

process. Despite this clear—and one would think simple—direction, the Defendants now ask that the Court permit them to continue to employ the racially-discriminatory aspects of the 1992 admissions policy because to stop doing so at this time would have undesirable consequences.

All the order requires Defendants to do is to stop using race as a factor as the admissions process goes forward. The Court should permit the Defendants to honor offers made before the Court’s injunction issued. The admissions office should proceed with the process but should not give preferential consideration to any candidates on the basis of their race. The Defendants have simply said, “We can’t do this.” They have apparently shut down the entire admissions process, and now ask this Court to save them from their extreme and gratuitous reaction to the Court’s order by staying the injunction against the consideration of race. Defendants should not be allowed to seek refuge from the Constitution without even making minimal efforts to comply, and their submissions conspicuously omit explanation of any efforts to do so.

Plainly, Defendants’ motion should be denied.

ARGUMENT

In considering Defendants’ motion, the Court should apply the familiar standard applied to all requests for injunctive relief. The Court is to balance whether the Defendants are likely to prevail on appeal, to what extent compliance with the Court’s Order will irreparably injure Defendants, the prospect of “substantial” injury to other parties if the stay is granted, and “where the public interest lies.” *Nader v. Blackwell*, 230 F.3d 833, 834

(6th Cir. 2000); see *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Defendants have cited no decision in which a district court has, after concluding that defendants’ constitutional violations should be enjoined, nonetheless stayed such injunction pending appeal.¹

Defendants allege irreparable injury because compliance with the Court’s Order will cause delay in completing the admissions process for the class entering this year. Whatever nominal delay there may be in no way warrants a stay of the Court’s Order. Given the alternative grounds for the Court’s Order — both that diversity is not a compelling interest and that, in any event, the 1992 admissions policy is not narrowly tailored — there is no reason whatsoever to believe that Defendants will prevail on appeal. Permitting Defendants to continue to violate the constitutional rights of applicants to the law school constitutes not only “substantial” harm, but is per se “irreparable.” See *Planned Parenthood Ass’n v. Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987). And the final factor also weighs against a stay “because ‘it is always in the public interest to prevent the

¹ Defendants do cite one case in which the Sixth Circuit concluded that an injunction should be stayed. See Defendants’ Stay Mem. at 9 (citing *Nader v. Blackwell*, 230 F.3d 833 (6th Cir. 2000)). In *Nader*, the Sixth Circuit stayed an election-related injunction several weeks before the election, but specifically based that stay on “plaintiffs’ own delay” in seeking judicial intervention. 230 F.3d at 835. No such fault can be attributed to Plaintiff in this case.

violation of a party's constitutional rights.” *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *G & V Lounge, Inc. v. Michigan Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994)).

I. Defendants Will Not Prevail on Appeal.

Much turns on the first factor, likelihood of success on appeal. Indeed, for the Defendants to be entitled to a stay, they either must prove that the Court's decision will likely be reversed on appeal or that the balance of harms weighs so strongly in their favor that the Court should err on the side of not requiring compliance. *See Michigan Coalition*, 945 F.2d at 153 (on motion for stay pending appeal, movant must show “likelihood of reversal”); *see also id.* (“probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the movants] will suffer absent the stay”). Defendants may not rely solely, however, on the balance of harms, for at a minimum they must establish “serious questions going to the merits.” *Id.* at 154 (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)). And Defendants certainly do not satisfy this first factor by showing merely that there “is a reasonable possibility that Defendants' position will ultimately prevail.” *See* Defendants' Mem. in Support of Motion to Stay Injunction, at 4 (“Defendants' Stay Mem.”).

Defendants attempt to establish a “serious question” on the merits by focusing exclusively on only one of the legal questions: whether diversity constitutes a compelling state interest sufficient to justify race-based discrimination. *See* Defendants' Stay Mem., at 3-6. In doing so, they have completely ignored this Court's finding, made after more

than three weeks of trial, that the 1992 admissions policy is not narrowly tailored. Presumably Defendants have ignored this part of the Court's Order because they can raise no "serious question" as to the merits of that finding. Even if diversity amounted to a compelling governmental interest, therefore, the relief that Defendants seek—a stay permitting them to proceed with their race-conscious admissions system—would be precluded unless they could also demonstrate a likelihood of reversing this Court's findings and conclusion that the current system is not narrowly tailored to achieve the stated diversity objective. As noted, they have not even addressed the issue, much less made the required showing.

The significance of Defendants' omission is magnified when one considers the posture of this case. As the Sixth Circuit has explained, likelihood of success on the merits means something different after a trial than it does at the preliminary-injunction stage. *See Michigan Coalition*, 945 F.2d at 153.

[A] motion for a stay pending appeal is generally made after the district court has considered fully the merits of the underlying action and issued judgment As a result, a movant seeking a stay pending review on the merits of a district court's judgment will have greater difficulty in demonstrating a likelihood of success on the merits [than will a movant seeking a preliminary injunction]. In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal. Presumably, there is a reduced probability of error, at least with respect to a court's findings of fact,

because the district court had the benefit of a complete record that can be reviewed by this court when considering the motion for a stay.

Id. Despite — or perhaps because of — this heightened standard for establishing a likelihood of reversal on a finding made after trial, Defendants do not challenge any of the Court’s findings related to narrow tailoring.

In addition to omitting any reference to narrow tailoring, Defendants make the somewhat mysterious argument that the Court’s Order is somehow overbroad; specifically that it is broader than the injunction approved by the Fifth Circuit in *Hopwood III*.² See Defendants’ Stay Mem., at 5-6 (citing *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000)). In *Hopwood III*, the Fifth Circuit did note that an injunction against use of racial preferences for any reason is too broad, *see id.* at 276-77, but the court also noted that the only constitutional use of racial preferences in this context is to remedy past discrimination. *Id.* at 277. As this Court is well aware, “no party in this case has alleged, or offered any evidence to suggest, that the law school or the University of Michigan has committed any acts of discrimination against any minority group which might warrant a race-based remedy.” March 27 Op., at 90 n.64. Thus, on this record, Defendants’ concern that the injunction is somehow too broad lacks merit.³ Similarly, because there is no

² They also make the baseless argument that *Hopwood III* retreated from a broader injunction that an earlier panel had “directed the district court to issue.” Defendants’ Stay Memo. at 5. That contention is utterly refuted by the very pages from *Hopwood III* that Defendants cite.

³ In any event, Defendants’ papers make plain that they would have precisely the

evidence of past discrimination by the Defendants (or in which they were a passive participant) to be remedied, the Defendants may not use racial classifications for that reason either. The only interest that the Defendants have offered in justification of their race-conscious admissions policies is the “diversity” rationale. Because that interest is not a compelling one, and it is the only one offered by Defendants, it is proper that this Court enjoined the Defendants from the consideration of race in the manner that it did. Moreover, if Defendants have some additional reason that they suddenly discover is “compelling,” they are free to seek a modification of this Court’s injunction in the future.

Defendants have shown no likelihood that they will prevail on appeal. They certainly have not shown that this Court’s Order is *likely* to be reversed.

II. The Defendants Will Not Suffer Irreparable Injury.

As Defendants see it, compliance with the Court’s Order will cause them “incalculable and irremediable injury,” principally in two ways. First, Defendants assert that they will encounter administrative inconvenience if forced to comply with the Court’s Order at this time, in the midst of enrolling the class that will enter this year. Aside from the facial illogic of this convenient assertion—given the law school’s consistent protestations that race is only one of a multitude of factors used in the admissions

same objection to an injunction preventing them from using race to achieve a diverse student population or to remedy the effects of discrimination identified by the Intervenors in their case.

process—it cannot conceivably justify continued deprivation of constitutional rights. Second, according to Defendants, compliance with the Court’s Order will thwart their ability to enroll a critical mass of minority students consistent with their educational mission and exercise of academic freedom. *See* Defendants’ Stay Mem. at 6.

A. Administrative Inconvenience Does Not Warrant a Stay.

Administrative inconvenience does not constitute irreparable injury. Defendants contend that they will have to halt their admissions process immediately and conduct a new statistical analysis. *See id.* at 7-8. Yet at trial the Defendants asserted they had already performed the relevant statistical analysis regarding yield rates. *See* Tr. Ex. 184; *see also* March 27 Op., at 24 n.18. The Defendants have consistently asserted that their unconstitutional behavior only affects a small percentage (approximately ten percent) of the class in any event, *see, e.g.*, Tr. Ex. 189, so the Court’s Order should permit much of the admissions process to continue with limited interruption.

The predicate for Defendants’ hue and cry seems to be that they have a well-oiled machine in place and if forced to replace it, there will be disruption or inconvenience. They may make mistakes in estimating the yield rate, for example, so the resulting class may be slightly smaller or larger than is ideal.⁴ This type of injury is simply no excuse for continuing a policy that violates the constitutional rights of applicants. *See, e.g., City of*

⁴ Of course, mistakes in estimating the yield rate can be made with or without a system that uses racial preferences. Defendants do not explain why the risk of error increases when racial preferences are removed.

Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989) (“the interest in avoiding the bureaucratic effort necessary to tailor remedial relief . . . cannot justify a rigid line drawn on the basis of a suspect classification”). Defendants have had ample notice of the possibility that the law school’s 1992 admissions policy would be declared unconstitutional. To the extent that they have failed to prepare for that possibility, that fact in no way justifies continued violation of the constitutional rights of applicants to the law school.

Defendants complain that they cannot “surgically excise the consideration of race from application review overnight.” *See* Defendants’ Stay Mem., at 7. This statement ignores the language of the 1992 admissions policy itself, which contemplates that at a certain point in the admissions process, after Defendants have achieved their desired level of racial diversity, race may be accorded less weight or no weight at all in the process. *See* Tr. Ex. 4, at 13. *See also* Trial Testimony of Richard Lempert, Tr. Vol. 3, at 130-131 (admitting that there is a point in the process when it is no longer appropriate to consider race in making admissions decisions). If Defendants’ own policy contemplates circumstances in which the admissions office may no longer consider race as a factor, it is disingenuous for Defendants to suggest that they cannot comply with a court order having the same effect.

B. Defendants May Not Avoid Their Constitutional Obligations by Relying on Their Educational Mission.

Perhaps it is true that if Defendants rely solely on their LSAT-UGPA grid to make admissions decisions, they will be hampered in fulfilling their educational mission of enrolling a diverse student body. Of course, this Court's Order does not require them to do so. The Court ordered Defendants to stop using racial classifications in violation of applicants' constitutional rights. The Court also suggested that the Defendants should focus their efforts on the "search for lawful solutions, ones that treat all people equally and do not use race as a factor." March 27 Op., at 85. If the Court stays its March 27 Order, the Defendants will have no incentive to undertake that search.

This assumes, of course, that Defendants themselves have a clear vision of the educational mission that is to be compromised, which, as the Court noted, they do not. Defendants profess a desire to obtain viewpoint diversity by means of a critical mass of underrepresented minority students, but the Court has found that the Defendants cannot define this "critical mass," March 27 Op., at 50, and that, in any event, the "connection between race and viewpoint is tenuous at best." *Id.* at 47. It is difficult to comprehend how such an interest, the contours of which are "so ill-defined," can possibly be the subject of irreparable injury. *Id.* at 50.

At bottom, Defendants appear to believe that they are irreparably injured if they are not permitted to violate applicants' constitutional rights. Their only justification is their "educational mission" and "academic freedom." Neither of these proffered justifications warrants violation of rights given to individuals by the United States Constitution. *Cf.*

Runyon v. McCrary, 427 U.S. 160, 176 (1976) (First Amendment rights cannot justify race-based discrimination by private school).

Defendants will not be irreparably injured by having to comply with the Court's Order. Defendants are attempting to create a problem by taking an unreasonable stance and shutting down their entire admissions process. The Court did not order the Defendants to halt their admissions process, and self-inflicted injury certainly cannot form the basis for this Court sanctioning continued violation of applicants' rights — which is precisely what a stay would entail.

III. Continued Violation of Applicants' Constitutional Rights Is *Per Se* Irreparable Injury.

In addition to considering the consequences that compliance with the Court's Order will have on Defendants, the Court must consider the rights of the applicants. The Court has found that, by applying the law school's 1992 admissions policy, the Defendants have violated the constitutional rights of applicants to the law school for many years. Permitting Defendants to continue to violate the constitutional rights of applicants to the law school constitutes not only substantial harm, but is *per se* irreparable. *See Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987); *see also Garrett v. Board of Educ. of Sch. Dist. of Detroit*, 775 F. Supp. 1004, 1013 (E.D. Mich. 1991) (loss of Fourteenth Amendment rights "for even minimal periods of time constitutes irreparable injury"); *Equal Open Enrollment Ass'n v. Board of Educ. of Akron City Sch. Dist.*, 937 F. Supp. 700, 709 (N.D. Ohio 1996) (same) ("*EOEA*").

Defendants acknowledge the principle that even “minimal infringement” of constitutional rights “constitutes irreparable injury,” but they advance this argument only in connection with the law school’s claim of academic freedom. Defendants’ Stay Mem. at 10-11. Their myopic view of the constitutional rights at issue in this case prevents them from seeing that that very same principle precludes, as a matter of law, the issuance of a stay in this case.

Rather than recognize the infringement of applicants’ constitutional rights that would result from the issuance of a stay, Defendants attempt to diminish such injury by arguing that, since the Plaintiff did not seek a preliminary injunction, she and others like her must only suffer injury compensable by damages. Defendants’ Stay Mem. at 11. This argument — and, in many ways, this motion — reveals the same callous disregard for the rights of applicants to the law school that resulted in the continuation of this unconstitutional policy throughout the pendency of this action. The fact that Plaintiff did not, either individually or on behalf of the class, seek a preliminary injunction in no way diminishes the magnitude of the harm that she and other applicants have suffered.⁵

IV. The Public Interest Is Served by Denying Defendants’ Motion.

⁵ Moreover, since the class includes those who are applying now, and those who will apply next year, it plainly includes people for whom injunctive relief is the most appropriate remedy.

As the Sixth Circuit has stated, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *G & V Lounge, Inc. v. Michigan Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994)); *see also EOE*, 937 F. Supp. at 709 (because the defendants’ policy “runs afoul of the Constitution, . . . it is contrary to the public interest”). “The public interest in this case is represented by the principles embodied in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In this case, the public interest would not be served but instead violated if the court were to grant the requested stay.” *Associated General Contractors of Ohio v. Drabik*, 50 F. Supp. 2d 741, 772 (S.D. Ohio 1999), *aff’d*, 214 F.3d 730 (6th Cir. 2000).

V. Defendants’ Alternative Request for an Administrative Stay Should Be Denied.

Defendants alternatively have sought a ten day administrative stay to permit the Defendants time to seek a stay from the Sixth Circuit. Plaintiff opposes this request. Allowing Defendants to proceed with their race-conscious admissions system for even minimal periods will deprive members of the class of their constitutional and civil rights to equal protection of the laws. As noted above, nothing in this Court’s order prohibits Defendants from proceeding with their review and decisions with respect to applicants to the law school, provided that race is not considered as a factor in making admissions decisions. Defendants’ decision to react to the Court’s injunction by shutting down the entire admissions process was a needless and self-inflicted injury, reversible by Defendants

at any time of their choosing. They should not be rewarded for their intransigence by a stay of even limited duration.

CONCLUSION

The Court's Order does no appreciable harm to Defendants. To the contrary, the law school's 1992 admissions policy has violated the constitutional rights of applicants for many years, and it should not be permitted to continue to harm others. Defendants have not, and cannot, make the case for a stay of the Court's Order, and, accordingly, their motion should be denied.

Dated: April 2, 2001.

Respectfully submitted,

MASLON EDELMAN BORMAN & BRAND, LLP

By _____

David F. Herr, #44441
R. Lawrence Purdy, #88675
Kirk O. Kolbo, #151129
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
612/672-8200

Kerry L. Morgan
PENTIUK, COUVREUR & KOBILJAK, P.C.
Suite 230, Superior Place
20300 Superior Street
Taylor, MI 48180-6303
734/374-8930

Michael E. Rosman
Michael P. McDonald
CENTER FOR INDIVIDUAL RIGHTS
1233 20th Street, NW
Suite 300
Washington, D.C. 20036
202/833-8400

ATTORNEYS FOR PLAINTIFF

135837.1