Case No. 01-1438

In the United States Court of Appeals for the Sixth Circuit

Jennifer Gratz and Patrick Hamacher,
for themselves and all others similarly stiuated,
Plaintiffs-Appellees

v.

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

Ebony Patterson, et al.,
Intervening Defendants-Appellants.

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

FINAL BRIEF OF PLAINTIFFS-APPELLEES

Statement of Corporate Affiliations and Financial Interest

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

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

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

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

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Kirk O. Kolbo

Dated: July 25, 2001

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Statement Regarding Oral Argument

Sixth Circuit Rule 9(b) provides that oral argument will be allowed unless "the appeal is frivolous," the "issue . . . has been recently authoritatively decided," or "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." The intervenors' arguments concerning notice are frivolous, and the absence of jurisdiction for this appeal is facially apparent from the nature of the orders entered in the district court. Accordingly, oral argument would be neither helpful nor necessary to the decisional process.

Statement of Subject-Matter and Appellate Jurisdiction

This Court does not have appellate jurisdiction to hear the intervenors' appeal, which should be dismissed. The appeal was taken from the district court's order dated March 21, 2001, which does not constitute an appealable order. The decision to reject the intervenors' arguments was not one on which a final judgment could be entered pursuant to Fed. R. Civ. P. 54(b) because it did not finally dispose of any "claims" within the meaning of that rule.

Statement of Issues

1. Does this Court possess appellate jurisdiction to consider the intervenors' appeal taken from the district court's order dated March 21, 2001?

2. Did the district court abuse its discretion by hearing plaintiffs' motion for summary judgment on liability and rejecting intervenors' arguments opposing plaintiffs' motion when intervenors were on notice that plaintiffs had moved for summary judgment and intervenors submitted voluminous memoranda and exhibits and were heard at oral argument on their reasons for opposing plaintiffs' motion?

3. Did the district court properly conclude that because the University was not motivated by "remedial" objectives in adopting its race-conscious admissions policies for

the College of Literature, Science & the Arts, these remedial rationales now asserted by intervenors cannot be a compelling interest justifying racial preferences?

4. Even if the University had been motivated by incidents of past racial discrimination on campus, did the district court properly conclude that these incidents cannot justify the University's racial preferences in admissions because they are remote in time or unrelated to admissions decisionmaking?

5. Did the district court properly conclude that social factors, like segregated residential and K-12 educational patterns, or a hostile racial "climate" on campus, cannot justify racial preferences in the University's admissions policies.

6. Even if the intervenors' asserted "remedial" interests had motivated the University to adopt its race-conscious admissions policies at issue in this case, did the district court correctly conclude that these policies were not "narrowly tailored" to achieve any remedial objectives?

Statement of the Case

This action commenced in October 1997. The Complaint alleged that defendants operated an admissions system in the College of Literature, Science and the Arts ("LS&A") within the University of Michigan ("University") that illegally discriminated on the basis of race in violation of 42 U.S.C. §§ 1981, 1983, and 2000d. (R. 1

Complaint, JA-34-42) Plaintiffs sought, among other things, declaratory and injunctive relief, and damages. (R. 1 Complaint, pg. 8-9, JA-41-42)

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

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

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

intervening defendants. (R. 210 February 26, 2001, Opinion, JA-103-26; R. 211 February 26, 2001, Order, JA-127-29; R. 218 March 21, 2001, Order, JA-137-40)

Statement of Facts

For their statement of facts, Plaintiffs incorporate those facts set forth in their appeal brief dated May 7, 2001, and will not unnecessarily burden the Court by repeating them here. *See* FRAP 28(i).

Summary of Argument

This appeal is both substantively and procedurally frivolous. Procedurally, intervenors have not made a separate claim in the district court that would warrant a Rule 54(b) order directing entry of a final judgment. Substantively, intervenors continue to contend—in the face of controlling precedent—that the University's violations of the Equal Protection Clause can somehow be justified by reasons other than those on which the University relied. Even if the law permitted such post-hoc justification, which it does not, the justification relied upon by intervenors is, at best, far too remote from the University to provide a defense to its actions.

In sum, this appeal should be dismissed for lack of appellate jurisdiction. If it is not, then, on the merits, the district court's rejection of the intervenors' arguments should be affirmed without hesitation.

Standard of Review

The district court's substantive decision to grant summary judgment (its determination whether there are genuine issues of material fact in dispute and entitlement to judgment as a matter of law) is reviewed de novo. However, the district court's procedural determination of whether a party had sufficient notice for entry of summary judgment is reviewed under an abuse of discretion standard. *See, e.g., Salehpour v. University of Tennessee*, 159 F.3d 199, 203 (6th Cir. 1998).

Argument

I. INTERVENORS' APPEAL SHOULD BE DISMISSED FOR LACK OF APPELLATE JURISDICTION.

Intervenors' appeal is fatally defective and should be dismissed. Intervenors appealed from the district court's order, dated March 21, 2001. This order (following the district court's February 26, 2001, order relating to the intervenors) directed entry of final judgment "with respect to Defendant-Intervenors' claims." (R. 218 March 21, 2001, Order, JA-137-40) Despite repeated use of the word "claims," however, neither the February 26, 2001, nor March 21, 2001, orders disposed of any "claim" as that term is used in the Federal Rules of Civil Procedure.

The term "claim" has a precise legal meaning under the rules, a "cognizable claim for relief." *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7 (1980). *See*

also NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 291-92 (7th Cir. 1992) (Easterbrook, J.) (discussing distinction between a "claim for relief" and a "legal theory.") When a "claim" has been disposed of, judgment can be entered with respect to it; judgments do not get entered on "issues" or "affirmative defenses."

Plaintiffs do not have any "claims," *i.e.*, causes of action, against the intervenors. Likewise, intervenors have no "claims" against plaintiffs; they have only arguments and defenses asserted against plaintiffs' claims (causes of actions under 42 U.S.C. §§ 1981, 1983, and 2000d) against the University defendants. Accordingly, the district court did not dispose of any "claims" by either plaintiffs or intervenors with respect to the other.[1] Instead, it resolved certain issues against the intervenors, an event which clearly did not satisfy the appealability standards of 28 U.S.C. § 1291. Intervenors' tacitly admit as much in their brief. *See* Intervenors' Br. at 2 (asserting that the "district court entered final judgment . . . with respect to intervenors' remedial arguments") (emphasis added). The fact that intervenors opposed plaintiffs' motion for summary judgment on some grounds that were not also urged by the University defendants, and that these grounds were not addressed in the district court's December 13, 2000, opinion, does not render

[1] It did, however, resolve plaintiffs' claims for damages against the individual defendants, which were therefore properly the subject of the district court's Rule 54(b) certification respecting those claims. (R. 208 February 9, 2001, Order, JA-97-99; R. 209 February 9, 2001, Judgment, JA-100-02)

the February 26, 2001, or March 21, 2001, orders into orders disposing of claims nor change anything with respect to the appealability of the March 21, 2001, order. This is the classic case, then, in which the requirements of Rule 54(b) have not been met.[2] Accordingly, the district court erred as a matter of law in certifying the March 21, 2001, order.

"A district court by definition abuses its discretion when it makes an error of law." *United States v. Coleman*, 188 F.3d 354, 357 (6th Cir. 1999). Because the district court abused its discretion in certifying the March 21, 2001, order, this Court lacks jurisdiction to hear the intervenors' appeal. *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 164 (11th Cir. 1997); *Hogan v. Consolidated Rail Corp*., 961 F.2d 1021, 1023 (2d Cir. 1992). *Cf. Interstate Power Co. v. Kansas City Power & Light Co.*, 992 F.2d 804, 806 (8th Cir. 1993) ("If the Rule 54(b) determination is ineffective, however, we lack jurisdiction because there is no final district court order.")

II. INTERVENORS' ARGUMENT ABOUT LACK OF NOTICE AND AN OPPORTUNITY TO BE HEARD ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IS FRIVOLOUS.

A. Intervenors Received Ample Notice that Plaintiffs Sought Summary Judgment on Liability.

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[2] Plaintiffs brought to the attention of both the district court and intervenors the inapplicability of Rule 54(b) to the district court's rejection of the intervenors' arguments. (R. 219 Response by Plaintiffs to Motion to Certify, JA-4119-29)

Intervenors lead their brief with an extraordinary argument that they did not receive fair notice of the district court's intent to consider and resolve intervenors' remedial rationales for opposing plaintiffs' motion for summary judgment. The argument is so riddled with error and contradiction as to be frivolous. The essence of it is that intervenors did not understand plaintiffs' motion for summary judgment to implicate intervenors' remedial justifications for the University's racial preferences. The disingenuousness of the contention can be shown from a number of sources, not least of which are intervenors' own filings in the district court and this Court.

Plaintiffs first filed a motion for partial summary judgment on liability on April 9, 1999. (R. 77 Motion for Summary Judgment, JA-202-03) Although intervenors had not yet been admitted as parties to the lawsuit, in motions filed in this Court they argued that plaintiffs' motion directly bore upon their legal arguments and that their legal interests would be "irreparably harmed" if plaintiffs' motion was granted. *See* Motions of Proposed Defendant-Intervenors to Supplement the Record and to Stay District Court Proceedings at pg. 2, 9, dated May 19, 1999 (Appeal No. 98-2248). ("The parties have filed cross motions for summary judgment in the proceedings below which together have a direct bearing on the issues raised in this interlocutory appeal"; "Should the district

court grant Plaintiff-Appellees Motion . . . Defendant-Intervenors will suffer irreparable harm to their significant legal interests.").

As intervenors concede, plaintiffs made an argument in their initial summary judgment brief that the University's racial preferences could not be defended on remedial grounds because the University had not adopted the preferences for those reasons. *See* Intervenors' Br. at 27, n.19. (R. 77 Motion and Memorandum, pg. 25, JA-239) One year after this Court granted intervenors permission to join in the lawsuit, plaintiffs renewed their motion for summary judgment. (R. 156 Renewed Motion, JA-1066-68) Plaintiffs' renewal of the motion for summary judgment specifically adopted their original summary judgment briefs and arguments. (R. 156 Renewed Motion, pg. 1, JA-1066)

Intervenors filed a brief opposing plaintiffs' renewed motion for summary judgment and specifically stated that they "oppose Plaintiffs' motion . . . on the ground that . . . summary judgment is inappropriate because, at a minimum, a triable issue exists as to whether the [admissions] program serves the uncontroverted compelling interest in remedying LS&A's past and current discrimination against minorities." (R. 175 Intervenors' Response, pg 2-3, JA-2213-14) Intervenors timely submitted to the district court more than 45 pages of briefing and hundreds of pages of exhibits in opposition to plaintiffs' motion and in support of intervenors' remedial arguments. They attended the November 16, 2000, oral argument in the district court on the motions for summary

judgment and argued that plaintiffs' motion should be denied on grounds of the remedial justifications offered by intervenors. (R. 204 Transcript, pg. 57-75, JA-4186-4204) All the arguments on the merits urged now by the intervenors on appeal were made to the district court. Plainly, intervenors understood then (as they understand now) that plaintiffs' motion for summary judgment implicated their purported remedial defenses. It is utter nonsense for them to suggest that they "were not on notice that they needed, in effect, to bring forward all the facts that they would put forward at trial to conclusively establish the existence of a remedial interest." Intervenors' Br. at 28.

Regardless of the notice given to a non-moving party, summary judgment is appropriate if no prejudice is shown from the district court's decision.[3] *Harrington v.*

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[3] This Court has even upheld entry of summary judgment against a party in circumstances, unlike here, where no motion for summary judgment had been filed. *See Shelby County Health Care Corp. v. Southern Council of Indust. Workers Health & Welfare Trust Fund*, 203 F.3d 926, 931-32 (6th Cir. 2000) (district court did not abuse its discretion in converting defendant's motion to dismiss into motion for summary judgment and entering summary judgment against defendant and in favor of non-moving plaintiff on the issue of liability where both parties submitted numerous exhibits and defendant filed a reply to plaintiffs' response and thus had an opportunity to respond to the arguments and exhibits that plaintiff submitted); *In re Century Offshore Mgmt. Corp.*, 119 F.3d 409, 412 (6th Cir. 1997) ("In the instant case, the parties fully briefed the determinative issue. . . .Thus, summary judgment [in favor of non-movant in the absence of a cross motion] was an appropriate procedure here."); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 393 (6th Cir. 1975) ("Since Dayco participated in the pretrial proceedings and filed counter-affidavits, it cannot claim unfair surprise when the district court converted the motion to dismiss to one for summary judgment.").

Vandalia-Butler Bd. of Educ., 649 F.2d 434, 436 (6th Cir. 1981). *See also Salehpour v. University of Tennessee*, 159 F.3d 199, 204 (6th Cir. 1998) ("Plaintiff not only had ample time to respond to Defendants' motion, but actually did respond with over two hundred pages of materials."). Here, intervenors had ample notice and used it to make their arguments and submissions to the district court.[4]

Although intervenors certainly knew that their remedial rationales were implicated by plaintiffs' motion for summary judgment, they are wrong in arguing that the remedial arguments had to be explicitly addressed in plaintiffs' motion.[5] In moving for summary judgment under Rule 56, a plaintiff seeks recovery in favor of its claims, not against particular arguments. *See* Fed. R. Civ. P. 56 ("A party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.") (emphasis added). As noted in the foregoing discussion on jurisdiction, a "claim" has a well-defined legal meaning and is not

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[4] In light of the foregoing analysis, it would be surprising if the two lone cases cited by intervenors supported their position. They do not. In neither *Harrington v. Vandalia-Butler Bd. of Educ.*, 649 F.2d 434 (6th Cir. 1981), nor *GBJ Corp. v. Eastern Ohio Paving Co.*, 139 F.3d 1080 (6th Cir. 1998), had the legal issues upon which the district court granted summary judgment been briefed or argued—by either side.

[5] Even if there were such a requirement, as noted above, plaintiffs' original brief in support of the motion for summary judgment, adopted by plaintiffs in their renewed motion, explicitly argued that remedial justifications could not justify the University's racial preferences.

synonymous with "argument" or "issue." Consistent with Rule 56, plaintiffs unambiguously moved for summary judgment in their favor on liability for the claims pled in the complaint.[6] In a case alleging race discrimination it is well known that once a plaintiff has shown that race was a factor in defendants' decisionmaking with respect to the plaintiff, the burden shifts to the defendants to justify such racially differential treatment with a compelling governmental interest. *See, e.g.*, *Brunet v. City of Columbus*, 1 F.3d 390, 405 (6th Cir. 1993) (burden is on the government to show that it had a compelling governmental interest in engaging in race-conscious or sex-conscious decisionmaking). Once plaintiffs moved for summary judgment on liability, therefore, the burden shifted to the University and intervenors to come forward with evidence that the University's racial preferences were motivated and justified by a compelling governmental interest.[7]

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[6] Intervenors assert that "[p]laintiffs and the University cross-moved for partial summary judgment on the question of the constitutionality of race-conscious admissions policies as a means of achieving a diverse student body." Intervenors' Br. at 6. Rule 56 does not authorize moving for summary judgment on a "question." But even if it did, that is not what plaintiffs did. Nothing like what intervenors described appears in plaintiffs' motion. As discussed in the text above, plaintiffs moved for summary judgment on liability.

[7] The intervenors' contention that the district court erred "in treating Plaintiffs as having moved for summary judgment against intervenors' remedial defenses" (Intervenors' Br. at 29) is thus ironic; plaintiffs did move against those defenses because a summary judgment motion on liability moved against any defenses.

B. Intervenors Waived Any Objection to Notice by Not Raising It in the First Instance with the District Court.

If intervenors had genuinely believed they had been deprived of an opportunity to respond to plaintiffs' motion, they waived any objection by not asking the district court at any time to afford intervenors further opportunity to respond to plaintiffs' motion. To the extent that intervenors were concerned that their submissions were not sufficient to support their legal arguments, they could have sought to supplement the record after the November 16, 2000, oral argument. Having failed to do so, they should not now be heard to complain that they would have submitted even more evidence "if only they had known." *See Oppenheimer v. Morton Hotel Corp.*, 324 F.2d 766, 767-68 (6th Cir. 1963) (affirming district court's decision to grant summary judgment on less than 10 days' notice where "[a]t the hearing of the motion for summary judgment the trial judge asked counsel if he had any further evidence to submit and he replied in the negative").

Because intervenors raise their procedural argument for the first time on appeal, it should be dismissed. *United States v. Miller*, 318 F.2d 637, 638-39 (7th Cir. 1963) (intervenor-defendant waived right to object to summary judgment decision against her on grounds that she received inadequate notice that the plaintiffs' motion was specific to her, where she raised no notice objection in the district court and fully participated in the hearing). Moreover intervenors have not even at this late date identified any additional

facts or evidence that they would have offered to oppose plaintiffs' motion for summary judgment. *See Thacker v. Whitehead*, 548 F.2d 634, 636 (6th Cir. 1977) (plaintiff's assertion of inadequate notice and prejudice was "so insubstantial as not to need further argument" where plaintiff did not raise an objection in the district court to the timing of the summary judgment decision, did not file a motion to vacate the order, and failed to show what additional evidence could or would have been submitted).

III. THE DISTRICT COURT PROPERLY RULED AGAINST INTERVENORS AS A MATTER OF LAW.

Intervenors' proffered remedial justifications for the University's racial preferences must be rejected because they are foreclosed by unambiguous Supreme Court precedents that pose insuperable legal barriers to intervenors' theories. First, the undisputed record demonstrates that the University was not motivated by the remedial justifications volunteered by intervenors. Second, intervenors' remedial arguments are thinly disguised proxies for arguments based on remedying the effects of societal race discrimination. Third, even if intervenors' post-hoc rationales based on remedying past discrimination could justify racial preferences, the preferences at issue here are not even close to being narrowly tailored to the interests asserted. The district court essentially—and correctly—agreed with each of these independent reasons for dismissing intervenors' arguments.

A. Intervenors' Post-Hoc Remedial Justifications Are Irrelevant Because They Did Not Motivate the University to Adopt Its Racial Preferences.

This Court should dispose of the merits of intervenors' appeal in short order because the "remedial" rationales they rely upon did not actually motivate the University's race-conscious admissions policies. A long line of decisions, many reached by the Supreme Court, clearly establish that post-hoc rationalizations such as those offered by intervenors are not sufficient to withstand strict scrutiny. Consequently, intervenors' appeal can be dismissed on this basis alone.

1. The Only Relevant Rationales for the Admissions Policies at Issue Are Those Which Motivated the University.

The leading case addressing this issue is the Supreme Court's decision in *Shaw v. Hunt*, 517 U.S. 899 (1996). In that case, the Court invalidated the drawing of two predominantly minority voting districts by the North Carolina legislature. One of the dissenters on the Court would have upheld the redistricting plan on the grounds, among others, that several reasons "may have motivated" the legislature to favor the creation of two minority districts. *Id.* at 941 (Steven, J., dissenting). However, the Supreme Court agreed with the district court's conclusion that the State had <u>not</u> been motivated by an interest in ameliorating past discrimination, noting that "[w]hile some legislators invoked the State's history of discrimination as an argument for creating a second majority-black district, the court found that these members did not have enough voting power to have

caused the creation of the second district on that basis alone." *Id*. at 909. Based on this finding, the Court concluded that the remedial rationales proffered by the State did not and could not support its redistricting plan:

> . . .[A] racial classification cannot withstand strict scrutiny based upon speculation about what "may have motivated" the legislature. To be a compelling interest, the State must show that the alleged objective was the legislature's "actual purpose" for the discriminatory classification . . .

Id. at 908 n.4 (citing *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 730 & n.16 (1982)).

The case cited and relied upon by the Court in *Shaw* for the foregoing proposition is one that in fact arose in the university admissions context. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the Court struck down a university admissions system that excluded men from a nursing school. In litigation, the state justified its exclusionary policy on the ground that it was engaging in "educational affirmative action" by "compensat[ing] for discrimination against women." *Id.* at 727-28. However, the Court concluded that the exclusionary policy actually perpetuated stereotyped views of women and that "although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective [was] the actual purpose underlying the discriminatory classification." *Id.* at 730; *see also id.* at 730 n.16 ("Even were we to assume that discrimination against women affects their opportunity to obtain

an education or to obtain leadership roles in nursing, the challenged policy nonetheless would be invalid, for the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination.").

In *United States v. Virginia*, 518 U.S. 515 (1996), the Court again made clear in the educational admissions context that a governmental interest sufficient to justify gender discrimination must be one that actually motivated the state's discriminatory conduct. In that case, the Virginia Military Institute asserted that it had relied on educational diversity and the "pedagogical benefits" to some students of single-sex education. *Id.* at 535. The Court did not reach the question whether these stated interests were important governmental interests[8] that could justify gender discrimination because the Court found that the proffered justifications were not the state's "actual purposes" in excluding women from their school:

> Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs

[8] Because both *Hogan* and *United States v. Virginia* involved gender discrimination, the Court applied an "intermediate" standard of review that requires the state to show that the challenged classification "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *United States v. Virginia*, 518 U.S. at 515. The "strict" standard of scrutiny that must be applied to the University's race-conscious admissions policies in the present case is even more restrictive.

> that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.

Id. at 535-36 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 & n.16 (1975) ("mere recitation of a benign [or] compensatory purpose" does not block inquiry into the actual purposes of government-maintained gender-based classifications)); *Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977) (rejecting government-proffered purposes after "inquiry into the actual purposes"). *See also Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 597 (3rd Cir. 1996) (in action challenging city ordinance creating subcontracting set asides, Court holds that "[t]he party challenging the race-based preferences can succeed by showing . . . that the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role"); *Podberesky v. Kirwan*, 956 F.2d 52, 56 n.4 (4th Cir. 1992) (race based scholarship could not be justified on diversity grounds where "it does not appear that [University] established the [scholarship] with this goal in mind"); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (Justice department's identification of "compelling interests" supporting FCC affirmative action program held irrelevant; "[a]s the independent agency [FCC] which promulgated the regulations in question, its view of the government interest it was pursuing must be accepted").

The cases cited by intervenors do not permit them a way around the requirements of *Shaw* and its progeny. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the defendant School Board argued that "the governmental purpose or goal advanced . . . was the School Board's desire to correct . . . prior employment discrimination against minorities while avoiding further litigation." *Id.* at 287 (1986) (O'Connor, J.). In light of this admission by the state actor involved, Justice O'Connor stated her position that contemporaneous findings of prior discrimination against minorities at the time the affirmative action policies were adopted would have provided a "desirable" evidentiary safeguard that the school district did, in fact, adopt the policy for its purportedly remedial purpose, but were not required. *Id*. at 289-90. There is nothing in her opinion, much less the opinion of the plurality, to suggest that evidence of the school district's actual motive would not have been required if the school district had not acknowledged that it adopted its policy for a remedial purpose.

Intervenors similarly misconstrue the nature of this Court's holding in *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). Although the Court allowed intervenors to join this action on the grounds that "the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria," *id.* at 401, the Court did not (and could not) reject the numerous Supreme Court precedents discussed above or absolve intervenors of the burden of

proving their case. That burden consists not merely of compiling and presenting evidence of past discrimination by the University or disparate impact; it extends to proving that the University was actually motivated by its alleged past discrimination or disparate impact theories (even if the University itself chooses not to assert those motivations in defense of its policies). Intervenors did not meet this burden, and the district court properly rejected their arguments for this (and other) reasons. *Cf. Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("[A]n intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.").

2. Intervenors' "Remedial" Justifications Did Not Motivate the University to Adopt Its Discriminatory Admissions Policies.

After reviewing the voluminous evidence put forth by intervenors and the other parties to this lawsuit, the district court concluded that "Defendant-Intervenors have failed to present any evidence that the discrimination alleged by them, or the continuing effects of such discrimination, was the real justification for the LSA's race-conscious admissions programs." (R. 210 February 26, 2001, Opinion, pg. 8, JA-110) This conclusion is amply supported by the record before this Court. As the district court noted, the University defendants have never claimed that the challenged programs were implemented as a means to remedy past discrimination. (R. 210 February 26, 2001,

Opinion, pg. 10, JA-112) Based on this record, it is clear that the University defendants did not adopt their current admissions policies with intervenors' remedial arguments in mind, and do not advance such remedial arguments now.[9] Consequently, such "remedial" justifications are insufficient, as a matter of law, to support the University's heavy consideration of race as part of its admissions process.

The evidence that intervenors rely upon to establish a remedial purpose, such as the "Michigan Mandate," does not support a contention that defendants had remedial purposes in mind in implementing the policies at issue. The language from the Michigan Mandate quoted by intervenors merely confirms that the University wished to increase the number of underrepresented minority students on campus. As the district court noted, President Duderstadt "described the Michigan Mandate as an attempt to better respond to the diversity of the nation and the world, by trying to change the nature of the institution itself so that all ethnic groups could be brought fully into the life and leadership of the institution," and proclaimed that it was enacted "with the goal of building a multicultural learning community which values, respects, and draws intellectual strength from the rich

[9] In their principal brief filed in the consolidated appeals in this case (Nos. 01-1333, 01-1416 and 01-1418) the University defendants again made this point crystal clear: "Although Defendant-Intervenors argued that 'LSA has a compelling interest in remedying the University's past and current discrimination against minorities,' the University has 'never justified [its] race-conscious admissions policies on remedial grounds,' and does not do so here." Defs.' Br. at 3 n.2.

diversity of people from different races." (R. 210, February 26, 2001, Opinion, pg. 9, JA-111) This sentiment is also reflected in a series of letters written in 1995 (the year of the first challenged admissions policies in this case), in which President Duderstadt characterized the Michigan Mandate as the University's "commitment to make the University of Michigan a national and world academic leader in the racial and ethnic diversity of its faculty, students, and staff," and repeatedly referred to the University's efforts to "achieve diversity," "better reflect ethnic, racial, and socioeconomic diversity," and "to build a richly diverse community of students." (R. 210 February 26, 2001, Opinion, pg. 9, JA-111)

There is an equal dearth of evidence to support any position that the University was motivated to adopt the racial preferences at issue either by what intervenors consider the disparate impact on minorities of other aspects of the admissions polices or by a hostile racial climate on campus. Intervenors' failure to produce any such evidence of a connection between the defendants' motives and the policies at issue is fatal to intervenors' remedial arguments.[10]

[10] Curiously, although intervenors had party status after this Court allowed their intervention in the case, and the district court then allowed months of additional discovery, intervenors took no depositions of University officials (past or present), which they might have done, of course, to elicit evidence on defendants' motives in adopting the racial preferences at issue.

B. The Justifications Proffered by Intervenors Are Not Compelling Interests.

Even if the University had been motivated by the reasons favored by intervenors, these rationales could not constitute compelling governmental interests justifying racial preferences. The three remedial justifications offered by intervenors are all variations on a theme that the University may use racial preferences to remedy the effects of societal discrimination against minorities. None of them relate to remedying identified intentional discrimination.

1. The University's Racial Preferences Cannot Be Justified on a "Disparate Impact" Theory.

Intervenors selectively assail certain of the non-racial aspects of the University's admissions criteria, particularly some of the factors that result in an award of points in scoring LS&A applications for admission. The factors complained of are for school and curriculum quality, geography, and alumni relations. Intervenors contend that minority groups are disadvantaged on these factors, thereby justifying the University's racial preferences. This Circuit, sitting en banc, has rejected exactly this kind of reasoning:

> It should be unnecessary to add that a public employer cannot be allowed to justify reverse discrimination by the bootstrap method of an alternating sequence of racial promotions (or hires). That is, the city cannot get points for using a presumptively biased eligibility list to make a string of white promotions and then turning around and trying to do some

> rough racial justice by promoting two blacks from the bottom of the list.

Aiken v. City of Memphis, 37 F.3d 1155, 1164 (6th Cir. 1994) (en banc) (quoting *Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir. 1993) (en banc)). *See also Ensley Branch NAACP v. Seibels*, 31 F.3d 1548, 1572 (11th Cir. 1994) ("Use of racial hiring quotas to mask the effects of discriminatory selection procedures places grievous burdens on blacks as well as whites."). Consequently, intervenors' proposed "disparate impact" argument cannot, as a matter of law, constitute a defense to the University's race-conscious admissions policies.

The kind of discrimination that can justify a narrowly tailored race-conscious remedy is past, identified intentional discrimination. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) ("In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."); *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). *See also Brunet v. City of Columbus*, 1 F.3d 390, 406 (6th Cir. 1993) ("[A] prima facie case of intentional

discrimination is sufficient to support a public employer's affirmative action plan.").[11] That is not what intervenors put forward with their "disparate impact" theory.

Intervenors, moreover, have not even demonstrated that the LS&A policies have a disparate impact on racial minority groups. This is because they selectively focus on a few of the factors and ignore others. One of the factors under the current system is an award of 20 points for socioeconomic disadvantage. Intervenors never establish why the weight of this race-neutral factor is not sufficient by itself to counteract the impact of the factors complained about, which are assigned significantly fewer points.[12] Indeed, intervenors have produced no evidence ruling out, and they apparently did not

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[11] *See also, e.g., People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 534 (7th Cir. 1997) (provision calling for certain percentage of hired teachers to be black or Hispanic could not be justified by statistical disparities or underrepresentation; "there is no finding that the school district has ever discriminated (by which we mean discriminate intentionally—the only kind of discrimination that violates the equal protection clause)"); *Wessmann v. Gittens*, 160 F.3d 790, 817 (1st Cir. 1998) (Lipez, J., dissenting) (although dissenting judge supports race-conscious admissions at selective public school, he rejects claim that low percentages of African Americans or Hispanics applying to the school or the disparate impact of admissions exam to the school are sufficient to justify race-conscious policy; "these disparate impact contentions are wrong because they do not account for the centrality of proof of discriminatory animus in justifying a race-conscious remedial program").

[12] Intervenors conducted no discovery to ascertain, and they produced no evidence to assess, the extent to which minority students who receive no points for "school," "curriculum," "geography" or "alumni" may still be eligible for points based on socioeconomic factors. Nor did the present <u>any</u> evidence about the overall impact of <u>all</u> non-racial criteria.

investigate, whether the 20-point award for socioeconomic status actually causes white students as a group to suffer the net disparate impact under the University's admissions policies.

One unsurprising consequence of the fact that the University was not itself motivated by a "disparate impact" rationale is that there is no evidence in the record explaining the relative sizes of the relationships between the factors complained of by intervenors and the racial preferences. How is it, for example, that a 4-point award for alumni connections justifies a whopping 20-point award for skin color under the 1998-present admissions policies? How can adding a tenth of a grade-point to relatives of alumni explain the half-point added for minority racial status, plus the award of "reserved" seats to racial minorities under the 1995-1997 policies? The answer, of course, is that the size of these relationships cannot be defended on a disparate impact theory because they were not designed for that purpose. Intervenors have not even tried to construct a post-hoc explanation of the size of the relative weights. This problem also poses an obvious narrow-tailoring barrier (no closeness or precision of "fit" between objective and remedy) to intervenors' disparate impact theory of justification.

There is even more trouble for the intervenors' concoction. They neglect to mention that their own expert's reports show that many individual minority students receive prized points for the factors disapproved by intervenors, while many whites or

disfavored minorities received no points at all.[13] (R. 180 Vol. III Expert Reports, Silver & Rudolph, pg. 14-17, JA-3699-3702) In spite of this undisputed fact, all underrepresented minority students, even those who receive points for school, curriculum, alumni, or geography also receive preferential treatment on the basis of their racial minority status, while others, like whites and Asian-Americans, receive no favored treatment based on race.

Jennifer Gratz provides just one illustration of how the alleged SCUGA disparities failed to benefit all white students. Gratz received no points for school quality, geography, or alumni connections, and, of course, she was accorded no preference on the basis of her race. (R. 180, Vol. III Expert Reports, Silver & Rudolph, pg. 9-10, JA-3695-96) On the other hand, many underrepresented minority students who applied the same year (1995) as Gratz received some SCUGA points in addition to the preference they automatically received for skin color. (R. 180, Vol. III Expert Reports, Silver & Rudolph, Appendix, pg. 34 (Table 15), JA-3718) Hence, it is abundantly clear that the factors challenged by intervenors can cut either way, often without regard to race.

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[13] For example, Silver's report establishes that for the entering 1995 class, more than one thousand non-minority students received no advantage from the SCUGA factors, while more than one thousand underrepresented minority applicants did receive SCUGA points. (R. 180 Vol. III Expert Reports, Silver & Rudolph, Appendix, pg. 34 (Table 15), JA-3718)

The gross effect that these factors may have on racial groups cannot justify race discrimination against individuals. *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.) ("[T]he 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.'") (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). If certain criteria are determined to disproportionately disadvantage some racial groups, the obvious remedy—and the narrowly-tailored one—is to remove the criteria. The racial preferences do not "remedy" the alleged disparate impact, because these other criteria have been left in place.[14] *Cf. Connecticut v. Teal*, 457 U.S. 440, 442, 452-56 (1982) (test which had disparate impact and eliminated minority candidates was not saved by affirmative action program for minorities that qualified under test). Intervenors argue in effect that two wrongs make a right, and that the allegedly discriminatory criteria should be matched with countervailing discriminatory criteria. However, as Jennifer Gratz's predicament makes clear, this "remedy" does not make the University's admissions process more fair. Indeed, awarding large preferences automatically on the basis of race makes the system both unfair and illegal, even if the motive is a "benign"

[14] Thus, under intervenors' theory of liability, the University could still, even with the use of racial preferences, have its federal funds cut off for continuing to use criteria, including standardized test scores, that result in a disparate impact. *See* Intervenors' Br. at 36-37 & nn.23, 24.

one. *See Croson*, 488 U.S. at 494 ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification."); *Regents of the University of California v. Bakke*, 438 U.S. 265, 289-90 (1978) (Powell, J.) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.").

2. The University's Racial Preferences Cannot Be Justified By Remote Prior Discrimination or a "Negative Racial Climate" on Campus.

Intervenors alternatively argue that "the University's race-conscious admissions program serves a compelling interest in remedying the present effects of past discrimination against minorities and addressing the current negative racial climate." Intervenors' Br. at 43. Plaintiffs agree that remedying the present effects of past identifiable and purposeful discrimination is a recognized compelling governmental interest. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). However, there is no evidence that the University's race-conscious admissions policies are justified by such considerations.

a. The University Does Not Have a Compelling Interest in "Remedying" Discrimination Unrelated to Admissions and Remote in Time.

In opposing plaintiffs' motion for summary judgment, intervenors did not produce an iota of evidence that the University or the LS&A ever facially discriminated against minorities in admissions decisions. The district court found that "[t]here is absolutely no evidence that minorities were ever outright excluded from admission to the University." (R. 210 February 26, 2001, Opinion, pg. 15-16, JA-117-18) Having failed to produce any relevant evidence of past discrimination in this regard, intervenors' remedial arguments were properly rejected.

Moreover, even if intervenors' allegations of discrimination by the University against minorities in areas other than admissions were relevant to the present suit, these incidents occurred "years before the challenged [admissions] policies were put in place."[15] (R. 210 February 26, 2001, Opinion, pg. 16, JA-

[15] Much of the evidence which intervenors have produced in this regard comes from hearsay accounts which appear in the reports of their expert witnesses, most notably James Anderson. Although experts may rely for their opinions on some types of facts not necessarily admissible in evidence, *see* Fed. R. Evid. 703, it is clear from intervenors' brief that they are relying on the underlying alleged "facts" of discrimination, not expert opinion, to buttress their appeal. Consequently, the vast majority of what intervenors rely on (*e.g.*, comments and anecdotes from current and former students) is inadmissible hearsay that should not be considered in evaluating the district court's decision to grant summary judgment. *See* Fed. R. Civ. P. 56(e) ("[S]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."); *see also State Mut. Life Assurance Co. v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979); *Daily Press, Inc. v. United Press Int'l*, 412 F.2d 126, 133

118) The most recent evidence of any form of discrimination by the University itself which appears in the record dates back to the 1960s. (R. 210 February 26, 2001, Opinion, pg. 12-13, JA-114-15) Other evidence cited by the intervenors dates back to 1817. These allegations of discrimination are simply too remote in time to justify the University's modern-day discrimination in the form of racial preferences. *See, e.g.*, *Brunet v. City of Columbus*, 1 F.3d 390, 405 (6th Cir. 1993) (discriminatory policy against women prior to 1975 was too remote in time to support gender preferences in a consent decree that was entered into in 1989).

Because the discrimination complained of by intervenors occurred well before today's applicants to the LS&A were even born (and in some cases, before their parents or grandparents were even born), it is not surprising that intervenors failed to introduce evidence of any present effects of such discrimination. Although intervenors blankly allege that "[t]hese discriminatory practices have served to exclude African-Americans and Latinos from the University, deterring some from attending and affecting the retention of those who remain," Intervenors' Br. at 44, not a single witness in this case testified that he or she chose not to attend the LS&A because of these remote instances of alleged discrimination. Similarly, there is no evidence that the "current racial climate" on

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(6th Cir. 1969). Plaintiffs objected in the district court to any consideration of such hearsay evidence. (R. 188 Reply Memorandum, pg. 11 n.7, JA-4043)

campus stems in any way from these historical events. Consequently, the district court properly rejected these "remedial" justifications. *See Freeman v. Pitts,* 503 U.S. 467, 494 (1992) ("Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance which is caused by demographic factors.").

b. The University Does Not Have a Compelling Interest in Remedying Discrimination by Third Parties or that Creates a "Negative Racial Climate" on Campus.

The allegations of prior discrimination are merely a front for intervenors' real contention that the University has a compelling interest in boosting minority enrollment in order to remedy the current racial climate on campus. However, the University itself is not the cause of this alleged racial hostility. (R. 210 February 26, 2001, Opinion, pg. 20, JA-122) Nor have intervenors presented evidence that the University has been a "passive participant" in these episodes. What conduct some students engage in cannot justify adoption of racial preferences by the University. *See Croson,* 488 U.S. at 491-92 (although a state or local subdivision has the authority to eradicate the effects of private discrimination within its own jurisdiction, it must do so within the constraints of the Fourteenth Amendment; only if the governmental unit involved can show that it has become a "passive participant" in such discrimination may it take affirmative, race-conscious steps to address such private prejudice); *American Mfrs. Ins. Co. v. Sullivan*,

526 U.S. 40, 52 (1999) (state action occurs only where state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State") (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978)); *Sullivan*, 526 U.S. at 53 (state's decision to give insurers an additional option for deferring payment for unreasonable treatment "can in some sense be seen as encouraging them to do just that," but such "subtle encouragement" does not constitute state action for purposes of the Fourteenth Amendment).

To the extent that intervenors' allegations of racial hostility on campus are accurate, they are certainly inconsistent with the University's position that its focus on diversity has had a positive impact on racial relations on campus. However, there is no suggestion that instances of race discrimination that occur informally on the University campus, whether in the classroom or in social settings, are different or worse than the kinds of discrimination that occurs generally in society. The case is closed on whether such generalized societal discrimination can justify state-sponsored racial preferences. It cannot. *Croson*, 488 U.S. at 505-06; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality) ("Societal discrimination, without more, is too amorphous a basis for . . . imposing a racially classified remedy."). As the Court in *Croson* explained:

> To accept [the] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications. . . ." *Bakke*, 438 U.S., at 296 -297 (Powell, J.). We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

488 U.S. at 505-06.

The fact that such societal discrimination happened (or happens) to take place on the University of Michigan campus does not make intervenors' remedial justification any less amorphous. Intervenors fail to explain how the remedy "fits" the specific instances of harm that they allege; how a court determines where the "logical stopping point" is; or how this remedy could avoid becoming "ageless" in its reach into the past and "timeless" in its effect into the future. *See Wygant*, 476 U.S. at 276 (plurality).

Moreover, the ostensible "remedy" which intervenors advocate merely serves to fuel racial passions by pitting various racial groups against one another, and reinforcing the underlying premise of racial inferiority that gives rise to discriminatory attitudes in the first place. *See 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.") (citing *Bakke*, 438 U.S. at 298 (Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."); *Hopwood v. Texas*, 78 F.3d 932, 953 & n.45 (5th Cir. 1996) ("racial preferences, if anything, can compound the problem of a hostile environment"). Consequently, there is no legal justification for the University to discriminate in admissions on this basis.

c. The University's Racial Preferences Are Not Narrowly Tailored to Remedy the Harms Alleged by Intervenors.

Aside from the fact that the intervenors' remedial justifications cannot as a matter of law qualify as compelling interests, intervenors have failed to meet their burden of establishing that the University's racial preferences are "narrowly tailored" to accomplish their objective. *See e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (racial "classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests"). In order to make this showing, intervenors must demonstrate that the University's race-conscious admissions policies have been crafted with precision, and that they are the least drastic remedy practically available. *See Bernal v. Fainter*, 467 U.S. 216, 217 (1984) (to satisfy strict scrutiny, "the State

must show that [the challenged law] furthers a compelling state interest by the least restrictive means practically available"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973) ("[S]trict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its [racial classification] has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives."). Intervenors have failed to make either showing. Consequently, summary judgment was appropriately entered on this basis as well.

There is a glaring disconnectedness between intervenors' grievances concerning the University's admissions policies and the "remedy," *i.e.*, racial preferences, that intervenors seek to justify. This is to be expected, since the University admits it was not motivated by the intervenors' concerns. But the absence of a fit, much less a close fit, is fatal to intervenors' legal theories. Moreover, even if the policies in question had been adopted with a remedial purpose in mind, intervenors fail to explain how the University's past practices or the past or present behavior of certain students is actually remedied by race-conscious admissions decisions. Intervenors cannot overcome this problem by simply ignoring it. *See Croson*, 488 U.S. at 500 ("[W]hen 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.").

Intervenors have failed to demonstrate "closeness of fit" not only in theory, but also in fact. Nowhere do intervenors explain how the University's past or present policies and practices (or student behavior) regarding, to list a few examples, housing assignments, sorority and fraternity practices, campus graffiti, hate mail, faculty hiring, police misconduct, etc., are remedied by race-conscious admissions policies. And they have presented no evidence that the University's use of racial preferences in favor of minorities, which dates back at least to the 1970s, has improved anything with respect to complaints of racial hostility and misconduct on the University of Michigan campus. Indeed, intervenors complain as much about the current racial climate on campus as they do about the University's "history of discrimination" against minorities. As noted above, one reasonable conclusion for this is that the University's preferential policies in fact perpetuate much of the alleged hostility among racial groups.

Aside from intervenors' failure to establish that the University's racial preferences are carefully crafted or even efficacious, they do not discuss, much less demonstrate, the unavailability of race-neutral alternatives to remedy the alleged racial discrimination and hostility on campus or the disparate impact of some admissions criteria. It seems rather self-evident that the appropriate, narrowly tailored solution to the problem of racial

incidents is to find and punish the offenders on campus and, with respect to criteria with disparate impact, to eliminate or mitigate these criteria, rather than add to the discrimination by adopting admissions policies that discriminate on the basis of race. Having failed to show that the University has considered these alternatives, or any others, intervenors do not approach the showing necessary to establish narrow tailoring. *See Croson*, 488 U.S. at 506 (rejecting defendant's contention that minority set-aside program was narrowly tailored in part because "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting").

Intervenors' limited discussion of narrow-tailoring misses the mark. First, intervenors trot out the rote argument (also made by the University) that "[t]he program considers race flexibly, containing no quotas or numerical goals." Intervenors' Br. at 42. As plaintiffs argued in their principal appellants' brief, there is nothing flexible about the University's policies of automatically awarding 20 points to every minority applicant solely because of his or her race and without regard to other circumstances. This "pre-existing commitment to a fixed amount of preference," *Middleton v. City of Flint*, 92 F.3d 396, 413 (6th Cir. 1996), makes the LS&A admissions program the "functional equivalent of a quota system." *Bakke*, 438 U.S. at 318 (Powell, J.). And, indeed, the undisputed effect of the policy is the admission of "virtually" 100 percent of students

from the three favored racial minorities who meet at least minimum qualifications. (R. 205 Joint Summary of Undisputed Facts, pg. 3, JA-4095)[16]

Second, intervenors argue that "consideration of race only has a marginal effect on the probability of admission for non-beneficiaries." Intervenors' Br. at 42. The faulty premise here is that rights are conferred on racial groups, rather than individuals. As a matter of logic, for every minority student who is admitted because of race, there is a non-minority student who is rejected because of race, and vice versa.[17] The ratio is one-to-one. Moreover, if intervenors' argument had merit, it is hard to understand the result

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[16] Intervenors' argument that race is not a "predominant factor" in admissions, whether true or not, is beside the point. Intervenors' Br. at 42. This test has been employed in voting redistricting cases to determine whether strict scrutiny should apply at all. *See*, *e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 907-08 (1996); *Hunt v. Cromartie*, 121 S. Ct. 1452, 1464 (2001) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.") (quoting *Bush v. Vera*, 517 U.S. 952, 958 (1996)). The test has not been employed by the Court in cases challenging differential treatment of individuals in the conferring or withholding of a benefit on the basis of a racial classification. Indeed, defendants' apparent concession that strict scrutiny is applicable here demonstrates that such (redistricting) cases are not on point. On a point of lesser significance, intervenors' experts are demonstrably wrong in suggesting that race is less important than an applicants' test scores. Intervenors' Br. at 42. As is well known, a <u>perfect</u> SAT or ACT score can garner an applicant only 12 points under the current system, whereas skin color is worth a flat 20 points for members of the preferred races.

[17] This, of course, is a necessary corollary of one of intervenors' (and the University's) other arguments: that removing race as a factor in admissions will "drastically decrease" the numbers of minority admissions. Intervenors' Br. at 43; University Br. at pg. 56-57.

in *Bakke*, where striking down the illegal system opened up only 16 seats for the much larger number of applicants from non-preferred racial groups. *See Bakke*, 438 U.S. at 274 n.2.

Third, intervenors argue that "if the University were to switch to a race-neutral admissions scheme, minority admissions would drastically decrease." Intervenors's Br. at 43. This argument, of course, impliedly confirms what intervenors and the University elsewhere choose to deny—the racial preferences are large and frequently decisive. It also confirms that the average differences in grades and test scores between racial groups is a driving factor in the University's use of preferences because grades and test scores are so important. Moreover, it assumes something that need not be assumed: that everything else about the University's current admissions system must remain the same under a system that does not discriminate on the basis of race. The University, in the exercise of its "academic freedom," would be free to make many changes in its admissions system, including changes that could have the effect of increasing minority admissions.

Finally, intervenors contend that "[b]uilding a critical mass [of minority students] also serves to change the institutional reputation so as to counter the deterrent effect a long-standing history of discrimination can have on applicants." Intervenors' Br. at 49. Notably, intervenors offered no evidence that the University's alleged history of

discrimination has deterred minority students from applying. Indeed, as noted above, intervenors have not introduced testimony from even a single student who contends that he or she chose not to apply to or attend the LS&A because of the University's alleged reputation of prior discrimination against minorities. Also missing is any logical explanation for how increased enrollment of racial minorities improves the University's reputation for past discrimination. Moreover, even if such evidence were in the record, the narrowly- tailored solution to this problem would be to increase recruiting efforts and inform potential minority applicants that the University no longer engages in or condones such discrimination. *See also Podberesky v. Kirwan*, 38 F.3d 147, 154 (4th Cir. 1994) ("poor reputation" of previously segregated university was not a sufficient present effect of past discrimination to justify race-specific scholarship because such effects will exist so long as there is knowledge of the historical fact of the dual system); *Hopwood v. State of Texas*, 78 F.3d 932, 952-53 (5th Cir. 1996) (adopting analysis in *Podberesky*).

Conclusion

For all the foregoing reasons, Plaintiffs respectfully request this Court to dismiss the intervenors' appeal for lack of appellate jurisdiction or alternatively to affirm the district court' decision granting plaintiffs' motion for summary judgment on liability.

Dated: July 25, 2001

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Designation of Joint Appendix Contents

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

DESCRIPTION OF ITEM	RECORD NO.	FILING DATE
Complaint	1	10/14/97
Answer and Affirmative Defenses	6	12/03/97
Plaintiffs' Response to Motion to Intervene	14	02/24/98
Letter from Kirk O. Kolbo, Attorney for Plaintiffs to Judge Duggan	32	08/06/98
Plaintiffs' Motion for Class Certification; Brief and Affidavit with Exhibits	45	10/13/98
Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Class Certification	56	11/18/98
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Exh. A - Jennifer Gratz Deposition	78	04/09/99
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Exh. K - Theodore Spencer Deposition	78	04/09/99
Exh. L - James Carl VanHecke Deposition	78	04/09/99
Exh. M - Minutes of the 04/10/96 EWG Meeting	78	04/09/99

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Exh. O - Minutes of the February 12, 1997 EWG Meeting	78	04/09/99
Exh. P - "OUA" Memorandum dated 04/12/96	78	04/09/99
Exh. Q - University of Michigan's Document Entitled "Protected Categories . . . Fall Term 1996" dated 06/27/96	78	04/09/99
Exh. R - University of Michigan's Document Entitled "Fall 1998 Freshman Potential Admits," dated 01/19/98	78	04/09/99
Exh. S - Admission Policy for Minority Students	78	04/09/99
Exh. T - Executive Summary—Affirmative Action and Diversity Programs at The University of Michigan	78	04/09/99
Exh. U - Dianne E. Gauss Deposition	78	04/09/99
Exh. V - Guidelines - SCUGA 1995	78	04/09/99
Exh. W - Guidelines - SCUGA 1996	78	04/09/99
Exh. X - Guidelines - SCUGA 1997	78	04/09/99

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Exh. AA - LS&A—Guidelines for 1997	79	04/09/99
Exh. BB - U of M Admission System Transaction: Application Information Retrieve 10/28/97 - Jennifer Gratz	79	04/09/99
Exh. CC - U of M Admission System Transaction: Application Information Retrieve 10/28/97 - Patrick Hamacher	79	04/09/99
Exh. DD - LS&A—Guidelines for 1998	79	04/09/99
Exh. EE - 1998 Guidelines for the Calculation of a Selection Index for all Schools and Colleges Except Engineering	79	04/09/99
Exh. FF - Profile of the University of Michigan—Fall 1995—Underrepresented Minorities	79	04/09/99
Exh. GG - Profile of the University of Michigan—Fall 1995—Not Underrepresented Minorities	79	04/09/99

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Exh. HH - Profile of the University of Michigan—Fall 1995—Black	79	04/09/99
Exh. II - Profile of the University of Michigan—Fall 1995—Hispanic	79	04/09/99
Exh. JJ - Profile of the University of Michigan—Fall 1995—White	79	04/09/99
Exh. KK - Profile of the University of Michigan—Fall 1995—Asian	79	04/09/99
Exh. LL - Profile of the University of Michigan—Spring-Fall 1996—Revised 09/10/96—Underrepresented Minorities	79	04/09/99
Exh. MM - Profile of the University of Michigan—Spring-Fall 1996—Revised 09/10/96—Not Underrepresented Minorities	79	04/09/99
Exh. NN - Profile of the University of Michigan—Spring-Fall 1996—Black	79	04/09/99
Exh. OO - Profile of the University of Michigan—Spring-Fall 1996—Hispanic	79	04/09/99
Exh. PP - Profile of the University of Michigan—Spring-Fall 1996—Revised 09/10/96 —White	79	04/09/99

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Exh. QQ - Profile of the University of Michigan—Spring-Fall 1996—Revised 09/10/96—Asian	79	04/09/99
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Defendants' Appendix, Volume 2: Deposition Excerpts - David Hunter depo. pg. 76-82	83	05/03/99
Plaintiffs' Memorandum in Opposition	97	06/01/99
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Exh. A - Expert Report of Kinley Larntz dated 12/14/98	99	06/01/99
Exh. B - Excerpts from the Introduction of the Compilation of Defendants' Expert Reports	99	06/01/99
Exh. C - 1998 Guidelines Training	99	06/01/99
Exh. D - November 16, 1995 Letter	99	06/01/99
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Exh. F - June 5, 1996 Letter	99	06/01/99
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Exh. F - Defendants' Supplemental Objections and Response to Interrogatory Number One (1)	156	07/17/00
Plaintiffs' Motion to Strike Any Testimony or Expert Opinions (Including of William Bowen) Based on a Consideration of the College and Beyond Database and Brief	157	07/17/00
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Affidavit and Exhibits in Opposition	173	08/11/00
Exh. A - *Johnson v. Board of Regents of the University System of Georgia* 2000 U.S. Dist. Lexis 10541 (S.D. Ga. July 24, 2000)	173	08/11/00

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Exh. E - "The Michigan Mandate," published in the December 1993 issue of the *Ann Arbor Observer*	173	08/11/00
Exh. F - Expert Report of Kinley Larntz, Ph.D., dated December 14, 1998	173	08/11/00
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