IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

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BARBARA GRUTTER,) Civil Action # 97-75928

) Hon. Bernard A. Friedman

for herself and all others) Hon. Virginia Morgan

similarly situated,)

)

Plaintiff,)

)

v.)

)

LEE BOLLINGER; JEFFREY LEHMAN;)

DENNIS SHIELDS; AND THE BOARD OF)

REGENTS OF THE UNIVERSITY OF)

MICHIGAN,)

)

Defendants,)

)

-and-)

)

KIMBERLY JAMES, ET AL.,)

)

Intervening Defendants.) **Class Action**

____)

MEMORANDUM IN SUPPORT OF

PLAINTIFF'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY

TABLE OF CONTENTS

PRINCIPAL CONTROLLING AUTHORITIES ii

STATEMENT OF THE ISSUES PRESENTED iii

INDEX TO EXHIBITS iv

INTRODUCTION 1

UNDISPUTED MATERIAL FACTS 2

ARGUMENT 3

CONCLUSION 10

PRINCIPAL CONTROLLING AUTHORITIES

Cases

Adarand Constructors v. Pena, 515 U.S. 200 (1995)

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)

Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978)

Runyon v. McCrary, 427 U.S. 160 (1976)

Shaw v. Hunt, 517 U.S. 899 (1996)

Statutes

42 U.S.C. § 1981

42 U.S.C. § 1983

42 U.S.C. § 2000d

42 U.S.C. § 2000d-7(a)(1)

STATEMENT OF THE ISSUES PRESENTED

1. Whether the record shows that there is no genuine issue of any material fact and that plaintiff and the class are entitled as a matter of law to partial summary judgment on liability because defendants' race-conscious admissions policies and practices for the University of Michigan Law School ("Law School") violate the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 2000d under the rationale articulated by Justice Powell in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

2. Whether the record shows that there is no genuine issue of any material fact and that plaintiff and the class are entitled as a matter of law to partial summary judgment on liability under 42 U.S.C. § 2000d because defendants claim that their race-conscious admissions policies and practices are motivated by an interest in "diversity," which is not a "compelling governmental interest" for strict scrutiny analysis under the Equal Protection Clause of the Fourteenth Amendment.

3. Whether the record shows that there is no genuine issue of any material fact and that plaintiff and the class are entitled as a matter of law to partial summary judgment on liability against defendants Bollinger and Lehman acting in their official capacity, for violating 42 U.S.C. §§ 1981 and 1983.

INDEX TO EXHIBITS

Tab Description

A Law School Admissions Policy, dated April 22, 1992

B Admissions Grid of LSAT & GPA for Applicants to the Fall 1999 First-Year Law School Class

INTRODUCTION

On May 3, 1999, plaintiff served and filed a motion for partial summary judgment on liability and a memorandum and exhibits in support of the motion. Subsequently, on May 30, 1999, plaintiff also filed and served a memorandum and exhibits in opposition to defendants' motion for summary judgment. The motions for summary judgment were not heard due to a stay of the proceedings issued by the Sixth Circuit and the subsequent addition in August 1999 of the intervenors as parties.

Plaintiff now renews her motion for summary judgment and submits this memorandum in support thereof. The grounds upon which plaintiff is entitled to judgment in her favor have not changed in the intervening months since the motion for summary judgment was first filed. Accordingly, plaintiff is satisfied to rest on the arguments, authorities, and statement of the record that are contained in her earlier submissions in support of the summary judgment motion. The purpose of this memorandum is to update the record and to discuss several subsequent court decisions that lend further support to plaintiff's positions.

As discussed below, the undisputed material facts continue to establish that defendants' admissions policies and practices violate the federal civil rights of the plaintiff and the class. They are, therefore, entitled to judgment in their favor and against defendant Bollinger and Lehman in their official capacities under 42 U.S.C. § 1981 and § 1983, and against the Regents of the University of Michigan ("University") under 42 U.S.C. § 2000d.

UNDISPUTED MATERIAL FACTS

Defendants continue to make admissions decisions pursuant to the admissions policy adopted by the University of Michigan Law School in 1992. *See* April 22, 1992 Law School Admissions Policy, attached as Exhibit A to the accompanying Affidavit of Kirk O. Kolbo. Accordingly, the Law School continues to make admissions decisions in a manner that ensures that it enrolls "meaningful numbers" or a "critical mass" of "underrepresented" minority students to achieve a stated goal of "diversity" within the student body. *See* Admissions Policy at 12.

Admissions data obtained from the Law School for the class enrolled after the filing of plaintiff's motion for summary judgment confirms that there remains a dramatic difference in treatment accorded to applicants based on their race or ethnicity. Undergraduate grades and scores on the LSAT remain very important to admissions outcomes, and these outcomes show that "underrepresented" minorities are generally held to a lower standard for admission than members of other races and ethnic groups, such as whites and Asian-Americans. *See* Admissions Grid of LSAT & GPA for Applicants to the Fall 1999 First-Year Law School Class, attached as Exhibit B to the Kolbo Affidavit.[(1)] For example, 19 out of 26 black applicants with a grade point averages of between 3.25 and 3.49 and LSAT test scores between 151-163 were offered admission, an acceptance rate of 73%. Among white students within the same ranges of grade point averages and test scores, there were 193 applicants and 13 offers of admission, an acceptance rate of less than 7%. And among Asian-Americans, 3 offers were made out of 66 applications, for an acceptance rate of 4½%. As in past years, the most dramatic differences are in the middle range of combinations, where offers are rare to white and Asian-American students and common to members of the "underrepresented" races. For example, for white applicants with grade point averages ranging between 3.0 to 3.49 and test scores ranging between 154-160, there were 5 offers of admission

among 156 applicants, an acceptance rate of about 3%. For Asian-Americans within the same combinations and ranges, there was 1 offer made out of 61 applications, for an acceptance rate of less than 2%. In contrast, the Law School made offers of admission to 22 out of 27 black applicants within these same combinations and ranges of grades and test scores, representing an acceptance rate of 81%. As with the admissions data from prior years, similar differentials exist across other combinations and ranges of grades and test scores.

ARGUMENT

Plaintiff demonstrated in her original motion for summary judgment and supporting memorandum and exhibits that defendants have violated the federal civil rights of plaintiff and the class, and that plaintiff and the class are entitled to a declaration of rights and an injunction prohibiting defendants from applying their illegal, racially discriminatory admissions policies and practices in the future. Defendants have identified no changes in their admissions system since plaintiff first moved for summary judgment. Accordingly, plaintiff is entitled to declaratory and injunctive relief for the same reasons already articulated in detail in plaintiff's earlier memorandum in support of her motion for summary judgment.

Although defendants claim Justice Powell's opinion in *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), as their lodestar, they persist in their active and flagrant disobedience of very clear proscriptions contained in that opinion. Justice Powell plainly disapproved of a "two-track" or dual admissions system in which different standards are applied to different racial groups, or in which race is considered in a manner other than as a "plus" factor in a "particular" applicant's file in an "individualized, case-by-case" review of files. 438 U.S. at 317-18, 319 n.53. Defendants entirely ignore that admonition and much else in Justice Powell's opinion. Instead, the evidence can lead to no reasonable conclusion other than that defendants systematically apply a race-based double standard in their admissions decisionmaking.

As set forth in plaintiff's original memorandum in support of motion for summary judgment, even if defendants' admissions system complied with the requirements of Justice Powell's opinion in *Bakke,* the "diversity" rationale of his opinion has never had the support of a majority of the Court (or a single other Justice). Because defendants purport to justify their race-conscious admissions policies solely on the basis of "diversity," their use of race is not founded on a "compelling governmental interest." *See* Plaintiff's Memorandum In Support of Motion for Partial Summary Judgment at pp. 26-36.

Recent court cases also defy defendants' paradigm. What is notable about most of these cases is that courts have generally declined to rule one way or the other on whether Justice Powell's "diversity" rational is binding authority. Instead, these courts have struck down illegal admissions policies on other grounds, like the absence of "narrow tailoring." This reluctance of the courts to decide cases on a ground that defendants treat as definitively established can hardly be evidence that Justice Powell's opinion is binding precedent.

In *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), and *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999), *cert denied,* 120 S. Ct. 1420 (2000), the Fourth Circuit simply assumed (without deciding) that diversity is a compelling governmental interest. *Tuttle*, 195 F.3d at 704-05; *Eisenberg*, 197 F.3d at 130. In both cases, the courts went on to invalidate the race-conscious school admissions policies because they were not "narrowly tailored." *See Tuttle*, 195 F.3d at 705-08; *Eisenberg*, 197 F.3d at 131-34.

In *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998), the First Circuit also declined to accept defendants' view of the precedential value of Justice Powell's opinion in *Bakke*. *Id.* at 796 ("we do not decide" whether "some iterations of 'diversity' might be sufficiently compelling."). And in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354-56 (D.C. Cir. 1998), the United States Court of Appeals for the District of Columbia ruled out "diversity" as a compelling interest that could justify the award of broadcast licences. *See also Peters v. Moses*, 613 F. Supp. 1328, 1335 (W.D. Va. 1985) ("I do not believe that Justice Powell's concurring opinion represents the court's opinion in *Bakke* with regard to this matter").

The court to most recently consider the "diversity" rationale in the education and admissions context resoundingly rejected it as a compelling governmental interest. In *Johnson v. Board of Regents of the Univ. Sys. of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), plaintiffs challenged the admissions policies of the University of Georgia that considered the applicant's race and gender in the admissions process. The school ranked applicants on the basis of a number of characteristics which were scored with points as "plus factors." *Id.* at 1365. These "plus factors" included being non-white and male. Students with a score at or above a designated minimum were automatically admitted. The plaintiffs who challenged the system, three white females, did not receive any points in the process for their race or gender. They commenced a lawsuit alleging violations of Title VI and Title IX, 20 U.S.C. § 1681.

As here, the University of Georgia justified its race-conscious admissions policy on grounds of diversity and Justice Powell's opinion in *Bakke*. The district court thoroughly considered and rejected this position and granted summary judgment in favor of the plaintiffs. The court first found that "Justice Powell's opinion regarding the compelling nature of student body diversity in university admissions is not binding precedent." *Id.* at 1369 (footnote omitted). It next examined post-*Bakke* cases to ascertain the status of the law concerning "diversity" as a justification for race-based preferences in admissions. It noted that the only post-*Bakke* majority authority for the diversity rationale was the "now-overrule[d] *Metro Broadcasting*" case, and that even in that case the Court "explicitly held only that [diversity] was 'important.'" *Id.* at 1370. And the court noted that "the Supreme Court has since made clear [that] the issue before this Court is not whether diversity is *important*, but whether it is *compelling*." *Id.* (citing *Adarand*, 515 U.S. at 227).

From the foregoing analysis, the district court reached the following conclusions: (1) the Supreme Court "looks askance at all explicit racial classifications"; (2) "racial balancing" is clearly unconstitutional; (3) race-conscious measures can be justified only for a "compelling" interest; and (4) no majority of "the Supreme Court has announced that diversity, or particularly student diversity in higher education, does or does not reach that 'compelling' level." *Id.* at 1371. The court also concluded that a Supreme Court majority has concluded that "ill-defined" or "amorphous" interests are insufficiently compelling. *Id.*

Much as the University of Michigan does in this case, University of Georgia officials had relied on self-serving testimony from university officials about the importance of diversity to students' "educational and life experiences"; about the importance of learning "to work cooperatively with people from 'different ethnic and cultural backgrounds'"; about how diversity "fosters an awareness of commonalities" and "enables students to make friends, forge relationships, and develop group identities on bases other than shared ethnic, geographic, or socioeconomic background"; and about how this diversity "contributes to education that also occurs inside the classroom." *Id.* at 1371-72. The district court rejected this circular--"it is because I say so"-- logic for the same reasons that the Supreme Court had warned against this kind of reasoning in *Croson*. *Id.* (quoting *City of Richmond v. J.A. Croson Co.*,

488 U.S. 469, 500 (1989) ("when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals")).

The district court in *Johnson* also noted that the diversity rationale suffers from the same defects that have doomed other asserted justifications for racial classifications: The "amorphous governmental interest like UGA's by definition contains no principled stopping point," just as the "role model" and "societal discrimination" rationales do not. *Id.* at 1372 (citing *Croson*, 488 U.S. at 505-06; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-275 (1986) (plurality)). Thus, "student body diversity" does not meet the high standard required to justify racial classifications--that it be "sufficiently specific and verifiable"--and the university could not identify with particularity "exactly when or how that goal will ever be met." *Id.*

The University of Michigan's diversity rationale suffers from the same fatal flaws as that of the University of Georgia because it is the same rationale. Nowhere has the University of Michigan defined how one can ascertain when the interest has been achieved and when the "stopping" point has been reached. Because the rationale is amorphous and open-ended, there is no effective manner of policing it to ensure that, or even to ascertain whether, other impermissible purposes are not being served.

An essential premise of defendants' diversity justification is that skin color is an effective proxy for viewpoints and experiences that students bring with them to the campus. This is a noxious form of stereotyping that the district court in *Johnson* rejected and that this Court too should reject. *Id.* at 1373-74 ("UGA merely presumes, stereotypically, that all members of a particular minority race will think, act, etc., differently from whites and thus 'contribute'" to the student body's 'overall educational experience.'"). It concluded that a "policy relying on the crude, and dangerous, proxy of race for ideological diversity sits in antipathy to [the] principle [that Fourteenth Amendment rights are personal rights, not group rights, and are 'guaranteed to the individual].'" *Id.* at 1374 (quoting *Bakke,* 438 U.S. at 289 (Powell, J.)).

Finally, the district court in *Johnson* refused to place importance on the fact that a number of other courts had declined to hold that diversity is not a compelling interest. The court rightly noted that these other courts had simply assumed, without deciding, the issue. Because it concluded that no plan could be narrowly tailored to meet the "inherently formless and malleable" diversity rationale, it determined that it "must face the threshold interest issue head-on." 106 F. Supp.2d at 1374. Therefore, it held squarely that "the promotion of student body diversity in higher education is not a compelling interest sufficient to overcome Title VI's prohibition against racial discrimination." *Id.* at 1375.

This Court too should reach the threshold question of whether the University of Michigan's "diversity" rationale is a compelling governmental interest. It is particularly important that the Court do so because the amorphous, formless, timeless rationale relied upon by defendants is just as incapable of being suited to "narrow tailoring" as it was in *Johnson*. Moreover, here the plaintiff class seeks forward-looking, injunctive relief. Such relief cannot be complete without a judicial determination of what purposes may properly justify any future consideration of race in defendants' admissions process. To "assume" the validity of the "diversity" rationale would be to assume without deciding that the plaintiff class is not entitled to an injunction forbidding defendants from relying on an impermissible goal in making race-conscious admissions decisions.[(2)]

Lastly, the addition of the intervenors to this case does not change anything with respect to plaintiff's entitlement to summary judgment. Although intervenors have identified a legion of witnesses whom they

plan to call at trial of this matter, plaintiff is not aware of single material fact that intervenors have developed to create any genuine issue about plaintiff's entitlement to summary judgment. This is so principally because intervenors have made no effort to establish that the Law School was motivated by any justification for the use of race in admissions other than defendants' purported "diversity" justification. The Supreme Court has made clear that an objective of suspect classifications cannot qualify as a compelling governmental interest unless that objective was the "actual purpose" of the classification. *See Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996); *United States v. Virginia*, 518 U.S. 515, 535-36 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 & n.16 (1982). Because defendants here rely only on the "diversity" rationale, other rationales that the intervenors believe *might have* justified race-conscious admissions practices, *e.g.,* an alleged past history of intentional discrimination in admissions or the alleged "disparate impact" of standardized test scores, are legally irrelevant because, among other reasons, they did not actually motivate the defendants to consider race in the admissions process.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in plaintiff's earlier memoranda in support of her motion for partial summary judgment, plaintiff respectfully requests the Court to grant her motion for summary judgment as follows:

1. Finding liability against the Board of Regents, and Lee Bollinger and Jeffrey Lehman in their official capacity;

2. Declaring that defendants have violated plaintiff's rights, and the rights of the class, under the Equal Protection Clause of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d); 42 U.S.C. § 1981; and 42 U.S.C. § 1983; and

3. Permanently enjoining defendants from applying their illegal, racially discriminatory admissions policies and practices in the future.

Dated: October 10, 2000 Maslon Edelman Borman & Brand, LLP

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1. The grid for the 1999 class was constructed by plaintiff's expert, Dr. Kinley Larntz, in the same manner as the grid that defendants had constructed for the 1995 first-year class, and that Dr. Larntz previously constructed for the 1996-1998 first-year classes. Specifically, the grid shows combinations of grade point averages and test score ranges, with the top row number in each "cell" representing the number of applicants in that combination and range and the bottom row number in each cell representing the number of offers of admission within that combination and range. *See* Affidavit of Kirk O. Kolbo at ¶ 4.

2. The additional amici briefs submitted in support of "diversity" as a compelling governmental interest add nothing new of worth. The amicus brief of General Motors, however, at least has the virtue of being almost immune from parody. General Motors repeatedly and crassly seeks to justify race-based decisionmaking in admissions as a means to further General Motor's own profitmaking. Thus, General Motors lectures that we must accept racial preferences in admissions to "make business 'hum.'" General Motors Br. 13. In other words, it appears that what's good for General Motors should be good enough for American constitutional law. Fortunately, the law has developed otherwise.

Like the other amici that have filed briefs in support of the University of Michigan, it appears that General Motors paid scant attention to the actual manner in which the Law School uses race as a factor in admissions. For example, General Motors touts its "closure of a $1 billion automotive deal with China" as one that was "aided by China's appreciation of the corporation's prior outreach efforts to Asian American employees and the Asian American community." General Motors Br. 10-11. What General Motors apparently does not know or care about is that the Law School aggressively discriminates against Asian American applicants on the basis of their race, as the admissions statistics amply demonstrate.