

BARBARA GRUTTER,

Plaintiff,

vs.

LEE BOLLINGER JEFFREY LEHMAN,

DENNIS SHIELDS,

REGENTS OF THE UNIVERSITY OF MICHIGAN,

and THE UNIVERSITY OF MICHIGAN LAW SCHOOL

Defendants

Civil Action No 97-CV-75928-DT

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY**

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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' race-conscious admissions policies and practices for the Law School 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 capacities, for violating 42 U.S.C. §§ 1981 and 1983.
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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 University 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)

INDEX OF EXHIBITS

INTRODUCTION

In *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), the United States Supreme Court struck down as illegal a "special admissions program" that systematically employed racial classifications to grant preferences in admission to certain favored racial minorities at the expense of members from other racial groups. *Id.* at 314-24 (1978) (Powell, J., concurring in the judgment); *id.* at 414-21 (Stevens, Stewart, Rehnquist, J.J., Burger, C.J., concurring in part in the judgment and dissenting in part). Today,

in open defiance of *Bakke* and subsequent Supreme Court decisions on racial classifications, the University of Michigan Law School ("Law School") illegally employs racial classifications in order to ensure that it enrolls a "critical mass" or "meaningful numbers" of racial and ethnic minorities. Plaintiff Barbara Grutter commenced this action and now brings this motion to obtain a declaration of rights that defendants' admissions policies and practices violate federal civil rights laws and the Equal Protection Clause of the Fourteenth Amendment. Plaintiff also moves for an order of this Court permanently enjoining defendants from engaging in their illegal race discrimination practices in the future.

Plaintiff Grutter is a white resident of the State of Michigan who applied for admission into the 1997 first-year class of the Law School. Ms. Grutter was originally placed on a "wait list," and she was subsequently denied admission. As plaintiff's Complaint alleges, and as the deposition testimony and documents produced by defendants abundantly confirm, Ms. Grutter had her application considered and rejected under an admissions system that violated her legally protected right to equal protection of the law.

Plaintiff brings this motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for partial summary judgment on the issue of whether the Board of Regents of the University of Michigan ("the University") violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and whether defendants Lee Bollinger and Jeffrey Lehman, in their official capacities, respectively, as president of the University of Michigan and dean of the Law School, violated the Equal Protection Clause and 42 U.S.C. §§ 1981 and 1983. Plaintiff also brings this motion on behalf of the class she represents, as certified by this Court by order dated January 7, 1999. Specifically, the motion is brought as to the admissions policies and practices of the Law School for the academic years from 1995 forward.

UNDISPUTED MATERIAL FACTS

I. The Plaintiff

Barbara Grutter is a white resident of the State of Michigan who applied in December 1996 for admission into the fall 1997 first-year class of the Law School. *See* Exhibit A to the accompanying affidavit of Kirk O. Kolbo (Deposition testimony of Barbara Grutter, pp. 42-43 (September 1, 1998)). Unlike most law school applicants, who apply immediately or shortly after completion of an undergraduate education, Ms. Grutter applied 18 years after graduating from college, at a time when she was married with two children and in the midst of a professional career. *See* Exhibit B (Law School Application File of Barbara Grutter). Among other things, her Law School Application disclosed that Ms. Grutter was applying with a cumulative 3.8 undergraduate grade point average and an LSAT score of 161, representing a score in the 86th percentile nationally. *See* Exhibit B.

Ms. Grutter was notified by letter dated April 18, 1997 from Dennis Shields, Assistant Dean and Director of Admissions, that the Law School had placed her file on a "waiting list for further consideration should space become available." *See* Exhibit B; Exhibit A (Grutter depo. pp. 94-96). By letter dated June 25, 1997, the Law School informed Ms. Grutter that "it is now clear that we will be unable to offer you a place in our 1997 first year class." *See* Exhibit C; Exhibit A (Grutter depo. pp. 100-101).

Ms. Grutter had also applied to law school at Wayne State University Law School, where she was accepted for admission into the fall 1997 first-year class. *See* Exhibit A (Grutter depo. pp. 59-60). She declined the offer of admission for several reasons, including that she believed the University of

Michigan Law School offered her the better curriculum in her chosen interest: health care law. *See* Exhibit A (Grutter depo. pp. 65-72). As a result, Ms. Grutter is not now enrolled in any law school. She still desires, however, to attend defendants' Law School. *See* Exhibit A (Grutter depo. pp. 118-19).

II. The Law School's Admissions Policies and Practices

A. Overview

A reading of defendants' answer is alone sufficient to establish as undisputed that defendants consider race and ethnicity in the admissions process, and that plaintiff, as a white applicant, did not have consideration of her application "enhanced" on the basis of her race. *See* Answer at ¶¶ 9, 19, 20, 23, 28 (Law School "uses race as a factor in admissions . . ."); *id.* at ¶ 21 ("Defendants admit that plaintiff is not a member of an underrepresented minority group and that her race was not a factor that enhanced the University of Michigan's consideration of her application."). Defendants justify the use of race as a factor in the admissions process on grounds that it serves a "compelling interest in achieving diversity among its student body." *See* Exhibit D (Defendants' "Objections and Responses to Interrogatory Numbers 1, 2, and 8 of Plaintiff's Interrogatories to Defendants (Set 1)," at response to interrogatory number 9, pp. 10-11). It is also undisputed that the University is a recipient of federal financial support. *See* Answer at ¶ 16 ("Defendants admit that the University of Michigan, which includes the University of Michigan Law School, receives federal funds.").

The enormous extent to which defendants consider race and ethnicity in making admissions decisions is conclusively established by their answers to interrogatories, documents produced in the course of discovery, and the deposition testimony of the Law School's employees. Defendants' own documents and words make for a compelling record that is more than sufficient to support summary judgment of liability against defendants for their unlawful race discrimination.

The formal admission policy at issue in this case was adopted by the Law School faculty in the spring of 1992. *See* Exhibit E (April 22, 1992 Admissions Policy) (hereinafter the "1992 Policy" or the "Policy"). The 1992 Policy explicitly states, however, that its object was "as much to ratify what had been done and to reaffirm our goals as it is to announce new policies." *See* Exhibit E (Policy at p. 13). Consequently, there is reason to examine the Law School's policies with respect to admission of racial and ethnic minorities prior to April 1992.

Mr. Allan Stillwagon was Assistant Dean and Director of Admissions from 1979 to approximately August 1990. *See* Exhibit F (Deposition of Allan Stillwagon, p. 10 (November 6, 1998)). Stillwagon made all or substantially all of the decisions on admission of students during his tenure. *See id.* (Stillwagon depo. pp. 16-17). He testified that there was an explicit "special admissions program" for certain underrepresented racial and ethnic minorities: African Americans, Hispanics, Native Americans, and Puerto Ricans born on the U.S. mainland. *See id.* (Stillwagon depo. pp. 23-24). Under the "special admissions program," the Law School sought to implement a policy of enrolling a class that consisted of a minimum of 10-12 percent underrepresented minorities. *See id.*

Defendants' Law School bulletins confirm the existence of a "special admissions program" for certain preferred minorities. For example, the "Law School Announcement 1991-1992" stated as follows:

In administering its admissions policy, the Law School recognizes the racial imbalance now existing in the legal profession and the

public interest in increasing the number of lawyers from the ethnic and cultural minorities significantly underrepresented in the profession. . . . Black, Chicano, Native American, and many Puerto Rican applicants are automatically considered for a special admissions program designed to encourage and increase the enrollment of minorities.

See Exhibit G (Law School Announcement 1991-92, at pp. 89-90); *see also* Exhibit H (Law School Announcement 1988-89, at pp. 85-86).

In a document submitted to the American Bar Association (ABA) in 1991 or 1992, as part of an accreditation review discussed in more detail below, the Law School explained to the ABA that because "four specific ethnic groups have been particularly victimized by discrimination (African Americans, Native Americans, Mexican Americans, and Puerto Rican Americans raised on the U.S. mainland)," the Law School had "adopted a special admissions program wherein qualifications predicting success beyond the LSAT and GPA may be somewhat more emphasized in the selection process." *See* Exhibit I (Law School's submission in 1991-1992 to the ABA on compliance with ABA Standard 212).

B. The Current Law School Admissions Policies

During the 1991-1992 term, then-Dean Bollinger appointed a committee to examine the Law School's admissions policies generally and to make recommendations on any changes. The Faculty Admissions Committee appointed for that purpose was chaired by Richard Lempert and composed of several other faculty members, including Donald Regan, Donald Herzog, Jeffrey Lehman, Theodore Shaw, and Assistant Dean and Director of Admissions, Dennis Shields. *See* Exhibit J (Deposition of Richard Lempert, pp. 38-39, 42-44 (November 5, 1998)); Exhibit K (Deposition of Lee Bollinger, pp. 21-22 (February 9, 1999)); Exhibit L (Deposition of Dennis Shields, pp. 18-19 (December 7, 1998)); Exhibit M (Deposition of Jeffrey Lehman, pp. 44-49 (January 21, 1999)); Exhibit N (Deposition of Theodore Shaw, pp. 52-53 (January 21, 1999)).

The Faculty Admissions Committee reported to the Faculty with a recommended admissions policy dated April 22, 1992. It was adopted by the faculty on April 24, 1992. *See* Exhibit E. The 1992 Policy remains the stated policy of the Law School on admissions, according to the current Assistant Dean and Director of Admissions, Erica Munzel, *see* Exhibit O (Deposition of Erica Munzel, p. 92 (June 1, 1998)).

The Law School admissions Policy that became effective in the spring of 1992 acknowledges that the Law School's "most general measure predicting graded law school performance is a composite of an applicant's LSAT score and undergraduate grade point average (UGPA) (. . . the 'index')." *See* Exhibit E (Policy at p. 3). The Policy acknowledges that "the index does not do all the predictive work that an admissions committee might wish," but that it "should not be ignored" and that "[i]n particular, as the size of the differences in applicant index scores increases, the value of the index as a predictor of graded law school performance increases as well." *See id.* (Policy at pp. 3-4). From these premises, the Policy reaches the following conclusion:

Bluntly, the higher one's index score, the greater should be one's chances of being admitted. The lower the score, the greater the risk the candidate poses. And when scores are extremely low, it is extremely difficult for us reliably to pick out those who would be successful at Michigan and in the practice of law. So we expect the vast majority of those students we admit to have high index

scores.

See id. (Policy at p. 4). Undisputably, the LSAT scores and undergraduate grade point averages of applicants are important factors in the Law School Admissions process. *See* Exhibit L (Shields depo. pp. 20-21, 61-62, 180-81, 116-18); Exhibit P (Memorandum authored by Dennis Shields, dated October 13, 1992, entitled, "The Gospel According to Dennis," at pp. 5-6).

The Policy also makes clear that the "result of the actual decision making" in the past, prior to adoption of the 1992 policy, could be demonstrated with a graph that plots combinations of LSAT scores and "UGPAs." *See* Exhibit E (Policy at p. 6). This graph, attached as an exhibit to the Policy, shows that 87% of admitted applicants had index scores in 9 cells located closest to the upper right portion of the grid, which represents the highest combinations of LSAT scores and UGPAs. The grid confirms the stated policy that "[t]he further applicants are from the upper right corner the less likely they are to be offered admission." *See id.*

The Policy notes that the Law School also operates under a "constraint" because it is "part of a publicly funded university" and that "as such we feel that a reasonable proportion of our places should go to Michigan residents, even if some have qualifications lower than those of some applicants from outside Michigan." *See id.* (Policy at p. 2). Several Law School witnesses stated that the definition of "reasonable proportion" changed from year to year, but that generally the goal was to enroll a first-year class consisting of approximately one-third residents of the State of Michigan. *See* Exhibit J (Lempert depo. pp. 98-99). In reference to the grid and fact that the "upper right portion" indicates the combinations of LSAT and UGPA that "characterize the overwhelming bulk of students admitted," the Policy adds the caveat that "[t]he location of out-of-state admittees as a group, would, if plotted separately, be higher and closer to the upper right corner than the location of all admittees since the group of non-resident admittees is on the whole somewhat stronger on the plotted dimensions than the group of resident admittees." *See id.* (Policy at p. 7 & n. 2).

The Policy also explains that there are "two principal reasons" why some students will qualify for admission "despite index scores that place them relatively far from the upper right corner of the grid." *See id.* (Policy at p. 8). The first reason is that files of some applicants lead to skepticism about the value of the index as predictor of law school success. The Policy provides an example of a student who had received a college UGPA of 3.57 at Brown University, but whose law school application was "weakened substantially" by an LSAT score at the 68th percentile, resulting in a "low index." *See id.* (Policy at p. 9). The student was admitted because standardized test scores, including the college SAT, had proven in his or her case to be a poor predictor of later academic success. *See id.*

The second type of justification for "admitting students with indices *relatively far* from the upper right corner" of the grid is to "help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *See id.* (emphasis added). The Policy gives several examples and singles out "a commitment to one particular type of diversity that the school *has long had and which should continue.*" *See id.* (Policy at p. 12) (emphasis added). It goes on to explain that "[t]his is a commitment to *racial and ethnic diversity* with special reference to the inclusion of students from groups which have been *historically discriminated against*, like African-Americans, Hispanics, and Native Americans, who without this commitment might not be represented in our student body in *meaningful numbers.*" *See id.* (emphasis added). The Policy notes that "[o]ver the past two decades, the law school has made special efforts to increase the numbers of such

students in the school" and that by "enrolling a '*critical mass*' of minority students, we have ensured their ability to make unique contributions to the character of the Law School." *See id.* (emphasis added).

The Policy also explained that "[s]peaking generally, the faculty believes the admission process has functioned well in recent years, producing classes both diverse and academically outstanding. . . ." *See id.* It concluded, then, that "[o]ur object . . . is therefore as much to ratify what has been done and to reaffirm our goals as it is to announce new policies." *See id.* (Policy at p. 13). With respect to index scores and the distribution on the grid, the Policy stated "[w]e do expect that in the foreseeable future the proportion of students we admit from the upper right portion of the index grid will either stay constant or will increase. . . ." *See id.*

One of defendants' witnesses has described the 1992 Policy with respect to consideration of race as more "modern" than earlier policies. *See* Exhibit Q (deposition of Susan Eklund, pp. 33-34 (June 2, 1998)). Gone, after 1992, was any explicit reference in the Policy to a "special admissions program." With the adoption of the 1992 Policy, defendants also ceased the practice of having minority law students review some of the applications from minority applicants. *See* Exhibit J (Lempert depo. p. 99). In other respects, however, the 1992 Policy was not intended to change the numbers of underrepresented minorities admitted to the Law School. *See* Exhibit J (Lempert depo. pp. 93-94).

Defendants' witnesses acknowledge that the concept of "critical mass" involves a number, although they deny that there is any one number or percentage that constitutes a critical mass. *See, e.g.,* Exhibit L (Shields depo. pp. 109-11). The concept of having numbers of minorities sufficient to constitute "critical mass" or to be "meaningful" means that at some point, the number of minority students could be too low to achieve the Policy objectives with respect to underrepresented minority representation. *See, e.g.,* Exhibit K (Bollinger depo. pp. 125-28).

The Law School has not changed the Policy since it became effective in the spring of 1992. *See* Exhibit O (Munzel depo. p. 92). Consequently, it governed the applications for admission for all of the years (1995 to the present) at issue in this lawsuit.

C. 1992 ABA/AALS Accreditation Review and The Law School's Comment on that Review

The Law School underwent a periodic accreditation review by the American Bar Association ("ABA") and Association of American Law School ("AALS") in February 1992. Prior to that review, defendants submitted materials to the ABA and AALS on a number of issues considered as part of the review, including former ABA Standard 212 (and current ABA Standard 211) relating to the Law School's "commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms." *See* Exhibit R. As part of its response to the ABA inquiry on the Standard, the Law School stated:

The Law School considers in admissions decisions the value to the educational experience of having students from a range of backgrounds and perspectives. Thus, ethnicity is one factor in making admissions selections from a pool of comparably qualified applicants. The faculty also has recognized that four specific ethnic groups have been *particularly victimized by discrimination* (African Americans, Native Americans, Mexican Americans, and Puerto Rican

Americans raised on the U.S. mainland), and therefore has adopted a *special admissions program* wherein qualifications predicting success beyond the LSAT and GPA may be somewhat more emphasized in the selection process in order to yield greater numbers of members of these groups in the entering class.

See Exhibit I (Law School submission in 1991-1992 to the ABA on compliance with ABA Standard 212) (emphasis added).

As part of the 1992 accreditation review process, defendants also prepared a "self-study" that included a section on admissions. *See* Exhibit S (Law School "Self-Study" submitted in 1991-1992 to ABA, pp. 5-7). That document explains the "divided" admission process that the Law School had used for years, whereby a "pool" of applicants had their applications considered largely without reference to LSAT scores and UGPA. *See id.* (Self-Study at p. 6). The self-study also lauded the "Special Admissions program [which] has achieved substantial success." *See id.* In the next sentence, the self-study cautioned and promised that "[t]here is no reason for complacency, however, and new strategies are being devised to enhance the diversity of our students in all dimensions." *See id.* A few months later, defendants adopted the 1992 Policy.

The ABA issued a report following its on-site evaluation of the Law School for the 1992 review. *See* Exhibit T (ABA Report on University of Michigan Law School, February 9-12, 1992). The report included sections on the admissions process and "Programs for Promoting Opportunities for Racial and Ethnic Minorities." *See id.* (Report at pp. 37-40). The latter section again recounted the means by which the Law School promoted such opportunities:

The faculty has targeted individuals from four groups for special admissions consideration: African Americans, Native Americans, Mexican Americans and Puerto Ricans raised on the mainland. For these applicants, factors in addition to LSAT and GPA *are reviewed more closely and given more weight* as predictors of success in law school.

See id. (Report at 37-38) (emphasis added). The report's section on "Admissions" included a similar description:

The faculty has targeted four racial and ethnic groups for special attention in the admissions process: African Americans, Native Americans, Mexican Americans and Puerto Ricans raised on the mainland. The Special Admissions process for applications from individuals in these groups includes the reading of files by students from minority organizations, who make recommendations to the Assistant Dean, and a *deemphasis of the GPA and LSAT relative to other predictors of success as a student and attorney.*

See id. (Report at 34) (emphasis added).

The ABA's report on the 1992 accreditation review was sent to the Law School for review and comment. By letter dated August 14, 1992, the Law School responded to the ABA report. *See* Exhibit U (Letter from Edward H. Cooper, Associate Dean for Academic Affairs of the Law School to James P. White, dated August 14, 1992). The August 1992 letter was written *after* the adoption of the 1992 Policy, as the letter itself makes clear. In one section of that letter, the Law School commented on and corrected certain aspects of the ABA report relating to admissions policies. The August 1992 letter also describes changes

made in the admissions policies since the site visit in February 1992. Specifically, the letter made the following points:

- "*Only one fact went astray* in the [ABA report's]

description of the admissions policies in place at the time of the team visit. . . . [I]t [the report] state[s] that the school has begun making special efforts to reach women and minority students. We have made special efforts for many years; the only recent change has been that *we have increased our efforts still further.*"

- "Several changes have been made in our statement of admissions policy since the time of the team visit, reflecting the review of the admissions process noted on page 34 [of the report]. . . . *The most specific change* is that the faculty admissions policy committee will take a more active, although still rather limited, role in individual admissions decisions. . . . Student participation in reviewing the applications [*sic*] files of minority students has been ended."

- "*A more general change* has been made in the diversity component of our statement of admissions policy. In broad outline, 'we seek to admit students with distinctive perspectives and experiences as well as students who are particularly likely to assume the kinds of leadership roles in the bar and make the kinds of contributions to society' that have characterized our graduates who have become 'esteemed legal practitioners, leaders of the American Bar. . . .' Within this broad goal, *we continue to include a specific 'commitment to racial and ethnic diversity* with special reference to the inclusion of students from groups which have *historically been discriminated against*, like African Americans, Hispanics and Native Americans. . . .'"

See id. (August 14, 1992 letter at pp. 3-4) (emphasis added). The Law School's letter response to the ABA report offered no correction or amendment of the comments in the report, and in the earlier Law School self-study, about the deemphasis of LSAT scores and undergraduate grade point averages in the consideration of applications from minority students relative to non-minority students.

D. Admission Decision Outcomes under the Law School's Admissions Policies

Defendants' own admission records demonstrate that race is an enormous factor in the admissions decisionmaking process. One such document is a series of "grids" or tables that plot different combinations of LSAT scores and undergraduate grade point averages for the first-year law school class that entered in the fall of 1995. *See* Exhibit V ("Admissions Grid of LSAT & GPA -- 1995 final grid). The grids are compiled separately on the basis of a variety of categories, including by race and ethnicity, residence, and gender. In each case, the left side of the grid represents different combinations of undergraduate grade point averages (GPA), and the category along the top of the page corresponds to different ranges of LSAT scores.

Within each cell of LSAT/GPA combinations, there is a top number that represents total applications received within that combination of scores and grades, as well as a number to the left indicating the number of offers of admission, and a number on the right representing the number of deposits paid. For example, the grid indicates that for the cell represented by a GPA of 3.25 to 3.49 and LSAT scores between 156-158, there were 10 applications from African Americans and 10 offers of admission, with 3 deposits paid. In the same cell for the Caucasian applicant grid, there are 51 applications and only *one*

offer of admission.

The 1995 tables can be readily examined for many similar, extraordinary differences on the basis of race/ethnicity in the rates of admission. In the case of African Americans, for example, all but one applicant with a grade point of 3.25 or above and an LSAT at or above 156 received an offer of admission (43/44). For Caucasians, there were 1,663 applicants within

those same combinations of GPA/LSAT range, of whom only 634 received offers of admission. In fact, about 90% of all offers made to Caucasians (597/668) were made to applicants whose academic credentials met a *minimum* of both a 3.25 for GPA and 164 for LSAT score. *No offers* were made to Caucasian applicants who had both a GPA below 3.25 and an LSAT score below 156. Despite defendants' representation about admitting students whose standardized test scores have proven to be poor predictors of academic performance, *no offers* were made to Caucasians with an LSAT score below 154 (regardless of GPA); only three offers of admission (3/668) were made to Caucasians with LSAT scores beneath 156 (regardless of GPA); and only a total of 12 offers of admission (12/668) were made to Caucasians with an LSAT score below 161—the 86th percentile nationally — (regardless of GPA). For African Americans, in considerable contrast, 90% of all offers of admission (96/106) were made to applicants at or above GPA/LSAT combinations of 2.75 and 148, respectively. Slightly less than one-third of all offers (30/106) to African Americans were made to applicants whose LSAT scores were below 156, a virtual dead zone for Caucasian applications; and 15% of all offers made to African Americans were to applicants with LSAT scores beneath 154, a certain dead zone for Caucasian applications.

Asian Americans are at a systematic disadvantage similar to Caucasians. In the cell for 3.25 to 3.49 GPA and 156-158 LSAT scores, 14 Asian Americans applied, and none were offered admission. For all combination ranges at or above 3.25 GPA and LSAT score of 156, there were 292 applications from Asian Americans, with 104 offers of admission made. Only three of all offers to Asian Americans went to applicants with less than a 161 LSAT score; and 95% of offers to Asian American applicants were made to those with *minimum* LSAT scores of 164 and GPAs of 3.25.

There are also tables for "Majority" applicants and for "Selected Minorities," *i.e.* African Americans, Native Americans, Hispanics, and Puerto Ricans. In the cell for 3.25 to 3.49 GPA and LSAT score between 156 and 158, there was one offer of admission made from among 75 "majority" applicants, an acceptance rate of 1.3%. For the "Selected Minority" group, there were 15 offers made out of an applicant pool of 18, representing an acceptance rate of 83%.

Plaintiff's statistical expert, from the database supplied by defendants in discovery, constructed grids for the first-year Law School classes admitted in 1996, 1997, and 1998. *See* Exhibit W (Deposition of Dr. Kinley Larntz, pp. 69-70 (February 4, 1999)); Exhibit X (Admission Grids for years 1995-1998 as compiled from Law School database). Again, much information is contained in these grids, and they can be examined in the same manner as was done above with respect to the 1995 grid. Among other things, when viewed as a whole, over the four-year period, they show that only two applicants (2/43) from a "Selected Minority" group with minimum GPA/LSAT credentials equal to plaintiff Grutter's, *i.e.*, minimum 3.75 GPA and minimum LSAT score of 161, were denied admission. During that four-year period, the acceptance rate for "Selected Minorities" with minimum GPA/LSAT combinations of 3.25 and 156 was 84.5% (378/447). The rate at the same minimum combinations during those years for "Majority" applicants was 44.6% (3911/8767). The most striking differences, however, are evident at

grade and LSAT score combinations that are at the margins for "Majority" applicants. For example, the combined acceptance rate for the four-year period for Majority applicants with GPAs of 3.25 and above and LSAT scores ranging between 156 and 163 was 8% (272/3371) compared to 80% (264/330) for "Selected Minorities."

It is undisputed, or there can be no genuine dispute, that the pool of underrepresented minority applicants to the Law School has on average generally lower LSAT scores and undergraduate grades than other groups, including Caucasians and Asian Americans. Indisputably, too, those lower scores and grades on average would make it difficult or impossible for the Law School to enroll a "critical mass" or "meaningful numbers" of underrepresented minorities *if* the importance of test scores and grades in the admissions process remained unchanged and if race and ethnicity were no longer factors. *See* Exhibit K (Bollinger depo. pp. 90-91, 157-158). Consequently, in order to enroll a "critical mass" or "meaningful numbers" of underrepresented minorities, it is the policy and practice of the Law School to admit such minorities with generally lower test scores and grades than those of other groups. *See* Exhibit J (Lempert depo. pp.132-33); Exhibit L (Shields depo. pp. 117-18); Exhibit Y (Herzog depo. pp. 83-85).

E. Racial/Ethnic Composition of the Class

In the years 1987-1990, when Allan Stillwagon was Assistant Dean for admissions and the Law School had an explicit "special admissions program" benefitting underrepresented minorities, the first-year Law School class included representation of African American students in proportions of 7.8% (30/381), 9.1% (35/383), 8.4% (31/369), and 8.6% (31/358), in 1987, 1988, 1989, and 1990, respectively. *See* Exhibit Z (Descriptive Data of Entering Class 1987-1990). In the two years after Assistant Dean Stillwagon's departure and before implementation of the 1992 policy, the enrollment of African Americans increased slightly. In 1991, the proportion was 9.9% (36/361), and in 1992 it was 10% (37/368). In the first class (fall 1993) enrolled under the 1992 policy, the proportion of African Americans in the class was 8.7% (33/380). In subsequent years the proportions have been 10.1% (37/363) in 1994, 8.5% (29/340) in 1995, 7.2% (23/319) in 1996, 7.3% in 1996, 7.3% in 1997, and 7% in 1998. *See* Exhibit Z.

Similar results are shown when the numbers or proportions of total numbers of "selected minorities," *i.e.*, students who are either African Americans, Mexican Americans, Native Americans or Puerto Ricans, are considered. From 1987 to 1998, these groups were represented in the first-year class in the following proportions: 11.8% (45/381) in 1987; 13.05% (50/383) in 1988; 13.8% (51/369) in 1989; 12.8% (46/358) in 1990; 17.2 (62/361) in 1991; 18.4% (68/368) in 1992; 13.9% (53/380) in 1993; 14.3% (52/363) in 1994; 12.6% (43/340) in 1995; 13.2% (42/319) in 1996; 12.4% (42/339) in 1997; and 12.02% (41/341) in 1998. *See* Exhibit Z.

ARGUMENT

I. Defendants Have Violated the Equal Protection Clause and Title VI

Title VI prohibits discrimination on the basis of race or ethnicity by those receiving federal funds. *See* 42 U.S.C. § 2000d. The Supreme Court has held that Title VI prohibits the same intentional conduct as does the Equal Protection Clause. *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *see also Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583, 585 n.3 (6th Cir. 1987). The Law School is a state-operated institution which, as a recipient of federal funds, is subject to the prohibitions of Title VI. By accepting federal funds, the University has waived any defense based on sovereign immunity for claims arising under Title VI. *See* 42 U.S.C. § 2000d-7(a)(1). *Cf. Franks v. Kentucky School for the Deaf*,

142 F.3d 360, 362 (6th Cir. 1998) (Congress, through § 2000d-7(a)(1), abrogated a state's sovereign immunity for Title IX claims). Title 42 U.S.C. Section 1983 provides a remedy, including declaratory and injunctive relief, for individuals whose constitutional rights have been violated under color of state authority. *See, e.g., Will v. Michigan Department of State Police*, 491 U.S. 58, 71 n.10 (1989).

Plaintiff's motion with respect to the Equal Protection Clause and Title VI is brought on two independent grounds. First, plaintiffs seek declaratory and injunctive relief on the narrow and limited ground that the Law School's admissions policies and practices are illegal under the reasoning employed by Justice Powell in his opinion in *Bakke*. Plaintiff assumes, for the purpose of this first argument only, that Justice Powell's opinion in *Bakke* constituted the "holding" of the Court and that the opinion, notwithstanding more recent Supreme Court decisions invalidating racial preferences, retains vitality insofar as it reasoned that "diversity" is a compelling interest that universities may strive to achieve by considering race and ethnicity as "plus" factors in admissions decisionmaking. As discussed in detail below, the material facts are relatively few and undisputed and lead inescapably to the conclusion that the University has violated Title VI and the Equal Protection Clause under the rationale of Justice Powell's opinion in *Bakke*.

The second, independent argument in support of plaintiff's motion for summary judgment on the Title VI and Equal Protection claims is that Justice Powell's "diversity" or "academic freedom" rationale, as set forth in his singular opinion in *Bakke*—the only basis on which defendants have justified their race-conscious decisionmaking—is not a compelling interest sufficient to meet strict scrutiny. No Justice other than Justice Powell, and certainly not a majority of the Court, has ever held that "intellectual diversity" or "academic freedom" are "compelling interests" justifying use of racial classifications of any kind. Consequently, even if defendants' admissions policies and practices met the requirements of Justice Powell's "diversity" or "academic freedom" rationale, they are illegal under controlling Supreme Court cases on racial classifications.

A. Defendants' Race-Conscious Admissions Policies and Practices Are Illegal under Justice Powell's "Intellectual Diversity" and "Academic Freedom" Rationale Articulated in *Bakke*.

1. The *Bakke* Case and Justice Powell's Opinion

In *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), plaintiff Allan Bakke brought suit under Title VI to challenge the admissions policies of the University of California Medical School at Davis, where Bakke, a white male, had twice applied and been rejected for admission. The Davis admissions program operated on a "rolling" basis and included a "special admissions program" that provided for offers of admission to a prescribed number of economically or educationally disadvantaged applicants who were also members of specified racial minorities: "Blacks," "Chicanos," "Asians" and "American Indians." *Id.* at 275. In the years Bakke applied, the prescribed number of seats to be offered pursuant to the special admissions program was 16 out of 100. *Id.* at 275-76.

The Davis "special admissions program" offered seats only to "qualified" minorities; and the majority of the class was comprised of non-minorities. *Id.* at 275-76. Most minority applicants for the "special admissions" program were rejected. *Id.* at 275-76 & n.5. The program was also "flexible" insofar as there was no "floor" under or "ceiling" over the total number of minority applicants to be admitted. *Id.* at 288 n.26.

Five Justices in *Bakke* held that the Davis program unlawfully considered race in the admissions process. Four of the five concluded that the program violated Title VI and that it was unnecessary to decide whether the program was also unconstitutional. *Id.* at 410-20 (Stevens, Stewart, Rehnquist, JJ., Burger, C.J., concurring in the judgment in part and dissenting in part). The fifth vote invalidating the program came from Justice Powell, who concluded in an opinion only for himself that the Davis program violated the Equal Protection Clause of the Fourteenth Amendment and Title VI.

Justice Powell applied "strict scrutiny" to the Davis program. He rejected as "beside the point" any "semantic distinction" about whether the program amounted to "goals" or "quotas" for minority representation in the medical school, and he determined that the special admissions program was "undeniably a classification based on race and ethnic background" or a "line drawn on the basis of race and ethnic status." *Id.* at 288-89. He then considered four objectives of the program offered by Davis to justify the use of a "suspect" classification and found only one to be sufficiently compelling: "attainment of a diverse student body." *Id.* at 311. Justice Powell based his conclusion on the premises that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment," *id.* at 312, and that the "freedom of a university to make its own judgments as to education includes the selection of its student body," *id.*

The constitutional interest in "diversity" that Justice Powell wrote about pertained to 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 that context of discussing a state interest in an intellectually diverse student body that Powell concluded "[e]thnic 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, and admonished that it was "not an interest in simple ethnic diversity," *id.* at 315.

Justice Powell made clear at several points in his opinion that in assembling a diverse or heterogeneous 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 "special admissions program," it was "evident" to Justice Powell, was guilty of a "facial intent" to discriminate. *Id.* at 318. A constitutional policy would be one, he reasoned, "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 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 *individualized comparisons*, or can show that a *systematic exclusion* of certain groups results." *Id.* (emphasis added). It bears repeating that Justice Powell voted to invalidate the Davis program as unconstitutional even though he (alone) wrote approvingly of "diversity" as a compelling governmental interest that could justify the use of race in university admissions decisions.

2. The Law School's Admission Policies and Practices Are Unlawful under *Bakke* and Justice Powell's Opinion.

The Law School's admissions policies and practices do not comply with the constitutional standard defined by Justice Powell. The reasons are several. They can be deduced from the following facts for which the record discloses there can be no genuine dispute: (1) LSAT scores and undergraduate grade point averages (together, the "index") have at all material times been important factors in the Law School's admissions process, with the general principle being that the higher an applicant's index score, the greater the chance of admission and, conversely, the lower the index score, the lower the chance of admission; (2) the LSAT scores and undergraduate grade point averages of the pool of applicants applying to the Law School who are underrepresented minorities are lower than those for other racial and ethnic groups; (3) the Law School desires to enroll a "critical mass" or "meaningful numbers" of underrepresented minorities into each year's class; and (4) in order to enroll a "critical mass" or "meaningful numbers" of minority students, it is the policy and practice of the Law School to admit underrepresented minorities whose LSAT scores and undergraduate grades are generally lower than those of other racial or ethnic groups.

Race and ethnicity are accounted for under defendants' system in a systematic manner that effectively creates a different relative importance—on the basis of race and ethnicity—for two very important variables, LSAT score and undergraduate grade point average. Both explicit policy and practice make clear and undisputed that LSAT scores and grade point averages are important generally (*e.g.*, "[b]luntly, the higher one's score, the greater should be one's chances of being admitted, [and] [t]he lower the score, the greater the risk the candidate poses"). Acknowledging that importance, the Policy explicitly contemplates that in justification and furtherance of the commitment to "diversity," including racial and ethnic diversity, students will be admitted with "indices relatively far from the upper right corner." The clear effect, even though the policy no longer says so explicitly, is that there remains a "special admissions program" for the preferred minority groups: African Americans, Native Americans, Hispanics, and Puerto Ricans born on the U.S. mainland.

It is formally and effectively a dual system that attaches far greater importance generally to the LSAT scores and undergraduate grade point averages when comparing applicants within the majority group than when comparing an underrepresented minority applicant to members of the majority group. Moreover, what the policy contemplates, the actual admissions outcomes confirm in staggering fashion.

In the same respect (although to a much different degree) that index scores are lower for Michigan residents than non-residents (*see* Policy at 6, 7 & n.2), index scores are lower for the preferred minority group than for the majority group. In the case of residents, the differential treatment results from the policy decision to ensure that a "reasonable proportion" of the places in the class go to Michigan residents. In the case of racial and ethnic minorities, the different treatment is designed to ensure that the preferred minorities are represented in the class in "meaningful numbers" such that they constitute a "critical mass."

The policy does not define the meanings of either "critical mass" or "meaningful numbers" of minorities, just as it does not define what is meant by a "reasonable proportion" of residents. Undisputably, however, these concepts include reference to numbers or percentages of minority students that the Law School, as a matter of policy, admits and enrolls each year. To the extent that the Law School has committed itself to ensuring that enough seats in the class go to assembling a "critical mass" of minorities as a group or groups, the Law School is giving systematic consideration to race and ethnicity, not merely "particularized," "case-by-case" consideration to individual applicants.

Plaintiff's point is not that test scores and grades are completely unimportant for minorities. In fact, it is clear that scores and grades, which compose the "index," are generally important for everyone. *Within* the preferred racial and ethnic groups, for example, it is clear defendants follow the Policy's maxim that the "higher one's score, the greater should be one's chance of being admitted." And plaintiff assumes, at least for the purposes of this motion, that every minority admitted to the Law School meets at least the minimum qualifications set forth in the Policy: the ability to successfully complete a course of study at the Law School. *See* Exhibit E (Policy at p. 2). But the fatal flaw in defendants' policies, when viewed in light of Justice Powell's rationale, is the obvious and *systematic* difference in *relative importance* of LSAT scores and grades when comparing applicants within the majority group versus comparing underrepresented minority applicants to the majority group: within the majority group, high test scores and grades relative to others in that group are obviously very important in admission outcomes generally, while it is much less important or not at all important for underrepresented minorities to have high test scores and grades when they are being compared to applicants in the majority group.

In fact, defendants' witnesses have testified that race is so important a factor in admissions that its removal from consideration would result in a "devastating" reduction in the numbers of minorities admitted to the class. *See* Exhibit K (Bollinger depo. p. 275). If that is so, it is one measure of the decisive and overwhelming importance that race and ethnicity have in defendants' admissions system. Considering the overall importance in admissions decisions of LSAT scores and undergraduate grades and the observably different relative importance of those factors between the preferred racial groups and the nonpreferred groups, there is no meaningful sense in which it can be said that the two groups compete for seats in the class on "an equal footing" or that race and ethnicity are factors "weighed fairly" in the admissions process. 438 U.S. at 317-18. Defendants' admission policies are illegal, therefore, even when considered under the strictures of Justice Powell's diversity rationale.

B. Defendants' Admissions Policies and Practices Are Unlawful Because Diversity is not a Compelling Governmental Interest

1. Justice Powell's "Academic Freedom" or "Diversity" Rationale Was Not the "Holding" of the Court in *Bakke*.

For several reasons, Justice Powell's lone opinion, with its "academic freedom" or "diversity" rationale, was not the "holding" of the Court in *Bakke*. Consequently, defendants cannot successfully defend against plaintiff's claims of constitutional and statutory civil rights violations by proving, if they could, that their race-conscious policies and practices satisfy Justice Powell's "diversity" and "academic freedom" analysis.

The four-Justice Brennan group did not adopt or endorse Powell's rationale. Nowhere in Justice Brennan's opinion does he even mention "diversity" or "academic freedom." Indeed, the Brennan group, while recognizing that "no single" opinion spoke for the Court, described the "central meaning" of all the

opinions:

[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.*

438 U.S. at 325 (emphasis added). 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 university in the pursuit or exercise of its "academic freedom." *See also Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (citing *Bakke*, 438 U.S. at 326 n.1, for the conclusion that the Brennan opinion "implicitly rejected Justice Powell's position").

The "diversity" rationale of Justice Powell cannot plausibly be said to represent the holding of *Bakke* when it was explicitly or implicitly rejected by eight other Justices. Justice Powell's vote was decisive of the outcome because the eight other Justices were evenly divided on the question of the lawfulness of the Davis program and the proper use of race in the admissions process. It does not follow merely from the vote alignment, however, that Justice Powell's "diversity" rationale represents some "common denominator" that commanded the assent of at least a majority of the Court. As demonstrated from the language of the other opinions, it is manifestly apparent that quite the opposite is true. There is no basis for concluding, therefore, that Justice Powell's "diversity" rationale represents the "holding" of the Court.

In *Marks v. United States*, 430 U.S. 188 (1977), the Supreme Court commented that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* at 193. An assertion that Powell's opinion represents the "holding" of the Court finds no support in an analysis to discern the "narrowest" ground on which the opinions of Powell and Brennan concurred on the permissible use of race in the admissions process. Powell approved of using race as a "plus factor" to achieve diversity in a manner that he suggested was described by the "Harvard plan" appended to his opinion. As noted, however, the Brennan opinion did not endorse Powell's justification of diversity, and Justice Brennan's reference to the "Harvard plan" contained a restriction not present in Justice Powell's analysis. Significantly, the Brennan group stated their agreement with Justice Powell that the "Harvard plan" was 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." 438 U.S. at 326 n.1 (Brennan, J., concurring in part and dissenting in part); *id.* at 379 (asserting that "Harvard plan" allocated seats to "*disadvantaged* minority students"). Given that express limitation placed by four of the five Justices in *Bakke* who would allow some consideration of race in the admissions process, it is surely erroneous to argue that the *narrowest* ground of concurrence is found only with reference to Justice Powell's diversity rationale.

It is not at all clear that any "narrowness" analysis can or should apply to a specific proposition or mode of analysis when a majority of the Court has rejected the analysis. *See, e.g., Rutledge v. United States*, 517 U.S. 292, 298-99 (1996) (where argument that "in concert" element of crime required proof less than that needed to prove a "conspiracy" was "rejected to varying degrees, by [eight Justices]," it had not been considered precedential by lower courts). Lower courts have generally eschewed the *Marks* "narrowness" analysis when the differing opinions of the Supreme Court have no "common denominator." *See, e.g.,*

Ass'n of Bituminous Contractors, Inc., v. Apfel, 156 F.3d 1246, 1254 (D.C. Cir. 1998) (the "narrowest grounds" approach "does not apply unless the narrowest opinion represents a 'common denominator of the Court's reasoning' and 'embod[ies] a position implicitly approved by at least five Justices who support the judgment'") (emphasis added); *Rappa v. New Castle County*, 18 F.3d 1043, 1056-58 (3d Cir. 1994).

The judicial history following one Supreme Court opinion, *Baldasar v. Illinois*, 446 U.S. 222 (1980), overruled in *Nichols v. United States*, 511 U.S. 738 (1994), best exemplifies problems with the "narrowness" analysis in the absence of a discernible common denominator. In *Baldasar*, a plurality held that a misdemeanor conviction of an unrepresented defendant resulting in no jail time, although valid under the Sixth Amendment, could not be used to convert a subsequent misdemeanor into a felony without violating that Amendment. Justice Blackmun provided the crucial fifth vote for the holding reversing the enhancement, but concluded that the earlier conviction was invalid (and could not be used for *any* purpose) because the defendant was subject to more than six months jail time for the first conviction. Lower courts concluded that no rule of law at all emerged from the case because there was no "common denominator" between the opinions of the plurality and Justice Blackmun. See, e.g., *United States v. Eckford*, 910 F.2d 216, 219 & n.8 (5th Cir. 1990); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 n.5 (7th Cir. 1983); *United States v. Robles-Sandoval*, 637 F.2d 692 n.1 (9th Cir. 1981) ("The Court in *Baldasar* divided in such a way that no rule can be said to have resulted."); *United States v. Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991) ("[W]e find that there is no common denominator applicable to this case upon which all of the Justices in the *Baldasar* majority agreed."); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 133-34 (6th Cir. 1994) ("Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce a result with which a majority of the Court from that case would agree, that standard is the law of the land.") (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 693 (3rd Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992)); *United States v. Nichols*, 979 F.2d 402, 416-18 (6th Cir. 1992) (stating agreement with analysis of *Baldasar* by other circuits, including opinions in *Eckford*, *Schindler*, and *Castro-Vega*), *aff'd*, 511 U.S. 738 (1994). In subsequently overruling *Baldasar*, the Supreme Court itself commented on the sometimes futility of resort to the *Marks* analysis:

We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it. This degree of confusion following a splintered decision such as *Baldasar* is itself a reason for reexamining that decision.

Nichols v. United States, 511 U.S. 738, 745-46 (1994).

Although the Supreme Court has not explicitly reexamined *Bakke*, the Court has subsequently commented on its splintered nature. In *Adarand Constructors v. Peña*, 515 U.S. 200, 218 (1995), the Court noted that "*Bakke* did not produce an opinion for the Court" and that the "failure to produce a majority opinion in *Bakke* [and other cases] left unresolved the proper analysis for remedial race-based governmental action." *Id.* at 221. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court made explicit that it "di[d] not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *Bakke*." *Id.* at 492; see also *Hopwood*, 78 F.3d at 945 ("[T]here has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination.").

The Sixth Circuit has cited *Bakke* and its various opinions on a number of occasions, but has neither conducted any analysis under *Marks* to ascertain the "narrowest" ground joined in by the concurring judgments nor ever held that Powell's "diversity" or "academic freedom" rationale constitutes the "holding" of the Court. In a case decided shortly after *Bakke*, however, the Sixth Circuit considered the constitutionality of an affirmative action plan instituted by the Detroit Police Department. *See Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979). In *Young*, the court noted that the decision of the United States Supreme Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), had addressed the lawfulness of such plans under Title VII, but that there was no "such clear authority in dealing with the constitutional issues." 608 F.2d at 694. The court then wrote that "we conclude that the opinion of Justices Brennan, White, Marshall and Blackmun in . . . *Bakke* . . . offers the most reasonable guidance," *id.*, and went on to analyze the constitutionality of the plan in question under Justice Brennan's opinion. *See also Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 170, 175 (6th Cir. 1983) ("Neither *Fullilove* nor *Bakke* produced a majority opinion from the Supreme Court and we depend on the several plurality opinions for guidance."); *Stotts v. Memphis Fire Department*, 679 F.2d 541, 553 (6th Cir. 1982) (citing *Bakke* for the proposition that Supreme Court approves race-conscious affirmative action "in a wide variety of situations where it is an attempt to ameliorate the effects of past discrimination"), *rev'd on other grounds*, 467 U.S. 561 (1984).

Justice Powell's "diversity" analysis and the Brennan group's remedial analysis are apples and oranges. Logic does not permit the conclusion that one always presents a narrower analysis than the other. They are just different. This remains the case even though the Brennan group purports to apply a lesser standard of review than does Justice Powell. Even when considered under the "lower" standard, the Brennan group would not accept something like the "Harvard plan" unless "necessitated by the lingering effects of past discrimination." 438 U.S. at 326 n.1. Moreover, under Justice Brennan's analysis, only members of minority groups that had been the victims of discrimination, where there was a high probability that individual beneficiaries were personally victims of societal discrimination, could receive an advantage. In voting to uphold the Davis plan, the Brennan group specifically relied on the fact that Davis looked beyond minority status to confirm disadvantage:

[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.

438 U.S. at 377 (Brennan, J., concurring in part and dissenting in part). Justice Powell's rationale based on diversity requires no such showing of disadvantage. It is meaningless and untrue, therefore, to argue that Justice Powell's vote to invalidate the Davis Program and the Brennan group's vote to sustain it proves the "narrower" scope of Justice Powell's "diversity" rationale. The facts of each case will determine which of the two rationales prove to be the "narrower" in the application. In a case of race-conscious decisionmaking that passes constitutional muster under Justice Powell's "diversity" rationale, but not under the "remedial" rationale of the Brennan group, it would be absurd to suggest that the Powell rationale is "narrower."

The only common denominator between the opinions of Justice Powell and Brennan is in their remedial

analysis. *See* note 4, *supra*. The five Justices represented by Justice Powell and the Brennan group agreed that race could be taken into account in some remedial forms. And between the two opinions that expressed that view, Justice Powell's remedial analysis was clearly narrower than that of the Brennan group.

Because Justice Powell's "diversity" and "academic freedom" rationale do not constitute the "holding" of *Bakke*, defendants would find no legal refuge even if they could successfully demonstrate that their race-conscious admissions policies and practices are consistent with Justice Powell's rationale. *See Hopwood*, 78 F.3d at 944 (Justice Powell's "view [on diversity] is not binding precedent."). Defendants do not offer any ground other than diversity as a compelling interest justifying their race discrimination. Consequently, this Court should grant plaintiff's motion for partial summary judgment.

2. Supreme Court Cases Prior and Subsequent to *Bakke* Confirm that Academic Freedom or Diversity Is Not a Compelling Governmental Interest.

In *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), a majority of the Supreme Court held that all governmental racial classifications are reviewed under the strict scrutiny standard, which requires demonstration that the classification is justified by a compelling governmental interest and that it is narrowly tailored to achieve that interest. *Id.* at 227-35. The Court has never found a "compelling" interest other than a "remedial" one. *See Hopwood*, 78 F.3d at 944 ("No case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis."). The Court has specifically rejected non-remedial interests like an interest in providing "role models." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497-98 (1989) (opinion of O'Connor, J.); *id.* at 520-21 (Scalia, J., concurring in the judgment). A majority of the Court has also rejected racial classifications as a remedy for "societal discrimination." *Shaw v. Hunt*, 517 U.S. 899, 909-10 & n.5 (1996); *Croson*, 488 U.S. at 498-99; *id.* at 521-22 (Scalia, J., concurring in the judgment). In *Croson*, the Court struck down racial preferences in the award of construction contracts in the City of Richmond, Virginia in part because "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry." *Id.* at 505.

Significantly, the Court has condemned *any* non-remedial interest. *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.") (opinion of O'Connor, J.) (emphasis added); *id.* at 520 (Scalia, J., concurring in the judgment); *see also Hopwood*, 78 F.3d at 944 ("[T]he Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs.").

Justice Powell's assertions to the contrary notwithstanding, the Court has never accepted any "right" of the state to engage in race-conscious decisionmaking based on the First Amendment. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court directly confronted a far more difficult issue—namely, whether private parties have the right to discriminate on the basis of the First Amendment—concluding that 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." *Id.* at 176 (emphasis added). If a private school's First Amendment right to express racially discriminatory views through its admissions policies and practices must yield to the equal protection claims of others, *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 people against the state, and not the other way around—should have even less weight when compared to principles of non-discrimination. In any event, the Court has never held that state entities should have *more* First Amendment protection than is afforded to private individuals and organizations. *See also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (noting [t]hat "the right to associate for expressive purposes is not . . . absolute," even for a private entity, and holding that the State of Minnesota's interest in eradicating discrimination was sufficiently important to overcome the First Amendment interest of a private organization's right of association for expressive purposes).

Although the Court has not reexamined or overruled *Bakke*, its subsequent decisions on racial classifications are obviously highly relevant to evaluating *Bakke*'s meaning. As demonstrated, Justice Powell's lonely opinion, with its non-remedial analysis, remains just that: alone. It did not command the allegiance of anyone on the Court but him, and it never has. In this case, defendants do not even purport to justify their use of racial preferences in admissions on any ground other than diversity. Defendants' broad, amorphous "diversity" justification meets neither the "societal discrimination" requirements of Justice Brennan's analysis, nor the requirement of remedying "identified" discrimination set forth by Justice Powell in *Bakke*, and confirmed by the majority in *Shaw v. Hunt* and *Croson*. *Cf. Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 350-56 (D.C. Cir. 1998) (FCC regulations violated Equal Protection Clause of the Fifth Amendment because stated "diversity" justification did not rise to "compelling" governmental interest, and regulations were not narrowly tailored). This Court should declare defendants' use of race-conscious admissions policies and practices illegal under the Equal Protection Clause and Title VI, and permanently enjoin defendants from engaging in those illegal practices in the future.

II. The Same Conduct Establishes Violations of 42 U.S.C. § 1981.

Title 42 Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws . . . as is enjoyed by white citizens . . ." Although its text suggests that only non-whites are the intended beneficiaries of Section 1981, the Supreme Court has held that it prohibits racial discrimination against whites to the same extent as others. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96 (1976). A contract for educational services is a "contract" for purposes of Section 1981. *See Runyon v. McCrary*, 427 U.S. 160, 172 (1976). Section 1981(c) specifically provides that the right to contract equally without regard to race is protected from impairment under color of state authority.

Plaintiff may establish a violation of Section 1981 by proving that defendants engaged in intentional race discrimination. *See, e.g., Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 175 (6th Cir. 1975); *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 239-41 (6th Cir. 1990); *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1270 (6th Cir. 1986). As demonstrated in the foregoing analysis of the Equal Protection and Title VI claims, the undisputed material facts establish that defendants have engaged in intentional race discrimination. Consequently, judgment as a matter of law is appropriate on the Section 1981 claim against defendants Bollinger and Lehman, acting in their official capacity.

III. Plaintiff and the Class Are Entitled to Partial Summary Judgment and Declaratory and Injunctive Relief.

Federal Rule of Civil Procedure 56(a) permits a party seeking to recover upon a claim to move for "summary judgment in the party's favor upon all or any part thereof." Rule 56(c) permits an "interlocutory" judgment to be rendered solely on the issue of liability, and Rule 56(d) also contemplates a judgment rendered on less than the entire case. Summary judgment is appropriate under Rule 56(c) when the record demonstrates that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." As demonstrated in the foregoing discussion, there are no genuine issues as to any facts material to plaintiff's claims that the Law School and defendants Bollinger and Lehman, in their official capacity, have violated plaintiff's rights protected by the Equal Protection Clause of the Fourteenth Amendment and by 42 U.S.C. §§ 2000d and 1981. Consequently, plaintiff and the class are entitled to partial summary judgment in their favor.

Title 42 U.S.C. § 1983 provides remedies against those who have violated the rights of others under color of state authority. Individuals who prove that their federal civil rights have been so violated may seek, among other things, a declaration that those rights have been violated and an order of the court enjoining defendants from engaging in the illegal practices in the future. *See, e.g., Will v. Michigan Department of State Police*, 491 U.S. 58, 71 n.10 (1989); *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (declaratory and injunctive relief available for violations of 42 U.S.C. § 1981). Plaintiff here seeks a declaration that the defendants' admissions policies and practices for the academic years 1995 through the present violate plaintiff's rights under the Constitution and 42 U.S.C. §§ 1981 and 2000d. Such a judicial declaration is important to vindicate plaintiff's constitutional rights and to establish an essential predicate for the individual remedial claims (*e.g.*, order of admission to the Law School or award of compensatory damages) of the plaintiff and members of the class. Plaintiff and the class also seek an order permanently enjoining defendants from engaging in the future in their illegal, racially discriminatory admissions practices. Injunctive relief is important and necessary, among other reasons, because thousands of individuals will, only a few months from now, begin filing their applications for admission to defendants' Law School. Unless enjoined from enforcing their illegal policies and practicing their illegal race discrimination, defendants will once again intentionally subject thousands of individuals to injury and indignity.

CONCLUSION

For all of the foregoing reasons, plaintiff respectfully submits she is entitled to summary judgment as follows:

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

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