SUPREME COURT OF THE UNITED STATES

No. 02–516

JENNIFER GRATZ AND PATRICK HAMACHER, PETITIONERS *v.* LEE BOLLINGER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 23, 2003]

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

Petitioners seek forward-looking relief enjoining the University of Michigan from continuing to use its current race-conscious freshman admissions policy. Yet unlike the plaintiff in *Grutter* v. *Bollinger*, *post*, p. 1,[1] the petitioners in this case had already enrolled at other schools before they filed their class-action complaint in this case. Neither petitioner was in the process of reapplying to Michigan through the freshman admissions process at the time this suit was filed, and neither has done so since. There is a total absence of evidence that either petitioner would receive any benefit from the prospective relief sought by their lawyer. While some unidentified members of the class may very well have standing to seek prospective relief, it is clear that neither petitioner does. Our precedents therefore require dismissal of the action.

I

Petitioner Jennifer Gratz applied in 1994 for admission

[1] In challenging the use of race in admissions at Michigan's law school, Barbara Grutter alleged in her complaint that she "has not attended any other law school" and that she "still desires to attend the Law School and become a lawyer." App. in No. 02–241, p. 30.

to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as an undergraduate for the 1995–1996 freshman class. After the University delayed action on her application and then placed her name on an extended waiting list, Gratz decided to attend the University of Michigan at Dearborn instead; she graduated in 1999. Petitioner Patrick Hamacher applied for admission to LSA as an undergraduate for the 1997–1998 freshman class. After the University postponed decision on his application and then placed his name on an extended waiting list, he attended Michigan State University, graduating in 2001. In the complaint that petitioners filed on October 14, 1997, Hamacher alleged that "[h]e intends to apply to transfer [to the University of Michigan] if the discriminatory admissions system described herein is eliminated." App. 34.

At the class certification stage, petitioners sought to have Hamacher represent a class pursuant to Federal Rule Civil Procedure 23(b)(2).[2] See App. 71, n. 3. In response, Michigan contended that "Hamacher lacks standing to represent a class seeking declaratory and injunctive relief." *Id.*, at 63. Michigan submitted that Hamacher suffered "'no threat of imminent future injury'" given that he had already enrolled at another undergraduate institution.[3] *Id.*, at 64. The District Court rejected Michigan's contention, concluding that Hamacher had standing to seek injunctive relief because the complaint alleged that he intended to apply to Michigan as a

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[2] Petitioners did not seek to have Gratz represent the class pursuant to Federal Rule Civil Procedure 23(b)(2). See App. 71, n. 3.

[3] In arguing that Hamacher lacked standing, Michigan also asserted that Hamacher "would need to achieve a 3.0 grade point average to attempt to transfer to the University of Michigan." *Id.*, at 64, n. 2. The District Court rejected this argument, concluding that "Hamacher's present grades are not a factor to be considered at this time." *Id.*, at 67.

transfer student. See *id.*, at 67 ("To the extent that plaintiff Hamacher reapplies to the University of Michigan, he will again face the same 'harm' in that race will continue to be a factor in admissions"). The District Court, accordingly, certified Hamacher as the sole class representative and limited the claims of the class to injunctive and declaratory relief. See *id.*, at 70–71.

In subsequent proceedings, the District Court held that the 1995–1998 admissions system, which was in effect when both petitioners' applications were denied, was unlawful but that Michigan's new 1999–2000 admissions system was lawful. When petitioners sought certiorari from this Court, Michigan did not cross-petition for review of the District Court's judgment concerning the admissions policies that Michigan had in place when Gratz and Hamacher applied for admission in 1994 and 1996 respectively. See Brief for Respondents 5, n. 7. Accordingly, we have before us only that portion of the District Court's judgment that upheld Michigan's new freshman admissions policy.

II

Both Hamacher and Gratz, of course, have standing to seek damages as compensation for the alleged wrongful denial of their respective applications under Michigan's old freshman admissions system. However, like the plaintiff in *Los Angeles* v. *Lyons,* 461 U. S. 95 (1983), who had standing to recover damages caused by "chokeholds" administered by the police in the past but had no standing to seek injunctive relief preventing future chokeholds, petitioners' past injuries do not give them standing to obtain injunctive relief to protect third parties from similar harms. See *id.*, at 102 ("[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects" (quoting *O'Shea* v.

Littleton, 414 U. S. 488, 495–496 (1974))). To seek forward-looking, injunctive relief, petitioners must show that they face an imminent threat of future injury. See *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 210–211 (1995). This they cannot do given that when this suit was filed, neither faced an impending threat of future injury based on Michigan's new freshman admissions policy.[4]

Even though there is not a scintilla of evidence that the freshman admissions program now being administered by respondents will ever have any impact on either Hamacher or Gratz, petitioners nonetheless argue that Hamacher has a personal stake in this suit because at the time the complaint was filed, Hamacher intended to apply to transfer to Michigan once certain admission policy changes occurred.[5] See App. 34; see also Tr. of Oral Arg.

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[4] In responding to questions about petitioners' standing at oral argument, petitioners' counsel alluded to the fact that Michigan might continually change the details of its admissions policy. See Tr. of Oral Arg. 9. The change in Michigan's freshman admissions policy, however, is not the reason why petitioners cannot establish standing to seek prospective relief. Rather, the reason they lack standing to seek forward-looking relief is that when this suit was filed, neither faced a "real and immediate threat" of future injury under Michigan's freshman admissions policy given that they had both already enrolled at other institutions. *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 210 (1995) (quoting *Los Angeles* v. *Lyons*, 461 U. S. 95, 105 (1983)). Their decision to obtain a college education elsewhere distinguishes this case from Allan Bakke's single-minded pursuit of a medical education from the University of California at Davis. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978); cf. *DeFunis* v. *Odegaard,* 416 U. S. 312 (1974) *(per curiam).*

[5] Hamacher clearly can no longer claim an intent to transfer into Michigan's undergraduate program given that he graduated from college in 2001. However, this fact alone is not necessarily fatal to the instant class action because we have recognized that, if a named class representative has standing at the time a suit is initiated, class actions may proceed in some instances following mootness of the named class representative's claim. See, *e.g.*, *Sosna* v. *Iowa*, 419 U. S. 393, 402

4–5. Petitioners' attempt to base Hamacher's standing in this suit on a hypothetical transfer application fails for several reasons. First, there is no evidence that Hamacher ever actually applied for admission as a transfer student at Michigan. His claim of future injury is at best "conjectural or hypothetical" rather than "real and immediate." *O'Shea* v. *Littleton*, 414 U. S., at 494 (internal quotation marks omitted); see also *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992).

Second, as petitioners' counsel conceded at oral argument, the transfer policy is not before this Court and was not addressed by the District Court. See Tr. of Oral Arg. 4–5 (admitting that "[t]he transfer admissions policy itself is not before you—the Court"). Unlike the University's freshman policy, which is detailed at great length in the Joint Appendix filed with this Court, the specifics of the transfer policy are conspicuously missing from the Joint Appendix filed with this Court. Furthermore, the transfer policy is not discussed anywhere in the parties' briefs. Nor is it ever even referenced in the District Court's Dec. 13, 2000, opinion that upheld Michigan's new freshman admissions policy and struck down Michigan's old policy. Nonetheless, evidence filed with the District Court by Michigan demonstrates that the criteria used to evaluate transfer applications at Michigan differ significantly from the criteria used to evaluate freshman undergraduate applications. Of special significance, Michigan's 2000 freshman admissions policy, for example, provides for 20

(1975) (holding that the requisite Article III "case or controversy" may exist "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot"); *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747 (1976). The problem in this case is that neither Gratz nor Hamacher had standing to assert a forward-looking, injunctive claim in federal court at the time this suit was initiated.

points to be added to the selection index scores of minority applicants. See *ante*, at 23. In contrast, Michigan does not use points in its transfer policy; some applicants, including minority and socioeconomically disadvantaged applicants, "will generally be admitted" if they possess certain qualifications, including a 2.5 undergraduate grade point average (GPA), sophomore standing, and a 3.0 high school GPA. 10 Record 16 (Exh. C). Because of these differences, Hamacher cannot base his right to complain about the *freshman* admissions policy on his hypothetical injury under a wholly separate *transfer* policy. For "[i]f the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *Lewis* v. *Casey*, 518 U. S. 343, 358–359, n. 6 (1996) (emphasis in original); see also *Blum* v. *Yaretsky*, 457 U. S. 991, 999 (1982) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar").[6]

Third, the differences between the freshman and the transfer admissions policies make it extremely unlikely, at best, that an injunction requiring respondents to modify the freshman admissions program would have any impact on Michigan's transfer policy. See *Allen* v. *Wright*, 468 U. S. 737, 751 (1984) ("[R]elief from the injury must be 'likely' to follow from a favorable decision"); *Schlesinger* v.

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[6] Under the majority's view of standing, there would be no end to Hamacher's ability to challenge any use of race by the University in a variety of programs. For if Hamacher's right to complain about the *transfer* policy gives him standing to challenge the *freshman* policy, presumably his ability to complain about the *transfer* policy likewise would enable him to challenge Michigan's *law school* admissions policy, as well as any other race-based admissions policy used by Michigan.

Reservists Comm. to Stop the War, 418 U. S. 208, 222 (1974) ("[T]he discrete factual context within which the concrete injury occurred or is threatened insures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied"). This is especially true in light of petitioners' unequivocal disavowal of any request for equitable relief that would totally preclude the use of race in the processing of all admissions applications. See Tr. of Oral Arg. 14–15.

The majority asserts that petitioners "have challenged *any* use of race by the University in undergraduate admissions"—freshman and transfer alike. *Ante*, at 18, n. 16 (emphasis in original). Yet when questioned at oral argument about whether petitioners' challenge would impact both private and public universities, petitioners' counsel stated: "Your Honor, I want to be clear about what it is that we're arguing for here today. *We are not suggesting an absolute rule forbidding any use of race under any circumstances.* What we are arguing is that the interest asserted here by the University, this amorphous, ill-defined, unlimited interest in diversity is not a compelling interest." Tr. of Oral Arg. 14 (emphasis added). In addition, when asked whether petitioners took the position that the only permissible use of race is as a remedy for past discrimination, petitioners' lawyer stated: "I would not go that far. . . . [T]here may be other reasons. I think they would have to be extraordinary and rare. . . ." *Id.*, at 15. Consistent with these statements, petitioners' briefs filed with this Court attack the University's asserted interest in "diversity" but acknowledge that race could be considered for remedial reasons. See, *e.g.*, Brief for Petitioners 16–17.

Because Michigan's transfer policy was not challenged by petitioners and is not before this Court, see *supra*, at 5, we do not know whether Michigan would defend its transfer policy on diversity grounds, or whether it might try to

justify its transfer policy on other grounds, such as a remedial interest. Petitioners' counsel was therefore incorrect in asserting at oral argument that if the University's asserted interest in "diversity" were to be "struck down as a rationale, then the law would be [the] same with respect to the transfer policy as with respect to the original [freshman admissions] policy." Tr. of Oral Arg. 7–8. And the majority is likewise mistaken in assuming that "the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions." *Ante*, at 16. Because the transfer policy has never been the subject of this suit, we simply do not know (1) whether Michigan would defend its transfer policy on "diversity" grounds or some other grounds, or (2) how the absence of a point system in the transfer policy might impact a narrow tailoring analysis of that policy.

At bottom, petitioners' interest in obtaining an injunction for the benefit of younger third parties is comparable to that of the unemancipated minor who had no standing to litigate on behalf of older women in *H. L.* v. *Matheson,* 450 U. S. 398, 406–407 (1981), or that of the Medicaid patients transferred to less intensive care who had no standing to litigate on behalf of patients objecting to transfers to more intensive care facilities in *Blum* v. *Yaretsky,* 457 U. S., at 1001. To have standing, it is elementary that the petitioners' own interests must be implicated. Because neither petitioner has a personal stake in this suit for prospective relief, neither has standing.

III

It is true that the petitioners' complaint was filed as a class action and that Hamacher has been certified as the representative of a class, some of whose members may well have standing to challenge the LSA freshman admissions program that is presently in effect. But the fact that

"a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 40, n. 20 (1976) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 502 (1975)); see also 1 A. Conte & H. Newberg, Class Actions §2:5 (4th ed. 2002) ("[O]ne cannot acquire individual standing by virtue of bringing a class action").[7] Thus, in *Blum*, we squarely held that the interests of members of the class could not satisfy the requirement that the class representatives have a personal interest in obtaining the particular equitable relief being sought. The class in *Blum* included patients who wanted a hearing before being transferred to facilities where they would receive more intensive care. The class representatives, however, were in the category of patients threatened with a transfer to less intensive care facilities. In explaining why the named class representatives could not base their standing to sue on the injury suffered by other members of the class, we stated:

> "Respondents suggest that members of the class they represent have been transferred to higher levels of care as a result of [utilization review committee] decisions. Respondents, however, 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they pur-

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[7] Of course, the injury to Hamacher would give him standing to claim damages for past harm on behalf of class members, but he was certified as the class representative for the limited purpose of seeking injunctive and declaratory relief.

> port to represent.' *Warth* v. *Seldin*, 422 U. S. 490, 502 (1975). Unless these individuals 'can thus demonstrate the requisite case or controversy between themselves personally and [petitioners], "none may seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974).' *Ibid*." 457 U. S., at 1001, n. 13.

Much like the class representatives in *Blum*, Hamacher—the sole class representative in this case—cannot meet Article III's threshold personal-stake requirement. While unidentified members of the class he represents may well have standing to challenge Michigan's current freshman admissions policy, Hamacher cannot base his standing to sue on injuries suffered by other members of the class.

IV

As this case comes to us, our precedents leave us no alternative but to dismiss the writ for lack of jurisdiction. Neither petitioner has a personal stake in the outcome of the case, and neither has standing to seek prospective relief on behalf of unidentified class members who may or may not have standing to litigate on behalf of themselves. Accordingly, I respectfully dissent.