

Case Nos. 01-1333, 01-1416, 01-1418

In the United States Court of Appeals for the Sixth Circuit

Jennifer Gratz and Patrick Hamacher,
for themselves and all others similarly situated,

Plaintiffs-Appellants (01-1333 and 01-1418)
Plaintiffs-Appellees (01-1416),

v.

Lee Bollinger; James J. Duderstadt;
The Board of Regents of the University of Michigan,

Defendants-Appellees (01-1333 and 01-1418)
Defendants-Appellants (01-1416),

Ebony Patterson, et al.,

Intervening Defendants-Appellees
(01-1333, 01-1416 and 01-1418).

On Appeal from the United States District Court
for the Eastern District of Michigan

**FINAL BRIEF OF PLAINTIFFS-APPELLANTS (Nos. 01-1333 and
01-1418) AND PLAINTIFFS-APPELLEES (No. 01-1416)**

Statement of Corporate Affiliations and Financial Interest

Pursuant to 6th Cir. R. 26.1, Plaintiffs Jennifer Gratz and Patrick Hamacher make the following disclosure:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation? No.

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

Kirk O. Kolbo

Dated: July 30, 2001

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Statement in Support of Oral Argument

Oral argument is requested. This class action involves issues of great public importance affecting the named plaintiffs and thousands of individuals similarly situated who have a constitutional right to have their applications for admission to colleges and universities considered without discrimination on the basis of race or ethnicity.

Statement of Subject-Matter and Appellate Jurisdiction

The complaint (the “Complaint”) asserts claims under 42 U.S.C. §§ 1981, 1983, and 2000d. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. (R. 1 Complaint, pg. 7-8, Joint Appendix (“JA”)-40-41)

This brief addresses issues raised in three appeals, consolidated pursuant to this Court’s order, filed April 6, 2001. The appeals arise from the same district court case: *Gratz v. Bollinger*, E.D. Mich. (Civil Action No. 97-75231). In an order dated March 26, 2001, this Court granted defendants’ timely petition, filed February 9, 2001, and plaintiffs’ timely cross-petition, filed February 16, 2001, for permission to appeal, pursuant to 28 U.S.C. § 1292(b), the district Court’s order dated January 30, 2001. (R. 207 Order, JA- 94-96) These appeals are docketed as Appeal Nos. 01-1416, and 01-1418.

Appeal No. 01-1333 has two jurisdictional bases. First, plaintiffs appeal as of right, pursuant to 28 U.S.C. § 1292(a), from the dismissal by the district court of plaintiffs’ request for injunctive relief in its order filed January 30, 2001. Second, plaintiffs appeal as of right, pursuant to 28 U.S.C. § 1291, from the district court’s final judgment, filed February 9, 2001, dismissing their claims against the individual defendants in their individual capacities on grounds of “qualified immunity.” (R. 206 Opinion, JA-43-93) The district court ordered the entry of that judgment pursuant to

Federal Rule of Civil Procedure 54(b). The notice of appeal was filed on February 26, 2001.

There is also a fourth appeal before this Court, Appeal No. 01-1438, which was filed by the Intervenor Defendants (“Intervenors”). This brief does not address the issues presented by that appeal, as it is the subject of a separate briefing schedule.

Statement of The Issues

1. Should the district court have granted plaintiffs’ motion for summary judgment seeking to enjoin use of defendants’ 1999-2000 admission policies, which grant a fixed, predetermined racial preference in favor of applicants from select racial minority groups, and which must be reviewed under the strict-scrutiny standard applicable to all racial classifications?

2. Should the district court have entered an injunction regarding the features of the 1995-1998 admissions policies that it declared illegal when defendants failed to demonstrate, and the district court failed to find, that there was no reasonable possibility of future violations?

3. Viewing the evidence in the light most favorable to plaintiffs, did the district court err in concluding that the defendants had met their burden of demonstrating the absence of genuine issues with respect to any fact material to defendants’ summary judgment motion?

4. Did the district court err in deciding that there is a compelling governmental interest in achieving “diversity” that can justify the use of racial preferences in university admissions?

5. Since systematic exclusion on the basis of race and “reserved” places in the class for racial minorities have been clearly illegal at least since the decision of the Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 438 U.S. 265 (1978), how can the individual defendants be entitled to qualified immunity for engaging in those same prohibited practices?

Statement of The Case

This action commenced in October 1997. The Complaint alleged that defendants operated an admissions system in the College of Literature, Science and the Arts (“LS&A”) within the University of Michigan (“University”) that illegally discriminated on the basis of race in violation of 42 U.S.C. §§ 1981, 1983, and 2000d. (R. 1 Complaint, pg. 7-9, JA-40-42) Plaintiffs sought, among other things, declaratory and injunctive relief, and damages. (R. 1 Complaint, pg. 8-9, JA-41-42)

The district court certified a class of plaintiffs, pursuant to Federal Rule of Civil Procedure 23(b)(2), in an opinion and order filed December 23, 1998. (R. 63 Memorandum Opinion and Order, JA-186-201; R. 62 Order, JA-184-85)

The intervenors were made parties to this case following an order of this Court reversing the district court's orders denying intervention. *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). (R. 102 Slip Opinion, JA-981-87)

The district court heard the parties' motions for summary judgment on November 16, 2000. In an opinion filed on December 13, 2000, and order filed on January 30, 2001, the district court granted plaintiffs' motion for summary judgment with respect to declaring defendants' admissions system for years 1995-1998 unlawful; granted defendants' motion for summary judgment with respect to defendants' admissions systems for 1999 and 2000; denied plaintiffs' motion for injunctive relief; granted the motion of defendants Bollinger and Duderstadt for summary judgment on grounds of qualified immunity; and denied defendant Board of Regents' motion for summary judgment on grounds of Eleventh Amendment immunity. (R. 206 Opinion, JA-43-93) In a separate opinion filed on February 26, 2001, and order filed on March 21, 2001, the district court rejected the arguments of the intervening defendants. (R. 210 Opinion, JA-103-26; R. 218 Order, JA-137-40)

Statement of Facts

I. Plaintiffs

A. Jennifer Gratz

Plaintiffs Jennifer Gratz and Patrick Hamacher were white residents of the state of Michigan who applied for admission to, and were rejected by, the LS&A in 1995 and 1997, respectively. (R. 205 Joint Summary Undisputed Facts, pg. 1, JA-4093)

Jennifer Gratz applied with a 3.8 grade point average and an ACT score of 25. (R. 79 Affidavit-Exhibits Volume II, Exhibit BB, U of M Admission System Transaction: Application Information Retrieve 10/28/97—Jennifer Gratz, JA-543) She was notified by letter dated January 19, 1995, that the LS&A had “delayed” a final decision on her application until early to mid-April. The letter also informed Gratz that her application “was classified as well qualified, but less competitive than the students who have been admitted on first review.” (R. 205 Joint Summary Undisputed Facts, pg. 1, JA-4093; R. 78 Affidavit-Exhibits Volume I, Exh. B, January 19, 1995 letter, JA-272)

By letter dated April 24, 1995, the University wrote to Ms. Gratz that “all of the applications have now been reviewed and [the University] regret[s] to inform you that we are unable to offer you admission.” (R. 205 Joint Summary Undisputed Facts, pg. 1-2, JA-4093-94; R. 78 Affidavit-Exhibits Volume I, Exh. C, April 24, 1995, letter, JA-273) The University invited Ms. Gratz to place her name on an “extended waiting list,” but went on to state that “we expect to take very few students from the Extended Waiting List, and recommend students make alternative plans to attend another institution.” (R. 205 Joint Summary Undisputed Facts, pg. 1-2, JA-4093-94; R. 78 Affidavit-Exhibits

Volume I, Exh. C, April 24, 1995, letter, JA-273) As a result of the denial of her admission to the LS&A, Ms. Gratz accepted an offer for admission into the freshman class of another institution, the University of Michigan at Dearborn, where she enrolled in the fall of 1995. (R. 205 Joint Summary Undisputed Facts, pg. 1-2, JA-4093-94; R. 78 Affidavit-Exhibits Volume I, Exh. A, Jennifer Gratz depo. pg. 8, 142-44, JA-268, 271)

B. Patrick Hamacher

Plaintiff Patrick Hamacher applied in 1996 for admission into the fall 1997 freshman class of the LS&A. (R. 205 Joint Summary Undisputed Facts, pg. 1-2, JA-4093-94) He applied with a 3.32 high school grade point average and a 28 ACT score. (R. 78 Affidavit-Exhibits Volume I, Exh. F, Hamacher application file, JA-280-95) By letter dated November 19, 1996, the University informed Mr. Hamacher that it “must postpone” a decision on his application until “mid-April.” (R. 205 Joint Summary Undisputed Facts, pg. 2, JA-4094; R. 78 Affidavit- Exhibits Volume I, Exh. E, November 19, 1996, letter, JA-279) The letter stated further that “[a]lthough your academic credentials are in the qualified range, they are not at the level needed for first review admission” to the LS&A. (R. 205 Joint Summary Undisputed Facts, pg. 2, JA-4094; R. 78 Affidavit-Exhibits Volume I, Exh. E, November 19, 1996, letter, JA-279)

On or about April 8, 1997, the University informed Mr. Hamacher that after further review, it was unable to offer him admission to the LS&A. (R. 205 Joint Summary Undisputed Facts, pg. 2, JA-4094) As a result of the denial of his admission into the freshman class of the LS&A, Mr. Hamacher accepted admission into another institution, Michigan State University, where he enrolled in the fall of 1997. (R. 205 Joint Summary Undisputed Facts, pg. 2, JA-4094; R. 78 Affidavit-Exhibits Volume I, Exh. D, Patrick Hamacher depo. pg. 74-76, JA-278)

II. Defendants

Defendant Board of Regents of the University of Michigan is the legal entity responsible for the control and operation of the LS&A. (R. 6 Answer, pg. 1, JA-148)

Defendant Lee Bollinger is president of the University of Michigan. Defendant James Duderstadt was Bollinger's predecessor as president of the University. (R. 6 Answer, pg. 4, JA-150)

Defendant-Intervenors are a group of individuals and organizations who argue in support of the University defendants' use of racial preferences, although they assert justifications for these preferences not used or relied upon by the University defendants.

III. Defendants' Admissions Policies and Practices

A. Overview

Defendants admit that they use race as a factor in making admissions decisions and that the race of plaintiffs Gratz and Hamacher was not a factor that "enhanced" the consideration of their applications. (R. 6 Answer, pg. 5, JA-151) Defendants also admit that the University is the recipient of federal funds. (R. 6. Answer, pg. 5, JA-151)

Defendants justify the use of race as a factor in the admissions process on one ground only: that it serves a "compelling interest in achieving diversity among its student body." (R. 78 Affidavit-Exhibits Volume I, Exh. H, Defendants' Objections and

Responses to Interrogatories, pg. 17, JA-314) Admission to the University is selective, meaning that many more students apply each year than can be admitted, and the University rejects many qualified applicants. (R. 205 Joint Summary Undisputed Facts, pg. 1, JA-4093) Defendants, however, have a policy to admit all qualified applicants who are members of one of three select racial minority groups: African American, Hispanic, and Native American.

[M]inority guidelines are set to admit all students who qualify and meet the standards set by the unit liaison with each academic unit, while majority guidelines are set to manage the number of admissions granted to satisfy the various targets set by the colleges and schools.

....

... Thus, the significant difference between our evaluation of underrepresented minority groups and majority students is the difference between meeting qualifications to predict graduation rather than selecting qualified students one over another due to the large applicant pool.

(R. 78 Affidavit-Exhibits Volume I, Exh. S, Admission Policy for Minority Students, pg. 2, JA-406; R. 78 Affidavit-Exhibits Volume I, Exh. T, Executive Summary, pg. 2, JA-413; R. 78 Affidavit-Exhibits Volume I, Exh. J, Marilyn McKinney depo. pg. 56-58, 81-82, 87-89, 103, JA-331, 334, 335-36, 339; Exh. K, Theodore Spencer depo. pg. 83-87, 119-20, 154-55, JA-355-56, 362, 367; Exh. L, James VanHecke depo. pg. 36-39, JA-383-84)

Defendants acknowledge that their consideration of race in the admissions process has the effect of admitting virtually every qualified applicant from any of the designated underrepresented minority groups. (R. 205 Joint Summary Undisputed Facts, pg. 3, JA-4095) The University generally defines a “qualified” applicant as one who could be expected, on the basis of the information contained in his or her application, to achieve passing grades as a student in the school to which the applicant has applied for admission. (R. 78 Affidavit-Exhibits Volume I, Exh. J, McKinney depo. pg. 56-58, JA-331; Exh. K, Spencer depo. pg. 82-87, JA-355-56; Exh. L, VanHecke depo. pg. 36-41, JA-383-85)

The defendants’ Office of Undergraduate Admissions (“OUA”) oversees and implements the LS&A admissions process. OUA uses written guidelines in effect for each academic year. (R. 205 Joint Summary Undisputed Facts, pg. 3, JA-4095) Admissions counselors are generally expected to make admissions decisions in accord with the guidelines, although there is some discretion to depart from them and counselors are expected to discuss any departures with a supervisor. (R. 205 Joint Summary Undisputed Facts, pg. 3, JA-4095; R. 78 Affidavit-Exhibits Volume I, Exh. J, McKinney depo. pg. 24-25, 29-30, 64-66, JA-325, 326, 332; Exh. K, Spencer depo. pg. 55-57, JA-353) The guidelines in effect for each of the years at issue are discussed below.

B. 1995-1997 Guidelines

Written “Guidelines” for all LS&A classes commencing in 1995, 1996, and 1997 have in common the use of grids or tables that are divided into cells representing different combinations of small ranges of adjusted high school grade point averages and scores on ACT or SAT tests. (R. 205 Joint Summary Undisputed Facts, pg. 5-7, JA-4096-98; R. 78 Affidavit-Exhibits Volume I, Exh. Y, LS&A—Guidelines for 1995, pg. 1-4, JA-436-39; Exh. Z, LS&A—Guidelines for 1996, pg. 1-2, JA-472-73; R. 79 Affidavit-Exhibits Volume II, Exh. AA, LS&A—Guidelines for 1997, pg. 1-2, JA-509-10) The grade point averages are adjusted first by clerical employees and second by admissions counselors. The adjustments made by the admission counselors are based on application of separate written “SCUGA” guidelines, which result in a score on a four-point scale (“GPA 2”) that is represented in the tables for each year. The SCUGA guidelines call for addition or subtraction of points based on the quality of an applicant’s high school (“S”), strength of curriculum (“C”), unusual circumstances (“U”), geographic factors (“G”), and alumni relationships (“A”). (R. 78 Affidavit-Exhibits Volume I, Exh. V, Guidelines-SCUGA 1995, pg. 1-4, JA-422-25; Exh. W, Guidelines-SCUGA 1996, pg. 1-4, JA-426-29; Exh. X, Guidelines-SCUGA 1997, pg. 1-4, JA-430-33)

Each cell in the Guidelines tables includes one or more possible actions for consideration by the admissions counselor reviewing an applicant’s file. Generally, the Guidelines actions fall into one of the following categories: admission, rejection, delay, or

postpone. The Guidelines for applicants in 1995 (which included Jennifer Gratz) have four separate tables, one for each of the following groups of applicants: in-state non-minority students; out-of-state non-minority students; in-state minority students; and out-of-state minority students. (R. 78 Affidavit-Exhibits Volume I, Exh. Y, LS&A—Guidelines for 1995, pg. 1-4, JA-436-39) For applicants for the 1996 and 1997 classes (which included Patrick Hamacher), there are two tables—for in-state and out-of-state applicants—and minority and non-minority action codes are provided for separately in each of the individual cells, with the top row of the cell representing the Guidelines action for non-minority students and the bottom two rows for minority applicants and disadvantaged or other students designated as underrepresented. (R. 78 Affidavit-Exhibits Volume I, Exh. Z, LS&A—Guidelines for 1996, pg. 1-2, JA-472-73; R. 79 Affidavit-Exhibits Volume II, Exh. AA, LS&A—Guidelines for 1997, pg. 1-2, JA-509-10) The addition of a new “SCUGA” factor for underrepresented minority status in 1997 had another consequence: underrepresented minorities, solely based on their race, had one-half point (.5) added to their grade point average calculation used in the already discriminatory Guidelines tables. (R. 78 Affidavit-Exhibits Volume I, Exh. X, “Guidelines-SCUGA 1997,” pg. 3, JA-432; Exh. K, Spencer depo. pg. 127-30, JA-363-64)

The Guidelines tables commonly reflect different guideline courses of action for minority applicants and non-minority applicants in the same cell. Generally, the Guidelines action for “admission” is found in cells representing relatively higher combinations of adjusted grade points (“GPA 2” or “Selection Index”) and test scores than in cells providing for delay, postpone, or rejection. The Guidelines reflect that admission decisions are generally more competitive for out-of-state than in-state applicants. The Guidelines also establish that admission decisions for non-minorities are generally more selective, requiring higher GPA 2 and test scores for admission than admission decisions for minority applicants. (R. 78 Affidavit- Exhibits Volume I, Exh. Y, LS&A—Guidelines for 1995, pg. 1-4, JA-436-39; Exh. Z, LS&A—Guidelines for 1996, pg. 1-2, JA-472-73; R. 79 Affidavit-Exhibits Volume II, Exh. AA, LS&A—Guidelines for 1997, pg. 1-2, JA-509-10; R. 78 Affidavit-Exhibits Volume I, Exh. K, Spencer depo. pg. 105-06, JA-358-59) For example, in 1995, minority Guidelines called for admission or delay decisions for students with combinations of adjusted grade point averages at or above 2.6 and ACT/SAT scores at or above 18 and 820, respectively. (R. 78 Affidavit-Exhibits Volume I, Exh. Y, LS&A—Guidelines for 1995, pg. 3-4, JA-438-39) For non-minority in-state students that year, the Guidelines

generally called for rejection of applicants with adjusted grade point averages below 3.2 and ACT/SAT scores below 23 and 950, respectively.¹

In the case of Jennifer Gratz, her adjusted high school grade point average (“GPA 2”) of 3.8 and ACT score of 25 placed her in a cell that called for a “postpone” on the first review under the 1995 Guidelines, which was the first action taken with respect to her. (R. 79 Affidavit-Exhibits Volume II, Exh. BB, U of M Admission System Transaction: Application Information Retrieve 10/28/97—Jennifer Gratz, JA-543; R. 78 Affidavit-Exhibits Volume I, Exh. Y, LS&A—Guidelines for 1995, pg. 1, JA-436) For a minority applicant (in-state or out-of-state) with the same combination of “GPA 2” and test score, the Guidelines called for a decision to “Admit.” (R. 78 Affidavit-Exhibits Volume I, Exh. Y, LS&A—Guidelines for 1995, pg. 1, JA-436)

Patrick Hamacher had an adjusted grade point average (“Selection Index”) of 3.0 and an ACT score of 28, which placed him in a cell in the 1997 Guidelines that called for postponement of non-minority students and delay or admission of minority students. (R. 79 Affidavit-Exhibits Volume II, Exh. CC, Admission Application Information Retrieve—Patrick Hamacher, JA-544; R. 78 Affidavit- Exhibits Volume I, Exh. F,

¹ In some cases, the Guidelines called for automatic rejection based on low grades or test scores. Underrepresented minorities, however, were never rejected automatically. (R. 78 Affidavit-Exhibits Volume I, Exh. J, McKinney depo. pg. 41, 97-98, JA-329, 338; Exh. K, Spencer depo. pg. 105, JA-358)

Patrick Hamacher application file, JA-280-95; R. 79 Affidavit-Exhibits Volume II, Exh. AA, LS&A—Guidelines for 1997, pg. 1, JA-509)

C. 1998-2000 Guidelines

The LS&A Guidelines for fall 1998 freshman enrollments dispensed with the tables and cells used in prior years. The new guidelines used a “Selection Index” calculated on a variety of factors and scored on a scale of up to 150 points. (R. 205 Joint Summary Undisputed Facts, pg. 7-8, JA-4098-99) For example, the 1998 Guidelines actions to be taken on an application are divided linearly as follows: 100 to 150 points (admit); 95-99 points (admit or postpone); 90-94 points (postpone or admit); 75-89 points (delay or postpone); 74 points and below (delay or reject). (R. 79 Affidavit-Exhibits Volume II, Exh. DD, LS&A—Guidelines for 1998, pg. 1, JA-547)

The factors used to calculate an applicant’s “Selection Index” under the 1998 Guidelines are similar to factors used in prior years. Up to 80 points can be based on high school grade point average (*e.g.*, 40 points for a 2.0 GPA; 60 points for a 3.0; and 80 points for a 4.0). (R. 79 Affidavit-Exhibits Volume II, Exh. EE, 1998 Guidelines for Calculation of Selection Index, pg. 9, JA-588) Up to 12 points, representing a perfect ACT/SAT score, can be earned for performance on either of the two standardized tests; up to 10 points for quality of school; from 8 to -4 points for strength or weakness of high school curriculum; 10 points for in-state residency; 4 points for alumni relationships; 1 point for an outstanding essay (changed to 3 points beginning in 1999); and 5 points for personal achievement or leadership on the national level. Under a “miscellaneous”

category, 20 points are added for one of several factors, including an applicant's membership in an underrepresented racial or ethnic minority group. (R. 79 Affidavit-Exhibits Volume II, Exh. EE, 1998 Guidelines for Calculation of Selection Index, JA-580; R. 78 Affidavit-Exhibits Volume I, Exh. J, McKinney depo. pg. 93-96, JA-337-38; Exh. K, Spencer depo. pg. 156-59, 163-67, JA-367-68, 369-70)

The University adopted the 1998 Guidelines with the intent to admit and enroll the same composition of class as had been admitted and enrolled under the previous Guidelines. (R. 78 Affidavit-Exhibits Volume I, Exh. J, McKinney depo. pg. 77-78, JA-333; Exh. K, Spencer depo. pg. 143-45, 152-53, 205, JA-365, 366, 375; R. 99 Affidavit-Exhibits in Opposition, Exh. C, 1998 Guidelines Training, pg. 1, JA-931; R. 83 Defendants' Appendix, Volume II, David Hunter depo. pg. 76-82, JA-700-03) In adopting the 1998 Guidelines, defendants did not intend to increase or decrease from prior years the extent to which they consider race and ethnicity in the admissions process. (R. 78 Affidavit-Exhibits Volume I, Exh. J, McKinney depo. pg. 103, JA-339; Exh. K, Spencer depo. pg. 144, JA-365) The parties have stipulated that the change from the tables to the selection index did not constitute a substantive change in the way that race and ethnicity were considered in the admissions process. (R. 205 Joint Summary Undisputed Facts, pg. 8, JA-4099) Defendants continued to use the 150-point Selection Index system for years 1999-2000. (R. 156 Motion, Affidavit, Exh. A,

LS&A—Guidelines for 1999, pg. 2, JA-1087; Exh. B, 1999 Guidelines for Calculation of Selection Index, pg. 7, JA-1118; Exh. C, LS&A—Guidelines for 2000, pg. 2, JA-1123; Exh. D, 2000 Guidelines for Calculation of Selection Index, JA-1147-54)

For years 1995-1998, defendants admitted all qualified applicants from the “underrepresented” minority groups as soon as possible, without deferring or postponing (waitlisting) their applications. (R. 205 Joint Summary Undisputed Facts, pg. 5, JA-4096) Students from other racial groups, like Jennifer Gratz and Patrick Hamacher, could have their applications deferred or postponed. Beginning in 1999, defendants abandoned their approach of “immediately” admitting all qualified underrepresented minority students. Instead, admissions counselors were permitted to “flag” for later consideration a file that fell into certain established classifications. (R. 205 Joint Summary Undisputed Facts, pg. 9, JA-4100) One of those classifications consisted of qualified underrepresented minority students meeting a designated selection index score. (R. 205 Joint Summary Undisputed Facts, pg. 8-9, JA-4099-4100)

For years 1995-1998, defendants also “reserved” or “protected” spaces in the class for members of certain groups of students, including students from one of the three underrepresented minority groups. (R. 205 Joint Summary Undisputed Facts, pg. 6-7, JA-4097-98) According to defendants, “as applicants from a particular group are admitted over the course of the admissions season, the protected spaces reserved for that

group are used.” (R. 78 Affidavit-Exhibits Volume I, Exh. I, Defendants’ Reply Memorandum on Reassignment Motion, pg. 3 n.2, JA-319; Exh. H, Defendants’ Objections and Responses to Interrogatories, pg. 13, JA-310) If the pool of qualified applicants from these underrepresented minority groups never reached the number of “protected spaces,” those slots “opened up” and could be filled by students who were not members of one of the underrepresented racial groups. (R. 78 Affidavit-Exhibits Volume I, Exh. H, Defendants’ Objections and Responses to Interrogatories, pg. 13, JA-310)

D. Illustrative Admissions Data

Admissions data illustrate the consequences of defendants’ race-conscious admissions policies. For example, in the Fall 1995 term, 46 underrepresented minorities applied with an adjusted grade point average (“GPA 2”) of 3.80 to 3.99 and ACT/SAT test scores between 24-25(ACT) or 1000-1090(SAT), and all 46 received offers of admission. (R. 79 Affidavit-Exhibits Volume II, Exh. FF, Profile—Fall 1995—Underrepresented Minorities, JA-589) For that same combination of scores, which is where Jennifer Gratz’s scores are located, 378 “Not Underrepresented Minorities” applied, and only 121 received offers of admission. (R. 79 Affidavit-Exhibits Volume II, Exh. GG, Profile—Fall 1995—Not Underrepresented Minorities, JA-590) The 1995 data show that for almost every combination of GPA 2 and test scores at or above 3.0(GPA 2) and 20-21(ACT)/800-890(SAT), the admission rate for

underrepresented minorities was at or above 90%. In more than half of those cells (28 out of 48), the admission rate was 100%. In another 11 cells, the admission rate for underrepresented minorities was between 90% and 99%. In comparison, a 90% or better acceptance rate for the “Not-Underrepresented Minority” group is found only with high combinations of GPA 2 and test scores (generally GPA 2 of at least 3.60 and/or minimum test scores of 29(ACT) or 1200(SAT)). In many of the cells with a 90% admission rate for underrepresented minorities, the “Not Underrepresented Minority” group has an admission rate ranging between 0% to less than 50%. (R. 79 Affidavit-Exhibits Volume II, Exh. FF, Profile —Fall 1995—Underrepresented Minorities, JA-589; Exh. GG, Profile—Fall 1995—Not Underrepresented Minorities, JA-590)

The 1996 data convey similar information. For the Spring-Fall 1996 term, there was at least a 90% acceptance rate for underrepresented minorities with minimum combinations of a 2.8 (GPA 2) and test scores of 20-21(ACT)/830-1000(SAT). (R. 79 Affidavit-Exhibits Volume II, Exh. LL, Profile—Spring-Fall 1996—Underrepresented Minorities, JA-595) For the “Not Underrepresented” group, a 90% or greater acceptance rate is again found only in cells with high grades and test scores (minimum GPA 2 of 3.8 and/or minimum test scores of 27(ACT) and 1200(SAT)). (R. 79 Affidavit-Exhibits Volume II, Exh. MM, Profile—Spring-Fall 1996—Not Underrepresented Minorities, JA-596)

Summary of Argument

Plaintiffs advanced two principal arguments in the district court: (1) that neither “diversity” nor “academic freedom” constitute compelling interests sufficient to justify the use of racial preferences in admissions; and (2) that even if diversity is compelling, the defendants’ use of racial preferences from 1995 to the present is not narrowly tailored to achieve that interest. The district court ruled that diversity is a compelling interest, but found that the admissions policies used from 1995 to 1998 were not narrowly tailored to achieve that interest. The district court also found that defendants’ 1999-2000 admissions policies were narrowly tailored and therefore survived strict scrutiny. In so doing, the district court made distinctions that have never been made by defendants, who have stipulated that no substantive difference was intended by the changes made to their admissions policies.

The district court should be reversed on a number of separate, but related, grounds. By making what appears to be a factual finding that diversity is a compelling interest sufficient to justify use of racial preferences, the district court erred procedurally and legally. Whether diversity is a compelling interest is a legal issue, and neither this Court nor the Supreme Court has ever ruled that it is.

Although defendants and the district court look to Justice Powell’s opinion for himself in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), even

Justice Powell expressly rejected preferences that are based solely on ethnic or racial diversity (as opposed to viewpoint diversity, which is the interest found compelling by Justice Powell—and only by Justice Powell). This Court could and should reverse the district court on this ground alone.

Significantly, even if the Court rules that diversity is compelling—despite the absence of any authority and over plaintiffs’ arguments to the contrary—it must still reverse the district court’s finding that the 1999-2000 admissions policy is narrowly tailored. That policy suffers from the very same shortcomings as does the 1995-1998 policy. Both policies include fixed, predetermined, purely racial preferences, and both therefore violate the Constitution.

Two important procedural holdings should follow from defendants’ failure to establish that either the 1995-1998 or 1999-2000 admissions policies are narrowly tailored. Despite finding the 1995-1998 policy unconstitutional, the district court did not enjoin its use by defendants, and that ruling should be reversed. Similarly, the district court’s finding on a motion for summary judgment that the 1999-2000 policy is narrowly tailored must be reversed if for no other reason than that the district court misapplied the summary-judgment standard. Although on the present record the district court could readily find that the defendants had not carried their burden of establishing that either

policy was narrowly tailored as a matter of law, it is inconceivable that a contrary finding could be made, consistent with the rules of procedure, without a trial.

Finally, the district court's ruling that the individual defendants are entitled to qualified immunity for having violated plaintiffs' constitutional rights should be reversed. At least since 1978, it has been abundantly clear that a state actor may not discriminate based on race using "reserved" places in the class or fixed, predetermined preferences that are the functional equivalent of quotas—yet that is precisely what defendants did. Individuals who engaged in such actions are not entitled to any immunity-based defense.

Standard of Review

These appeals present issues of law arising from the district court's rulings on summary judgment. This Court should review the propriety of summary judgment de novo under the same standard that was applicable in the district court. *See, e.g., Rafferty v. City of Youngstown*, 54 F.3d 278, 279 (6th Cir. 1995); *Johnson v. United States Postal Serv.*, 64 F.3d 233, 236 (6th Cir. 1995). Summary judgment is appropriate where the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *J.Z.G. Resources, Inc. v. Shelby Ins. Co.*, 84 F.3d 211, 213 (6th Cir. 1996).

A district court's legal conclusions for its decision to grant or deny a permanent injunction are reviewed de novo. *South Cent. Power Co. v. International Bhd. of Elec.*

Workers, Local Union 2359, 186 F.3d 733, 737 (6th Cir. 1999). Because the district court denied permanent injunctive relief and did so on motions for summary judgment, the standard of review for findings of fact (clearly erroneous), *id.*, and the scope of injunctive relief (abuse of discretion), *id.*, are not applicable on these appeals.

A district court's decision to grant summary judgment on a defendants' affirmative defense based on qualified immunity is reviewed de novo. *Taylor v. Michigan Dep't of Corrections*, 69 F.3d 76, 79 (6th Cir. 1995).

Argument

I. Defendants' Admissions Policies Are Not Narrowly Tailored To Achieve the Interests In "Academic Freedom" And "Diversity" Recognized By Justice Powell in *Bakke*.

Defendants undisputedly consider race in the admissions process, and they purport to do so for the purpose of achieving an ostensible compelling governmental interest in "diversity" under the rationale articulated by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). As discussed separately below, diversity is not a compelling interest that can justify racial preferences. The district court erred, therefore, in denying plaintiffs' request for injunctive relief. But even if diversity were a compelling interest, defendants' admissions policies for all the years at issue are well

outside the bounds of what Justice Powell approved in *Bakke* when he wrote about “academic freedom” and “diversity.”

Racial classifications are antithetical to the Fourteenth Amendment, the central purpose of which was to eliminate racial discrimination by the states and state officials. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996). As a general rule, the Fourteenth Amendment subjects any consideration of race by a state actor to “strict scrutiny.” *Id.* “Strict scrutiny” requires both a compelling governmental interest and narrowly tailored means to achieve that compelling interest. *Id.* at 908. The Supreme Court has held that Title VI prohibits the same intentional conduct as the Equal Protection Clause. *Alexander v. Sandoval*, 121 S. Ct. 1511, 1516 (2001); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992). Defendants’ large, mechanical racial preferences fail any plausible narrow-tailoring analysis.

A. A Review Of *Bakke* and Justice Powell's Opinion

In *Bakke*, the Court found that the admissions program of the University of California Medical School at Davis, which protected 16% of the places for incoming students for educationally or economically disadvantaged minorities, was illegal. Five justices, including Justice Powell, held that the Davis program unlawfully considered race in the admissions process. Another group of five Justices, also including Justice Powell, reversed the judgment of the California Supreme Court enjoining Davis from using race under any circumstances. No one theory, though, explained why that was so.

The Davis program struck down in *Bakke* operated on a “rolling” admissions basis. *Bakke*, 438 U.S. at 275. The reserved 16% of spaces in the class were for economically or educationally disadvantaged students from one of four specified racial groups: “Blacks,” “Chicanos,” “Asians,” and “American Indians.” *Id.* The reserved places in the class were available only to “qualified” members of the designated minority racial groups. Most minority applicants for the reserved spaces were rejected. *Id.* at 275-76 & n.5. The program was “flexible” insofar as there was no “floor” or “ceiling” on the total number of minority applicants to be admitted. *Id.* at 288 n.26. That is, like defendants’ “reserved” places, Davis did not use all the reserved seats for disadvantaged minority students if there were an insufficient number of such applicants who qualified. *Id.*

Justice Powell, in an opinion only for himself, applied strict scrutiny to the Davis program. He dismissed as “beside the point” any “semantic distinction” about whether the program amounted to “goals” or “quotas” for minority admission. *Id.* at 288-89. He then considered four objectives of the program offered by Davis and found only one to be sufficiently compelling: an interest in “academic freedom” derived from the First Amendment. Justice Powell concluded that “academic freedom,” although not a specifically enumerated Constitutional right, was a “special concern” of the First Amendment and thus a sufficiently compelling interest to meet strict scrutiny. *Id.* at 312. “Academic freedom” included the freedom to determine who would be allowed to study at a state university. *Id.* The Regents specifically wanted their institutions to select a group of students who would contribute to a robust exchange of ideas, and argued that “ethnic diversity” was a means of achieving that goal. *Id.* at 313-15. While rejecting the argument that Davis’s specific program of reserving spaces for disadvantaged minorities was necessary to achieve the robust exchange of ideas that the Regents allegedly wanted, Justice Powell did state that race and ethnicity could be considered as “plus” factors by universities seeking to achieve that goal. Justice Powell opined that a state interest in a robust exchange of ideas would not justify the consideration of race to achieve the ethnic diversity promoted by Davis, but could justify its consideration to achieve a diversity

which “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Id.* at 315.

B. Defendants’ Admissions System Does Not Meet the Requirements of Justice Powell’s Analysis in *Bakke*

It bears keeping in mind that although Justice Powell concluded that “academic freedom” was an interest sufficiently compelling to justify race as a factor in admissions, his opinion contains much in the nature of proscriptions on the manner of using race even for what he considered compelling purposes. Enough so, of course, that he voted with the majority of the Court in finding the race-conscious program at Davis unlawful. Unless his reasoning is limited to the facts in *Bakke*, or unless much of what he actually wrote in describing the academic freedom rationale is selectively and arbitrarily interpreted, defendants’ admissions policies are well outside of what he approved.

First, defendants fundamentally misapprehend the interest that Justice Powell found compelling. He did not conclude that there was a compelling interest in attaining racial and ethnic diversity. He specifically rejected the notion that there was a compelling interest in “simple ethnic diversity.” *Bakke*, 438 U.S. at 315. Instead, Justice Powell wrote approvingly about intellectual, viewpoint diversity: “the right to select those students who will contribute the most to the ‘robust exchange of ideas’” and the “atmosphere of ‘speculation, experiment and creation’—so essential to the quality of

higher education.” *Id.* at 312-13 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)). It was in the context of discussing a state interest in the freedom to select a student body that would contribute to the intellectual vitality of the student body that Justice Powell concluded “ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.” *Id.* at 314. Yet Defendants have relentlessly misused Justice Powell’s opinion to suggest that he recognized a compelling interest in racial and ethnic diversity as itself an end:

MR. PAYTON: . . . Now Justice Powell and *Bakke*. I don’t think that there’s any question but that what Justice Powell is talking about in *Bakke* is racial and ethnic diversity, not viewpoint diversity.

COURT: I am sorry. Say that again?

MR. PAYTON: I don’t think there is any question but that Justice Powell is talking about racial and ethnic diversity in *Bakke* and that there is no other conclusion.

. . . .

MR. PAYTON: . . . [T]here is no doubt he [Justice Powell] is talking only about race and admissions.

. . . .

MR. PAYTON: . . . *Bakke* is not about viewpoint diversity. It’s about racial and ethnic diversity. It’s just not about viewpoint diversity or academic diversity and that’s why I walked through that in some detail. That’s not what it’s about.

(R. 204 TR 39-41, 49, JA-4168-70, 4178)

What defendants can ignore but cannot escape is that Justice Powell wrote nothing about the educational value of racial and ethnic diversity alone, much less about whether white students benefit from attending classes that contain a “critical mass” of students from designated racial minority groups, or whether such a benefit could ever constitute a compelling interest. Yet defendants’ regime of preferences rests squarely on the pretext that their racial rationale was authored by Justice Powell.

Defendants are just as false to Justice Powell’s explanation of the means by which he believed a university could consider race as a factor in the exercise of academic freedom. Powell repeatedly made the point that in assembling a diverse or heterogenous student body, race or ethnicity was a factor that might be considered on an individualized, case-by-case basis, rather than in a systematic, generalized fashion. Thus, he reasoned that “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file. . . . The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive.” *Id.* at 317 (emphasis added). “In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.” *Id.* (emphasis added). In Allan Bakke’s case, it was the “denial” of his “right to individualized consideration

without regard to his race” that Justice Powell called “the principal evil” of the Davis special admissions program. *Id.* at 318 n.52 (emphasis added).

The Davis program, it was “evident,” was guilty of a “facial intent” to discriminate. *Id.* at 318. A “facially nondiscriminatory admissions policy” would be one “where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process.” *Id.* (emphasis added). “So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process.” *Id.* at 319 n.53 (emphasis added). Even under a facially nondiscriminatory admission policy, however, an applicant could overcome a presumption of good faith on the part of the university if the “applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results.” *Id.* (emphasis added). Thus, Justice Powell found that the Davis “dual admission” or “two-track” system, *id.* at 314-15, in which a number of seats in the medical school class were reserved on the basis of an “explicit racial classification,” *id.* at 319, violated the Equal Protection Clause, *id.* at 319-20.

In a number of respects, the defendants’ mechanical, automatic, systematic award of preferences to designated racial minorities is even more egregious than the Davis program struck down in *Bakke*. Defendants openly employ separate guidelines and

standards for admission of racial and ethnic minority applicants versus non-minority applicants. They automatically add a large, fixed, and predetermined number of points to the application of every member of certain racial or ethnic minority groups solely on the basis of that minority status. And defendants' policies have included "reserved" seats in the class for designated minorities, as well as racially segregated waiting lists. These preferences have impermissibly focused on one thing only: "simple ethnic diversity." *Id.* at 315.

The district court's determination that there is a substantive difference between the admissions policies for 1995-1998 and for 1999-2000 does not withstand analysis. First, it contradicts the agreed fact that the substance of defendants' consideration of race has not changed during the years at issue. (R. 205, Joint Summary Undisputed Facts, pg. 8, JA-4099) Second, there is undisputed evidence that the current (1999-2000) policies based on use of the selection index, were designed with a goal to admit the same class as was admitted with use of the tables and grids. (R. 99 Affidavit-Exhibits in Opposition, Exh. C, 1998 Guidelines Training, pg. 1-2, JA-931-32) It is not plausible to believe that Justice Powell's analysis rules out setting aside seats in the class for designated minorities, while at the same time authorizing a fixed award of points to accomplish the same objective. Systematic exclusion and the absence of individual, particularized consideration, are just as much a feature of the defendants' 1999-2000 system, with its

large and statistically predetermined award of points for skin color, as the earlier admissions programs found unlawful.

Clearly, therefore, defendants' statistical transformation of the form of the preference from the tables or grids used in 1995-1997 to the point-based selection index used beginning in 1998 cannot prevent the inevitable determination that the preferences for all years at issue are illegal. This Court has made the same point in deriding artificial and arbitrary distinctions between mere differences in form of racial preferences:

[W]e note that quotas and preferences are easily transformed from one into the other. Certainly, where the ranking criteria are already known, the correspondence is exact. In our case, if it were deemed objectionable to admit that there was a 1:1 quota, exactly the same result could have been reached by adding 20 points to the score of each minority applicant. . . . A pre-existing commitment to a fixed amount of preference . . . has the result, in any given case, of determining exactly the proportion of the favored group that will be selected.

Middleton v. City of Flint, 92 F.3d 396, 412-13 (6th Cir. 1996) (invalidating racial preference program in hiring) (citing *Bakke*, 438 U.S. at 378 (Brennan, J., concurring and dissenting)). The district court here completely ignored this admonition, which contains particularly apt language for this case since the race-conscious admissions system upheld by the district court includes (among other things) a "pre-existing commitment to a fixed amount of preference" that "add[s] 20 points to the score" of each underrepresented minority applicant. *Middleton*, 92 F.3d at 413.

C. Defendants' Admission System Does Not Meet the Traditional Requirements of Narrow Tailoring Required by Strict Scrutiny

The Supreme Court has repeatedly held that once a plaintiff establishes that governmental action was based on a suspect classification such as race, the government bears the burden of demonstrating that the classification “has been structured with ‘precision,’ and is ‘tailored’ narrowly” to achieve a compelling government interest. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973). The government must show that the challenged practice furthers a compelling state interest by the “least restrictive means practically available.” *Bernal v. Fainter*, 467 U.S. 216, 227 (1984). *See also, e.g., Miller v. Johnson*, 515 U.S. 900, 920 (1995); *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

The Supreme Court and this Court have made clear that a number of factors should be assessed in determining whether defendants have met their burden on narrow tailoring. These include (1) whether the defendant has considered race-neutral means of achieving the compelling interest; (2) the efficacy of less drastic, alternative possibilities; (3) the flexibility and duration of the remedy (4); the relationship of the means to the goal; and (5) the impact of the remedy on the rights of third parties. *See, e.g., City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 507-08 (1989); *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Middleton v. City of Flint*, 92 F.3d 396, 409 (6th Cir. 1996).

It was on the basis of narrow-tailoring requirements that the district court found the defendants' 1995-1998 admission programs unlawful. (R. 206 December 13, 2000 Opinion, pg. 40-44, JA-82-86) The court erred as a matter of law, however, in failing to draw the same conclusion for the 1999-2000 admissions programs. Defendants have not met their burden to demonstrate that they have considered race-neutral alternatives; gauged the efficacy of less drastic, alternate possibilities; or employed the least restrictive means practically available. They drew a pass on these requirements from the district court.

Defendants have merely stated in conclusory fashion that their admissions system was narrowly tailored and that they were "unable" to achieve diversity in the student body without including race among the factors considered. (R. 78 Affidavit-Exhibits Volume I, Exh. H, Defendants' Objections and Responses to Interrogatories, pg. 18, JA-315) They have placed nothing in evidence to explain why educational diversity cannot be achieved through alternatives less drastic and restrictive than different admissions standards; the fixed, rigid, and automatic award of 20 points solely for skin color; explicit racial set-asides (protected spaces); or racially segregated waiting lists. *See, e.g., Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 280 n.6 (1986) ("[T]he classification at issue must 'fit' with greater precision than any alternative means.") (plurality opinion).

The mechanical, predetermined, and automatic award of preference for race is inconsistent also with the requirement that the means be flexible. Why, for example, are there not less drastic means than a system of preferences that automatically awards 20 points (the equivalent on the scale to a full grade point) to the selection index score of every member of one of the preferred minorities? Why must the practice be, at an otherwise competitive institution, to admit virtually every qualified member from these minority groups, when many qualified applicants from the disfavored races are denied admission?

Defendants also have failed to place any limits on the duration of the preferences. Indeed, the district court acknowledged that the diversity rationale is a “permanent and ongoing interest” that “lives on perpetually.” (R. 206 December 13, 2000 Opinion, pg. 24, JA-66) Justifying a regime of racial preferences on a permanent basis defies Supreme Court precedent and one of the purposes of narrow tailoring, which is to ensure that the racially discriminatory means employed are temporary. *See, e.g., Croson*, 488 U.S. at 510 (“Proper findings . . . defin[ing] both the scope of the injury and the extent of the remedy . . . serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”)

Another way in which defendants failed to meet their burden on narrow tailoring is the failure to show a relationship and a closeness of fit between means and ends. There is nothing in the record disclosing how much diversity is necessary to reach “critical mass” or to achieve its alleged educational benefits, or how much preference (how many points?) must be given to get to that undefined level of diversity/critical mass. *See Middleton v. City of Flint*, 92 F.3d 396, 412 (6th Cir. 1996) (“It seems obvious that a plan’s tailoring is less ‘narrow’ if it results in a very large degree of preference for minority group members (and corresponding disadvantage for non-minority group members) than if the degree of preference is smaller.”)

The explicit limitation of the racial preferences to three minority groups is further evidence that the means employed are not closely fit to a goal of attaining intellectual diversity. The arbitrariness of this assignment of preferences to favored minority groups is completely irreconcilable with Justice Powell’s opinion, a point which was not even addressed by the district court. It is a preference that is not closely fit even to an impermissible goal of achieving “simple ethnic diversity,” *see Bakke*, 438 U.S. at 315 (Powell, J.); it unaccountably prefers certain select minority groups and excludes others. Ultimately, it demonstrates that the defendants’ real objective is likely to be racial balancing, *i.e.*, guaranteeing that the three specified groups will be represented in the class in numbers satisfactory to the defendants. *See Croson*, 488 U.S. at 510 (absent

proper findings to define the scope of the injury and the extent of the remedy “there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics”); *id.* at 510-11 (“[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a ‘piece of the action’ for its members.”) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting)).

Finally, the impact of defendants’ racial preferences on the rights of third parties is great. Individuals like Jennifer Gratz and Patrick Hamacher and the thousands of similarly situated class members are precluded, solely because of their race, from competing under the same admissions standards that are applied to the preferred minority students.

II. The District Court Erred In Not Enjoining The Illegal Aspects of Defendants’ Admissions Policies.

Because defendants’ admissions policies for all years at issue fail any plausible narrow-tailoring analysis, the district court erred in not enjoining defendants’ use of the current (1999-2000) admissions policies. The error was compounded by the district court’s failure to enjoin use of the admissions policies that it did find illegal. (R. 206

December 13, 2000 Opinion, pg. 50, JA-92) Defendants had gone so far as to defy the result in *Bakke* by doing some of the same things that had been found explicitly illegal in that case: *e.g.*, reserving seats in the class for students from specified racial groups. The district court failed, however, to explain why plaintiff was not entitled to an injunction based on the determination that these admissions policies were illegal. The district court's determination (even if correct) that the 1999-2000 policies were lawful cannot by itself be a reason to deny plaintiffs' request for an injunction. There is no evidence in the record that defendants either acknowledge the illegality of the 1995-1998 policies or agree not to repeat those illegal practices in the future.

Past violations of the law are relevant to the propriety of injunctive relief. They are relevant even if defendants were now complying with the law. *E.g.*, *SEC v. Fehn*, 97 F.3d 1276, 1295 (9th Cir. 1996) (“The existence of past violations may give rise to an inference that there will be future violations; and the fact that the defendant is currently complying with the securities laws does not preclude an injunction”) (quoting *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980)); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972) (“[F]raudulent past conduct gives rise to an inference of a reasonable expectation of continued violations.”). Defendants' past conduct is particularly relevant where (as here) the defendants do not concede that their past

conduct was illegal. *E.g.*, *Walling v. Helmerich & Payne*, 323 U.S. 37, 43 (1944); *SEC v. Lorin*, 76 F.3d 458, 461 (2d Cir. 1996).

The district court made no determination that plaintiffs' request for an injunction was moot or that there was no reasonable expectation that defendants would violate the law in the future. A defendant's voluntary cessation of illegal activity after a lawsuit is commenced does not moot a request for injunctive relief. Indeed, litigation-induced changes in behavior are the kind least likely to demonstrate permanent change that would meet a defendant's burden. *See, e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982); *Linton by Arnold v. Commissioner of Health & Env't*, 30 F.3d 55, 57 (6th Cir. 1994); *Dixie Fuel Co. v. Commissioner of Social Sec.*, 171 F.3d 1052, 1057 (6th Cir. 1999). Defendants have not met their "heavy" burden of showing that there is "no reasonable expectation" that they will reinstate the admissions policies that the district court found to be illegal. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Accordingly, it was error for the district court to deny plaintiffs' request for an injunction.

III. The District Court Erred In Disregarding Established Summary Judgment Standards and Burdens And In Granting Defendants' Motion for Summary Judgment On The 1999-2000 Admissions Systems.

The district court granted summary judgment in favor of defendants regarding their 1999-2000 admissions policies after weighing the evidence, resolving doubts and inferences in favor of the moving party (defendants), and making findings of fact. This was so despite the well known standard on motions for summary judgment that the court view the evidence in the light most favorable to the nonmoving party and resolve conflicting inferences and doubts against the moving party. *See Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d 727, 731-32 (6th Cir. 1994); *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir. 1979). The district court's disregard of traditional summary judgment standards and burdens is evident both on the question whether diversity is compelling and on narrow tailoring.

The district court's analysis on the legal status of the diversity rationale is confused. If the question whether diversity is compelling is one of law, as plaintiffs and defendants contend, then empirical evidence on the issue is beside the point; it is either irrelevant to the extent that the evidence contradicts the proposition that diversity is compelling, or it is mere surplusage if the evidence confirms the proposition. If, on the other hand, the question is an evidentiary one, it cannot be decided on a motion for summary judgment where reasonable doubts and inferences exist viewing the evidence in the light most favorable to the nonmoving party. The district court, however, erroneously decided the matter by focusing instead on its view of the sufficiency of the evidence: "If

presented with sufficient evidence regarding the educational benefits that flow from a diverse student body, there is nothing barring this Court from determining that such benefits are compelling.” (R. 206 December 13, 2000 Opinion, pg. 21, JA-63 (emphasis added))

Nowhere have the parties stipulated that there is an evidentiary basis for the conclusion that diversity has educational value or that it is a compelling interest. The district court even acknowledged some of the doubts, objections, and inferences raised against the evidence presented by defendants. But it then either ignored these disputed issues, or proceeded improperly to weigh the conflicting inferences. For example, the court noted several factual objections to the report of Patricia Gurin that had been lodged in the amicus brief submitted by the National Association of Scholars, an “organization comprising professors, graduate students, administrators, and trustees at accredited institutions of higher education throughout the United States.” (R. 167 Brief of National Association of Scholars (“NAS”), pg. iv., JA-2048)

The NAS had raised rather fundamental objections, such as that Gurin never actually measured racial diversity in her studies at the University of Michigan (R. 167, Brief of NAS, pg. 8-9, JA-2057-58); that her assessment of “learning outcomes” does not measure educational outcomes (R. 167, Brief of NAS, pg. 10-11, JA-2059-60); that her conclusions drawn from another database were actually contradicted in a published work

by the custodian of that database (R. 167, Brief of NAS, pg. 6-7, JA-2055-56); that even on the face of Gurin’s analysis, the effects purportedly associated with racial diversity were extremely small (R. 167, Brief of NAS, pg. 11-12 & n.10, JA-2060-61); and that Gurin had made no effort to ascertain how much diversity is necessary to achieve the purported educational benefits, or how educational outcomes would be affected by marginal changes in racial diversity. (R. 167, pg. 8-9, JA-2057-58) After reciting some of these objections (R. 206 December 13, 2000 Opinion, pg. 25, JA-67), the district court did not reject them as unreasonable or frivolous. Instead, it simply noted that it was “persuaded, based on the record before it, that a racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny.” (*Id.*) This amounted to a process of evidence-weighting inappropriate on motions for summary judgment.

One glaring instance of the district court’s departure from the required norm on this issue is that it based its decision on narrow tailoring for the 1999-2000 admission system on an assertion of fact that was contrary to what the parties had agreed upon and what the record demonstrated to be undisputed. Defendants concede that the changes over the years in their admission system relate to “only the mechanics, not the substance, of how race and ethnicity [were] considered in admissions.” (R. 205 Joint Summary

Undisputed Facts, pg. 8, JA-4099) This is borne out further by the undisputed evidence that the point-based selection index was designed by defendants to produce the same results as the system that the district court found illegal. (R. 99 Affidavit-Exhibits in Opposition, Exh. C, 1998 Guidelines Training, pg. 1, JA-931) Yet, the district court disregarded the record and the parties' agreement on this point of fact and substituted its own finding of fact, concluding that there was a substantive difference between the 1995-1998 and 1999-2000 admissions systems.

On other aspects of narrow tailoring, the district court either placed the burden on plaintiffs or drew all inferences in favor of defendants' position. Despite having the burden, defendants made no showing from anyone connected with their admissions office on consideration of race-neutral or less restrictive means. The court cited the testimony of admissions officials only for the proposition that defendants engage in minority recruitment efforts; there was no testimony from such officials on the consideration of race-neutral or less drastic alternatives. The two witnesses whose conclusions the court accepted unquestioningly on these points had nothing to do with defendants' admissions policies. Defendants' in-house statistical expert, Stephen Raudenbush, performed statistical analysis on the 1995-1997 data that projected declines in minority admissions if race were removed from the process, and everything else remained the same. (R. 206 December 13, 2000 Opinion, pg. 37, JA-79) His report discloses no effort to consider

alternatives that would produce the defendants' desired level of diversity. Similarly, the district court concluded from defendants' witness William Bowen "that a system that relied entirely on test scores would . . . lead to the rejection of a number of qualified minority applicants." (R. 206 December 13, 2000 Opinion, pg. 37, JA-79) This is a straw man argument. Plaintiffs have never suggested that the defendants must or should place more, total, or any reliance on tests of any kind, or that any particular criteria be used in selecting students.

The district court also accepted Bowen's criticism of the "Texas approach," under which all students who finish in the top ten percent of their class are guaranteed admission. (R. 206 December 13, 2000 Opinion, pg. 38, JA-80) Bowen did not opine that this system was incapable of achieving a diverse student body or that it was a ruse for racial discrimination. Instead, he criticized it for accepting students from weaker high schools "while turning down better-prepared applicants" not in the top ten percent of their class at stronger schools. (R. 206 December 13, 2000 Opinion, pg. 38, JA-80) He also "hypothesize[d]," that such a plan—"treating all applicants alike"—would provide a "spurious form of equality that is likely to damage the academic profile of the overall class of students admitted." (R. 206 December 13, 2000 Opinion, pg. 38, JA-80) The irony is palpable. Nowhere do Bowen or the district court explain how such equality of treatment is any worse than automatically treating all members of certain minority groups

alike by, say, automatically tacking 20 points to their applications and offering admission to virtually every such minority who meets minimum qualifications, even if that means rejecting many “better prepared applicants” from other races who plainly would have been admitted had they also been “underrepresented” minorities. The main point, however is that although reasonable people can disagree on the merits of any particular admission system, it was improper for the district court to conclude from Bowen’s criticism of one particular plan used elsewhere that defendants had met their summary judgment burden of demonstrating conclusively that they had considered race-neutral, or less restrictive, alternative systems.

Plaintiffs also raised genuine issues about whether defendants were motivated by something other than educational diversity, namely simple racial diversity or a desire for racial balancing, and whether race was “weighed fairly,” *Bakke*, 438 U.S. at 318, in defendants’ admission system. (R. 82 Michigan Mandate (“Exh. D”), pg. v-vii, JA-697-98; R. 99 Affidavit-Exhibits in Opposition, Exh. A, Kinley Larntz Expert Report, JA-893-926)

As argued above, defendants’ failure to carry their burden on narrow tailoring is one of the reasons that plaintiffs are entitled to summary judgment. At a minimum, the record demonstrates that the district court did not conduct “the detailed examination,

both as to ends and as to means” that strict scrutiny requires for all racial classifications.

Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995) (emphasis added).

IV. The District Court Erred In Determining That “Diversity” Is A Compelling State Interest Justifying Racial Preferences

The existence of a “compelling interest” is a question of law. *E.g., Young v.*

Crystal Evangelical Free Church, 82 F.3d 1407, 1419 (8th Cir. 1996), *vacated on other*

grounds, Christians v. Crystal Evangelical Free Church, 521 U.S. 1114 (1997),

reinstated, 141 F.3d 854 (8th Cir. 1998). Indeed, Justice Powell relied on no factual

findings to reach his singular legal conclusion that a university’s interest in “diversity”

rose to the level of a compelling governmental interest. Defendants have relied upon the

sole opinion of Justice Powell in *Bakke* to support their assertion that “diversity” is a

compelling interest. They argue that Powell’s diversity rationale constituted the rationale

for the holding of the court in *Bakke* based on the separate opinion authored by Justice

Brennan and joined in by Justices Marshall, White, and Blackmun (“Brennan group”).

But it was not concurred in explicitly or implicitly by the Brennan group, and the

Supreme Court has never adopted it.

A. A Review Of The Brennan Group Opinion In *Bakke*

In reviewing the Davis program, the Brennan group seemingly rejected “strict scrutiny” (*Bakke*, 438 U.S. at 357 (Brennan, J. concurring in part, dissenting in part)),

although they borrowed a scrutiny level from gender-discrimination cases that they characterized as “strict and searching.” *Id.* at 362. Specifically, they required the use of race to serve important governmental objectives and to be substantially related to achieving those objectives. *Id.* at 359.

The Brennan group concluded that the Davis program met their “strict and searching” scrutiny analysis because remedying the effects of past societal discrimination was a sufficiently important governmental objective, and because the Davis program was, in their view, substantially related to achieving that objective. In reaching the latter conclusion, the Brennan group stated that remedies for past discrimination need not be limited to victims identified by specific proof, but that they should be limited to those “within a general class of persons likely to have been the victims of discrimination.” *Id.* at 363. In finding that the Davis program met that requirement, the Brennan group emphasized:

[T]he Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant’s personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program. . . . [S]pecific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great.

Id. at 377-78. *Cf. id.* at 275 n.4 (Powell, J.) (noting the admissions chairman would confirm “disadvantage” of individual applicants).

The Brennan group rejected Justice Powell’s argument that the Davis program was not “narrowly tailored,” and found it substantially related to meeting the goal of remedying past discrimination. Specifically, they rejected any constitutional difference between a set-aside program and one which gave minorities a “plus.” *Id.* at 378-79 (Brennan, J., concurring in part, dissenting in part). In their view, the “Harvard” program espoused by Justice Powell “openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to disadvantaged minority students.” *Id.* at 379 (emphasis added). Thus, among other disagreements, Justice Powell and the Brennan group apparently could not even agree on what a “Harvard plan” was.

B. Justice Powell’s “Academic Freedom” Rationale Was Not The Rationale For the Holding Of The Court In *Bakke*.

For several reasons, Justice Powell’s lone opinion, and the “academic freedom” or “diversity” rationale contained therein, was not the rationale for the holding of the Court in *Bakke*. First, the Brennan group did not adopt Powell’s rationale. *See Bakke*, 438 U.S. at 326 n.1 (Brennan, J., concurring and dissenting) (a “Harvard” plan “is constitutional under our approach, at least so long as the use of race to achieve an

integrated student body is necessitated by the lingering effects of past discrimination”).

See also Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (the Brennan opinion “implicitly rejected Justice Powell’s position”). Indeed, it is significant that the Brennan group, while recognizing that no one opinion spoke for the Court, stated:

[T]his should not and must not mask the central meaning of today’s opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Bakke, 438 U.S. at 325 (emphasis added). This is a plausible combination of the opinions of Justice Powell and the Brennan group. Justice Powell had asserted that the State had a “legitimate and substantial interest in ameliorating . . . the disabling effects of identified discrimination,” but held that racial classifications required “judicial, legislative, or administrative findings of constitutional or statutory violations.” *Id.* at 307 (Powell, J.). He concluded that the Davis Medical School not only had not, but could not, make such findings. *Id.* at 307-10.

Conspicuously, the Brennan group did not state that the “central meaning” of the opinions in *Bakke* was that race could be considered to achieve intellectual diversity or any other purported goal of a college pursuant to its interest in academic freedom—again, as in their first footnote, demonstrating that they rejected that analysis. And in the only

portion of Justice Powell’s Equal Protection analysis joined in by the Brennan group, Part V-C, nothing was said about “diversity” or “academic freedom.” *Id.* at 320.

The basis for the district court’s conclusion that diversity constitutes a compelling governmental interest is clouded and contradictory. *Cf. Hopwood v. Texas*, 236 F.3d 256, 275 n.69 (5th Cir. 2000) (opinion of Weiner and Stewart, JJ.) (Although inconsistent with earlier *Hopwood* panel’s conclusion regarding diversity, “*Gratz* is nevertheless consistent with our position that the [earlier *Hopwood*] panel was neither constrained to accept, nor required to reject, diversity as a compelling state interest under binding Supreme Court precedent.”), *cert. denied*, 121 S. Ct. 2550 (2001). First, it stated correctly that “[t]he most that can be garnered from *Bakke*’s splintered decision is that five Justices reached the same conclusion, *i.e.*, that universities may take race into account in admissions when done so properly, for separate, unrelated reasons.” (R. 206 December 13, 2000 Opinion, pg. 15, JA-57 (emphasis added). The district court next noted that it “does not necessarily agree with the Ninth Circuit’s conclusion that Justice Powell’s *Bakke* ‘analysis is the narrowest footing upon which a race-conscious decisionmaking process could stand.’” (R. 206 December 13, 2000 Opinion, pg. 15, JA-57 (quoting *Smith v. University of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2192 (2001))).

The district court went on to state, however, that it reached the “same ultimate conclusion” as the Ninth Circuit, “*i.e.*, that under *Bakke*, diversity constitutes a compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process, albeit through somewhat different reasoning.” (R. 206 December 13, 2000 Opinion, pg. 15, JA-57) It is unclear, however, precisely what that “different reasoning” is. The district court made an uncontroversial point on which plaintiffs agree: “neither the Supreme Court nor the Sixth Circuit have definitively held that diversity can never be a compelling interest under strict scrutiny.” (R. 206 December 13, 2000 Opinion, pg. 15, JA-57) But that hardly answers the question on which defendants have the burden under strict scrutiny analysis, which is whether diversity is a compelling interest.

The district court expressed its disagreement with other courts that have found an implicit rejection of the diversity rationale either in the *Bakke* opinion itself or subsequent Supreme Court cases. (R. 206 December 13, 2000 Opinion, pg. at 15-18, JA-57-60 (discussing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), and *Johnson v. Board of Regents of Univ. Sys. of Georgia*, 106 F. Supp.2d 1362, 1375 (S.D. Ga. 2000)) Even if the district court’s analysis on implicit rejection is correct, however, there remains for resolution a statement of the legal basis from which it can be concluded affirmatively that diversity is a

compelling governmental interest. The district court's opinion never develops that point, at least not as a question of law. Instead, it determined that “if presented with sufficient evidence regarding the educational benefits that flow from a diverse student body, there is nothing barring the Court from determining that such benefits are compelling under strict scrutiny analysis.” (R. 206 December 13, 2000 Opinion, pg. 20, JA-62 (emphasis added)) Unlike Justice Powell, or the Ninth Circuit in *Smith*, therefore, which both decided the diversity question as a matter of law, the district court in this case in effect decided the question by impermissibly weighing the evidence on motions for summary judgment.

The district court, as noted, did not rely on the “narrowest footing” analysis, announced in *Marks v. United States*, 430 U.S. 188 (1977), although it did cite to the proposition stated by this Court that “[w]here a Justice or Justices concurring in the judgment in such a case [where no single rationale explaining the result has the support of a majority] articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land.” *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994). Whether or not relied upon by the district court, however, the *Marks* analysis does not yield a conclusion either that the diversity “rationale” is narrower than the Brennan group remedial rationale or that the diversity rationale enjoyed the assent of a majority of the

Court. *Hopwood v. Texas*, 236 F.3d at 275 n.66 (opinion of Weiner and Stewart, JJ.) (rejecting argument that Powell’s rationale was the narrowest under a *Marks* analysis). The diversity and remedial rationales are simply different rationales; neither one is a subset of the other, and there is no common denominator between them.

Although the district court stated that it did not “necessarily agree” with the narrowness analysis of the Ninth Circuit in *Smith*, it suggested that Justice Brennan’s “silence regarding the diversity interest in *Bakke* was not an implicit rejection of such an interest, but rather, an implicit approval of such an interest.” (R. 206 December 13, 2000 Opinion, pg. 17, JA-59) The district court quoted from the Ninth Circuit’s opinion in *Smith* on this same point:

True it is that Justice Brennan did not specifically say that “race” could be used to achieve student body diversity in the absence of any societal discrimination, but, then, there was no need for him to do so in light of his view about past societal discrimination. Yet, we can hardly doubt that he would have embraced that somewhat narrower principle if need be, for he thought that it was simply an allotrope of the principle he was propounding.

(*Id.* (quoting *Smith*, 233 F.3d at 1200)). This reasoning is fallacious. It depends essentially not on what Justice Brennan actually wrote in *Bakke*, but instead on speculation about what he might have “thought,” or even more peripherally, speculation about what he “would have embraced.” *Smith*, 233 F.3d at 1200.

As noted, the only portion of Justice Powell’s Equal Protection analysis actually joined in by the Brennan group was Part V-C, which is silent on the matter of “diversity” and “academic freedom.” Part V-C provides no more support for the proposition that the Brennan group accepted the “diversity” rationale than it does for the proposition that Justice Powell accepted the remedial rationale articulated by the Brennan group or that any of the five accepted a “role model” analysis.

C. Cases Both Before And After *Bakke* Cast Doubt On Justice Powell’s Analysis

Given the absence of any holding in *Bakke*, this Court must look to other Supreme Court authority to determine if defendants’ (and Justice Powell’s) proposed governmental interests should be deemed compelling. Cases both before and after *Bakke* demonstrate that they are not.

First, Justice Powell’s assertion of principles of “academic freedom” notwithstanding, the Court has never accepted any “right” to consider race or sex based in the First Amendment. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court concluded that a private school that wanted to promote segregation could not exclude racial minorities, despite the obvious difficulty an integrated student body would present in promoting segregationist beliefs. *Id.* at 176 (although “parents have a First Amendment right to send their children to educational institutions that promote the belief

that racial segregation is desirable, . . . it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle”) (emphasis in original). *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (private club’s right to associate for expressive purposes must yield to the State of Minnesota’s interest in eradicating discrimination). A fortiori, a state’s interest in First Amendment freedoms—a far more problematic idea, since the First Amendment is usually thought of as a source of rights for the people against the state, and not the other way around²—should have even less weight when compared to principles of non-discrimination.

Second, subsequent to *Bakke*, the Court has made clear that any form of race discrimination must be justified by a compelling governmental interest and be narrowly tailored to meet that interest. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235-36 (1995). Of particular concern to the Court has been the possibility that a justification

² *E.g.*, *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) (“the First Amendment protects citizens’ speech only from government regulation; government speech itself is not protected by the First Amendment”); *Student Government Ass’n v. Board of Trustees of Univ. of Massachusetts*, 868 F.2d 473, 481 (1st Cir. 1989) (administrative unit of state university “has no First Amendment rights” even though analogous private entities did); *Muir v. Alabama Educ. Television Comm’n*, 688 F.2d 1033, 1041 (5th Cir. 1982) (en banc) (television station operated by University of Houston, which in turn is operated by the State of Texas, is a “state instrumentalit[y]” and is thus “without the protection of the First Amendment”). *See generally Hopwood*, 78 F.3d at 943 n.25.

could permit the use of race in an unlimited way, *i.e.*, without numerical or temporal constraints. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505 (1989) (“The ‘evidence’ relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.”).

The Court has never found any “compelling” interest other than a “remedial” one; it has specifically rejected non-remedial interests like an interest in providing “role models” on the ground that they would permit undefined racial preferences endlessly into the future. *Croson*, 488 U.S. at 497-98 (opinion of O’Connor, J.) (“because the role model theory had no relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to ‘justify’ race-based decisionmaking essentially limitless in scope and duration”) (citing *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 276 (1986) (plurality opinion)); *Croson*, 488 U.S. at 520 (opinion of Scalia, J.). Indeed, the Court has said that any non-remedial “interest” would suffer from similar defects. *Croson*, 488 U.S. at 493 (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility” (emphasis added)) (opinion of O’Connor, J.); *id.* at 520 (opinion of Scalia, J.).

Without a majority rationale in *Bakke*, this Court must turn to other Supreme Court precedents and analytical framework to assess defendants' purported compelling interests. As shown above, Justice Powell's lone opinion in *Bakke*, and its non-remedial analysis, has remained just that: alone. Its "academic freedom" rationale was inconsistent with binding precedent and it did not command the allegiance of anyone else on the Court. It never has. *Hopwood*, 78 F.3d at 944 ("Justice Powell's view in *Bakke* is not binding precedent on this issue"). See also *Alexander v. Sandoval*, 121 S. Ct. 1511, 1531 n.15 (2001) (Stevens, J., dissenting) (The five Justices in *Bakke* who voted to overturn the injunction imposed by the lower courts "divided over the application of the Equal Protection Clause—and by extension Title VI—to affirmative action cases. Therefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a majority for any particular substantive interpretation of Title VI.") (emphasis added); *Adarand*, 515 U.S. at 218 ("*Bakke* did not produce an opinion for the Court"); *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980) (Court did "not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as . . . *University of California Regents v. Bakke*."). And the amorphous, ill-defined, open-ended contours of the diversity rationale are precisely the kinds of fatal flaws that have caused the Court to reject other asserted interests in racial classifications.

V. The District Court Erred In Granting The Individual Defendants' Motion for Summary Judgment on Grounds of Qualified Immunity.

Although concluding that the defendants' admissions system for years 1995-1998 was unlawful and "impermissible under the principles enunciated by Justice Powell in *Bakke*" (R. 206 December 13, 2000 Opinion, pg. 44, JA-86), the district court granted the individual defendants' motion for summary judgment on grounds of qualified immunity.

Qualified immunity is an affirmative defense, and plaintiffs may defeat it by producing "sufficient evidence after discovery to prove the existence of genuine issues of material fact regarding the issue of immunity, or if the undisputed facts show that the defendant violated [plaintiffs'] clearly established rights." *Noble v. Schmitt*, 87 F.3d 157, 161 (6th Cir. 1996). Defendants are not entitled to qualified immunity here because plaintiffs established both the violation of a clearly established right and the existence of genuine issues of fact precluding summary judgment in defendants' favor.

It could not be clearer that plaintiffs have a right to be free from state-sponsored intentional discrimination on the basis of race. More than twenty years ago, the Court in *Bakke* struck down an illegal admissions system that intentionally discriminated against applicants on the basis of race. Among the reasons the Davis system was struck down

was the existence of an admissions policy that systematically excluded applicants from consideration for admission solely on the basis of their race, and that reserved seats in the class for certain designated minorities. Defendants have engaged in precisely the same practices and have had the temerity to do so by actually invoking *Bakke*. The district court made the same point, at least with respect to the 1995-1998 policies: “It is clear that the LSA’s system operated as the functional equivalent of a quota and therefore, ran afoul of Justice Powell’s opinion in *Bakke*.” (R. 206 December 13, 2000 Opinion, pg. 41, JA-83 (emphasis added)); (R. 206 December 13, 2000 Opinion, pg. 41, JA-83 (“In this Court’s opinion, there is no significant difference between the LSA’s prior practice of “protecting” or “reserving” seats and the University of California’s quota system.”)); (R. 206 December 13, 2000 Opinion, pg. 42, JA-84 (“It cannot be seriously disputed, however, that the effect of the LSA’s differing standards was to systematically exclude a certain group of non-minority applicants . . . solely on account of their race.”) (emphasis added))

It was untenable for the district court to have concluded both that defendants had clearly operated a system like the one struck down in *Bakke*, and that defendants had not violated plaintiffs’ clearly established constitutional rights. The district court confused debate about whether diversity is a compelling interest with something that *Bakke* left no doubt about: a system operated like the one at Davis is clearly illegal, even assuming the

diversity rationale to be controlling. The district court also contradicted its own reasoning (quoted above) and elevated form over substance in dismissing plaintiffs' claims on a theory that defendants "did not employ the same type of rigid quota" found illegal in *Bakke*. (R. 206 December 13, 2000 Opinion, pg. 46, JA-88) In many respects, *e.g.*, admission of virtually all qualified minorities and no required showing of disadvantage on the part of those eligible for the preferences, defendants' system is even more flagrantly discriminatory than the illegal Davis program.

Finally, the existence of genuine issues of fact concerning defendants' qualified immunity defense also precluded granting their summary judgment motion. Plaintiffs produced evidence that defendants' real motive for their race-conscious admissions system was racial and ethnic (as opposed to educational) diversity, *i.e.*, racial balancing. (R. 82 Michigan Mandate ("Exh. D"), pg. v-vii, JA-697-98) Indeed, as discussed above, defendants' counsel stated as much at oral argument on the motions for summary judgment, *see supra* at 30-31. Defendants' subjective motive is an important factor in assessing their defense based on qualified immunity. *Poe v. Haydon*, 853 F.2d 418, 432 (6th Cir. 1988); *Tompkins v. Vickers*, 26 F.3d 603, 607 (5th Cir. 1994) ("Every circuit that has considered the question has concluded that a public official's motive or intent must be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation.").

Conclusion

For the foregoing reasons, plaintiffs respectfully request this Court to reverse the decision of the district court denying plaintiffs' motion for summary judgment and request for an injunction and granting defendants' motion for summary judgment regarding the 1999-2000 admissions system and the claims against the individual defendants.

Dated: July 30, 2001

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Certificate of Compliance

Pursuant to 6th Cir.R.32(a)(7)(c), the undersigned certifies this brief complies with the type-volume limitations of 6th Cir.R.32(a)(7)(B).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN THE 6TH CIR.R.32(a)(7)(B)(iii), THE BRIEF CONTAINS:

13,981 words

2. THE BRIEF HAS BEEN PREPARED:

in proportionately spaced typeface using WordPerfect Version 8.0 Legal Edition in Times New Roman 14 point type

3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE AN ELECTRONIC VERSION OF THE BRIEF AND/OR A COPY OF THE WORK OR LINE PRINTOUT.
4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 6TH CIR. R. 32(A)(7), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

Kirk O. Kolbo

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Designation of Joint Appendix Contents

Appellants, pursuant to 6th Circuit Rule 30(b), hereby designate the following filings in the district court as items to be included in the joint appendix:

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Complaint	1	10/14/97
Answer and Affirmative Defenses	6	12/03/97
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Exh. B - January 19, 1995 Letter	78	04/09/99
Exh. C - April 24, 1995 Letter	78	04/09/99
Exh. D - Patrick Hamacher Deposition	78	04/09/99
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Exh. H - Defendants' Objections and Responses to Interrogatory Numbers One (1), Two (2), and Ten (10) through Fourteen (14) of Plaintiffs' Interrogatories to Defendants (Set I)	78	04/09/99
Exh. I - Reply Memorandum in Support of Defendants' Motion for Reassignment Or, Alternatively, for Designating Actions as Companion Cases	78	04/09/99
Exh. J - Marilyn McKinney Deposition	78	04/09/99
Exh. K - Theodore Spencer Deposition	78	04/09/99
Exh. L - James Carl VanHecke Deposition	78	04/09/99
Exh. M - Minutes of the 04/10/96 EWG Meeting	78	04/09/99
Exh. N - Minutes of the 1/15/97 EWG Meeting	78	04/09/99
Exh. O - Minutes of the February 12, 1997 EWG Meeting	78	04/09/99

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Exh. R - University of Michigan's Document Entitled "Fall 1998 Freshman Potential Admits," dated 01/19/98	78	04/09/99
Exh. S - Admission Policy for Minority Students	78	04/09/99
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Exh. HH - Profile of the University of Michigan—Fall 1995—Black	79	04/09/99
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