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

In the United States Court of Appeals for the Sixth Circuit

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

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

v.

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

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

Ebony Patterson, et al.,

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

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

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

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Statement in Support of Oral Argument

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

Statement of Subject-Matter and Appellate Jurisdiction

For their statement of subject-matter and appellate jurisdiction, Plaintiffs incorporate the statement set forth in their opening appeal brief.

Statement of the Issues

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

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

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

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

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

Statement of the Case

For their statement of the case, Plaintiffs incorporate the statement set forth in their opening appeal brief.

Statement of Facts

For their statement of the case, Plaintiffs incorporate those facts set forth in their opening appeal brief.

Summary of Argument

The Supreme Court has never recognized "diversity" to be a compelling governmental interest justifying racial preferences, and there are sound reasons why such an interest is inherently incapable of constituting a compelling interest.

Like interests in remedying societal discrimination and providing role models to children, the diversity rationale is too amorphous and unlimited in scope and duration to support narrowly-tailored measures. Especially as articulated by defendants, the diversity rationale—focused on racial and ethnic diversity—is in many respects indistinguishable from (and equally as amorphous and unlimited as) a rationale based on remedying societal discrimination. The defendants admittedly seek through diversity in admissions to address the consequences of residential and K-12 segregation, racial isolation, racial stereotypes, and other social phenomena associated with the history of race relations in this country. Racial preferences justified on such grounds could lead to an unlimited claim for preferences in many areas of American society.

Nor can the defendants' diversity rationale be justified by the splintered opinions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which did not produce a rationale justifying the use of race in admissions on which a majority of the Court could agree. The defendants' claim that Justice Powell's singular "diversity" rationale is "settled law" is belied by the fact that many lower courts have declined to decide or hold that it is or ever was controlling.

Whatever the status of the diversity rationale may be, the defendants' fixed, rigid, and automatic award of a large number of points to every member of certain

preferred racial minorities flouts Justice Powell's insistence on an admissions process that "treats each applicant as an individual." *Id*. at 318. Defendants tellingly regard students as valuable merely for belonging to the right racial "pool." They have erected race-based double standards in the admissions process to achieve their desired level of diversity. The form of those double standards has changed some over the years, but the substance and their effect have undisputably remained the same: The defendants admit virtually every qualified student who belongs to one of the three preferred racial minority groups (African American, Hispanic, and Native American), while rejecting many qualified applicants from other racial or ethnic groups.

This Court should affirm the district court's determination that the defendants' admissions policies for years 1995-1998, with its use of dual grids and "reserved" spaces in the class for racial minorities, were illegal. It should reverse, however, the district court's order granting summary judgment in favor of defendants on the 1999-2000 admissions system and denying plaintiffs' motion for an injunction. Because defendants' admission system clearly violated even Justice Powell's strictures in *Bakke*, as the district court acknowledged for years 1995-1998, this Court should also reverse the district court's order granting the individual defendants' motion for summary judgment on grounds of qualified immunity.

Standard of Review

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

A district court's legal conclusions for its decision to grant or deny a permanent injunction are reviewed de novo. *South Cent. Power Co. v. International Bhd. of Elec. Workers, Local Union 2359*, 186 F.3d 733, 737 (6th Cir. 1999). Because the district court denied permanent injunctive relief and did so on motions for summary judgment, the standard of review for findings of fact (clearly erroneous), *id.*, and the scope of injunctive relief (abuse of discretion), *id*., are not applicable on these appeals.

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

Argument

I. The University's Admissions Policies Are Not Narrowly Tailored to Achieve the Interests in "Academic Freedom" and "Diversity" Recognized by Justice Powell in *Bakke*.

A. The University's Racial Preferences: Treating Applicants as Members of Racial Groups, Not Individuals.

It is telling that the defendants ("University") chose to ignore much of what plaintiffs argued in their opening brief about why the LS&A's mechanical racial preferences cannot pass muster under traditional narrow-tailoring requirements or Justice Powell's analysis in *Bakke*. The LS&A's automatic 20-point award[1] for racial and ethnic status is just what this Court described in striking down the racial preferences at issue in *Middleton v. City of Flint*, 92 F.3d 396, 412-13 (6th Cir. 1996): a "pre-existing commitment to a fixed amount of preference." The University does not dispute the point. It is a fatal one. Justice Powell certainly did not approve of this mechanical approach; and it finds no counterpart in the

[1] The University actually states that applicants "earn" the 20 points because of their racial or ethnic status. *See* Defs.' Br. at 49.

"Harvard plan." It certainly is not consistent with the "case-by-case," or "individualized" consideration of applicant files that Justice Powell endorsed. *See Bakke*, 438 U.S. at 319 n.53 (Powell, J.). Under its policies, the University does not need to know anything about an applicant—not his or her name, address, background, interests, experiences, achievements, academic or other credentials—other than skin color in order to award the fixed and rigid 20 points for race.[2] A machine could do what the University does in awarding points for race. This mocks Justice Powell's approach.

The University defends its automatic award of 20 points to all members from the three preferred racial minorities by reference to "pool size" and "stiff competition" from other universities for the preferred racial minorities. Defs.' Br. at 54-56. These are highly revealing statements. They crystalize the point that the University regards applicants not as unique individuals, but instead as members of discrete racial "pools." Since "race shapes everyone's experience" why bother to learn anything more than an applicant's race before granting the preference? Defs.' Br.

[2] The University defends on the ground that the award of points for race "does not mean that they [minorities] are guaranteed admission or that non-minorities are excluded from consideration." Defs.' Br. at 49. The same was true of the Davis system. The 16 reserved spaces did not guarantee any minority a spot in the class. *See Bakke*, 438 U.S. at 275-76 n.5, 288 n.26.

at 55 n.32. Besides, the goal is to get as many qualified "underrepresented" minorities as can be gotten. Applicants have value to the University simply for belonging to the right racial group. *See id.* ("To enroll meaningful numbers of minorities, every underrepresented minority receives a 'plus' for race.") (emphasis added). This is, of course, fundamentally at odds with an admissions program that "treats each applicant as an individual." *Bakke*, 438 U.S. at 318 (Powell, J.). Its focus on simple racial and ethnic diversity is precisely the kind of "discrimination for its own sake" that Powell proscribed. *Id.* at 315; *see also Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (invalidating on narrow-tailoring grounds race-based school assignment system) ("The Policy, like the Davis admissions program in *Bakke*, does not treat applicants as individuals. The race/ethnicity factor grants preferential treatment to certain applicants solely because of their race.") (emphasis added); *Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998) (invalidating on narrow-tailoring grounds a race-based school assignment policy) ("Insofar as the Policy promotes groups over individuals, it is starkly at variance with Justice Powell's understanding of the proper manner in which a diverse student body may be gathered.") (emphasis added).

B.

Quotas, Preferences, and Word Games.

The University also chose simply to ignore what this Court in *Middleton* wrote about semantical distinctions between quotas and preferences:

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

Middleton, 92 F.3d at 412-13. What *Middleton* described is essentially what the LS&A accomplished in setting up the transformation from the 1995-1998 system (with its separate grids and reserved spaces in the class for minorities) to the current, point-based system. The LS&A's quota-equivalent calls for the admission of all qualified minority students. That is a formal statement of policy that the LS&A even reduced to writing in 1995.[3] (R. 78 Affidavit-Exhibits Volume I, Exh. S,

[3] The University implies that this policy is no longer in effect: "This memo was created in 1995, well before the current admissions program was implemented." Defs.' Br. at 12 n.8. This is a *non sequitur*. The fact that the statement was first written in 1995 does not mean that it is no longer in effect. It is not one of the three "abandoned practices" referenced in the University's brief. Defs.' Br. at 12-14. Defendants have admitted that the policy of admitting all qualified minority students remained in effect after adoption of the point-based system. (R. 78 Affidavit-Exhibits Volume I, Exh. J, Marilyn McKinney depo. pg. 85-87, JA-335) Moreover, it is undisputed that the current system was designed with a goal to admit the same class as was admitted under the grid system in effect when the 1995 memo was written. (R. 99 Affidavit-Exhibits in Opposition, Exh. C, 1998 Guidelines Training, pg. 1, JA-931)

Admission Policy for Minority Students, pg. 2, JA-406) And that is undisputedly the practical effect of the LS&A's racial preferences. Whatever the new language or label, the University undisputably continues to achieve through its current racial preferences that same result—the admission of virtually all underrepresented minority applicants—that it achieved under the 1995-1998 system. *See* Defs.' Br. at 17.

The University does not immunize itself from liability by cleverly declining to label its system a "quota," or by evasively describing its goal as one to enroll "meaningful" numbers. Defs.' Br. at 54. *See Tuttle*, 195 F.3d at 707 (rejecting "distinctions without differences" in racial preferences). A policy with a purpose and practical effect of granting admission to all qualified minority students while denying that benefit to other members of racial groups is a quota system more rigorous than the one struck down in *Bakke*, where the reservation of 16 spaces in the class for disadvantaged minorities was actually a <u>limitation</u> on the quota system; the Davis policy did not seek to offer admission to all qualified minorities, and those who were not disadvantaged had to compete instead under the regular admissions system.

C.
Race-Based Double Standards: The University's "Dual" Admissions System.

In denying that a policy and practice to admit all qualified minority students, but not all qualified students from other groups, creates different admissions standards,[4] the University reveals to what extent its defense depends on assigning its own self-serving and nonsensical definitions to observed and undisputed facts. It simply defies common sense and logic to insist, as does the University, that setting a lower threshold for admission (meeting minimum qualifications, *i.e.*, capable of graduating) for designated minority students than exists for students from other racial groups (competition based on spaces available) does not amount to separate admissions standards.

In repeatedly arguing that only "qualified" minority students are admitted through its preferences, the University never confronts the fact that the same thing could be said for the Davis system struck down in *Bakke*. *See Bakke*, 438 U.S. at 275-76, 288 n.26 (Powell, J.). Not surprisingly, therefore, the University is unable to offer a cite anywhere to the opinions of *Bakke* for their argument that the decision "limits the extent to which race may be considered . . . [by prohibiting] the admission of unqualified students." *See* Defs.' Br. at 46.

[4] According to the University, "nothing in the memo [describing the"Minority Admissions Policy"] creates admissions standards separate from the guidelines that apply to all applicants." Defs." Br. at 12 n.8.

The University's argument about "pool size" is also revealing on the issue of double standards and its dual admissions system. Its discussion of the point makes clear that the issue is not pool size per se *i.e.*, the numbers of minority applicants. Instead, the University defends its mechanical preferences on the basis of the generally lower credentials of the minority applicants on the criteria of test scores and grades. *See* Defs.' Br. at 55 ("the number of underrepresented minority students nationally with grades and test scores in ranges comparable to those of most enrolled LS&A students is quite small.") (emphasis added).[5]

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[5] Throughout their brief, defendants use the word "qualified" in a variable and self-serving way. Thus, in denying the existence of a double standard, they assert that "[t]he University has made a judgment that 'qualifications' are not limited to high school grade point average and standardized test scores, and that an applicant with somewhat higher grades and scores is not necessarily 'more qualified.'" Defs.' Br. at 7. Yet when they try to justify the need for what is in fact a double standard, they use precisely the definition of "qualified" that they rejected in the prior quote. For example, defendants assert

> Despite LSA's effort, recruiting is insufficient to enroll a student body with meaningful numbers of underrepresented minority students because the pool of qualified underrepresented minority applicants is significantly smaller than the pool of qualified non-minority applicants . . . . [T]he pool of potential underrepresented minority applicants with grades and test scores comparable to the range of enrolled LSA students is quite small. For example, nationally in 1999, of all students with a B average or above and SAT scores of 1000 or above, only 11% were underrepresented minority

Ultimately, the 20-point bonus for skin color and all the other forms of the University's racial preferences are just means of allowing students from the preferred minority groups to be systematically judged by a different and lower standard than that to which applicants from other racial groups are held. The University compensates for the lower academic credentials (and "wins" in the skin-color competition with other schools) by lowering standards (*e.g.*, boosting scores) for the "underrepresented" minority pool. By its own admission—albeit indirect—the University has just what the plaintiffs have claimed all along: a race-based "dual" or "two-track" admissions system. *Bakke*, 438 U.S. at 314-15 (Powell, J.).

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students.

Defs.' Br. at 16 (emphasis added except for "only 11%"). *See also* Defs.' Br. at 55 (recruiting "efforts produce only a small pool of qualified underrepresented minority applicants") (emphasis added); *id*. at 56 ("The number of qualified underrepresented minority students who apply is smaller still . . .") (emphasis added).

Thus, defendants change the definition of "qualified" whenever it suits them. If "qualified" means something other than grades and test scores, and a student with grades and/or test scores lower than another can still be more qualified, then defendants have demonstrated nothing with their statistics cited by Camara. If "qualified" is defined with respect to grades and test scores, then defendants' definition proves the existence of the race-based double standard.

Defendants' argument that "systematic exclusion" does not occur because "[e]ach application is reviewed in its entirety according to a single set of standards" is fallacious for multiple reasons. Defs.' Br. at 48. First, as noted above, standards for admission are different based on race. Second, file "review" is certainly not inconsistent with systematic exclusion. The policy at issue in Davis permitted the review and consideration of all applications. Systematic exclusion occurred because at Davis there was a limited number of total seats in the class, and Davis wanted a portion of those seats to be filled by disadvantaged students from certain minority groups. So too, here there are limited spaces available each year in the freshman LS&A class, and the University has devised a point-based system to assure that enough of those seats are filled by minority students (disadvantaged or otherwise) so that the University achieves its desired level of racial and ethnic diversity. By systematically assuring inclusion of "meaningful numbers" or all "qualified" students from certain racial minority groups through the use of its racial preferences, the University necessarily assures systematic exclusion of other students based on their disfavored race.

D.

Grids, Protected Spaces, and the 1995-1998 Policies.

The University continues to defend the separate grid guidelines in effect for 1995-1997 with ridiculous arguments. Hence, it argues that the use of "different pieces of paper" for minority and non-minority students "simply reflects that race was taken into account." Defs.' Br. at 51. No. The use of separate grids (whether or not on the same "pieces of paper") with separate guidelines on admissions outcomes reflects the fact that different standards of admission were (and still are) applied to minority and non-minority students. It is true that the University could have "asked counselors to take race into account by factoring it into GPA 2." Defs.' Br. at 51. In fact, that is just what the University did for the entering 1997 class, in addition to maintaining separate grid outcomes based on race. Changing the form in this fashion did not change the fact that the LS&A had, and has, a race-based "two-track," or "dual" admissions system. *Bakke*, 438 U.S. at 314-15 (Powell, J.).

The University quibbles about whether the LS&A had a practice of automatically rejecting some non-minority applicants solely on the basis of low grades and test scores. It cites the testimony of clerk supervisor Dianne Gauss for the proposition that clerks were permitted to send all such applications to counselors for review. *See* Defs.' Br. at 52. What the University neglected to point out is that Ms. Gauss herself would follow the automatic reject policy. (R. 161 Appendix Gauss

depo., pg. 62, JA-1458) ("When I do them myself, I will do the rejects.") And since the guidelines called for rejection, and the counselors were generally expected to follow the guidelines (R. 205 Joint Summary of Undisputed Facts, pg. 3, JA-4095), it hardly matters that the rejection occurred at the level of counselor, rather than clerk, review.

The University's defense of its practice (1995-1998) of "protecting" or "reserving" spaces for minority students is breathtakingly dishonest. *See* Defs.' Br. at 52-53. Since the University accuses plaintiffs of being misleading about the description of this practice, *see id.* at 52, it should suffice to quote from the University's own description of this practice:

> Because the class is selected on a rolling basis, rather than at one point in time, a certain number of seats is designated during the admissions cycle for in-state students and for certain other groups of students, including, for example, athletes, foreign applicants, underrepresented minority candidates, and ROTC candidates (sometimes called "protected" space). This space is "protected" to enable OUA to achieve the enrollment targets of the University and of the individual units while using a rolling admissions system. If this space is not filled by qualified candidates from the designated groups toward the end of the season, it is used to admit qualified candidates remaining in the applicant pool, including candidates from the postponed pool or the extended waiting list, applicants to other units, etc. After all of the applications have gone through a first review (usually by late March), OUA and EWG evaluate the status of admissions, paid enrollment deposits, and available space in the class. If there is available space remaining in the class in the spring, OUA then reconsiders the pool of applications on which final decisions were postponed during the first review.

(R. 78 Affidavit-Exhibits Volume I, Exh. H, Defendants' Objections and Responses to Interrogatories, pg. 13, JA-310) (emphasis added)

> . . . As applicants from a particular group are admitted over the course of the admissions season, the protected spaces reserved for that group are used. If the pool of qualified applicants never reaches the number of protected spaces, those slots are filled with qualified applicants off the wait list.

(R. 78 Affidavit-Exhibits Volume I, Exh. I, Defendants' Reply Memorandum on Reassignment Motion, pg. 3 n.2 (July 29, 1998), JA-319)

> In light of these admissions, it is extraordinary that the University now tries to mislead this Court into believing that "protected" or "reserved" spaces were really only "just projections." Defs.' Br. at 52. The only virtue of the University's revisionism is that it betrays a certain consciousness of culpability. Moreover, the fact that the University is ultimately willing to argue that a system that "reserves" or "protects" spaces for minorities passes muster under Justice Powell's opinion in *Bakke* reveals just how radical the University's interpretation of that opinion really is. The illegal Davis system had a "rolling admissions system," and did not guarantee that the 16 spaces would be used up if there was not a sufficient number of qualified minority students.[6] *Bakke,* 438 U.S. at 274,

[6] Defendants assert that the varying numbers of <u>enrolled</u> minority students each year demonstrates that the "protected spaces" method did not "create a fixed number of places in the class for minorities." Defs.' Br. at 53. But, of course, the

275-76 & n. 5, 288 n.26. So the University's feeble effort to distinguish the set aside in *Bakke* from its own is preposterous.[7]

variation could have been entirely in the "yield," which might change from year to year. *See* Defs.' Br. at 17 (describing "yield").

[7] The University also persists in arguing that the discrimination here is acceptable because "[u]nder a race-neutral system, the likelihood of admission for a non-minority applicant would rise only slightly, and the absolute number of additional non-minority students who would be admitted would be small as well." Defs.' Br. at 56 n.33. As plaintiffs pointed out in their opening brief, the exact same thing could be said about the facts in *Bakke*: Invalidating the Davis program only opened up 16 spaces, which could then be competed for by the more than 2,000 non-minority applicants. *Bakke*, 438 U.S. at 274 n.2 (Powell, J.). The problem with the University's argument lies with its view that racial groups, not individuals, are entitled to constitutional rights.

E.
The District Court's Legal Distinction Between the 1995-1998 and 1999-2000 Admissions Systems Is Untenable.

The University attempts an amusing high-wire act by defending a basis on which the district court could find constitutionally significant distinctions between the 1995-1998 and 1999-2000 systems, while simultaneously arguing for rejection of the very distinctions drawn by the court. *See* Defs.' Br. at 50-54. Ultimately, the arguments fall flat. It is one thing to argue in the abstract that changes in the "manner" of considering race "can be constitutionally significant." Defs.' Br. at 50. It is another to determine whether particular changes are constitutionally significant. The University, of course, concludes that there are no constitutionally significant differences between the 1995-1998 and 1999-2000 systems. *See* Defs.' Br. at 51 ("The district court erred in concluding that . . . features of [the 1995-1998 policies] . . . rendered them unconstitutional."). Plaintiffs and the University can agree on this much: the change in the "mechanics" of the LS&A's admissions policies did not change anything with respect to the lawfulness of those policies. The parties have also agreed that the mechanical changes did not constitute a substantive change in the way that race and ethnicity are considered

in the admissions process.[8] (R. 205 Joint Summary of Undisputed Facts, pg. 8, JA-4099) The latter stipulation is not just an agreement about legal consequences. It is an agreement that race is not considered any less under the 1999-present guidelines than under the 1995-1998 guidelines. The district court simply disregarded these stipulations of fact and substituted its own fact finding

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[8] The University made this point repeatedly in the district court:

> But, while the mechanics of the admissions process have varied over time, the policies underlying the guidelines have not changed.
>
> . . . .
>
> While the selection index is different in appearance, the changes to the process were mechanical, not substantive.

(R. 158 Defs.' Summary Judgment Brief, filed July 17, 2000, pg. 16, 21, JA-1265, 1270) (emphasis added)

> Throughout these changes in how the grids were organized, and the creation of the current selection index, the substance of the admissions guidelines and the significance of race in decisionmaking has remained the same.
>
> . . .
>
> The grids represented visually what the points represent in the linear selection index; the relative importance of the various factors remains the same.

(R. 159 Defs.' Summary Judgment Br., pg. 14, JA-1338) (emphasis added)

(on motions for summary judgment) that there were substantive differences between the different forms.

The changes are indeed, as plaintiffs originally argued (and as the University has not denied) "mere differences in form." Defs.' Br. at 50 (quoting Pltfs.' Br. at 35). The 1995-1998 system is just as unlawful as the 1999-present system and vice versa. The principle articulated by this Court in *Middleton*—that labels don't matter and that the effect of a quota can be achieved by simply adding a pre-determined number of points to an applicant's score—is once again apt. A change in form from the separate grids, protected spaces, and segregated waiting list to the point-based system designed (statistically) to produce the same results is not a change that has constitutional or other legal significance.

F.
The University Has Not Met Its Burden Under Traditional Requirements of Narrow Tailoring.

Aside from the University's clear departure from the means that Justice Powell approved to achieve diversity, the University's racial preferences cannot withstand traditional narrow-tailoring analysis required of all racial classifications. The fixed and rigid method of assigning 20 points for race is certainly not "flexible." And the University has not refuted plaintiffs' point that the preferences are of indefinite duration. Instead, the University pleads that it is entitled to be

excepted from that requirement. *See* Defs. Br. at 38 (arguing that it "is of absolutely no constitutional significance" that an interest in diversity may be 'ongoing'"; "the [diversity] interest at stake need not have a built-in 'stopping point'"). The University's reliance on the view of the district court on this matter obviously begs the question presented on appeal. The existence of temporal limits has been held in similar contexts to be crucial to the narrow-tailoring analysis. *See, e.g., Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 706 (4th Cir. 1999) ("Because a racial classification cannot continue in perpetuity but must have a 'logical stopping' point, the [school's race-based student assignment policy] is not narrowly tailored.") (emphasis added).

The University demonstrates a fundamental misunderstanding of what the Supreme Court has required for an interest to qualify as sufficiently compelling to support racial classifications. *See* Defs.' Br. at 38 ("In objecting to the 'timelessness' of the [diversity] interest, Plaintiffs have improperly conflated the narrow tailoring inquiry with the identification of a compelling interest.") It is not just that the means must be narrowly tailored; the interest itself must be one that by its nature is amenable to narrow tailoring. That is why the Supreme Court has made clear that otherwise laudable interests in remedying the effects of societal race discrimination or providing role models to school children are interests that

cannot qualify as compelling interests. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (evidence of school desegregation in city of Richmond and evidence of general discrimination in construction or contracting industry "could justify a preference of any size or duration"). *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 267, 276 (1986) ("[A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive.") (plurality). Accordingly, the University is not entitled to the pass it has given itself on the requirement that its racial preferences be shown to be temporary.

The University has shown no inclination to mount a defense of the "closeness of fit" between the preferences at issue and the claimed interest in diversity. Except for evidence that the 20-point bonus for race was statistically designed to replicate the results of the grid-based system, the number of assigned points has no shown relationship to what is actually "necessary" to achieve Justice Powell's interest in diversity. Why will not a lesser amount of preference, *e.g.*, 5, 10, 15 points, suffice? How much diversity would be produced thereby? Why would not that amount of diversity produce the "educational benefits" of diversity? These questions also would be relevant in considering whether less race-conscious admissions policies could accomplish the same objectives. The record

is utterly barren on these points, and the district court did not even ask the questions.[9]

The University's dodge for all questions on narrow tailoring is the bald assertion that it takes race into account just so much as is necessary obtain "meaningful diversity." Defs.' Br. at 54. It is a convenient position to take because it is one without ascertainable, objective standards: The University gets to decide for itself how much racial and ethnic diversity it wants, and preferences necessary to produce that result, however large, will be considered "narrowly tailored." Indeed, the University shows signs that the current large preferences are not enough. *See* Defs.' Br. at 57 n.34 (Gurin "concluded that LSA is far from maximizing those [educational] benefits [of diversity]."). If the University is

[9] The University's refrain is that the Gurin report addresses "how much" diversity is enough. Defs.' Br. at 57. It does not, as discussed elsewhere. *See* discussion *infra* at 49. And it certainly contains no reference to, or study of, the closeness of fit of the particular "means" employed by the University to achieve diversity. For example, one will search in vain in the reports of Gurin (or any of the University's experts) for <u>any</u> consideration or even mention of the 20 points awarded for race, much less an analysis of why that amount of preference is necessary to achieve the alleged educational benefits of diversity. It is also noteworthy that the University's statistical expert, Raudenbush, made no effort to establish what the marginal effects on racial diversity would be of an award of some points fewer than 20 for race or of any other possible modifications to the point system.

allowed to set its own limits on the consideration of race and to be the judge of what it means to "weigh fairly" the consideration of race, there is nothing to stop it from granting 50, 100, or 150 points for race in the future.[10] Under such a result, narrow-tailoring requirements will be nothing more than an illusion.

G.
The District Court Erred in Denying Plaintiffs' Request For An Injunction.

The district court, having found the 1995-1998 admissions system unlawful, should have ordered an injunction (as it should also have enjoined the 1999-2000 system). As plaintiffs have demonstrated, voluntary cessation of an illegal practice does not moot a claim for an injunction. *See, e.g., City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982).

Defendants confuse the concepts of mootness and standing in their reliance on *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). Plaintiffs have the burden of proving, at the time of commencement of the lawsuit, that there was a reasonable possibility of a future violation; if a party claims mootness by reason of its own voluntary cessation after commencement of the lawsuit, it has the burden of showing why there will not be a future violation.

[10] Since the University considers itself in fierce competition with other colleges and universities for the "minority pool," under this rationale, the size of the preference can always be increased, if for no other reason, to beat the competition.

The district court in this case determined that there was standing when it certified the injunctive class in this case. Accordingly, the burden is on defendants to show that there is no longer a threat that the violation found by the district court will not occur again.

In any event, no matter who has the burden at trial, defendants certainly had the burden of demonstrating the absence of a genuine issue of material fact with respect to the threat of a future violation on their summary judgment motion. Plaintiffs obviously presented some facts by which a trier could conclude that there was a threat of future injury. First, defendants have conceded that plaintiffs' claims are not moot. *See* Defs.' Br. at 54 n.31. That is, they concede that they could not meet the burden of showing that there is no reasonable likelihood of a future violation, *i.e.* that they will resume the conduct. But with that concession, how can they possibly meet the equally high (if not higher) burden of showing the absence of any genuine issue of fact concerning the likelihood of a future violation?

Second, as already noted, the change from an illegal system to an allegedly legal system occurred only after this lawsuit commenced. The timing of that alone is sufficient to conclude (or create an inference) that this was a litigation-induced

change. That would call into play the presumption of a likely future violation identified above.

Defendants have not only failed to represent that they will never return to the systems used in 1995-1998; they defend them with vigor, which is yet another reason to conclude that there is a reasonable possibility of a future violation and a fact from which a reasonable trier of fact could draw that conclusion. *See SEC v. Lorin*, 76 F.3d 458, 461 (2d Cir. 1996) (a "court may properly view a culpable defendants' continued protestations of innocence as an indication that injunctive relief is advisable"); *FEC v. Furgatch*, 869 F.2d 1256, 1262 (9th Cir. 1989) ("A defendant's persistence in claiming that (and acting as if) his conduct is blameless is an important factor in deciding whether future violations are sufficiently likely to warrant an injunction."); *SEC v. MacElvain*, 417 F.2d 1134, 1137 (5th Cir. 1969) ("in a suit for injunction, a defendant's assertion of the correctness of his behavior is a ground for restraint").

The district court did not even address or make any findings on the propriety of an injunction based on its determination of the unlawfulness of the 1995-1998 system. Accordingly, it is impossible to know how or even whether it exercised any discretion in the matter. The defendants' policies should be enjoined both

because of the illegal aspects of the 1995-1998 system and the continued illegality of the 1999-2000 system.

II. "Diversity" Is Not a Compelling Interest Justifying the LS&A's Racial Preferences

A.

Justice Powell's Diversity's Rationale Is Not the Holding in *Bakke*

The University confuses the fact that there was a holding in *Bakke* with the far different and critically important question of whether Justice Powell's diversity rationale was part of that holding. It was not. Plaintiffs made this point clear in their brief. *See* Pltfs.' Br. at 53 ("For several reasons, Justice Powell's lone opinion, and the 'academic freedom' or 'diversity' rationale contained therein, was not the rationale for the holding of the Court in *Bakke*."). Confronted with this reality, the University chooses to write its own version of Part V-C of Justice Powell's opinion, the only portion of his Equal Protection analysis joined by the Brennan group. Specifically, the University has read the diversity rationale into that small section of the Powell opinion, although it is conspicuously absent. Part V-C of Justice Powell's opinion is significant only insofar as it makes clear that five Justices agreed that Davis should not be enjoined from "any" consideration of race in the admissions process. It does not contain a holding or

discussion concerning what interests could justify consideration of race in the admissions process. No doubt it was silent on that point because Justice Powell and the Brennan group clearly could not agree on what interests or purposes could justify the consideration of race in admissions.

The statement in Part V-C that the "State has a substantial interest that legitimately may be served by a properly devised admission program involving the competitive consideration of race and ethnic origin" certainly does not answer any questions concerning what interests might be sufficiently compelling to justify racial considerations. *Bakke*, 438 U.S. at 320. That a constitutional system must be "properly devised" is a mere tautology. That it must be "competitive" is a content-neutral requirement that could be consistent with all manner of interests, including interests based on remedying societal discrimination or developing role models. Consequently, Part V-C simply does not answer the question: What interests are sufficiently compelling to justify racial preferences in admissions? More to the point, it does not answer the question: Is diversity a compelling interest that may justify racial preferences in university admissions? *See Grutter v. Bollinger*, 137 F. Supp. 2d 821, 846 (E.D. Mich. 2001) ("[W]hile the Brennan group and Justice Powell agreed that race may be considered in admissions

(hence the joinder of the Brennan Group in Part V-C of Justice Powell's opinion), they disagreed entirely as to the reasons why.")

The University's "narrowness" analysis under *Marks v. United States*, 430 U.S. 188 (1977), does not yield a conclusion that the Powell diversity rationale is narrower than the Brennan group remedial rationale. Any such analysis is impossible because the rationales are completely different, so that one cannot meaningfully or logically be said to be narrower than the other. *See Grutter*, 137 F. Supp. 2d at 847 ("The diversity rationale articulated by Justice Powell is neither narrower nor broader than the remedial rationale articulated by the Brennan group. They are completely different rationales, neither one of which is subsumed within the other.")

The University confuses means with purposes in arguing that the Powell rationale is narrower since the Brennan group would have upheld the Davis quotas. Whether diversity is compelling is a question of legitimate purposes. The Brennan group found the Davis purposes and program acceptable because of its focus on remedying past discrimination. Brennan's approval of the Harvard plan expressed a clear reservation, agreeing 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."

Bakke, 438 U.S. at 326 n.1 (Brennan, J. concurring in part and dissenting in part) (emphasis added). Justice Powell's diversity rationale contained no such reservation. Hence it is easy to imagine an admissions system that would pass muster under the diversity rationale, but not under the Brennan group remedial rationale: an admissions system that focuses on diversity, without any required linkage to past discrimination. Accordingly, it cannot logically be said that the diversity rationale is narrower than the remedial one.

The sweeping breadth of the University's interpretation of Justice Powell's diversity rationale is evidenced also by the claims that the University itself makes for it. According to the University, achieving racial and ethnic (rather than intellectual) diversity is compelling because, among other things, it remedies the effects of "residential segregation,"[11] "legacies of racial isolation," "persistent and prevalent" racial "separation," and the "perpetuation of racial stereotypes" that follow from all of the foregoing. Defs.' Br. at 35-36. As if that agenda is not

[11] The University cites Professor Gurin for the proposition that most white students at the University grew up in "predominantly white neighborhoods" and attended "predominantly white high schools." Defs.' Br. at 36. It is characteristic of Gurin's work in this case that she neither sought to ascertain, nor reported, how predominantly white these neighborhoods or schools are. "Predominantly white" could mean as much racial diversity as 51% white, 49% minority. The LS&A is itself predominantly white, so based on the scant data reported, the University's and Gurin's point is a meaningless one.

expansive enough, the University throws in the dividends that businesses supposedly reap from hiring students who have attended "diverse" schools. *Id*. at 37. It should be obvious that this justification of the diversity rationale is at least as broad as (and arguably indistinguishable from) the remedial rationale offered by the Brennan group. As discussed below, it also demonstrates conclusively why the diversity rationale is as inherently incapable of being a compelling interest as are rationales based on remedying societal discrimination or providing role models. *See* discussion *infra* at 41-44.

B.
Cases Both Before and After *Bakke* Cast Doubt on Justice Powell's Analysis.

The University chose not even to discuss or acknowledge in their brief the cases cited by plaintiffs that undermine the University's position that it has a First Amendment right to practice race discrimination. *See. e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); Pltfs' Br. at 59-60. In a number of other cases, the Supreme Court has made clear that university admissions policies must yield to Constitutional and federal civil rights law prohibitions on discrimination. *See United States v. Virginia*, 518 U.S. 515 (1996) (striking down gender-based admissions policy); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (same). *Cf. Bob*

Jones University v. United States, 461 U.S. 574 (1983) (upholding IRS revocation of 501(c)(3) tax-exempt status of university that maintained racially discriminatory admissions policy). Indeed, the notion that public educational institutions have the "academic freedom" to discriminate in admissions on the basis of race undermines the important principle established in *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny.

The University's argument that the "Supreme Court has never questioned *Bakke's* holding permitting race-conscious admissions programs" is highly misleading at several levels. Defs.' Br. at 23. First, as is well known, the Court has not reviewed a case involving the consideration of race in higher education admissions to achieve "diversity" since *Bakke*. It has never endorsed the Powell rationale, and no other Justice has even opined that diversity is a compelling governmental interest. *See Adarand Constructors, Inc. v Pena*, 515 U.S. 200, 218 (1995) ("*Bakke* did not produce an opinion for the Court"); *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980) (Court did "not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as . . . *Bakke*."). In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990), the Court did not

decide that diversity was a compelling governmental interest.[12] Since the Court's holding in *Metro Broadcasting* that a lesser interest could justify racial preferences was subsequently overruled in *Adarand*, what the *Metro Broadcasting* Court considered to be a "constitutionally permissible," *id*. at 568, justification for racial preferences can hardly be considered controlling or even helpful.[13] Accordingly, plaintiffs have never argued that the diversity rationale

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[12] The University's citation, *see* Defs.' Br. at 29 & n.18, to a reference by Justice O'Connor in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986), does not add force to its argument that the Court has held Justice Powell's rationale to be controlling. Justice O'Connor did not attribute any finding about diversity to the Court in *Bakke*. What she wrote is certainly true with respect to what Justice Powell alone "found." And, Justice O'Connor wrote only for herself in *Wygant*, a fact which the University finds insignificant in that case, although it curiously hastens to point out that Justice O'Connor did not write for the Court in *Croson* when she stated that race-based classifications must be "strictly reserved for remedial settings." *Croson*, 488 U.S. at 511 n.1 (O'Connor, Kennedy, White, JJ., Rehnquist, C.J.). But Justice Scalia furnished the fifth vote for the Court's judgment in *Croson*, and his view of what is sufficiently compelling to justify racial preferences is even more restrictive than Justice O'Connor's rationale and certainly does not include "diversity." *Id*. at 520-528 (Scalia, J. concurring in judgment).

[13] *See Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) ("Even if *Metro Broadcasting* remained good law in that respect, it held only that the diversity interest was 'important.' We do not think diversity can be elevated to the 'compelling' level, particularly when the Court has given every indication of wanting to cut back *Metro Broadcasting*. In that case, the majority's analysis of the government's 'diversity' interest seems very much tied to the more forgiving standard of review it adopted.").

has been "implicitly overruled." *See* Defs.' Br. at 24. Since it did not constitute part of the holding in *Bakke*, there has been nothing to overrule.

The University persists in conflating the holding in *Bakke* that reversed the California Supreme Court's injunction against any consideration of race in the admissions process with the very different question of what rationale could justify that consideration. In essence, the University's argument can be reduced to this faulty syllogism: (1) five Justices in *Bakke* held that Davis could not be enjoined from any consideration of race in the admissions process; (2) the defendants consider race in their admissions process; (3) therefore defendants cannot be enjoined from any consideration of race. Note that the diversity rationale is not even a part of this reasoning. Even if one adds the requirements of the "competitive" consideration of race and a "properly devised" admissions system, the diversity rationale is nowhere to be found. The reason, of course, is that one cannot deduce from the above that either the diversity or academic freedom rationales are compelling interests justifying racial preferences.

For these reasons, the University's reliance on the Court's decisions in *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987), and *Minnick v. California Department of Corrections*, 452 U.S. 105, 115 (1981), gets it nowhere. Neither case, of course, had anything to do with either university admissions or the

diversity rationale (in any context). Moreover, *Johnson* is a Title VII case, where different considerations apply. The presence or absence of rights being "trammeled" is a consideration sometimes used to assess "race-conscious" affirmative action plans under Title VII, but it is irrelevant to the Fourteenth Amendment analysis. *Johnson v. Transportation Agency,* 480 U.S. at 627 n.6 ("the statutory prohibition [*viz.*, Title VII] with which [a public] employer must contend was not intended to extend as far as that of the Constitution."[14]

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[14] *See also Brunet v. City of Columbus*, 1 F.3d 390, 405 (6th Cir. 1993) ("The obligations of a public employer under Title VII and under the Constitution in regard to an affirmative action plan are not identical" and thus citation of *Johnson* in a case brought pursuant to the Constitution "is simply not helpful."); *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991) (although race-conscious hiring plan met requirements of Title VII, remand was necessary to determine whether it could meet requirements of strict scrutiny); *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 437 (10th Cir. 1990) ("The level of proof necessary to justify the consideration of race in an employer's hiring practices . . . differs depending on whether the challenge invokes the equal protection clause or Title VII. Under Title VII, an affirmative action plan must be justified by the existence of a 'manifest imbalance' in a traditionally segregated job category. . . . Once this imbalance is demonstrated, the court must also consider whether the rights of the discriminatee are 'unnecessarily trammeled' by the affirmative action plan. . . . By contrast, review of a claim of an equal protection violation is made under the more demanding "strict scrutiny" analysis, adopted by a majority of the Court in [*Croson*]. Under this standard, the preference given to minorities in the District's layoff decisions must be justified by a compelling governmental interest that is achieved only through narrowly tailored means."); *Keller v. Prince George's County*, 827 F.2d 952, 963 (4th Cir. 1987) ("The standards for review of affirmative action plans, for both public and private employers, are more liberal under Title VII than are the standards imposed on public employers by the fourteenth amendment in

The University has worked hard to create a false impression that there is a consensus among the lower courts that Justice Powell's diversity rationale is "settled law." Defs.' Br. at 2; *id.* at 30 ("All but one of the appellate courts that have considered the question have treated as controlling Justice Powell's conclusion that diversity is compelling.") In fact, the University cites to just one appellate case, *Smith v. University of Washington Law School*, 233 F.3d 1188, 1200 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2192 (2001), that actually held Powell's diversity rationale to be controlling. That other courts have decided the case before it by expressly not deciding whether diversity is compelling hardly supports the University's view that the issue is "settled law." Why would appellate courts sidestep the issue if the *Bakke* case decided it?

The University is completely lacking in candor, for example, in citing (*see* Defs.' Br. at 30) to the Fourth Circuit's decisions in *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 705 (4th Cir. 1999), and *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 131 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000), on the issue of whether diversity is compelling. Here is what the Fourth Circuit actually wrote in *Tuttle:*

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a Sec. 1983 suit.").

> The first question is whether diversity is a compelling government interest. This question remains unresolved.
>
> . . . .
>
> We have never decided the question of whether diversity is a compelling interest. . . . Since we conclude below that the [race-based school assignment policy at issue] is not narrowly tailored, we leave the question of whether diversity is a compelling interest unanswered.

Tuttle, 195 F.3d at 704 (emphasis added). The most that can be gleaned from *Tuttle* in support of the University's position is that the question whether diversity is a compelling interest is an open one. *Id*. at 705. *See also Eisenberg v. Montgomery County Pub. Sch*., 197 F.3d at 130 ("*Tuttle* notes that whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved."); *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) ("As matters turn out, we need not definitively resolve this conundrum [whether diversity is compelling] today. Instead, we assume *arguendo*—but we do not decide—that *Bakke* remains good law and that some iterations of 'diversity' might be sufficiently compelling, in specific circumstances, to justify race-conscious actions."); *Hopwood v. Texas*, 236

F.3d 256, 275 n.69 (5th Cir. 2000) (opinion of Weiner, Stewart, JJ.)[15] (Although inconsistent with earlier *Hopwood* panel's conclusion regarding diversity, [district court opinion in] *Gratz* is nevertheless consistent with our position that the [earlier *Hopwood*] panel was neither constrained to accept, nor required to reject, diversity as a compelling state interest under binding Supreme Court precedent.") (*Hopwood III*) (emphasis added), *cert denied*, 121 S. Ct. 2550 (2001).

As the Fourth Circuit noted in *Eisenberg* (and as the University neglected to mention), still more appellate courts in related or other contexts have either expressed skepticism about the diversity rationale or referred to the issue as unsettled. *See Eisenberg*, 197 F.3d at 130 n.17 (citing *Taxman v. Board of Educ. of Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998)).

This Court has not addressed whether diversity is a compelling interest or whether Justice Powell's diversity rationale is controlling. The University's

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[15] Judge Weiner wrote separately in the earlier *Hopwood* decision, *Hopwood v. Texas*,78 F.3d 932 (5th Cir. 1996) (*Hopwood II*), concluding that the University of Texas Law School admissions system was not narrowly tailored to achieve diversity. Judge Stewart was not on the *Hopwood II* panel.

implication to the contrary is false. *See* Defs.' Br. at 23 & n. 13. The one case cited by defendants, *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757, 763 (6th Cir. 1983), involved the review of a plan to remedy prior race discrimination by a school board; it neither discussed, nor held, anything regarding "diversity" or "academic freedom." In its brief reference to *Bakke*, this Court only distinguished the means of taking race into account—a "quota"—versus something "more flexible." *Id*. More recently, this Court has stated that "[t]he only cases found to present the necessary 'compelling interest' sufficient to 'justif[y] a narrowly tailored race-based remedy' are those that expose . . . 'pervasive, systematic, and obstinate discriminatory conduct.'" *Associated Gen. Contractors of Ohio v. Drabik*, 214 F.3d 730 (6th Cir. 2000) (quoting and citing *Adarand*, 515 U.S. at 237; *United States v. Paradise*, 480 U.S. 149 (1987)).

C.
The District Court Erred in Finding Diversity "Compelling" As an Evidentiary Matter.

1.
Achieving Racial and Ethnic Diversity Is an Interest Inherently Incapable of Constituting a Compelling Interest that Can Support Narrowly-Tailored Racial Preferences.

It is remarkable how hard the University and its amici are fighting to ensure that this Court engages in no substantive review of the claim that "solid evidence" proves racial and ethnic diversity to be a compelling governmental interest. In the University's view, strict scrutiny should amount to essentially no scrutiny at all of the empirical claims for racial and ethnic diversity made by the University. They in effect ask this Court to make an exception to the rule that there be a "detailed examination," both as the means and justifications of the racial preferences at issue. *Adarand*, 515 U.S. at 236. The basis on which they urge this deferential review is their repeated assertion that plaintiffs have "conceded" the educational value of diversity. Defs.' Br. at 20. This is not true, although it would not matter if it were. The question is not whether diversity has any value; it is whether the interest can be a compelling one justifying racial preferences. Plaintiffs have argued all along (and still do argue) that the question whether racial and ethnic diversity is a compelling interest is a question of law. Defendants agree with that proposition. *See* Defs.' Br. at 40. At the hearing on the motion for summary judgment, from which the University gleans the "concession," plaintiffs assumed for the purpose of argument that diversity could be good, valuable, even important. (R. 204 Summary Judgment Tr., pg. 27-28, JA-4156-57)

The point was that "to assert those propositions is a far different thing and does not lead to the conclusion that these interests are compelling governmental interests that can pass muster under the strictest scrutiny that racial classifications must bear." (R. 204 Summary Judgment Tr., pg. 27-28, JA-4156-57) In fact, for the same reasons that the laudable goals of remedying societal discrimination and providing role models to children cannot constitute compelling interests, racial and ethnic diversity, whatever benefits it produces, cannot rise to the level of a compelling interest justifying racial preferences in admissions. (R. 204 Summary Judgment Tr., pg. 28-29, JA-4157-58) The diversity interest is simply too amorphous, open ended, and limitless in scope and duration to be a compelling interest capable of supporting narrowly-tailored measures.

Certainly the diversity interest as defined by the University—focused on racial and ethnic diversity—is at least as amorphous, ill defined, and indefinite as an interest in remedying societal discrimination or providing role models to children. Indeed, the University often explicitly justifies the diversity interest on the grounds that it ameliorates the effects of societal discrimination and racial isolation. The "educational benefits" asserted are primarily the benefits that flow from addressing segregated residential and K-

12 education patterns, and racial stereotypes associated with a history of social and racial isolation. *See* Defs.' Br. at 35-36. The University was quite frank about this remedial justification for the diversity rationale at the hearing on the motion for summary judgment:

> We remain a divided country, certainly separated along racial and ethnic lines in very real and important ways. Residential segregation remains the rule, not the exception. Most African Americans, for example, live in communities that are overwhelmingly African American. Most white Americans live in communities that are overwhelmingly white. There are consequences to this separation. We don't go to the same elementary schools. We don't go to the same middle schools. We don't go to the same high schools. We don't play together. We don't have occasion in K through 12 to learn about each other, to learn about differences or to learn about similarities from each other. <u>This is an enormous educational challenge.</u>

(R. 204 Summary Judgment Tr., pg. 34-35, JA-4163-64) (emphasis added); R. 204 Summary Judgment Tr., pg. 39, JA-4168) ("And we show why that [having a racially and ethnically diverse student body] especially matters in our society, and that's because we are so separate racially and ethnically as a society.") The breadth of the diversity rationale is shown also by how the University and its amici tout it for benefits accrued long after a student's higher

education experience has ended. It is no wonder, then, that the interest is one which is "permanent and ongoing" and which will "live[] on perpetually." (R. 206 December 13, 2000 Opinion, pg. 24, JA-66) Indeed, for all the social benefits that the University claims for diversity, it is hard to understand what principle should limit racial preferences to the higher education context. Why not use such preferences to accomplish directly throughout American society what the University can only do indirectly and on a relatively small scale?[16] Racial preferences in housing, K-12 school assignments, employment, and contracting can all be justified by the diversity rationale. *Cf. United States v. Starrett City Assoc.*, 840 F.2d 1096 (2d Cir. 1988) (landlord employed separate tenant waiting lists by race to ensure a good racial mix and prevent white flight; court holds that this violates the Fair Housing Act). How can achieving diversity be any less compelling in those spheres than it is in higher education, particularly when the justification in higher education relies so heavily on what happens in students' lives before and after they leave the University? The answer, of course, is that diversity cannot be a compelling interest in any of these spheres because, among other things, it is so

[16] After all, not everyone attends highly selective colleges or universities, and many do not receive any post-high school education.

inherently without principled limits on scope or duration. The district court erred therefore in not rejecting as a matter of law the University's diversity rationale.

2.The University's Evidence on Diversity Is Not Legally Sufficient to Entitle It to Summary Judgment.

The University apparently is of the view that it has met its heavy burden of justifying the racial preferences at issue by simply offering expert witness opinion that diversity has educational benefits. For the reasons discussed above, that certainly does not suffice. Even if the question were an evidentiary one, however, it certainly would require more than producing some evidence of educational benefits. There must be a determination that whatever evidence has been produced is legally sufficient to support the conclusion that diversity is compelling. This Court reviews all legal issues de novo, and the district court's decision to decide on motions for summary judgment that diversity is compelling requires this Court to review de novo whether the evidence produced by the University satisfies strict scrutiny standards for finding a compelling interest. And because the case was decided on motions for summary judgment, all reasonable doubts and inferences must be resolved against the University's position that diversity is compelling. *See, e.g., Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d 727, 731-32 (6th Cir. 1994).

It is absurd for the University to argue that the plaintiffs have no standing to challenge the sufficiency of the Gurin report merely because plaintiffs did not produce an expert report to rebut Gurin. Plaintiffs have maintained all along that the alleged (or assumed) educational benefits of diversity cannot make that interest compelling. The University does not relieve itself of its burden on the issue by simply producing an expert with opinions. At a minimum, there remains a question of whether the expert's opinions are sufficient on their face to support the conclusion that diversity is compelling. The district court itself viewed the matter as one of the sufficiency of the evidence. (R. 206 December 13, 2000 Opinion, pg. 21, JA-63) The University cannot escape review of the issue.

On its face, the Gurin report is so fundamentally and methodologically flawed that it cannot support a conclusion that racial and ethnic diversity is a compelling interest or that it produces measurable educational benefits. *See* Fed. R. Civ. P. 56 advisory committee notes to 1963 ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary material is presented."); 10A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE CIV. 3D § 2727, at 482 (1998) (same). The University's

chief complaint is that this problem was brought to the attention of the district court by an amicus, the National Association of Scholars (NAS). It complains that the University was not able to conduct discovery against the NAS, although it does not say what discovery it would have sought.[17] Moreover, the University does not explain why it needs discovery from third parties in order simply to answer the serious objections raised by the NAS concerning the Gurin report. The University should take its questions and discovery requests to Professor Gurin.

The University in effect urges the strange and ironic position that arguments made by amicus curiae are entitled to no consideration unless the same arguments have also been made by the parties.[18] It was not enough,

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[17] The NAS brief was filed in the district court on July 19, 2000. (R. 167 NAS Br., JA-2044-79) The University had an opportunity to respond to it in its responsive briefing. Other than to acknowledge it in a footnote and call it "insubstantial and unsubstantiated," however, the University chose not to undertake any refutation in the district court of the NAS's methodological or other criticisms of Gurin's work. (R. 182 Memorandum in Opposition to Plaintiffs' Renewed Motion for Partial Summary Judgment, filed August 11, 2000, pg. 6 n.4, JA-3962)

[18] The University has not seen fit to this raise this objection to this Court's consideration of arguments raised only by the University's amici. In some cases, these arguments were not made by anyone at all in the district court. *See, e.g.*, Amicus Curiae Brief of Stanford Institute for Higher Education Research ("SIHER"). Acting out a role of obvious surrogate for the University, SIHER, which was neither a party nor an amicus in the district court, parrots the University's procedural arguments about discovery and (of all things) the standing

according to the University, that the NAS filed a brief in the district court (as it has in this Court) detailing its arguments with respect to the Gurin report, some of which were actually called to the attention of the district court by plaintiffs and others which were acknowledged by the district court in its opinion. (R. 206 December 13, 2000 Opinion pg. 24-25, JA-66-67; R. 204 Summary Judgment Tr., pg. 77-78, JA-4206-07) Under this erroneous view, of course, participation by amici would serve no purpose other than to add repetition to the record. The rule of course is the opposite; that amicus briefs are allowed precisely because they add additional perspectives for the benefit of the court's consideration. *See, e.g., Stupak-Thrall v. Glickman,* 226 F.3d 467, 475-76 (6th Cir. 2000).

The perspectives added by the NAS concerning the Gurin report do not merely raise reasonable doubts about the report; they are simply devastating to the University's evidentiary case. *See* NAS Br. at 3-20; *see also* Brief for Amicus Curiae National Association of Scholars in Support of Affirmance at 9-16, filed in *Grutter v. Bollinger* (Case No. 01-1447). Indeed, the University offers only a timid response to the merits of the NAS arguments,

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of an amicus to assert independent arguments.

concentrating its fire instead on efforts to protect Gurin's work from any scrutiny.[19] The flaws, however, remain open, obvious, and many, including the following: Gurin, purporting to study the educational benefits of racial and ethnic diversity, astonishingly never measured or controlled for different levels of such diversity in the work that she did based on the University of Michigan data. *See* NAS Br. at 6-7. Her only measures of actual racial and ethnic diversity were taken from another database, whose custodian, among others, has publicly contradicted the claim that the data show evidence of a correlation between diversity and educational outcomes. *Id.* at 13-14 & n.6. What correlations she does show are extremely weak. *Id.* at 15-18. And her technique for measuring "learning outcomes" is just as bad. Instead of conducting any standardized or objective measurement of academic performance, she collects information primarily on student self-assessments and attitudes. The assessment of "democracy outcomes" is similarly subjective, with Gurin arbitrarily assigning value to certain political or social points of view. *Id.* at 10-12.

[19]The University, violating the rule it wants imposed on plaintiffs, has left the task of responding to the NAS primarily to one of the University's amici, SIHER.

No less important is the undisputed fact that the Gurin report, on its face, provides no measurement or means of measuring how much diversity is needed to produce the "learning" or "democracy" outcomes; or what the marginal consequences for these outcomes would be for different levels of diversity. And as discussed elsewhere, *see* discussion *supra* at 23-24 & n.9, Gurin does not even discuss, much less analyze, the particular relationship between the University's means (*e.g.*, awarding 20 points for race) and the asserted interest. The district court acknowledged that these critiques raised questions at least about narrow tailoring. (R. 206 December 13, 2000 Opinion, pg. 24-25, JA-66-67) But it did not attempt to answer them. Strict scrutiny demands the inquiry that the University and Gurin have to date successfully avoided.

Even if the University had shown measured or measurable educational benefits from diversity, the question would remain whether there is a net benefit after adjusting for the harm, including stigmatization, racial stereotyping, and a hostile racial climate, that is produced through the use of racial preferences. These harms have been recognized by the courts, including the Supreme Court, and were made known to the district court in this case. *See, e.g.*, *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."); *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"). (R. 188 Plaintiffs' Memorandum in Reply to Defendant-Intervenors' Memorandum Opposing Plaintiffs' Motion for Summary Judgment, filed August 24, 2000, pg. 12-13, JA-4044-45; R. 77 Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, filed April 9, 1999, pg. 33, JA-247)

Many prominent scholars and academics have pointed to the harms that racial preferences cause. The National Association of Scholars is certainly not alone in that regard.[20] Even the University's experts have acknowledged that

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[20] *See, e.g.*, Shelby Steele, A DREAM DEFERRED 113 ("The most dehumanizing and defeating thing that can be done to black Americans, for example, is to lower a standard in the name of their race."); Alan Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L. REV. 379 (1979) ("The crucial point is that the 'diversity-discretion' model [of admissions], because it lacks real substantive content, is inherently capable of manipulation for good or evil results. . . . It becomes difficult, therefore, to hold the university accountable for its admissions program or for any particular admissions decisions. . . . [The] 'diversity' concept . . . subverts the ideals of responsibility and candor that are the hallmarks of any institution of learning in an open and democratic society."); William Van Alstyne, *Rites of Passage: Race, the Supreme Court and the Constitution*, 46 U. CHI. L.

racial preferences impose costs. William Bowen and Derek Bok have written the following: "The very existence of a process that gives explicit consideration to race can raise questions about the true abilities of even the most talented minority students ('stigmatize' them, some would say). The possibility of such costs is one reason why selective institutions have been reluctant to talk about the degree of preference given black students. Such reticence may be due in part to a desire to avoid criticism and controversy, but some of these institutions may also be concerned that the standing of black students in the eyes of white classmates would be lowered if differences in test scores and high school grades were publicized." William Bowen & Derek Bok, THE SHAPE OF THE RIVER 264-65 (Princeton Univ.

REV. 775, 809 (1979) ("[O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life, or in the life and practices of one's government, the differential treatment of human beings by race."); Alexander Bickel, *Moral Authority and the Intellectual*, THE MORALITY OF CONSENT 132-33 (1975) ("The dilution of standards in the university as a whole, administrators and faculty have told themselves, is not serious if the numbers recruited as faculty and students is kept low in proportion to total numbers. The solution in other words, is the quota, the *numerous clausus*, by whatever name it may be called or by whatever euphemism disguised. . . . [D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. . . . The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.")

Press 1998). Professor Bok has also posed an excellent question: "How does the prospect of indefinite racial preferences fit with Martin Luther King's ideal of a world in which advancement is determined not by the color of one's skin but by the content of one's character?" Derek Bok, *Assessing the Results of Race-Sensitive College Admissions*, 29 J. BLACKS AND HIGHER ED. 106, 109 (Autumn 2000). It is simply inconceivable that the acknowledged negative aspects of achieving diversity through racial preferences are so insubstantial as to warrant no consideration or mention by the district court in granting summary judgment on the diversity claim.

The University gets it wrong when it suggests that plaintiffs have changed their minds and now want a trial on diversity. Plaintiffs' position is, as it has been from the beginning, that the question should and can be decided as a matter of law. But if the question is instead to be decided by the weight of the evidence, then the usual standards and burdens should remain in effect. On motions for summary judgment that means that the district court cannot engage in evidence weighing or resolution of conflicting inferences and doubts that can reasonably be drawn from the evidence. *See Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d 727, 731-32 (6th Cir. 1994); *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir. 1979). And it means that as to whether

diversity is compelling, plaintiffs are entitled to the benefit of all reasonable doubts and inferences in deciding the University's motion.

The district court, moreover, was required to evaluate the University's "evidence presented through the prism of the substantive evidentiary burden" on the University. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 254 (1986). In this case, that means the University's evidence on its motion for summary judgment must be considered in light of its ultimate "heavy" burden of proving, *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973), that there is a "strong basis in the evidence" for concluding that diversity is compelling. *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277) (plurality)). As discussed above, there are many reasons why the University's evidence, including the work of Gurin, was "susceptible of different interpretations or inferences by the trier of fact." *Hunt v. Cromartie*, 526 U.S. 541 (1999); *see Amey Inc. v. Gulf Abstract & Title*, 758 F.2d 1486, 1502 (11th Cir. 1985) ("If reasonable minds differ on the inferences generated by undisputed facts, then summary judgment is inappropriate."). It was therefore inappropriate for the district court to have resolved those interpretations and inferences in defendants' favor on motions for summary judgment.

III. The District Court Erred in Granting the Individual Defendants' Motion for Summary Judgment on Grounds of Qualified Immunity.

It has been beyond question at least since *Bakke* that admissions systems that intentionally discriminate on the basis of race are unconstitutional. The University itself holds Justice Powell's opinion out as the supposed model for its system. As the district court concluded, at least with respect to the 1995-1998 system: "It is clear that the LSA's system operated as the functional equivalent of a quota and therefore, ran afoul of Justice Powell's opinion in *Bakke*." (R. 206 December 13, 2000 Opinion, pg. 41, JA-83) (emphasis added). The University's undisputed practice of "protecting" or "reserving" seats in the class for members of certain racial group—twenty years after *Bakke*—was an astoundingly defiant and flagrant flouting of what *Bakke* clearly prohibited. No one could reasonably believe that it is permissible to engage in the kind of systematic exclusion that the district court correctly attributed to the University's system. (R. 206 December 13, 2000 Opinion, pg. 42, JA-84) ("It cannot be seriously disputed, however, that the effect of the LSA's differing standards was to systematically exclude a certain group of non-minority applicants . . . solely on account of their race.") (emphasis

added)

The district court did not explain, however, how it could conclude that it is "clear" that the LS&A system violated the proscriptions of *Bakke*, while at the same time concluding that the LS&A did not violate plaintiffs' clearly established rights. If it "cannot be seriously disputed" that these admissions policies violated rights recognized in *Bakke*, then it cannot be seriously argued that the individual defendants responsible for the policies are entitled to qualified immunity. Moreover, the current system, with the mechanical and automatic award of a fixed and large number of points to all members of certain racial groups accomplishes the same systematic exclusion that the "protected" seats and other aspects of the 1995-1998 policies produced. Accordingly, the district court erred as a matter of law in granting the individual defendants' motion for summary judgment.

Conclusion

For all the foregoing reasons and the reasons set forth in plaintiffs' opening brief, plaintiffs respectfully request this Court to reverse the decision of the district court denying plaintiffs' motion for summary judgment and request for an injunction, and granting the defendants' motion for summary judgment, regarding the 1999-2000 admissions system. The Court should also reverse

the dismissal of the claims against the individual defendants in their individual capacities. The district court's decision with respect to the unlawfulness of the 1995-1998 admissions system should be affirmed.

Dated: July 30, 2001

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

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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
Defendants' Summary Judgment Brief	158	07/17/00
Defendants' Summary Judgment Brief	159	07/17/00
Appendix (Volume 2 - deposition excerpts) Gauss depo., pg. 62	161	07/17/00
Defendants' Memorandum in Opposition	182	08/11/00