, cultural and other fields by taking "special and concrete measures . . . for the purpose of guaranteeing [racial groups or individuals belonging to them] the full and equal enjoyment of human rights and fundamental freedoms." Race Convention, art. 2.

The provisions in the Civil and Political Covenant provide protection to much broader categories of persons and define the civil and political rights in greater detail. Part II establishes the general duties of State Parties, which include the obligation to "take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Civil and Political Covenant, art. 2(2). Articles 2, 3 and 26 set forth the basic principle of equal protection of the laws. Article 2(1) requires that State Parties provide the enumerated rights to all individuals within their jurisdiction without regard to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 specifically guarantees "the equal right of men and women to the enjoyment of all civil and political rights set forth in the . . . Covenant." Article 26 reinforces the equal protection language in Article 2 by stating that all persons are equal before the law and are entitled to equal protection regardless of any of the specified bases.

The Human Rights Committee has also considered whether distinctions are permissible under the Civil and Political Covenant which requires that the rights under the treaty be provided without regard to "race, colour, sex, language, religion, birth or other status." Civil and Political Covenant, art. 2(1). The Committee recognized that "not all differentiation of treatment constitutes discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." U.N. GAOR, Hum. Rts. Comm., 37th Sess., 984th mtg., at 4, U.N. Doc. CCPR/C/21/Rev.1/Add.1 (1989).[4]

Petitioner seeks to eliminate the Law School's affirmative action program that benefits minorities. Petitioner takes the position that affirmative action programs are inherently discriminatory. *See* Petition for Writ of Certiorari at 26, 29. That view of affirmative action conflicts with the definition of "racial discrimination" in the Race Convention, which provides that actions "taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection . . . in order to ensure . . . equal enjoyment or exercise of human rights or fundamental freedoms shall not be deemed racial discrimination." Race Convention, art. 1(4). Indeed, by eliminating programs that seek to address the lack of equality in certain areas, Petitioner

[4] *See also, Prevention of Discrimination: The Concept and Practice of Affirmative Action: Report of the Special Rapporteur*, Sub-Comm. on the Promotion and Protection of Human Rights, 53rd Sess., Agenda Item 5, U.N. Doc. E/CN.4/Sub.2/2002/21 (June 17, 2002), for a report on the issue of affirmative action at the international and national arenas.

may force the Law School to perpetuate racial discrimination in violation of the Race Convention.[5]

This Court made clear in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that a race-based preference program may be a constitutional means of remedying discrimination. Justice O'Connor in the majority opinion recognized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand*, 515 U.S. at 237. Thus, "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." *Id*. at 237. Petitioner requests that the Court abandon affirmative action programs that seek to promote diversity, even those government programs "narrowly tailored to further a compelling interest," in violation of the Constitution and the provisions of the two treaties. Indeed, the treaty obligations themselves can constitute a compelling state interest to justify the establishment of such programs. *See* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 468 (1997).

[5] This is similar to the position of Justice Stevens, who was joined by Justice Ginsberg, in his dissent in *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 243 (1995), where he noted that there is a difference between racial classifications that are used for the purpose of discrimination and those that have the goal of remedying discrimination.

A prohibition of affirmative action programs will directly conflict with the obligation of the United States as a party to the Race Convention, under Article 2(2) to take "special and concrete measures . . . for the purpose of guaranteeing [racial groups or individuals belonging to them] the full and equal enjoyment of human rights and fundamental freedoms." It may also impinge on the obligation in the Civil and Political Covenant to take "necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized" in that treaty. Civil and Political Covenant, art. 2(2). Indeed, the Human Rights Committee in 1995, after considering a report from the United States on its progress on ensuring the enjoyment of rights under the Covenant, made the specific recommendation that affirmative action should be adopted in order to eliminate discriminatory attitudes and prejudice toward minority groups and women. *See* Consideration of Reports: Comments of the Human Rights Committee, United States of America, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., U.N. Doc. CCPR/C/79/Add.50 (1995) at ¶ 30.

Finally, the Race Convention mandates that the United States should take affirmative steps "to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race . . . to equality before the law, notably in the enjoyment of . . . (e) [e]conomic, social and cultural rights, in particular: . . . (v) the right to education and training." Race Convention, art. 5(e)(v). In this way, Petitioner's request may also impair the ability of government entities to meet that obligation, since it places a burden on minority groups seeking to take part in education and training.

Thus, it is imperative that this Court considers treaty language in determining whether the University's programs at issue violate the Constitution because of the potential negative impact that the ruling can have on the United States' treaty obligations.

III. The Application of the Self-Executing Doctrine

This Court developed the doctrine of "self-executing" treaties to limit the Constitutional rule that treaties are the law of the land. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). Under that doctrine, only clauses of treaties that specify duties which directly confer rights may be enforced directly with the courts.[6] Courts have applied various theories when discussing that doctrine. *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties,* 89 AM. J. INT'L L. 695 (1995). Under one test, a self-executing clause is "equivalent to an act of the legislature whenever it operates by itself without the aid of any legislative provision." *Foster*, 27 U.S. (2 Pet.) at 314. Another test looks for the "intent of the parties" reflected in the treaty's words and, when the words are

[6] The holding in *Foster* was not in complete conformity with prior decisions upholding the application of treaties. *See* Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 577 (1991). Furthermore, *Foster* must be read in conjunction with *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), where the Court admitted error in its first analysis of the treaty in question. Nonetheless, the basic rule remains, that only clauses of treaties that specify duties that directly confer rights may be enforced directly with the courts.

unclear, in circumstances surrounding the treaty's execution. *See Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988); *Cook v. United States*, 288 U.S. 102, 119 (1933); *Jones v. Meehan*, 175 U.S. 1, 10-23 (1899); *Chew Heong v. United States*, 112 U.S. 536, 539-43 (1884); *Percheman*, 32 U.S. (7 Pet.) at 65-68; *Foster*, 27 U.S. (2 Pet.) at 310-16.

The intent of the parties may be difficult to ascertain when multilateral treaties such as the Race Convention and the Civil and Political Covenant are involved, and it is questionable that the intent of only one of the parties would determine the effect of a particular clause. Multilateral treaties rarely make clear the process by which parties are to incorporate its provisions into national law. FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 586 (2d ed. 1996). Many countries, such as the United States, incorporate treaties without separate action by the legislature. *See* Riesenfeld & Abbott, *supra* note 3, at 575. Indeed, the original purpose of the Supremacy Clause was to alter the British rule that all treaties are "non-self-executing" in order to require the state courts as well as the federal courts to enforce treaties directly. *See* Vázquez, at 698-700.

Some courts have listed factors they considered in ascertaining intent. *See Frolova v. Union of Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985); *People of Saipan v. United States Dep't of Interior,* 502 F.2d 90, 97 (9th Cir. 1974). In *Frolova v. USSR*, the court fashioned the following factors: the language and purposes of the agreement as a whole, the circumstances surrounding its execution, the nature of the obligations imposed by the agreement, the availability and feasibility of alternative enforcement mechanisms, the implications of permitting a

private cause of action, and the capability of the judiciary to resolve the dispute. *See Frolova*, 761 F.2d at 373.

Under the *Frolova* factors, the Civil and Political Covenant articles addressing affirmative action are self-executing. First, the language and purpose of the treaties are clear in protecting the human rights of individuals. Second, Article 3 imposes an obligation to State Parties to provide for effective remedies. It provides as follows:

> Each State Party to the present Covenant undertakes
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Civil and Political Covenant, art. 3.

Third, because the United States has not ratified the Optional Protocol to the Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), *entered into force* Mar. 23, 1976, 999 U.N.T.S. 302, which provides for an individual right to petition the Human Rights Committee, there are no other enforcement mechanisms available.

Fourth, since the treaty provides rights to individuals, there is no reason to believe that individuals should not have a private cause of action to enforce the provisions. Finally, the judiciary is the most capable institution for addressing whether the treaty has been violated since it has traditionally been the means whereby individuals in the United States enforce their constitutional rights.

Despite the clarity of many of the provisions in the Civil and Political Covenant, the Senate ratified it with a declaration that it was not self-executing. *See* 138 CONG. REC. S4784-01 (daily ed., April 2, 1992). The same was done with the Race Convention. *See* 140 CONG. REC. S7634 (daily ed., June 24, 1994). It is questionable whether the Senate, instead of the courts, can make such a determination. *See* Connie de la Vega & Jennifer Fiore, *The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in* Michael Domingues v. State of Nevada, 21 WHITTIER L. REV. 215, 220 n. 33 (1999). Further, such a declaration should not be given effect because it runs counter to the object and purpose of the treaty, which is to protect the individual rights enumerated therein. *See* Riesenfeld & Abbott, *supra* note 6, at 608. This Court, however, need not address those points since the legislative history indicates that the Senate merely intended to prohibit private and independent causes of action. *See* 138 CONG. REC. S4784. In cases such as this, the governmental entities would not be using the treaties to assert a private cause of action. They would use it defensively and thus is not invoking a separate cause of action. *See* John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555, 581-82 (1998).

The defensive use of a treaty is a judicially accepted means by which litigants have been successful in enforcing treaty provisions without having courts make a determination regarding whether the provisions are self-executing. *See*, *e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (allowing defensive use of a treaty to escheat proceeding under Oregon law); *Ford v. United States*, 273 U.S. 593 (1927) (allowing use of a treaty as a defense to personal jurisdiction); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914) (recognizing the defensive use of a treaty in a criminal case, but ultimately holding that there was no conflict between the treaty and state law). Hence, this Court need not address the non-self-executing declaration and can apply the treaty provisions to this case.

IV. The Treaties Are Helpful for Interpreting United States Standards

International human rights standards have often been useful tools for interpreting laws in the United States. *See, e.g., Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980). *See generally* Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue,* 1 RUTGERS RACE & L. REV. 193 (1999).

In 1995, the United States' delegation to the Human Rights Committee stated that "courts of the [United States] could refer to the Covenant and take guidance from it." Statement of Conrad Harper, Legal Advisor, U.S. Department of State, to the United Nations Human Rights Committee, U.N. GAOR, Hum. Rts. Comm., 53rd Sess.,

1405th mtg., U.N. Doc. HR/CT/404 (1995). Hence, as a means to ensure compliance with the treaty obligations, the courts of this country should seek guidance from the Civil and Political Covenant in interpreting United States laws. Similarly, courts could seek the same interpretive guidance from Race Convention provisions. Failure to do so will undermine the United States credibility as a State Party to these, as well as other treaties.

The treaty obligations above are useful for interpreting the Constitution as well as federal statutory provisions of encouraging state and local governments to voluntarily remedy past discrimination. For example, this Court has recognized that in passing Title VII, Congress intended to encourage public and private employers to voluntarily enact race- and gender-based affirmative action programs in order to accomplish the national goal of "break[ing] down old patterns of racial segregation and hierarchy." *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). By denying state and local entities the power to voluntarily redress past discrimination through race- and gender-conscious means, courts will not only impede the furtherance of congressionally mandated goals, but will also impede the goal of eradicating racial and gender discrimination mandated by the Race Convention and the Civil and Political Covenant.

Ratification of treaties is not to be treated lightly, and such action by the President and two-thirds of the Senate evidences the acceptance of the treaty. The documents should, therefore, provide meaningful guidance to the Court.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to uphold the ruling of the Sixth Circuit in this case.

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