IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF Michigan

JENNIFER GRATZ, and PATRICK HAMACHER, and all others similarly situated

Plaintiffs,

vs.

LEE BOLLINGER,
JAMES J. DUDERSTADT
THE UNIVERSITY OF MICHIGAN, and
THE UNIVERSITY OF MICHIGAN
COLLEGE OF LITERATURE**,** ARTS and
SCIENCE

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ,
LAURENT CRENSHAW, KARLA R.
WILLIAMS, LARRY BROWN, TIFFANY
HALL, KRISTEN M.J. HARRIS, MICHAEL
SMITH, KHYLA CRAINE, NYAH
CARMICHAEL, SHANNA DUBOSE, EBONY
DAVIS, NICOLE BREWER, KARLA
HARLIN, BRIAN HARRIS, KATRINA
GIPSON, CANDICE B.N. REYNOLDS, by and
through their parents or guardians, DENISE
PATTERSON, MOISES MARTINEZ, LARRY CRENSHAW,
HARRY J. WILLIAMS,
PATRICIA SWAN-BROWN, KAREN A.
MCDONALD, LINDA A. HARRIS,
DEANNA A. SMITH, ALICE BRENNAN, IVY RENE
CARMICHAEL, SARAH L. DUBOSE, INGER
DAVIS, BARBARA DAWSON, ROY D.
ARLIN, WYATT G. HAPRIS, GEORGE C.
GIPSON, SHAWN R. REYNOLDS, AND
CITIZENS FOR AFFIRMATIVE ACTION'S
PRESERVATION

Proposed Defendant-Intervenors

Civil Action No. 97-775231
Hon. Patrick J. Duggan
Hon. Thomas A. Carlson

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

Applicants Ebony Patterson, Ruben Martinez, Laurent Crenshaw, Karla R. Williams, Larry Brown, Tiffany Hall, Kristen M.J. Harris, Michael Smith, Khyla Craine, Nyah Carmichael Shanna DuBose, Ebony Davis, Nicole Brewer, Karla Harlin, Brian Harris, Katrina Gipson, Candice B.N. Reynolds[1] are African-American and Latino high school students who seek to attend the University of Michigan, College of Literature. Arts and Science ("University") and the Citizens for Affirmative Action's Preservation ("CAAP"). Applicants seek to intervene as defendants in this litigation; because the suit directly threatens their access to their State's flagship public institution of higher education and, through *its stare decisis* effect, may diminish their access to colleges and universities throughout the State of Michigan and beyond, their participation is indispensable to a proper and just resolution of the suit. Applicants also assert an interest in an admission policy that promotes racial and ethnic diversity at the University of Michigan, a public institution supported by all the people of the State. Applicants are entitled to intervention because of the danger that. Defendants' expressed intent to defend the University's admissions policies notwithstanding, their vital interest in preserving fair and equal educational access for African-American and Latino students--which is distinct from the University's institutional interest in maintaining diversity--will not be adequately represented in this litigation.

Introduction

This litigation bears directly on proposed intervenors' interest in preserving fair and equal educational access for African-American and Latino students through an admissions policy that allows full consideration of a student's background--including race, ethnicity, and one's status as a member of a historically disadvantaged minority group. The allegations made in Plaintiffs' complaint and the broad relief that they seek threaten educational opportunity for African-American

[1] The individual applicants are minors who move to intervene by their parents or guardians, respectively, Denise Patterson, Moises Martinez, Larry Crenshaw, Harry J. Williams, Patricia Swan-Brown, Karen A. McDonald, Linda A. Harris, Deanna Smith, Alice Brennan, Ivy Rene Carmichael, Sarah L. Dubose, Inger Davis, Barbara Dawson, Roy D. Harlin, Wyatt G. Harris, George C. Gipson, and Shawn R. Reynolds.

and Latino students at the University and could result in a student body at the University that is substantially less racially and ethnically diverse. Plaintiffs, who are two white students denied admission to the University, allege that the University's admissions policy violates their rights under the Fourteenth Amendment's Equal Protection Clause, 42 U.S.C. §§ 1981, 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. They contend that the University employed race as one of the "predominant factors," rather than as a "plus factor." in determining admission to the University. In so doing, Plaintiffs allege, the University lacked any compelling interest and was motivated neither by an interest in furthering educational diversity nor by an interest in remedying the effects of past discrimination. Complaint paragraphs 21, 22, 23. Plaintiffs also claim that, even assuming that Defendants had a compelling interest in "us[ing]. . . race in the admissions process," Defendants failed to employ

race-neutral means of achieving that interest. Complaint paragraph 25. The remedy sought by Plaintiffs includes enjoining Defendants from continuing their alleged "discrimination" against Plaintiffs in admissions to the University.

While casting their complaint in terms of eradicating discrimination, Plaintiffs effectively seer: to bar consideration of an applicant's racial background in admissions, affecting programs that have contributed significantly to the presence of fully-qualified African-Americans and Latinos at the University[2]. Applicants have more than an incidental interest in this suit; rather, what is at stake is Applicants' direct and immediate interest in preserving their access to public higher education at the University of Michigan and the benefits to all students that flow from a student body composed of students of diverse backgrounds.

Argument

I. Applicants Are Entitled to Intervene as of Right in this Action

Applications for intervention of right in federal court actions are governed by Federal Rule

2 This does not mean that Plaintiffs' assertion that Defendants use race as a "predominant factor" in admissions, *see* Complaint paragraph 22, is true. This allegation--upon which much, if not all, of Plaintiffs' case depends--has been denied by Defendants. *See* Defendants' Answer ("Answer") paragraph 22. The actual weight that Defendants place upon race in their admissions program--like the rest of the mechanics of the admissions process--will be revealed through discovery.

of Civil Procedure 24(a), which in relevant part provides that:

[u]pon timely application anyone shall be permitted to intervene in an action...when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant Ls so situated that the disposition of the action may as a practical matter impair or-impede the applicant's ability to protect that interest. unless that interest is adequately represented by existing parties.

Any doubts concerning the propriety of intervention must be resolved in favor of intervenors. *See Michigan State AFL-CIO v. Miller,* 103 F.3d 1240, 1246 (6th Cir. 1997) ("[R]ules governing intervention are 'construed broadly in favor of the applicants."' (quoting *Idaho Farm Bureau Fed'n v. Babbitt, 58* F.3d 1392,1397 (9th Cir. 1995)). Applicants, as explained fully below, meet each of the Rule's three requirements for intervention: (1) as prospective applicants for admission and as parents of prospective applicants for admission to the University, Applicants plainly possess a direct and significant interest that could be impaired by the disposition of this case, (2) Applicants' interests cannot be represented adequately by the parties presently before the Court; and (3) the application for intervention is timely.

A. **Applicants Have a Significant Legal Interest that Stands to be Impaired by this Litigation**

Applicants have a "significantly protectable interest," *Donaldson* v. *United States,* 400 U.S. 517, 531 (1971), in intervening in this suit--the gravamen of which is an effort to enjoin the University from considering an applicant's racial background as a factor in admissions. The Sixth Circuit has interpreted the interest requirement liberally, *see Bradley v. Milliken,* 828 F.2d 1186, 1199 (6th Cir. 1987), and has taken a "rather expansive" view of the "interest sufficient to invoke intervention of right," *Michigan State AFL-CIO,* 103 F.3d at 1245.[3] For instance, in *Jansen v. City of Cincinnati,* 904 F.2d 336, 342 (6th Cir. 1990), present and future black job applicants sought to intervene as defendants in a challenge by white

firefighters to a consent decree setting goals and timetables for minority hiring and promotion. Finding that the litigation imperiled the proposed intervenor's interest "in continuing affirmative action under the consent decree," the Sixth Circuit

3 The Sixth Circuit has also made clear that prospective intervenors need not demonstrate a legal or equitable interest in the suit, nor need they possess Article III standing. *See Purnell v. City of Akron,* 925 F.2d 941, 948 (6th Cir.1991) (citing *Trbovich v. United Mine Workers,* 404 U.S.528, 536-39 (1972)).

held intervention to be authorized. *Id; see also In Re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492, 1497 nn.12 & 13 (11th Cir. 1987) (beneficiaries of race conscious employment remedy entitled to intervention of right), *aff'd sub nom. Martin v. Wilks, 490* U.S. 755 (1989); *Associated Gen. Contractors v. City of New Haven,* 130 F.R.D. 4, 11-12 (D. Conn. 1990) (minority-owned business entitled to intervene to defend against challenge to municipal minority-business contracting program). Applicants' interest in ensuring fair and equal educational opportunity for African-American and Latino students is akin to the direct and protectable interest-acknowledged by this Circuit—that students have in eliminating segregation at the primary and secondary level. *See Bradley,* 828 F.2d at 1192.[4] Recognizing this interest, courts have allowed intervention by minority students when programs benefiting them are challenged. *See, e.g., Podberesky v. Kirwan,* 838 F. Supp. 1075 (D. Md. 1993) (granting intervention to recipients of scholarship aimed at attracting high-achieving African-American students to formerly all-white flagship campus), *rev'd on other grounds,* 38 F.3d 147 (4th Cir. 1994); *Wooden v. University of Georgia,* No. CV 497-45 (S.D. Ga. Sept. 10, 1997) (order granting intervention).

Applicants have a direct and significant interest in an admissions policy that preserves and broadens access to the University, including--but by no means limited to--the University's authority to consider the impact of a student's racial background on his or her life experiences as a distinct factor in evaluating qualifications for admission. Applicants have an interest in an admissions program that allows the University to consider the race or ethnicity of qualified applicants who otherwise meet or exceed the University's admissions criteria and who have long been

4 While the *Bradley* court recognized that the interest in eliminating segregation was sufficient to satisfy Rule 24(a)(2), the court denied intervention in that case. The court was skeptical that the proposed intervenors had a sufficient interest in the case given that they were concerned primarily about the problems faced by a particular school and not with the overall desegregation suit. *See* 828 F.2d at 1192. Furthermore, the court found that even assuming that the proposed intervenors had a significant interest in the suit, they had failed to show that the existing representation was inadequate. *See id.* These factors are not present in the instant case as Applicants do not seek to use this suit to further an incidental interest, but rather are concerned about the central issue in this suit and the possibility that its disposition will diminish the enrollment of African Americans and Latinos at the University of Michigan. Moreover, as explained *infra,* Applicants are not adequately represented by the current parties.

underrepresented at the University. By increasing the number of African-American and Latino students, an admissions program that considers race in pursuit of a diverse student body also serves to create a more receptive, less hostile and less isolated experience for those students. Applicants also have interests in an admissions program that considers and values the perspectives and experiences that students of diverse racial and ethnic backgrounds bring-to the University's educational environment.

In view of the strength of Applicants' interests, the "impairment" requirement has also been met. Prospective intervenors need not show that an unfavorable disposition in the case would necessarily impair their right, only that it *"'may* . . . impair or impede [their] ability to protect [their] interest."'

Purnell, 925 F.2d at 948 (quoting Rule 24(a)(2) and adding emphasis), that is, that impairment is "possible." *Michigan State AFL-CIO,* 103 F.3d at 1247. Plaintiffs' proposed remedy-terminating the use of race-conscious measures in the University's admissions process and, apparently, any consideration of race[5]--runs directly counter to Applicants' interest in ensuring that qualified African-American and Latino students will have continued access to higher education at the University of Michigan, and that all students receive the benefits of a diverse student body.

Prohibiting any consideration of a student's racial background in admissions will substantially reduce the number of African-American and Latino students at the University, even though the majority of the students excluded meet or exceed admissions' standards and would succeed academically at the University and in post-graduate endeavors.[6] Furthermore, if this Court,

5 The complaint is rather cryptic about the remedy it seeks, *see* Complaint, at 8 (demanding the enjoining of "defendants from continuing to discriminate on the basis of race"). There is reason for translating this as a demand that the University refrain from all consideration of race. *See Hopwood II,* 78 F.3d at 962. The public interest law firm that represented the plaintiffs in *Hopwood* is also counsel for plaintiffs here.

6 That some African-American and Latino students might be offered admission to other state universities does not diminish Applicants' interest in fair and equal access to the University of Michigan, just as plaintiff Gratz argues that her attendance at Michigan State University does not diminish the claimed injury she suffered in not being offered admission to the University of Michigan. As the Supreme Court recognized in *Sweatt v. Painter,* 339 U.S. 629, 633-35 (1950), a flagship state university may offer resources and intangible benefits--including prestige, faculty, and alumni networks--that are superior to that of other state universities.

and the Sixth Circuit were to grant Plaintiffs the broad relief granted by the Fifth Circuit in *Hopwood v., Texas,* 78 F.3d 932 (5th *Cir.)(Hopwood II), cert. denied,* 116 S. Ct. 2581 (1996), it would imperil access for African-American and Latino students to all four-year institutions throughout Michigan and in the other states in the Sixth Circuit**.** Prohibitions on the consideration of race in admissions at universities in other states have resulted in steep declines in the enrollment of otherwise qualified African-American and Latino students and threatens to resegregate these institutions. (7) That the same situation could result if Plaintiffs prevail in their suit is sufficient to show that the interest here is both significant and likely to be impaired if intervention is denied**.** Moreover, impairment could also result from the potential ***stare decisis*** effect of a ruling that the University's admissions program violates the Constitution or federal statutes. *See Jansen. 904* F.7d at 342 (potential adverse *stare decisis* effect is sufficient to support intervention). An adverse decision could affect an attempt by proposed intervenors to enforce their rights in any future litigation involving the University's admissions programs. Limiting Applicants' role to that of *amici curiae* would not allow for adequate protection of their compelling concerns, and would render them unable either to procure evidence regarding the University's admissions programs--all of which is

7 After a ban on any consideration of race in admissions to University of California graduate schools took effect on January 1, 1997, the number of African-American students offered admission to UC Berkeley Law School (Boalt Hall) decreased from 75 to 14; and the number of Latino students offered admission decreased from 34 to 16, see UC Berkeley Law School, Office of Public Information, *Boalt Hall Reports a Substantial Drop in Offers of Admission Made to Minority Applicants Other than Asians,* May 14,1997, prompting complaints that the new admission policies violate Title VI of the Civil Rights Act of 1964, *see* Letter from Abby Liebman, California Women's Law Center, et. al to Stefan Rosenzweig, Regional Director, United States Department of Education, Office of Civil Rights (Mar. 19,1997). For the 1997-98 school year, only seven Latino students enrolled at Boalt Hall (down from 28 for the 1996-97 school year), and only one African-American student (compared to 10 the prior year) enrolled. *See* MALDEF, UC *Law School Admissions Figures* (compiled from Boalt Hall, Office of Admissions).

Similarly, after the Fifth Circuit barred the University of Texas Law School from considering race in its admissions program, *see Hopwood II,* 78 F.3d at 962, applications fell by forty percent for African Americans, and by fifteen percent for Mexican Americans; offers of admission fell from sixtyfive to five for African-Americans and from seventy to eighteen for Mexican Americans. *See* Lydia Lum, *Applications by Minorities Down Sharply,* HOUS. CHRON. Apr. 8, 1997, at 1A; Mary Ann Roser, *UT Issues Minorities Fewer Law Admissions,* AUSTIN AM. STATESMAN, Apr. 9, 1997, at A1. Actual enrollment of

African-American students fell from thirty-one to four, and of Mexican-American students from forty-two to twenty-six. William E. Forbath & Gerald Torres, *The "Talented Tenth " in Texas,* THE NATION, Dec. 15, 1997, at 21.

within the exclusive control of Defendants--or to introduce evidence necessary to demonstrate the need for race-conscious admissions programs, or to appeal a final or consent judgment in the litigation.

B. **Proposed Intervenors' Interests Cannot be Adequately Represented by the Existing Parties**

Although Defendants' cursory response to Plaintiffs' complaint reveals little about Defendants' intended defense of the University's admissions programs, Defendants cannot adequately represent Applicants" interests. As an initial matter, it is worth emphasizing that although defendants are presumed to be adequate representatives, proposed intervenors carry only a "minimal " burden of showing that their interests *"may"* not be adequately represented by defendants. *Michigan State AFL-CIO,* 103 F.3d at 1247 (quoting *Linton v. Commissioner of Health and Environment,* 973 F.2d 1311, 1319 (6th Cir. 1992)), *see also Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10 (1972). While a "slight difference in interests . . . does not necessarily show inadequacy," the "interests need not be wholly adverse' before there is a basis for concluding that existing representation of a different' interest may be inadequate." *Jansen,* 904 F.2d at 342 (quoting *Nuesse v. Camp,* 385 F.2d 694, 702 (D.C. Cir. 1967) (internal quotations omitted). This may mean simply that an existing party may fail to make all the prospective intervenor's arguments. *See Michigan State AFL-CIO,* 103 F.3d at 1247. Accordingly, courts, including the Sixth Circuit, have routinely granted intervention to minorities seeking to defend the race-conscious programs that benefit them. *See, e.g., Jansen,* 904 F.2d at 343 (allowing intervention as of right to beneficiaries of race-conscious employment remedy); *In re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d at 1496 nn. 12-13 (same); *Associated General Contractors of Connecticut,* 130 F.R.D. at 11 (allowing minority-owned business to intervene to defend against challenges to municipal minority business contracting program); *Baker v. City of Detroit,* 504 F. Supp. 841, 849 (E.D. Mich. 1980) (permitting intervention to black police officers to defend city's voluntary affirmative action plan,

because there was no "guarantee" that city would provide evidence of its own past discrimination).(8)

In the instant case, Defendants may share some of Applicants' ultimate goals, but their interests are far from identical. The Supreme Court has identified a series of circumstances where race-conscious governmental action is permissible, if not required, including: (1) to remedy discrimination, either by the government actor itself or by others within its jurisdiction, or to avoid its becoming a "passive participant" in others' discrimination. *see City of Richmond v. Croson,* 488 U.S.469, 492 (1989) (Opinion of O' Connor, J.), and (2) to pursue diversity in higher education, *see, e.g., Regents of the University of California v. Bakke,* 438 U.S. 265, 314 (1978) (Opinion of Powell, J.); *Wygant v. Jackson Bd of Educ.,* 476 U.S.267, 286 (1986) (O' Connor, J., concurring) (noting the compelling governmental interest in diversity). Defendants, however, are poorly positioned to advance these justifications vigorously.

First, as public actors, Defendants' ability to advance the full range of legal justifications for considering race in admissions is constrained substantially by other legitimate governmental considerations, and by

their own institutional interest in academic freedom, their educational goals,

8 To be sure. the Fifth Circuit's denial of intervention in *Hopwood is* an exception to this line of decisional authority. *See Hopwood v. Texas,* 21 F.3d 603, 606 (3rd Cir. 1994) *(Hopwood I); Hopwood II,* 78 F.3d at *961. Hopwood,* of course, has no binding effect on public institutions outside the Fifth Circuit. and its rationales for disregarding Supreme Court precedent with respect to both the "diversity" and the "remedial" justifications for race-conscious university admissions program are highly questionable. Cf. *Agostini v. Felton,* 521 U.S. _,138 L. Ed.2d 391,423 (1997) (Reaffirming principle that " the Court of Appeals should follow the case which directly controls leaving to [the Supreme] Court the prerogative of overruling its own decisions"' (quoting *Rodriguez de Ouijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989)). Furthermore, the theory on which the *Hopwood* court denied intervention is, at the very least, inconsistent with the law of the Sixth Circuit. The *Hopwood* court relied on a presumption that a governmental actor could adequately represent the interests of all citizens, *see Hopwood I,* 21 F.3d at 505, a presumption implicitly rejected by this Circuit in the several cases allowing intervention when one of the parties is a governmental entity. *See, e.g., Michigan State AFL-CIO,* 103 F.3d at 1247; *Jansen,* 904 F.2d at 342; *Baker,* 504 F. Supp. at 849. Moreover, as this Circuit has recognized, even if this were the general rule, the policies favoring, such a rule might suggest a different approach where, as here, it is precisely this responsibility to *all* the State's citizens that limits the government's ability to stand in for individuals whose interests are peculiarly affected, and where the government's own past and current discrimination might be at issue. *See text infra.*

The *Hopwood* court also denied intervention on the ground that the intervenors had failed to present a separate defense of the admissions program that the State had not asserted. *See Hopwood II,* 78 F.3d at 960. In this Circuit, however, intervention is authorized where the intervenor's "approach and reasoning" may be different from that of an existing party, and where inadequacy is likely, though not certain. *Michigan State AFL-CIO,* 103 F.3d at 1247.

and their fiscal and administrative concerns. The proposed intervenors' goals of ensuring educational access for African-American and Latino students and of furthering a diverse student body are but two of the many competing interests that the University confronts in carrying out its mission. This difference manifests itself in at least two ways: the University may be subject to internal and external pressures that temper its ability-to protect often-controversial race-conscious admissions programs, and the University faces less risk of harm than do Applicants if such race-conscious admissions programs are dismantled.

The Sixth Circuit has recognized that this inherent difference between the interests of a government actor seeking to defend its affirmative action program and those of beneficiaries of affirmative action is itself sufficient to warrant the conclusion that representation "may" not be adequate. In *Jansen*, the court allowed intervention in part because it found that the City-defendant's interest in defending its hiring practices challenged in a "reverse discrimination" suit were distinct from the proposed intervenors'--present and future black applicants-interest in present and future employment. *See Jansen,* 904 F.2d at 343. While the proposed intervenors in that case had an interest in achieving integration in the police force, the City's interest was primarily in "protecting its integrity as an employer"--a difference that amounts to more than a "mere disagreement over litigation strategy." *Id; see also Michigan State AFL-CIO,* 103 F.3d at 1247 (allowing intervention where applicant as "a target of the [challenged] statutes' regulations. would harbor an approach and reasoning for upholding the statutes that will differ markedly from those of the state, which is cast by the statutes in the role of regulator").

Beyond this generalized conflict, the University's vigor in defending its admissions programs might be affected by real differences among faculty, members of the Board of Regents, and other members of the University community regarding the desirability of race-conscious admissions. Defendants may face additional pressure from alumni of the University--often key donors and fundraisers--who might oppose race-conscious admissions programs or who might seek to maintain preferential admissions for their children--even if to the detriment of African-American and Latino

students.9 Additionally, the University is subject to external political pressures particularly from the state

legislature, which has legislative and budgetary control over the University,(10) and from State residents ideologically opposed to affirmative action. All these pressures may affect the intensity and manner with which the Defendants address the critical issues at stake in this litigation, including, but not limited to. the University's assertion of its interest in promoting diversity. On the other hand, the University may be less responsive to the opinions of African-Americans and Latinos, fewer of whom occupy seats in the state legislature or leadership positions at the University.

Apart from these internal and external pressures, the Defendants' goal in this lawsuit is different from that of Applicants, and Defendants face considerably less harm should Plaintiffs prevail in their suit. The University seeks to defend its admissions programs in its various permutations and--no doubt--seeks to avoid paying damages to Plaintiffs and Plaintiffs' proposed class (if they could succeed in establishing that this case is maintainable as a class action). Applicants' interest, by contrast, is not in defending any particular admissions program implemented by the University, but rather in preserving access for African-American and Latino students and in maintaining a racially and ethnically diverse student body. Thus, as discovery reveals the contours of the University's admissions practices, Applicants may find that their interests in fair and equal access to educational opportunities for African Americans and Latinos, and ensuing a diverse student body, are not served best by the University's present admissions practices. Furthermore, the University's interest in furthering a diverse student body--though compelling and central to learning and to its broader mission of producing societal leaders--differs from African-American and Latino students' more focused interest in preserving their access to an education at the University. *See*

9 See Rusty Hoover, *Race-Based Policy Divides U-M Alumni,* DETROIT NEWS, Dec. 30, 1997, at D 1 (noting dissent among alumni regarding the consideration of race in admissions to the University).

'° *See* Rusty Hoover, *U-M Admission Fight Costly: University Says Defense of Affirmative Action Policy is Worth S1 million to $ 3 million. Critics Call it Waste,* DETROIT NEWS, Oct. 30, 1997, at A-l (state legislator and others criticize spending to defend the University's Affirmative Action programs); David Pollison, *Lawmaker Takes No Prisoners,* LEGISLATIVE MICHIGAN, Oct. 20, 1997, at A-10 (describing state legislator's solicitation of plaintiffs to bring challenge to the University of Michigan's admissions programs).

Associated General Contractors, 130 F.R.D. at 1-12 (minority contractors' compelling economic interests were sufficient to show that city might not adequately represent their interests even though both parties were committed to defending the challenged minority business contracting program). While the University's continued existence or prosperity would not be jeopardized by a ruling for Plaintiffs in this case, Applicants face a serious risk of being excluded from educational opportunity at the University.

Second, Applicants should not be required to entrust their interests to Defendants because, as courts in other cases have repeatedly recognized, even those educational institutions that purport to defend affirmative action admissions policies are unlikely to proffer defenses that would call attention to their own past, let alone any present, discrimination. *See, e.g., Baker,* 504 F. Supp. at 849 (intervention by black police officers served to "minimize the employer's dilemma" of presenting evidence of its own past discrimination); *Podberesky,* 838 F. Supp. at 1082 n.47 (noting that a university defending an affirmative action program is put in the "unusual position" of having to "engage in extended self-criticism in order to justify its pursuit of a goal that it deems worthy").

An example of a remedial rationale that Defendants might be unlikely to advance is the argument that an

admissions program that bars any consideration of race and relies--as Plaintiffs apparently desire--primarily on purportedly objective admissions criteria like standardized tests may exclude, without sufficient justification, African-American and Latino students who can perform capably and, in many cases with distinction, at the University and beyond.)(11) At this stage, the

"For all students, race notwithstanding, standardized tests scores are claimed by the testmakers to correlate only with first-year grades--not overall college performance, or graduation rates--and, even then, only about 50 percent of the time. *See, e.g.,* ACT WHAT WE KNOW ABOUT ACT-TESTED STUDENTS WHO ATTEND COLLEGE: AN EXAMINATION OF ACT DATA 40 (1995); Anthony P. Carnevale et. al, *Test Scores as Predictors of Academic and Career Performance,* at 4 (Nov. 1997); Karin Cheoweth, *A Measurement of What?,* BLACK ISSUES IN HIGHER EDUCATION, Sep. 4, 1997, at 19-90. Because--across all income groups--African-American and Latino students tend to score lower on the ACT and the SAT than do white students, *see* ACT, *supra,* at 5; Analysis of 1996 National SAT Data Tape by Martin Shapiro, the impact of any predictive shortcomings of standardized tests falls more heavily on these students. Black and Latino enrollment would likely fall significantly if standardized tests were used as the central measure of merit by university admissions committees. *Cf.* Linda F. Wightman, *Threat to Diversity In Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor In Law School Admission Decisions,* 72 N.Y.U. L. Rev. 1 (1997) (concluding that reliance on tests as a predominant factor in admissions would greatly decrease the

manner in which the University's admissions program operates and the extent to which the University actually relies on standardized tests is unclear. The University may, however, be reluctant to challenge Plaintiffs' reliance on standardized test scores as a basis for their assertion that African-American and Latino students are less qualified for admission than are white students, *see* Complaint, paragraph 19, lest the University's own reliance on these tests be called into question. In addition, the Defendants may be unwilling to argue that an admissions system that is prohibited from considering an applicant's racial background and that instead places undue weight on standardized tests with limited predictive validity may have an unjustified discriminatory effect on African American and Latino students under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and its implementing regulations.(12) *See* 34 C.F.R. § 100.3(b)(2)(1997); *Larry P. u Riles,* 793 F.9d 969 (9th Cir. 1984) (use of non-validated IQ tests with discriminatory effect on black children to place students in classes for the educable mentally retarded violates Title VI); *Groves* v. *Alabama State Bd. of Educ.,* 776 F. Supp. 1518 (M.D. Ala. 1991) (enjoining, as violative of Title VI, state board of education use of minimum ACT score as a requirement for admission to undergraduate teacher training program).

This is not to suggest that this lawsuit need be transformed into an inquiry into the psychometric validity and racially disparate impact of the SAT and other standardized tests. The

---

number of African-American students admitted, even though these students could perform capably as attorneys).

An admissions system that depends primarily on results of standardized tests as a significant indicator of capabilities and future effort may--given the prevailing racial segregation in public education in Michigan and the inferior educational resources of predominantly black schools, *see* Gary Orfield et al., *Deepening Segregation in American Public Schools* (Apr. 5, 1997) (showing that Michigan has the second most segregated school system in the nation), devalue the "credentials" achieved in the face of these social obstacles.

12 Title VI prohibits "discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d. The Act's regulations provide that recipients of federal funds may not "utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination." 34 C.F.R. § 100.3(b)(2) (emphasis supplied). Thus, under the federal regulations implementing Title VI, it is not necessary to show discriminatory intent to establish a violation and receive relief; it is sufficient to show that the challenged practice or policy has an unjustified discriminatory impact. *See Alexander v. Choate,* 469 U.S. 287, 293 (1985).

point, simply, is that if the use of standardized tests does become an issue in this litigation, the University

would be poorly positioned to represent the interests of Applicants. Moreover, the same would hold for any remedial argument, because Defendants might fear that making such arguments might subject them to future liability to Applicants or others. Cf. *Wygant,* 476 U.S. at 991 (O' Connor, J., concurring) (noting that public employers might be "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken"). At this stage, the possibility that Defendants will fail to make such arguments is sufficient to support Applicants' quite "minimal burden" of showing that representation "may" be inadequate. *See Baker, 504 F.* Supp. at *849* (holding intervention to have been justified on the theory that the city might not have advanced remedial rationale for race-conscious program, even though it later did so).

Similarly, the University's past history of discrimination against African-American and Latino applicants may have current effect through the practice of legacy admissions. It appears, from intervenors' limited knowledge of admissions practices at the University, that the University currently gives some preference for the children of University graduates. To the extent that the past discrimination was recent enough that the use of preferences for applications by children of prior graduates is, in effect, a preference for white applicants, then intervenors may seek to argue that there remain current effects of past discrimination. Those current effects would justify affirmative action as a remedial step. The University is unlikely to advance this argument both because of the strong support for "legacy" admissions among alumni and because the University is unlikely to admit that there remain current effects of past discrimination.

In the end, the divergent interests of Applicants and Defendants are more than an abstraction. Without the participation of those who will bear the greatest costs if an applicant's racial or ethnic background can never be taken into account in evaluating an application for admissions--proposed intervenors--the consideration of race and ethnicity in admissions might not be vigorously defended, and--if this case were to proceed that far--the trial record might fail to substantiate thoroughly both the vital need for considering race and ethnicity in admissions and the benefits that doing so provides

to the student body and the greater society.(13)

C. **The Application is Timely**

In considering whether an intention is timely, the court should consider "all relevant circumstances," including the length of time the applicant knew of his interest in the suit. the purpose of intervention. the extent to which the suit has progressed, and whether the parties were prejudiced by any delay. *See Michigan Ass'n for Retarded Citizens v. Smith,* 657 F.2d 109, 105-6 (6th Cir. 1981); *Jansen, 904* F.9d at 340 (listing factors relevant to whether intervention is timely). Applying these standards. there can be no serious question as to the timeliness of this Application for intervention: (1) intervention is sought for the compelling purpose of assuring access to the State's public education system and maintaining a diverse student body; (2) Applicants have sought intervention soon after the commencement of the litigation; (3) Applicants sought intervention promptly after the State's responsive pleading was filed; and, most importantly, (4) there is no basis upon which either Plaintiffs or Defendants could claim prejudice. *See United States v. Marsten Apartments, Inc.*,175 F.R.D.265, 267-68 (E.D. Mich.1997) (finding no prejudice where motion for intervention was filed two months after proposed intervenors learned of their

potential claims and when only limited discovery had taken place).(14)

It is worth noting that the present application is more prompt--both in absolute terms and relative to the progress of the litigation--than many others that courts have found timely. *See, e.g, Grubbs v. Norris,* 870 F.2d 343,345-46 (6th Cir.1989) (allowing intervention 9 years after suit was brought, and after discovery and trial); *Baker,* 504 F. Supp. at 848 (granting intervention to minority

13 Commentators have noted numerous shortcomings in the legal theories and strategies adopted by the University of California in *Regents of the Univ. of Cal. v. Bakke,* 438 U.S.265 (1978), including the University's failure to plead or prove its own prior discrimination; present testimony from expert witnesses or minority students; substantiate the need for minority doctors; or to demonstrate the good performance of minority students admitted pursuant to the affirmative action program. *See generally* Emma C. Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action,* 14 Harv. C.R.-C.L. L.Rev. 31, 76 (1979).

14 The *Marsten* court also found that though allowing intervention would require the taking of additional discovery, "this . . . alone [was] insufficient to establish prejudice." *Marsten,* 175 F.R.D. at 268.

police officers three years after suit was filed and three months before trial). As the timeliness factors seer; to prevent "a tardy intervenor from derailing a lawsuit within sight of the terminal " *United States v. South Bend Community Sch. Corp.,* 710 F.2d 394, 396 (7th Cir.1983), *cert. Denied sub nom. Brookins v. South Bend Community Sch. Corp.,* 466 U.S.926 (1984), allowing intervention here--soon after the filing of Defendants' Answer, and prior to discovery or class certification--must satisfy the Rule's requirement.

Given the inherent conflict between the interests of Defendants and those of the Applicants, and the strength of the Applicants' interest in this case, intervention is appropriate even though the litigation is still in its early stages. Indeed, the rules favor intervention at the beginning of the lawsuit before substantial litigation has taken place, *see Marsten Apartments,* 173 F.R.D. at 268, implicitly recognizing that applicants should not be required to wait until potential conflicts and representational inadequacies are fully manifested (which often occurs at the close of discovery and sometimes after final judgment). Were it otherwise, courts would face the unsatisfactory choice between reopening discovery and denying intervenors the ability to fully protect their interests. Allowing intervention now allows Applicants to participate in important discovery concerning the scope of the University's admissions pro rams and to provide critical evidence regarding the vital interests served by allowing the University to consider race as a factor in its admissions program.

II. Permissive Intervention Under Rule 24(b) is Also Proper

The considerations outlined above also plainly suffice to grant Applicants permissive intervention under Rule 24(b). Rule 24(b) grants a district court the discretion to allow intervention if the application is timely, *see Purnell,* 925 F.2d at 950, and if the "applicant's claim or defense and the main action have a question of law or fact in common." Fed R. Civ. P. 24(b)(2). In exercising its discretion, the district court should also consider whether "intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Purnell,* 925 F.2d at 951. Unlike with intervention under Rule 24(a), the court need not determine the significance of the interests of the proposed intervenors, nor the adequacy of representation.

As demonstrated above, proposed intervenors seek to interpose defenses that share common

factual and legal questions with those raised in the main action. Proposed intervenors seek to ensure educational access for African-American and Latino students and to maintain a diverse student body. Further, as explained above, there is no tenable basis upon which either party could claim that proposed intervenors' participation will cause prejudice or delay: Applicants have sought intervention promptly after the filing of Defendants' answer. and before any significant progression of this suit.(15) Thus, even if this Court should determine that not all of the requirements of Rule 24(a) have been met, it should permit the requested intervention under Rule 24(b).

Conclusion

For the foregoing reasons, Applicants Ebony Patterson, et al., are entitled to participate in this action as defendant-intervenors, either as a matter of right, *see* Fed. R. Civ. P.24(a), or with the Court's permission, id. R. 24(b).

Respectfully submitted,

Dated: February 5, 1998

Godfrey J. Dillard P-2202
Milton R. Henry P-14884
Reginald M. Turner, Jr. P-40543
Citizens for Affirmative
Action's Preservation
2500 Buhl Building
Detroit, MI 48226

ELAINE R. JONES
DIRECTOR-COUNSEL

Theodore M. Shaw
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013

15 That Applicants are represented by several counsel should not engender any prejudice or delay. Counsel will act as a single entity, submitting a single set of pleadings, papers, and discovery requests, and will, if necessary, designate a single attorney for receiving service of other parties' papers.

Christopher A. Hansen
Steven R. Shapiro
Deborah N. Archer
American Civil Liberties
Union Foundation
125 Broad St.
New York, NY 10004

Brent E. Simmons
ACLU Fund of Michigan
217 S. Capitol Avenue
P.O. Box 13038
Lansing, MI 48901

Michael J. Steinberg 4P-43085
ACLU Fund of Michigan
1949 Washington Blvd., Suite 2910
Detroit, MI 48926

Patricia Mendoza
Mexican American Legal &
Educational Fund
549 S. Dearborn
Suite 750
Chicago, IL 60605