

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ AND PATRICK
HAMACHER,

for themselves and all others
similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, ET AL.,

Defendants,

and

EBONY PATTERSON, ET AL.,

Intervening Defendants.

Civil Action No. 97-75231
Hon. Patrick J. Duggan
Hon. Thomas A. Carlson

CLASS ACTION

**PLAINTIFFS' BRIEF REGARDING (1) BURDEN OF PROOF;
(2) LEGAL STANDARD; AND (3) STANDING**

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues 1

Controlling or Principal Authorities 2

Introduction..... 3

Argument 6

 I. Defendants Have the Burden of Proving that Plaintiffs and the Class Members Would Not Have Been Admitted Absent the Illegal Discrimination in the LSA Admissions Process. 6

 II. The Legal Standard Which Defendants Have the Burden of Meeting Cannot be Based on a Hypothetical, *i.e.*, “Fictitious Recasting of Past Conduct.” 10

 III. Plaintiffs Have Standing to Assert Their Damages and Other Remedial Claims for Relief..... 14

Conclusion 18

TABLE OF AUTHORITIES

CASES

Aiken v. Hackett, 281 F.3d 516 (6th Cir. 2002)2, 13, 14, 15, 16

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977)8

Beattie v. Madison County School, 254 F.3d 595 (5th Cir. 2001)6

Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985)2, 7, 9

Carey v. Piphus, 435 U.S. 247 (1978)2

Farm Labor Organizing Committee v. Ohio State Highway Patrol,
308 F.3d 523 (6th Cir. 2002)7

Fields v. Clark University, 817 F.2d 931 (1st Cir. 1987)11

Grutter v. Bollinger, 539 U.S. 306 (2003)1, 8

Hartsel v. Keys, 87 F. 3d 795 (6th Cir. 1996)7

Heit v. Bugbee, 494 F. Supp. 66 (E.D. Mich. 1980)6

Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996)6

Johnson v. Board of Regents of University System of Georgia,
106 F. Supp. 2d 1362 (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001)2, 6, 10

Jordan v. Dellway Villa of Tennessee, 661 F.2d 588 (6th Cir. 1981)2, 9, 10

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) *passim*

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)2, 5, 11

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) *passim*

Rowland v. Mad River Local School District, 730 F.2d 444 (6th Cir. 1984)7

Saunders v. White, 191 F. Supp. 2d 95 (D.D.C. Cir. 2002)6

Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111 (6th Cir. 1987)7

Texas v. Lesage, 528 U.S. 18 (1999) *passim*

Wicker v. Board of Education, 826 F.2d 442 (6th Cir. 1987)7

FEDERAL STATUTES/RULES

42 U.S.C. § 1981.....2, 4, 6, 9

42 U.S.C. § 1983.....5

42 U.S.C. § 2000d.....2, 4, 6, 7, 13

Federal Rule of Civil Procedure 815

Federal Rule of Civil Procedure 23(b)(2)15

STATEMENT OF ISSUES

1. Which party has the burden of proof on the issue of whether plaintiffs or class members would have been denied admission, even absent defendants' race discrimination?
2. What is the correct legal standard for determining whether the burden identified in issue number one has been successfully carried?
3. Have plaintiffs and the class members satisfied Article III standing requirements for the additional relief that they seek?

CONTROLLING OR PRINCIPAL AUTHORITIES

Aiken v. Hackett, 281 F.3d 516 (6th Cir. 2002)

Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985)

Johnson v. Board of Regents of University System of Georgia,
106 F. Supp. 2d 1362, (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001)

Jordan v. Dellway Villa of Tennessee, 661 F.2d 588 (6th Cir. 1981)

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

Texas v. Lesage, 528 U.S. 18 (1999)

INTRODUCTION

At the status conference held on January 31, 2005, the Court requested briefing on three issues. The first two of these issues are those which plaintiffs identified as appropriate for decision on a class-wide basis in their December 8, 2004, brief in support of their motion for class certification and partial summary judgment with respect to certain claims. These are: (1) which party has the burden of proof on the issue of whether plaintiffs and class members would have been admitted to the University's College of Literature, Science & the Arts ("LSA"), absent the race discrimination that was practiced for all years at issue; and (2) what is the legal standard for determining whether the burden has been carried. Defendants have asserted in other briefing that with respect to the first issue, plaintiffs and class members have the burden of proof, and that as to the second issue, the legal standard is whether plaintiffs would have been admitted under a "narrowly-tailored" admissions system in the manner approved by the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In resolving the second inquiry, defendants apparently believe it is relevant and sufficient to ascertain whether plaintiffs and class members would have been admitted under the LSA admissions system that the University devised in 2003, in response to the Supreme Court's decision in this case. Plaintiffs disagree and demonstrate below why well-settled law requires rejection of defendants' positions both with respect to burden of proof and legal standard.

There is a long line of precedent establishing that once the plaintiff has proven discrimination, the burden shifts to the defendant to prove by a preponderance of the evidence that the plaintiff would not have obtained the sought-after benefit—in this case admission to the LSA—even absent the illegal consideration. Here, the decisions of this Court (with respect to the 1995-1998 admissions systems) and the Supreme Court (with respect to the 1999-2003 admissions systems) have established with judicial finality that the defendants practiced

systematic race discrimination, in violation of the Equal Protection Clause, Title VI (42 U.S.C. § 2000d), and 42 U.S.C. § 1981, for all years at issue. Accordingly, for the next stage of the proceedings, the burden of proof has shifted to the University to demonstrate by a preponderance of the evidence that it would have made the same decision to deny plaintiffs and the class members admission, even absent the illegal discrimination. Second, Supreme Court and Sixth Circuit precedent make clear that defendants cannot satisfy their burden through use of their proposed approach of hypothetically supposing what would have happened in admissions decision-making with respect to plaintiffs and the class members if the University had applied their recently-devised admissions process (or some other hypothetically-constructed process). Instead, as the cases demonstrate, the inquiry must focus on the actual admissions process existing at the time the decisions were made, with the University required to prove that it would have made the same decision through use of that process, even if it had not considered the illegal factors.

The third issue for which the Court has asked for briefing is one raised by defendants. They contend that plaintiffs and the class members have not alleged or proven Article III standing sufficient to entitle them to liability or the additional relief that plaintiffs have sought in other pending motions. Plaintiffs explain in the last section of this brief why defendants' standing argument is thoroughly misguided, erroneous, and contrary to settled precedent.

This brief does not address a number of issues that are already before the Court on separate pending motions. Plaintiffs have elsewhere explained why they and the class members are entitled to at least nominal damages under the principles of *Carey v. Piphus*, 435 U.S. 247 (1978), for the violations of constitutional rights that undisputedly occurred, even in the case of

class members who sustained no actual damages.¹ In addition, for reasons also explained in previous briefing, plaintiffs and class members seek a refund of the fee paid by them to the University at the time of their applications for admission, which can be awarded to them either as damages or in the nature of equitable relief flowing from the University's unlawful and unconstitutional practices.²

Finally, plaintiffs reiterate that their request for class-wide treatment of issues relating to nominal damages, refund of application fees, and compensatory damages does not require the Court to engage in highly individualized factual determinations with respect to each class member. The awards of nominal damages and application fees refunds can be made without any further factual findings. Moreover, as discussed and explained in previous briefing, a number of courts have adopted a *pro rata* approach to award of compensatory damages in cases of class-wide discrimination, and plaintiffs have suggested a form of the *pro rata* method which would be appropriate here for awarding compensatory damages.³ This method, as the courts which have applied it have noted, accommodates a number of interests by (1) appropriately limiting the damages a defendant must pay, (2) assuring that class members who have been injured receive some, even if less than complete, compensation, and (3) doing so in a far more judicially-efficient manner than would be possible with trial of individual cases. This is one of those cases in which it is a certainty that some class members have sustained actual injuries and damages

¹ See Plaintiffs' Memorandum in Support of Motion for Class Certification and Partial Summary Judgment with Respect to Certain Nominal and Incidental Damages Claims, at 8-12, filed December 8, 2004 (discussing entitlement to nominal damages); Plaintiffs' Reply Memorandum, at 12-15, filed January 28, 2005 (same).

² See Plaintiffs' Memorandum in Support of Motion for Class Certification and Partial Summary Judgment with Respect to Certain Nominal and Incidental Damages Claims, at 12-15, filed December 8, 2004 (discussing entitlement to refund of application fees paid by class members); Plaintiffs' Reply Memorandum, at 12-15, filed January 28, 2005 (same).

³ See Plaintiffs' Memorandum in Support of Motion for Class Certification and Partial Summary Judgment with Respect to Certain Nominal and Incidental Damages Claims, at 15-19, filed December 8, 2004; Plaintiffs' Reply Memorandum, at 6-12, filed January 28, 2005.

flowing from what are undisputed constitutional and civil rights violations committed by the University over a period of years. As a matter of justice and fairness, an appropriate and efficient means should be employed to permit class members to obtain some recovery for the legal violations and injuries that have occurred. Plaintiffs respectfully suggest that this can be accomplished by employing one or more of the class-wide mechanisms for relief proposed by plaintiffs.

ARGUMENT

I. Defendants Have the Burden of Proving that Plaintiffs and the Class Members Would Not Have Been Admitted Absent the Illegal Discrimination in the LSA Admissions Process.

This Court's December 13, 2000, opinion and January 30, 2001, order and the decision of the Supreme Court in this case established with judicial finality that the University's admissions systems for all years at issue (1995-2003) were unconstitutional and unlawful under Title VI and 42 U.S.C. § 1981. What remains to be decided, in accord with this Court's bifurcation order entered at the time the case was certified as a class, are questions of remedy and/or damages for the plaintiffs and the class members. Defendants have taken the position, without citation to authority, that in the next stage of the proceedings⁴ plaintiffs must "prove[] that they would have been admitted under a system that considered race in a narrowly and constitutionally tailored manner." *See* Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment and Class Certification, at 14, filed January 19, 2005. Defendants are wrong both with respect to where the burden lies and in their description of the legal standard to be applied in determining whether the burden has been met. The first section of this brief discusses the proper placement of burden, and the following section addresses the correct legal standard to be applied.

⁴ Defendants like to make much about whether the next stage of the litigation should be regarded as part of "liability" or "damages." This dispute about labels is irrelevant to the question addressed here of which party bears the burden on the question that both parties agree is one subject of the next stage of the proceedings.

It is now well-settled law that once a plaintiff demonstrates that a defendant has operated an illegal discriminatory system, the burden shifts to the defendant to prove that it would have denied the benefit to the plaintiff (made “the same decision”) even in the absence of the discrimination. Although first articulated in a case involving First Amendment protections, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977),⁵ this principle of burden shifting has been adopted in other areas, including cases alleging discrimination. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court expressly held that the *Mt. Healthy* analysis applied to determining claims for gender discrimination under Title VII. Specifically, the Court held that once the plaintiff demonstrated that gender played a role in an employment decision, the burden shifted to the employer to prove by a preponderance of the evidence that it would have made the “same decision” even if it had not taken the illegal factor into account. *Id.* at 244-45, 253-55 (Brennan, J., joined by Marshall, Blackmun, Stevens, JJ., concurring); *id.* at 276 (O’Connor, J., concurring) (after plaintiff’s showing of discrimination, “the burden then rests with the employer to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor.”).

In *Texas v. Lesage*, 528 U.S. 18 (1999), the Court endorsed the *Mt. Healthy* analysis for claims under 42 U.S.C. § 1983 for race discrimination in university admissions:

Under *Mt. Healthy* . . . even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration. . . . Our previous decisions on this point have typically involved alleged retaliation for protected First Amendment activity rather than racial discrimination, but that distinction is immaterial. The underlying principle

⁵ In *Mt. Healthy*, a school teacher claimed that the school refused to rehire him for reasons that infringed on his First Amendment right to freedom of expression. The Court held that because the teacher had carried his burden of demonstrating that his conduct was constitutionally protected and at least one motivating factor in the decision not to rehire, the burden shifted to the school board to show “by a preponderance of the evidence that it would have reached the same decision as to the [teacher’s] reemployment even in the absence of the protected conduct.” *Mt. Healthy*, 429 U.S. at 287.

is the same: The *government* can avoid liability by *proving* that it would have made the same decision without the impermissible motive.

Id. at 20-21 (emphasis added).⁶

In deciding discrimination cases, lower courts have repeatedly followed the Supreme Court's instructions with respect to the *Mt. Healthy* burden-shifting analysis. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which like this case involved claims under Title VI and 42 U.S.C. § 1981, the court expressly "conclude[d] that the *Mt. Healthy* methodology is appropriate in the instant case." *Id.* at 956. Similarly, in *Johnson v. Board of Regents of University System of Georgia*, 106 F. Supp. 2d 1362, (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001), involving a challenge to the race-based admissions policies of the University of Georgia, the court held that the university had "the burden of demonstrating that it would have made the same decision to reject the plaintiffs even if race and gender had not been used." 106 F. Supp. 2d at 1376 (citing *Mt. Healthy* and *Texas v. Lesage*). *See also, e.g., Beattie v. Madison County School*, 254 F.3d 595, 601, 604 & n.15 (5th Cir. 2001) (First Amendment claim); *Saunders v. White*, 191 F. Supp. 2d 95, 112 (D.D.C. Cir. 2002) (defendants failed to prove that plaintiff would not have been promoted even in absence of race and gender criteria); *Heit v. Bugbee*, 494 F. Supp. 66, 67 (E.D. Mich. 1980) (applying *Mt. Healthy* in a Title VII case) ("Significantly, both *Mt. Healthy* and *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252 (1977), are cited in support of the plaintiff's position in [*Bakke*].").

⁶ While the issue of burden was not before the Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *see id.* at 280 n.13, Justice Powell's opinion references *Mt. Healthy* and includes the following statement:

With respect to [Bakke's] entitlement to an injunction directing his admission to the Medical School, [Davis] has conceded that it could not carry *its burden* of proving that, but for the existence of its unlawful admissions program, [Bakke] still would not have been admitted. Hence, [Bakke] is entitled to the injunction"

Id. at 320 (emphasis added).

In *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985), a Title VII discrimination case, the Sixth Circuit expressly adopted the *Mt. Healthy* burden-shifting analysis, which it reiterated in *Terbovitz v. Fiscal Court of Adair County*, 825 F.2d 111, 115 (6th Cir. 1987) (defendants’ asserted “nondiscriminatory reason for its action . . . effectively becomes an affirmative defense on which the employer bears the burden of proof”). Indeed, the Sixth Circuit cases recognizing and applying the *Mt Healthy* analysis are too numerous to cite with completeness. See, e.g., *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 308 F.3d 523, 538 (6th Cir. 2002) (Equal Protection and § 1983 claim); *Hartsel v. Keys*, 87 F. 3d 795, 803 (6th Cir. 1996) (Title VII claim); *Wicker v. Board of Education*, 826 F.2d 442, 449 (6th Cir. 1987) (First Amendment claim); *Rowland v. Mad River Local School District*, 730 F.2d 444, 450 (6th Cir. 1984) (First Amendment claim).

In light of this overwhelming weight of authority, defendants’ unsupported assertion in earlier briefing that the burden will be on *plaintiffs* to prove they would have been admitted, but for the existence of defendants’ discriminatory practices in LSA admissions, is baffling. On the contrary, because plaintiffs have established the first part of the *Mt. Healthy* analysis through a judicial determination that their applications were subjected to an illegal consideration,⁷ the burden shifts to defendants to prove that the plaintiffs and class members would have been denied admission even in the absence of the unlawful race discrimination.

As noted, defendants never cite to any authority for their position on where the burden of proof lies at this stage of the litigation. Instead, they seem to seek to avoid analysis of the applicability and principles of *Mt. Healthy* by shifting the discussion to “standing.” As explained

⁷ This is particularly notable with respect to the proposed subclass as defined by plaintiffs: those, like Jennifer Gratz and Patrick Hamacher, who received letters advising them that they were qualified or even highly qualified for admission, but for whom the University lacked enough spaces to grant admission. See note 8 *infra*.

below in the third section of this brief, defendants' contentions that plaintiffs' lack standing, or that the allegations of the Complaint are insufficient to establish standing, are baseless.

II. The Legal Standard Which Defendants Have the Burden of Meeting Cannot be Based on a Hypothetical, *i.e.*, "Fictitious Recasting of Past Conduct."

Defendants are wrong not only about where the burden lies, but also about the legal standard that applies in determining whether they have carried their burden. They have asserted in past briefing (again without citation to authority) that the inquiry about whether plaintiffs or other class members would have been admitted should be viewed in light of what would have happened "if the University had considered race in a manner approved by *Grutter*." See Defendants' Brief in Opposition to Plaintiffs' Motion for an Award of Attorneys' Fees and Costs, at 4-5, filed September 3, 2004. See also Defendants' Response to Plaintiffs' Motion for Summary Judgment and Class Certification, at 14, filed January 19, 2005 (asserting that the next step in the case "is to see whether any plaintiff can show they have standing to seek damages because they would have been admitted under a system that considered race in a more narrowly tailored manner."). There is clear authority, however, that defendants' proposed hypothetical approach is precisely what is *not* permitted. Justice Powell made the point explicit in *Bakke*:

Having injured [Bakke] solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S., at 265 . . . No one can say how—or even if—[Davis] would have operated its admissions process if it had known that legitimate alternatives were available. . . . In sum, a remand would result in a fictitious recasting of past conduct.

Regents of University of California v. Bakke, 438 U.S. 265, 320-21 n.54 (1978).

Because Justice Powell approved of some uses of race and ethnicity in admissions to achieve "diversity," it is clear that the rationale articulated above foreclosed Davis from seeking to prove that it would have denied Bakke admission even if it had used race and ethnicity in the

more narrowly-tailored approach approved in Justice Powell’s opinion. For the same reason, it is clear that the University cannot defeat the claims for damages of the plaintiffs and class members in this case by retroactively and hypothetically applying admissions standards that it adopted only in 2003, after it was forced to do so by the Supreme Court’s decision in this case. This would be precisely the “fictitious recasting of past conduct” rejected in *Bakke*. 438 U.S. at 320-21 n.54.

The Sixth Circuit has quoted and expressly endorsed Justice Powell’s admonition quoted above. In *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985), in which the Sixth Circuit endorsed the *Mt. Healthy* analysis for Title VII cases, the court described the “difficulty of the employer’s burden,” once discrimination has been proven, *id.* at 712, and then quoted directly from *Bakke* to explain one way that a defendant *could not* satisfy that burden:

We recognize, however, that ‘[h]aving injured respondent [plaintiff] solely on the basis of an unlawful classification, petitioner [employer] cannot now hypothesize that it might have employed lawful means of achieving the same result.’ [citing *Bakke*, 438 U.S. at 320-21 n.54]. Consideration of an employer’s other grounds for discharge should not “result in a fictitious recasting of past conduct.”

Blalock, 775 F.2d at 712 n.12.

In *Jordan v. Dellway Villa of Tennessee*, 661 F.2d 588 (6th Cir. 1981), the Sixth Circuit was equally forceful in rejecting the hypothetical approach that defendants seek to use here. *Jordan* was a housing discrimination case involving, like this case, a claim under 42 U.S.C. § 1981. The court found that the defendant had unlawfully discriminated against a class of plaintiffs on the basis of race. The defendant argued that in the remedy phase, it should be free to reconstruct how many members of the class would still have had their applications rejected if all applicants had been treated in a nondiscriminatory manner. The Sixth Circuit rejected this approach as “hypothetical” and “speculative” and an “insufficient basis for denying individual recovery”:

Hypothetical factors are irrelevant to this inquiry [of who is entitled to damages]. Accordingly, courts are not to erect hypothetical constructs of what might have happened in each individual class member's case had the defendant not discriminated against the entire class.

Jordan, 661 F.2d at 595.

Instead, the court in *Jordan* made clear that in the remedial phase, the task was to focus on “what actually occurred . . . not what would have transpired had [all] applicants been processed fairly.” *Id.* at 594. Repeatedly, the Sixth Circuit emphasized that the focus must be on the “pre-existing” policies of the defendant:

[I]n the remedial hearings that the district court will conduct to determine the scope of each individual claimant's recovery, the appellees [defendants] are nevertheless free to attempt to prove that an individual applicant would have been rejected on the basis of *pre-existing* racially neutral policies. If appellees make such a showing in any claimant's case, that claimant is not entitled to recover damages.

Id. at 593-94 n.9 (emphasis added); *id.* at 595 (“We believe that the only relevant factors in determining ‘what actually occurred’ are (1) the *pre-existing* policies of the defendants, (2) the actions *actually taken* by the defendant pursuant to those policies, and (3) the impact of those actions on the individual claimants.”) (emphasis added).

It is clear then, that the University cannot defeat the claims of the plaintiffs and class members for compensatory damages by seeking to prove either that it *could* have made the same decision absent the unlawful consideration of race, or that it *would* have made the same decision under an admissions process that it has adopted in response to the past illegality. These are precisely the hypothetical and speculative approaches rejected in *Bakke* and by the Sixth Circuit. Instead, the University has the burden of proving by a preponderance of the evidence that plaintiffs and class members would have been denied admissions under the policies that were actually in effect when they applied, even absent the prohibited uses of race and ethnicity. The court made this clear, for example in *Johnson v. Board of Regents of University System of*

Georgia, 106 F. Supp. 2d 1362, 1377 (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001), which rejected the same kind of hypothetical approach that the University hopes to use in this case:

UGA must prove that ‘it *would have* made the same decision absent the forbidden consideration.’ *Lesage*, [528 U.S. at 20-21] (emphasis added), not that it could have made the same decision. So the question is not whether the plaintiffs would have been denied admission under a constitutional admissions process, but whether UGA would have denied them admission under *the actual plan used*, minus (only) the prohibited race and gender factors. *See Bakke*, [438 U.S. at 320-21 n.54] (Powell opinion).

Id. at 1377. *See also Price Waterhouse v. Hopkins*, 490 U.S. at 252 (“Moreover, proving ‘that the same decision would have been justified . . . is not the same as proving the same decision would have been made.’”) (citations omitted).

Under these principles and authorities, it is beyond debate then, that the University has the burden of proving by a preponderance of the evidence that even if it had not used the illegal race and ethnic considerations in effect at the time the plaintiffs’ and class members’ applications were rejected, it would have made the same decision based on considerations *then existing* at the time of the rejected applications. As other courts have noted, this difficult burden is justifiably placed on the party which has engaged in illegal discrimination. *See Fields v. Clark University*, 817 F.2d 931, 936 (1st Cir. 1987) (“‘it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor’”) (quoting *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (Scalia, J.)). It will be particularly difficult for the University to carry its burden in this case for several reasons, among them that defendants advised many applicants, like Jennifer Gratz and Patrick Hamacher, that

they were highly qualified for admission,⁸ and that it actually destroyed the written application files for the class members for years 1995 and 1996.⁹ In any event, defendants will not be able to satisfy their burden by retroactively applying some different and later admissions standard, such as the one they have adopted only in 2003 in response to the Supreme Court's decision in this case.

III. Plaintiffs Have Standing to Assert Their Damages and Other Remedial Claims for Relief.

Defendants have argued in several of their recent briefs that the plaintiffs have not alleged or proved standing to seek further relief. Their argument is foreclosed by the Supreme Court's decision in *Bakke*. In one of the few legal holdings in that case which garnered five votes, the Court expressly rejected the contention that Allan Bakke lacked standing. *See Bakke*, 438 U.S. at 281 n.14 ("The trial court found such an injury [to Bakke], apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. . . . Hence the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief.").

⁸ It is important to note that plaintiffs' motion for class certification with respect to claims for compensatory damages defines the proposed subclass to which the certification would apply to be those class members whom the University had determined were "qualified" for admission, as stated in the letters to them postponing or eventually denying admission. *See* Plaintiff's Memorandum in Support of Motion for Class Certification and Partial Summary Judgment with Respect to Certain Nominal and Incidental Damages Claims, at 7-8, filed December 8, 2004. These determinations were made with respect to both Jennifer Gratz and Patrick Hamacher. *See id.* Hence, when the class is defined in such a way, defendants, by operation of this definition, will be precluded from denying any subclass members' claim on an assertion that the subclass member did not meet minimum qualification standards for admission, and the Court will not be entangled in fact determinations about which subclass members were qualified for admission.

⁹ Defendants admitted to this file destruction in the course of discovery, when plaintiffs sought a sample of application files for all years at issue. *See* Memorandum of Law in Support of Plaintiffs' Motion to Compel, at 1-2, dated May 3, 1999. This is the reason, for example, that the University does not possess the file of Jennifer Gratz, other than what limited information was stored electronically. Regardless of what legal standard is adopted by the Court, it is hard to understand how the University could possibly satisfy its burden of proof for those class members who applied in 1995 and 1996.

Defendants nonetheless ignore *Bakke*'s express holding with respect to standing and claim support for their position from the Supreme Court's decision in *Texas v. Lesage* and the Sixth Circuit's opinion in *Aiken v. Hackett*, 281 F.3d 516 (6th Cir. 2002). The argument can be easily dismissed on several grounds. As an initial matter, the Court's per curiam opinion in *Texas v. Lesage*, which like *Bakke*, addressed university admissions, did not purport to overrule anything in *Bakke*, and the Sixth Circuit's decision in *Aiken*, which had nothing to do with university admissions, does not suggest otherwise.

Texas v. Lesage involved a single plaintiff who sought admission to the University of Texas. The Supreme Court concluded that the defendant had met *its* burden of proving that the plaintiff would not have been admitted, even absent the consideration of race. The case did not address or hold anything with respect to what allegations must be contained in a Complaint to sufficiently establish standing to seek compensatory damages. Instead, the explicit premise of the Court's decision was that there was conclusive evidence that the defendants' consideration of race had no effect on the decision to deny admission to the plaintiff. *Lesage*, 528 U.S. at 19-20 (citing and quoting district court opinion.). Under the *Mt. Healthy* analysis that the Court expressly applied to plaintiff's Section 1983 claim, the defendant prevailed because it had made a "conclusive demonstration that it would have made the same decision [to deny admission] absent the alleged discrimination." *Id.* at 21.

Aiken v. Hackett expressly relied on *Texas v. Lesage* to dismiss the race discrimination claims of police officers employed by the city of Memphis, Tennessee. While the Sixth Circuit addressed the matter as one of Article III standing, the opinion makes clear that the claims were dismissed because "it appear[ed] *beyond debate* that absent the forbidden criterion used by the City, the [plaintiffs] still would not have been promoted to sergeant." *Aiken*, 281 F.3d at 519

(emphasis added). Indeed, the Sixth Circuit relied and quoted findings of the district court that “[p]laintiffs *do not dispute*, and have offered no evidence, that absent the City’s use of affirmative action the promotions would have been made other than in accordance with strict rank-order.” *Id.* at 518-519 (quoting district court opinion) (emphasis added). The City, on the other hand, had offered evidence “that the plaintiffs in question were not ranked high enough to be considered for promotions absent the City’s use of affirmative action.” *Id.* at 519 (quoting district court opinion). Hence, the result is what would be expected under the burden-shifting principles of *Texas v. Lesage* and *Mt. Healthy*.

Although the Sixth Circuit in *Aiken* made reference to Article III standing requirements and plaintiffs’ pleading sufficiency, what the court actually held, as explained above, was that conclusive (“beyond debate”) evidence produced by the defendant necessitated the dismissal of plaintiffs’ claim. There is nothing in the opinion, moreover, which suggests that there was a dispute about which party had the burden of proving that the “same decision” would have been made in the absence of race considerations. Indeed, the question of burden is obviously an academic one, and not essential to the decision, when the evidence is “undisputed” and “beyond debate,” as it was characterized by the Sixth Circuit in *Aiken*. Given these factors and *Aiken*’s express reliance on *Texas v. Lesage*, which itself expressly imposes on the *defendant* the burden of proving that the “same decision” would have been made absent the discrimination, it is simply not tenable to describe *Aiken* as holding that the *plaintiff* has the burden on this question.

Defendants’ contention that plaintiffs’ have not sufficiently even *alleged* standing to seek compensatory damages in light of *Aiken* is preposterous. The Complaint in this case specifically alleges that the plaintiffs’ applications were “rejected” as a result of defendants’ discriminatory procedures and practices. *See* Complaint at ¶ 25. It alleges in four separate places that plaintiffs

are seeking damages. *See id.* at ¶¶ 1, 13, 25, pp. 8-9 (“Relief”). It also specifically alleges that plaintiffs and the class members have also sustained damages because of defendants’ unlawful activities. *See id.* at ¶ 13.¹⁰ These allegations are more than sufficient under the notice and general pleading requirements of Federal Rule of Civil Procedure 8. If for some reason this Court disagrees, then plaintiffs will seek leave of the Court to amend the Complaint, which can certainly cause no prejudice to defendants because they have known all along that plaintiffs and the class members seek damages for unlawful discrimination practiced by defendants.¹¹

From the foregoing, it is obvious why plaintiffs have standing to seek compensatory damages and other relief for the undisputed discrimination practiced by defendants in admissions for all years at issue. It is equally clear why *Texas v. Lesage* and *Aiken v. Hackett* do not support a contention that plaintiffs and the class members lack standing. First, plaintiffs and the class members have unambiguously alleged damages flowing from defendants’ unlawful practices, and this grants them standing for the same reason that the Court in *Bakke* held that Allan Bakke had Article III standing even if he would have been denied admission absent the illegal special admission program. *See Bakke*, 438 U.S. at 281 n.14. Second, unlike *Texas v. Lesage* and *Aiken v. Hackett*, it is far from true in this case that defendants have produced evidence from which it is “undisputed” or “beyond debate” that defendants would have denied admission to plaintiffs and the class members even absent the illegal discrimination. Indeed, defendants have

¹⁰ Ironically, defendants’ Answer does not allege that they would have made the same admissions decisions with respect to plaintiffs and class members even in the absence of discrimination. *See* Fed. R. Civ. P. 8(c) (“In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense.”).

¹¹ Defendants’ attack on the sufficiency of plaintiffs’ pleading for establishing entitlement to damages is ironic and disingenuous for another reason: At the class certification stage, when defendants were trying to defeat the Rule 23(b)(2) certification sought by plaintiffs, defendants argued repeatedly that plaintiffs’ and the class members’ claims were “primarily” for damages. *See, e.g.*, Defendants’ Reply Memorandum in Support of Defendants’ Motion for an Order Denying Class Certification, at 2, dated November 2, 1998 (“the vast majority of the class are situated to seek only damages”); *id.* (“This class seeks primarily damages.”); *id.* at 4 n.5 (“plaintiffs seek primarily monetary damages.”).

not even yet *attempted* to carry their burden on this issue, much less succeeded in doing so. Thus, whether characterized as an issue of liability, or damages, or standing, defendants have not come close to meeting their burden with respect to even a single plaintiff or class members.

Third, unlike *Texas v. Lesage* and *Aiken v. Hackett*, plaintiffs brought this case as a class action. The significance of this fact is that even if defendants can successfully carry their burden of proving that a particular class member would not have been admitted absent the discrimination, this proves nothing about whether defendants can prove the same thing with respect to *other* class members. For the result in this case to be analogous to the result in *Texas v. Lesage* and *Aiken v. Hackett*, the defendants would need to prove that no plaintiff or class member in this case would have been admitted in the absence of the illegal discrimination, something they have not even attempted, much less accomplished.

CONCLUSION

For all the foregoing reasons, plaintiffs respectfully request the Court to rule as a matter of law, and for the benefit of all the class members, that (1) defendants have the burden of proving at the next stage of this litigation that plaintiffs and the class members would not have been admitted even in the absence of the illegal consideration of race; (2) that defendants may not carry this burden by applying a hypothetically-devised admissions process to the decisions that were made; and (3) that plaintiffs have standing to seek damages and additional relief.

Dated: February 22, 2005

MASLON EDELMAN BORMAN & BRAND, LLP

By s/Kirk O. Kolbo

David F. Herr, #44441

R. Lawrence Purdy, #88675

Kirk O. Kolbo, #151129, kirk.kolbo@maslon.com

Michael C. McCarthy, #230406

3300 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402

612/672-8200

Michael E. Rosman

CENTER FOR INDIVIDUAL RIGHTS

1233 20th Street, NW, Suite 300

Washington, D.C. 20036

202/833-8400

Kerry L. Morgan

PENTIUK, COUVREUR & KOBILJAK, P.C.

Edelson Building, Suite 200

2915 Biddle Avenue

Wyandotte, MI 48192

734/281-7100

ATTORNEYS FOR PLAINTIFFS

#379450 v1

RE: *Jennifer Gratz and Patrick Hamacher v. Lee Bollinger, et al.*
Court File No.: 97-75231

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2005, I electronically filed

**PLAINTIFFS' BRIEF REGARDING (1) BURDEN OF PROOF; (2) LEGAL
STANDARD; AND (3) STANDING**

with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

James K. Fett (jim@frflaw.com, mo@frflaw.com)
Richard A. Wilhelm (rwillhelm@dickinsonwright.com)

and I hereby certify that I have mailed by United States Mail the papers to the following non-ECF participants:

Leonard M. Niehoff
Butzel Long
Suite 300
350 South Main Street
Ann Arbor, MI 48104

John Payton
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

Theodore M. Shaw
NAACP Legal Defense and Educational
Fund, Inc.
99 Hudson Street
Suite 1600
New York, NY 10013

Dated: February 22, 2005

MASLON EDELMAN BORMAN & BRAND, LLP

By s/Kirk O. Kolbo

David F. Herr, #44441

R. Lawrence Purdy, #88675

Kirk O. Kolbo, #151129, kirk.kolbo@maslon.com

Michael C. McCarthy, #230406

3300 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402

612/672-8200

Michael E. Rosman

CENTER FOR INDIVIDUAL RIGHTS

1233 20th Street, NW, Suite 300

Washington, D.C. 20036

202/833-8400

Kerry L. Morgan

PENTIUK, COUVREUR & KOBILJAK, P.C.

Edelson Building, Suite 200

2915 Biddle Avenue

Wyandotte, MI 48192

734/281-7100

ATTORNEYS FOR PLAINTIFFS

#380254 v1