WASHINGTON AND LEE
UNIVERSITY
SCHOOL OF LAW
Lexington, Virginia 24450-2116

THE WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW

Presents the

THIRTY-THIRD ANNUAL
JOHN W. DAVIS APPELLATE ADVOCACY
MOOT COURT COMPETITION FINALS

OCTOBER 19, 2012
5:30 P.M.
SYDNEY LEWIS HALL
MILLHISER MOOT COURT ROOM

TODAY'S PROGRAM

Opening Remarks

Welcome and Introductions	Chris Edwards
Competition Overview	Amy Conant & David Miller

First Round

Counsel for the Petitioner	Alex Sugzda
Counsel for the Respondent	Rockwell Bower

Second Round

Counsel for the Petitioner	Ben Willson
Counsel for the Respondent	Matthias Kaseorg

Break for Deliberations

Results

Best Brief Awards	Professor Ann M. Massie Professor Russell A. Miller
Oralist Awards	The Bench

Concluding Remarks Chris Edwards

The Thirty-Third Annual John W. Davis Appellate Advocacy Moot Court Competition

"I may be frank on the subject of Moot Court; I have no doubt that Mr. Graves thinks I put too much emphasis on them.... I concede that the thing may be overdone; and that after all the real school for practice must be the courtroom; but so much embarrassment can be saved the young practitioner, and so much added to his capacity for serving those who are unfortunate to be among his early clients, that I hardly think too much care can be taken in training him, so far as possible, in the tools of the trade."

—John W. Davis, *April 30, 1898*
In a letter written to Professor Henry St. George Tucker

The Washington and Lee University School of Law hosts the John W. Davis Moot Court Competition every fall. Law students and faculty developed the Competition to provide participating students the opportunity to practice their oral advocacy and brief writing skills.

All second and third-year students, except members of the Moot Court Executive Board, are invited to participate. The competition is designed to showcase participants' written and oral advocacy. Each participant submits a written brief prior to presenting both Petitioner and Respondent oral arguments in the first two rounds of the Competition. Participants advance in the Competition based on the combined score of their brief and oral argument. As the Competition progresses, emphasis shifts to participants' oral argument skills. In this final round, competitors are judged on their oral arguments alone.

This year, Amy Conant and David Miller, the 2012 Davis Moot Court Administrators, created and wrote the Problem and supervised the Competition. In addition, Ms. Conant and Mr. Miller, served as judges during the preliminary and quarterfinal Rounds. Moot Court Executive Board members also served as judges in these preliminary rounds. Three members of our distinguished faculty—Professors C. Elizabeth Belmont, David I. Bruck, Timothy C. MacDonnell—judged oral arguments in the Semifinal Round.

The Competition Administrators judged all briefs submitted by the participants for content, grammar and proper citation. They then selected those briefs with the four highest scores as Best Brief nominees. Professors Ann M. Massie and Russell A. Miller selected the Best Brief winner among the Best Brief nominees.

The 2012 John W. Davis Moot Court Competition culminates today with the announcement of the Best Oral Advocate and winner of the Best Brief Award following the presentation of oral arguments. Those students who excel in the Competition may be selected to represent Washington and Lee at different external competitions across the country this spring.

This Competition would not be possible without the generous attention and support of several individuals. First, the John W. Davis Appellate Advocacy Competition owes its success in large part to the enthusiastic support of Washington and Lee School of Law alumnus, Philip G. Gardner (Class of 1972) and the late Benjamin R. Gardner (Class of 1967). After earning their Juris Doctor degrees from Washington and Lee Law, the Gardner brothers founded the Martinsville firm of Gardner, Barrow, Sharpe & Reynolds in 1975. The Board is grateful for Mr. Philip Gardner's continued support of the Moot Court Program at Washington and Lee.

The Moot Court Executive Board owes much appreciation to the professors and student participants who made the 2012 John W. Davis Moot Court Competition a success.

RESULTS OF THE 2012 JOHN W. DAVIS APPELLATE ADVOCACY MOOT COURT COMPETITION

FINALISTS

Rockwell Bower
Alexander Sugzda
Matthias Kaseorg
Ben Willson

SEMIFINALISTS

Joseph Antel
Marcus Lasswell
Claire Hagan
Randall Miller

QUARTERFINALISTS

Emerald Berg
Tiffany Eisenbise
Todd Hefner
Chloe McDougal
Nathan Schnetzler
Scott Weingart
Brian Buckmire
Carter George
Emily Kuchar
Lindsay Powell
Kimberly Streff
Lucas White

BEST BRIEF NOMINEES

Emily Kuchar and Tiffany Eisenbise
Marcus Lasswell and Lucas White
Alexander Sugzda
Scott Weingart and Claire Hagan

IN THE SUPREME COURT OF THE UNITED STATES

SUZANNE PETERS,

Petitioner,

V.

UNIVERSITY OF LEXINGTON AT TRIOLO,

Respondent.

General Fact Pattern

Suzanne Peters filed suit in the Western District of Lexington. Ms. Peters is a Caucasian female who applied for admission to the University of Lexington at Triolo in the fall of 2008. She was rejected. She sued the University and most of the administration. Ms. Peters contends the admissions policies and procedures currently applied by the University of Lexington discriminate against her on the basis of her race in violation of her right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution. Ms. Peters seeks invalidation of the race conscious admissions policy used by the University of Lexington at Triolo.

Issue

The University of Lexington at Triolo ("LX") is a public education institution. It is a highly selective university, receiving applications from approximately four times more students each year than it can enroll in its freshman class. For the entering class of 2008, to which Plaintiff sought admission, 29,501 students applied to LX. Less than half, 12,843, were admitted and 6,715 ultimately enrolled. As the flagship university of Lexington, LX describes its admissions goal as enrolling a meritorious and diverse student body with the expectation that many of its graduates will become state and national leaders. To accomplish this, the University continuously develops internal procedures to supplement the judicial and legislative mandates governing its admissions process.

In order to counter past decreases in minority enrollment, the Lexington State Legislature passed House Bill 588, known as HB 588 or the "Top Ten Percent law." HB 588, which is still in effect, granted automatic admission to any public state university, including LX, for all public high school seniors in the top ten percent of their class at the time of their application, as well as the top ten percent of high school seniors attending private schools that make their student rankings available to university admissions officers.

The purpose of the Top Ten Percent law was to "ensure a highly qualified pool of students each year in the state's higher educational system" while promoting diversity among the applicant pool so "that a large well qualified pool of minority students [is] admitted to Lexington universities." HB 588, House Research Organization Digest (1997) at 4-5. Though facially neutral, one of the purposes of HB 588 was to increase minority representation at LX. Under HB 588, minority enrollment levels have improved. The entering freshman class of 2004, the last admitted under this race-neutral system, was 4.5 percent African-American and 16.9 percent Hispanic, compared to 2.7 percent and 12.6 percent respectively seven years earlier. Seventy-five percent of all admitted African-American students and seventy-six percent of all admitted Hispanic students in 2004 qualified under the Top Ten Percent law, compared to fifty-six percent of all admitted Caucasian students.

The prohibition on the consideration of race in admissions ended after the 2004 admissions cycle as a result of the United States Supreme Court's landmark decision in *Grutter v. Bollinger*. The Supreme Court held that universities have a compelling governmental interest "in obtaining the educational benefits that flow from a diverse student body." In order to improve classroom discussion, develop the next generation of leaders, and break down racial stereotypes, the Supreme Court decided universities may consider race as a "plus" in evaluating an applicant's file in order to enroll a "critical mass" of minority students, described as "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated ... or like spokespersons for their race."

To conform with the *Grutter* decision, LX again modified its admissions policies. On August 6, 2003, the University of Lexington Board of Regents passed a resolution authorizing each LX System school to decide "whether to consider an applicant's race and ethnicity as part of the [institution's] admission" policies, which must include "individualized and holistic review of applicant files in which race and ethnicity are among a broader array of qualifications and characteristics considered," as well as periodic reviews to evaluate the efficacy and necessity of considering applicants' race.

To determine whether such consideration of race was warranted, LX conducted a study in November 2003 that concluded there was not a critical mass of underrepresented minority students enrolled at the University, though it did not establish what number or percentage of minority students would meet that standard. In their survey responses, minority students reported feeling isolated and a majority of students at the University stated there was insufficient diversity in the classroom. The study also found that in 2002, 90 percent of classes with 5 to 24 students had one or zero African-American students and 43 percent had one or zero Hispanic students. Thus, in August 2004, after almost a year of deliberations, the LX System approved a revised admissions policy for LX that included an applicant's race as a special circumstance reviewers may consider in evaluating an applicant's Personal Achievement Indices ("PAI").

LX does not have a projected date by which it intends to cease using race as a factor in undergraduate admission decisions.

From 1998 to 2008, the enrollment of African-American students increased from three to six percent of the entering freshman class and the enrollment of Hispanic students increased from 13 to 20 percent. However, the various programs in place make it difficult to attribute increases in minority enrollment to a specific program or programs. Furthermore, demographics in the state of Lexington have changed substantially in recent years, indicating that increases in minority enrollment may be at least partially attributed to population shifts.

The system under which Plaintiff was denied admission to LX is a product of all of the developments discussed above, with its most recent changes based on the affirmative action program used by the University of Michigan School of Law and approved by the United States Supreme Court in *Grutter v. Bollinger*. As did the University of Michigan School of Law, LX uses "a holistic, multi-factor, individualized assessment of each applicant" in which race is but one of many factors. However, the two institutions' admissions policies and procedures differ significantly due to LX's legislatively mandated admission of the Top Ten Percent. Accordingly, Lexington residents largely dominate the admissions process. As a result of HB 588, LX operates a two-tiered system of admissions based on the Top Ten Percent law and the AI/PAI (Academic Index/Personal Achievement Indices) system, under which an applicant's race is taken into consideration.

THE HONORABLE G. STEVEN AGEE

United States Circuit Judge for the Fourth Circuit Court of Appeals

Judge Agee serves as a United States Circuit Judge for the Fourth Circuit Court of Appeals. He graduated from Bridgewater College (B.A.), the University of Virginia School of Law (J.D.), and the New York University School of Law (L.L.M.).

In 2008, President George W. Bush nominated Judge Agee to a vacancy on the Fourth Circuit. The United States Senate confirmed Judge Agee's nomination to the federal bench in May 2008. Prior to his confirmation, Judge Agee served as justice of the Virginia Supreme Court from 2003-2008 and as judge of the Virginia Court of Appeals from 2001-2003.

Judge Agee worked in private practice for more than 20 years. From 1980-2001, he worked at Osterhoudt, Ferguson, Natt, Aheron, and Agee, where his practice included civil litigation and commercial transactions, with a particular focus on bankruptcy, trusts and estates, and commercial acquisitions.

From 1982-1994, Judge Agee served as an elected Delegate to the Virginia General Assembly. He represented the City of Salem and parts of Roanoke and Montgomery Counties. Judge Agee also served in the Army JAG Reserves from 1986-1997.

Judge Agee and his wife have one son.

THE HONORABLE SANFORD L. STEELMAN, JR.

Judge for the North Carolina Court of Appeals

Judge Steelman serves as a judge for the North Carolina Court of Appeals. He graduated from Davidson College (A.B.) and from the University of North Carolina School of Law.

After graduating from law school in 1976, he entered private practice in Monroe, North Carolina, where he practiced for nearly twenty years. Judge Steelman practiced at Griffin, Caldwell & Helder P.A. from 1976-1988, at the law office of Sanford L. Steelman, Jr. from 1988-1992, and at Steelman & Long from 1992-1994.

From 1994-2001, Judge Steelman served as Resident Superior Court Judge and from 2001-2002 as Senior Resident Superior Court Judge for Stanly and Union Counties. In 2003, Judge Steelman was elected to an eight year term on the North Carolina Court of Appeals. In 2010, he was reelected to a second term.

Judge Steelman and his wife have three sons.

THE HONORABLE JOHN M. TYSON

Judge for the North Carolina Court of Appeals

Judge Tyson serves as a Recall Judge for the North Carolina Court of Appeals. He graduated from the University of North Carolina-Wilmington (B.A.), Campbell University School of Law (J.D.), Duke University (M.B.A.), and the University of Virginia School of Law (LL.M.).

Following law school, Judge Tyson worked as a Real Estate Manager and Counsel for Family Dollar Stores, Inc. from 1981-1985 and as Real Estate Director and Counsel for Revco Drug Stores, Inc. from 1988-1993. In 1993, Judge Tyson entered private practice in Fayetteville, North Carolina, where he practiced until 2001.

Judge Tyson was elected judge for the North Carolina Court of Appeals in 2001. He has served as Adjunct Professor of Law at Campbell University School of Law since 1987. In 2007-2008, he served as Vice President of the North Carolina Bar Association.

Judge Tyson and his wife have four children.

JOHN W. DAVIS (1892, 1895L)

The annual Moot Court Competition at Washington and Lee is named in memory of John W. Davis. Renowned for both his advocacy skills and public service, Davis was considered the finest Supreme Court attorney of his day. Davis argued before the Court 139 times before his death in 1955, at the time a twentieth century record.

Davis was born in 1873 in West Virginia, and attended Washington and Lee for both undergraduate and law degrees. Davis taught at Washington and Lee for three years after his graduation, but chose private practice over a permanent position at the Law School. Davis practiced law in Clarksburg, West Virginia from 1897-1913, serving as a U.S. Congressman from 1911-13. From 1913-1918, he served as Solicitor General of the United States, after which he served as ambassador to the Court of St. James until 1921. Upon returning from London, Davis became the head of the prominent New York law firm of Davis, Polk and Wardwell. He rejected an appointment to the Supreme Court in 1922, choosing instead to continue practicing before it. He received the Democratic nomination for President of the United States in 1924, losing to Calvin Coolidge. Davis then left the political arena, and spent the remainder of his life devoted to private practice.

Davis' advocacy record presents a complex and seemingly self contradictory history. He is best known for successfully defending the steel industry against seizure during the Korean War in *Youngstown Sheet and Tube Co. v. Sawyer* and for unsuccessfully defending segregation of public schools in *Brown v. Board of Education*. Davis also spoke in defense of religious liberty when Al Smith was attacked during the 1928 presidential campaign because of his Catholicism, and defended, *pro bono* a Yale divinity professor in the landmark case for conscientious objection, *United States v. McIntosh*.

Students of appellate advocacy know well *The Argument of an Appeal*, an address given by Davis to the Association of the Bar of the City of New York in 1940. Davis sets forth his "ten commandments" of oral argument, which, if followed, lead to success for the attorney and client. His admonitions, from "know your record from cover to cover" to "read sparingly and only from necessity" guide the participants today in the competition named in his honor.

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