IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ, *et al.*,	)	
Plaintiffs	)	**Civil Action No. 97-75231**
v.	)	**Hon. Patrick Duggan**
LEE BOLLINGER, *et al.*,	)	**Hon. Thomas A.Carlson**
Defendants,	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY

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TABLE OF CONTENTS

Statement of the Issues..........iii

STATEMENT OF THE ISSUES PRESENTED..........iii

PRINCIPAL CONTROLLING AUTHORITIES.........iv

TABLE OF AUTHORITIES...........v

INDEX OF EXHIBITS...........viii

INTRODUCTION.........1

UNDISPUTED MATERIAL FACTS.............2

I. The Plaintiffs...............2

A. Jennifer Gratz..........2

B. Patrick Hamacher..........3

II. College of Literature, Science and the Arts ("LSA") Admissions Policies and Practices..........4

A. Overview..........4

B. LSA "Guidelines"..........10

C. Actual Admissions Outcomes Under the Guidelines..........15

ARGUMENT..........17

I. Defendants Have Violated the Equal Protection Clause and Title VI..........17

A. Defendants' Race-Conscious Admissions Policies and Practices Are Illegal under Justice Powell's "Intellectual Diversity" and "Academic Freedom" Rationale Articulated in *Bakke*..........19

1. The *Bakke* Case and Justice Powell's Opinion..........19

2. The University's Admission Policies and Practices Are Unlawful under *Bakke* and Justice Powell's Opinion...........22

B. Defendants' Admissions Policies and Practices Are Unlawful Because They Have No Remedial Purpose...........25

1. Justice Powell's "Academic Freedom" or "Diversity" Rationale Was Not the "Holding" of the Court in *Bakke*..........25

2. Supreme Court Cases Prior and Subsequent to *Bakke* Confirm that Remedying Identifiable Discrimination Is the Only Interest Sufficient To Justify Racial Classifications..........33

II. The Same Conduct Establishes Violations of 42 U.S.C. § 1981...........36

III. Plaintiffs and the Class Are Entitled to Partial Summary Judgment and Declaratory and Injunctive Relief...........37

CONCLUSION..........38

STATEMENT OF THE ISSUES PRESENTED

1. Whether the record shows that there is no genuine issue of any material fact and that plaintiffs and the class are entitled as a matter of law to partial summary judgment on liability because defendants' admissions policies and practices for the College of Literature, Science and the Arts ("LSA") violate 42 U.S.C. § 2000d under the rationale articulated by Justice Powell in *Regents of University of California v. Bakke,* 438 U.S. 265 (1978).

2. Whether the record shows that there is no genuine issue of any material fact and that plaintiffs and the class are entitled as a matter of law to partial summary judgment on liability under 42 U.S.C. § 2000d because defendants' admissions policies and practices for the LSA are based on racial classifications that are not intended to remedy past, identifiable discrimination.

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

PRINCIPAL CONTROLLING AUTHORITIES

Cases

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

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

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

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

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

Statutes

42 U.S.C. § 1981

42 U.S.C. § 1983

42 U.S.C. § 2000d

42 U.S.C. § 2000d-7(a)(1)

TABLE OF AUTHORITIES

(NOT INCLUDED)

INDEX OF EXHIBITS

Volume I:

Exhibit Description

A Excerpts from the deposition of Jennifer Gratz taken on September 17, 1998.

B Letter dated January 19, 1995 to Jennifer Gratz from Theodore L. Spencer.

C Letter dated April 24, 1995 to Jennifer Gratz from Theodore L. Spencer.

D Excerpts from the deposition of Patrick Hamacher taken on September 11, 1998.

E Letter dated November 19, 1996 to Patrick Hamacher from Theodore L. Spencer.

F The defendants' file on the application of Patrick Hamacher to the University of Michigan at Ann Arbor.

G The University's standard form letter for the action code R/EWLO that is contained in Patrick Hamacher's application file.

H Defendants' Objections and Responses to Interrogatory Numbers One (1), Two (2), and Ten (10) through Fourteen (14) of Plaintiffs' Interrogatories to Defendants (Set I) (dated April 7, 1998).

I Page 3 n.2 of the Reply Memorandum in Support of Defendants' Motion for Reassignment or, Alternatively, for Designating Actions as Companion Cases (dated July 29, 1998).

J Excerpts from the deposition of Marilyn McKinney taken on October 1, 1998.

K Excerpts from the deposition of Theodore L. Spencer taken on June 3-4, 1998.

L Excerpts from the deposition of James VanHecke taken on July 21, 1998.

M "EWG" Meeting Minutes dated April 10, 1996.

N "EWG" Meeting Minutes dated January 15, 1997.

O "EWG" Meeting Minutes dated February 12, 1997.

P "OUA" Memorandum dated April 12, 1996.

Q Defendants' document entitled "Protected Categories . . . Fall Term 1996," dated June 27, 1996.

R Defendants' document entitled "Fall 1998 Freshmen Potential Admits," dated January 19, 1998.

S Defendants' documents entitled "Admission Policy for Minority Students."

T Defendants’ document entitled "Executive Summary: Affirmative Action and Diversity Programs at the University of Michigan," dated November 1995.

U Excerpts from the deposition of Dianne Gauss taken on June 4, 1998.

V Defendants’ document entitled "Guidelines - SCUGA 1995."

W Defendants’ document entitled "Guidelines - SCUGA 1996."

X Defendants’ document entitled "Guidelines - SCUGA 1997."

Y Defendants’ document entitled "College of Literature, Science and the Arts Guidelines for All Terms of 1995."

Z Defendants’ document entitled "College of Literature, Science and the Arts for All Terms 1996."

Volume II

AA Defendants’ document entitled "College of Literature, Science and the Arts Guidelines for All Terms of 1997."

BB Defendants’ document entitled "U of M Admission System – Application Retrieve" for Jennifer Gratz.

CC Defendants’ document entitled "U of M Admission System – Application Retrieve" for Patrick Hamacher.

DD Defendants’ document entitled "College of Literature, Science and the Arts Guidelines for All Terms of 1998."

EE Defendants’ document entitled "1998 Guidelines for the Calculation of a Selection Index for all Schools and Colleges Except Engineering."

FF Defendants’ document entitled "Profile of the University of Michigan--Fall 95--Underrepresented Minorities," dated July 11, 1995.

GG Defendants’ document entitled "Profile of the University of Michigan--Fall 1995--Not Underrepresented Minority," dated July 11, 1995.

HH Defendants’ document entitled "Profile of the University of Michigan--Fall 95--Black," dated July 10, 1995.

II Defendants’ document entitled "Profile of the University of Michigan--Fall 95--Hispanic," dated July 10, 1995.

JJ Defendants’ document entitled "Profile of the University of Michigan--Fall 95--White," dated July 10, 1995.

KK Defendants’ document entitled "Profile of the University of Michigan--Fall 95--Asian," dated

July 11, 1995.

LL Defendants' document entitled "Profile for the University of Michigan--Spring-Fall 96--Underrepresented Minorities," dated September 9, 1996.

MM Defendants' document entitled "Profile of the University of Michigan--Spring-Fall 96--Not Underrepresented Minorities," dated September 9, 1996.

NN Defendants' document entitled "Profile of the University of Michigan--Spring-Fall 96--Black," dated September 23, 1996.

OO Defendants' document entitled "Profile of the University of Michigan--Spring-Fall 96--Hispanic," dated September 23, 1996.

PP Defendants' document entitled "Profile of the University of Michigan--Spring-Fall 96--White," dated September 9, 1996.

QQ Defendants' document entitled "Profile of the University of Michigan--Spring-Fall 96--Asian," dated September 9, 1996.

INTRODUCTION

More than twenty years ago, the United States Supreme Court invalidated a university admissions system that, through explicit racial classifications, constituted a "dual admissions" program—one for certain favored racial minorities, and another for the disfavored majority. *Regents of University of California v. Bakke,* 438 U.S. 265, 314-24 (1978) (Powell, J., concurring in the judgment); *id.* at 414-21 (Stevens, Stewart, Rehnquist, J.J., Burger, C.J., concurring in part in the judgment and dissenting in part). Today, in brazen and breezy defiance of *Bakke* and subsequent Supreme Court decisions on racial classifications, the University of Michigan operates an explicitly race-based dual admissions program. Plaintiffs Jennifer Gratz and Patrick Hamacher commenced this action and now bring this motion to obtain a declaration of rights that defendants' admissions policies and practices violate federal civil rights laws and the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs also move for an order of this Court permanently enjoining defendants from engaging in their illegal race discrimination practices in the future.

Plaintiffs Gratz and Hamacher are two white residents of the State of Michigan who applied for admission into the 1995 and 1997 fall, freshman classes, respectively, of the College of Literature, Science and the Arts (hereinafter "LSA"), the principal undergraduate school of defendant University of Michigan. Both Ms. Gratz and Mr. Hamacher were originally "postponed" or "wait-listed" and subsequently denied admission into the LSA. As plaintiffs' Complaint alleges, and as the deposition testimony and documents produced by defendants abundantly confirm, both Ms. Gratz and Mr. Hamacher had their applications considered and rejected under an admissions system that violated their legally protected right to equal protection of the law.

Plaintiffs bring this motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for partial summary judgment on the issue of whether the Board of Regents of the University of Michigan ("the University") violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and whether defendant Lee Bollinger, in his official

capacity as president of the University of Michigan, violated the Equal Protection Clause and 42 U.S.C. §§ 1981 and 1983. Plaintiff Hamacher also brings this motion on behalf of the class he represents, as certified by this Court by order dated December 23, 1998. Specifically, the motion is brought as to the admissions policies and practices of the LSA for the academic years from 1995 forward.

UNDISPUTED MATERIAL FACTS

I. The Plaintiffs

A. Jennifer Gratz

Jennifer Gratz is a white resident of the State of Michigan who applied in January 1995 for admission into the fall 1995 freshman class of the LSA. *See* Exhibit A to the accompanying affidavit of Kirk O. Kolbo (deposition testimony of Jennifer Gratz, p. 104 (September 17, 1998)). Ms. Gratz was notified by letter dated January 19, 1995 from Mr. Theodore L. Spencer, Director of the Office of Undergraduate Admissions of the University of Michigan, that the University had "delayed" a final decision on her application until early to mid-April. *See* Exhibit B; Exhibit A (Gratz depo. pp. 138-39). The letter informed Ms. Gratz that her application "was classified as well qualified, but less competitive than the students who have been admitted on first review." *Id.*

By letter dated April 24, 1995, the University informed Ms. Gratz that "all of the applications have now been reviewed and [the University] regret[s] to inform you that we are unable to offer you admission." *See* Exhibit C. The University invited Ms. Gratz to place her name on an "extended waiting list," but went on to state that "we expect to take very few students from the Extended Waiting List, and recommend students make alternative plans to attend another institution." *Id.* As a result of the denial of her admission to the LSA, Ms. Gratz accepted an offer for admission into the freshman class of another institution, the University of Michigan at Dearborn, where she enrolled in the fall of 1995, and from which she will graduate in the spring of 1999. *See* Exhibit A (Gratz depo. pp. 8, 142-44).

B. Patrick Hamacher

Plaintiff Patrick Hamacher is a white resident of the State of Michigan who applied in 1996 for admission into the fall 1997 freshman class of the LSA. *See* Exhibit D (deposition testimony of Patrick Hamacher, pp. 24-25 (September 11, 1998)). By letter dated November 19, 1996, the University informed Mr. Hamacher that it "must postpone" a decision on his application until "mid-April." *See* Exhibit E; Exhibit D (Hamacher depo. pp. 62-63). The letter stated further that "[a]lthough your academic credentials are in the qualified range, they are not at the level needed for first review admission" to the LSA. *See* Exhibit E.

On or about April 8, 1997, the University informed Mr. Hamacher that after further review, it was unable to offer him admission to the LSA. As a result of the denial of his admission into the freshman class of the LSA, Mr. Hamacher accepted admission into another institution, Michigan State University, where he enrolled in the fall of 1997 and where he is currently enrolled as a sophomore. *See* Exhibit D (Hamacher depo. pp. 74-76).

II. College of Literature, Science and the Arts ("LSA") Admissions Policies and Practices

A. Overview

A reading of defendants' answer is alone sufficient to establish as undisputed that defendants consider race and ethnicity in the admissions process, and that plaintiffs Gratz and Hamacher, as white applicants, did not have consideration of their applications "enhanced" on the basis of their race. *See* Answer at ¶¶ 18, 19, 22 (Defendants "use race as a factor in admissions . . ."); *id.* at ¶ 21 ("Defendants admit that plaintiffs are not members of an underrepresented minority group and that their race was not a factor that enhanced the University of Michigan's consideration of their applications."). It is also undisputed that the University is the recipient of federal financial support. *See* Answer at ¶ 15 ("Defendants admit that the University of Michigan, which includes the College of Literature Science and the Arts, receives federal funds.").

The sweeping extent to which defendants consider race and ethnicity in making admissions decisions is conclusively established by their answers to interrogatories, documents produced in the course of discovery, and the deposition testimony of defendants' employees. Defendants' own documents and words make for a compelling record that is more than sufficient to support summary judgment of liability against defendants for their unlawful race discrimination. Defendants explained the "mechanics" of the admissions process for the LSA in their answer to plaintiffs' first set of interrogatories. The material portions of that answer (Exhibit H) can be summarized as follows:

- The Office of Undergraduate Admissions (OUA) has principal responsibility for making admissions decisions for the LSA.

- The OUA is assisted by the Enrollment Working Group ("EWG"), comprised of representatives of various units and offices within the University. The EWG has a principal role of ensuring that the University does not exceed or fall short of enrollment targets. EWG also assists in achieving the desired distribution of students among academic units and the desired composition of the entering class.

- Applications begin arriving in the summer preceding the academic year for which applicants are applying (*e.g.,* summer of 1994 for the fall term of 1995). OUA does a "first review" of applications as they begin to arrive and makes admissions decisions on a "rolling basis," *i.e.,* throughout the admissions cycle.

- The OUA admissions process is implemented pursuant to written guidelines in effect for each academic year.

- Clerical employees of OUA process applications by, among other things, converting applicant high school grade point averages to a 4.0 scale used by the University, and entering identifying information concerning an applicant, *e.g.,* recomputed GPA, high school percentile rank, SAT/ACT scores.

- Applicants whose grades and standardized test scores fall within "pre-determined ranges" in the guidelines are either accepted or rejected for admission. The applications of all others are forwarded for "first review" by one of approximately twenty admissions counselors.

- The applications of all "underrepresented minority" applicants are forwarded to admissions counselors, regardless of whether their grades and test scores fall within the pre-determined guideline ranges for "automatic" admit or reject decisions.

- Admissions counselors assign points to applicants on the basis of various admissions factors,

> including the membership of an applicant in an "underrepresented racial or ethnic group."
>
> • Admissions counselors then make "first review" decisions on applicants after consulting the written guidelines. The actions that may be taken on first review include admission, rejection, delaying for additional information, or postponing for reconsideration during the final review process in the spring.

See Exhibit H (Defendants Objections and Responses to Plaintiffs' Interrogatory No. 1, pp. 6-14) (April 7, 1998)).

Defendants justify the use of race as a factor in the admissions process on grounds that it serves a "compelling interest in achieving diversity among its student body." *See id.* (Response to Interrogatory No. 12, p. 17).

In answering plaintiffs' interrogatories, defendants also admitted that they "protect" a "certain number of seats" in each class for certain groups of students, including underrepresented minority candidates:

> 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.

See Exhibit H (Defendants Response to Interrogatory No. 1, p. 13).

As noted above, admissions decisions on applicants whose credentials are not sufficiently high to be admitted on first review are sometimes "postponed" for review later in the admission cycle. The "postpone" or "wait list" candidates are those whose academic credentials would "qualify" them for admission if there were sufficient spaces available in the class for all "qualified" students. *See* Exhibit J (McKinney depo. p. 152). The University generally defines a "qualified" applicant as one who could be expected, on the basis of the information contained in his or her application, to achieve passing grades as a student in the school to which the applicant has applied for admission. *See* Exhibit J (McKinney depo. pp. 57-58); Exhibit K (Spencer depo. pp. 82-87); Exhibit L (VanHecke depo. pp. 36-41).

Applicants who are members of "underrepresented minority" racial or ethnic groups and who are "qualified" for admission to the LSA do not have their applications "postponed" or "wait listed" for consideration for review in the spring. *See* Exhibit J (McKinney depo. pp. 54, 143-44, 174-76). This is because it is the policy and practice of the defendants to offer admission to all underrepresented minority applicants who are "qualified" for admission, *i.e.,* who could be expected to achieve passing grades at the LSA. *See id.* (McKinney depo. pp. 56-58). Applicants who are not members of "underrepresented minority groups," however, like Jennifer Gratz and Patrick Hamacher, may be placed on the "postpone"

or "wait list." *See id.* (McKinney depo. pp. 32-33, 115-18, 175-76). The University defines "underrepresented minority groups" to include African-Americans, Hispanic Americans, and Native Americans. *See id.* (McKinney, depo. p. 39); Exhibit K (Spencer depo. p. 73); Exhibit L (VanHecke depo. pp. 40-41). The policy with respect to "qualified" minorities versus "qualified" non-minorities is memorialized in writing by the University:

> . . . [M]inority guidelines are set to admit all students who qualify and meet the standards set by the unit liaison with each academic unit, while majority guidelines are set to manage the number of admissions granted to satisfy the various targets set by the colleges and schools. . . .
>
> . . . .
>
> . . . Thus, the significant difference between our evaluation of underrepresented minority groups and majority students is the difference between meeting qualifications to predict graduation rather than selecting qualified students one over another due to the large applicant pool.

See Exhibit S (Office of Undergraduate Admissions "Admission Policy for Minority Students," p. 2 (October 4, 1995)); *see also* Exhibit T ("Executive Summary: Affirmative Action and Diversity Programs at the University of Michigan," p. 2 (November 1995)). Defendants' employees responsible for implementing admissions policies have confirmed in deposition testimony that it is and has at all material times been the policy of the University to admit all "qualified" applicants who are members of "underrepresented minority" groups; whereas admission of "qualified" applicants who are not members of underrepresented minority groups is based on competitive considerations due to limited available spaces in the class. *See* Exhibit J (McKinney depo. pp. 56-58, 81-82, 87-89, 103); Exhibit K (Spencer depo. pp. 83-87, 119-20, 154-55); Exhibit L (VanHecke depo. pp. 36-39).

B. LSA "Guidelines"

Written "Guidelines" for all LSA classes commencing in 1995, 1996, and 1997 have in common the use of grids or tables that are divided into cells representing different combinations of adjusted high school grade point averages and scores on ACT or SAT tests. The grade point averages are adjusted first by clerical employees and second by admissions counselors. The adjustments made by the admission counselors are based on application of separate written "SCUGA" guidelines, which result in a score on a four-point scale that is represented in the tables for each year. The SCUGA guidelines, for example, call for addition or subtraction of points based on the quality of an applicant's high school ("S"), strength of curriculum ("C"); unusual circumstances ("U"), geographic factors ("G"), and alumni relationships ("A"). *See* Exhibits V, W, and X (SCUGA Guidelines for academic years 1995, 1996, and 1997, respectively).

Each cell in the Guidelines tables includes one or more possible action for consideration by the admissions counselor reviewing an applicant's file. Generally, the Guidelines actions fall into one of the following categories: admission; rejection; delay; or postpone. Generally, too, admissions counselors are expected to conform admissions decisions to the Guidelines. *See* Exhibit J (McKinney depo. pp. 24-25, 29-30, 64-66); Exhibit K (Spencer depo. pp. 55-57). The Guidelines for applicants in 1995 (which includes Jennifer Gratz) have four separate tables for each of the following groups of applicants: in-state non-minority students; out-of-state non-minority students; in-state minority students; and out-of-state minority students. See Exhibit Y (1995 Guidelines, pp. 1-4). For applicants for the 1996 and 1997 classes (which include Patrick Hamacher), there are two tables—for in-state and out-of-state applicants—and minority and non-minority action codes are provided for separately in each of the individual cells, with

the top row of the cell representing the Guidelines action for non-minority students and the bottom two rows for minority applicants or other disadvantaged or underrepresented students. *See* Exhibit Z (1996 Guidelines, pp. 1-2); Exhibit AA (1997 Guidelines, pp. 1-2).

The actions called for by the Guidelines differ among cells within the table or tables and in many cases among different applicant groups within the same cell. Generally, the Guidelines action for "admission" is found in cells representing relatively higher combinations of adjusted grade points ("GPA 2" or "Selection Index") and test scores than in cells providing for delay, postpone, or rejection. The Guidelines reflect that admission decisions are generally more competitive for out-of-state than in-state applicants. The Guidelines also establish that admission decisions for non-minorities are generally more selective, requiring higher academic qualifications, than admission decisions for minority applicants. *See also* Exhibit K (Spencer depo. pp. 105-06). For example, in 1995, minority Guidelines called for *admission* or delay decisions for students with combinations of adjusted grade point averages at or above 2.6 and ACT/SAT scores at or above 18 and 820, respectively. For non-minority in-state students that year, the Guidelines generally called for *rejection* of applicants with adjusted grade point averages below 3.2 and ACT/SAT scores below 23 and 950, respectively.

In the case of Jennifer Gratz, her adjusted high school grade point average ("GPA 2") of 3.8 and ACT score of 25 placed her in a cell that called for a "postpone" on the first review under the 1995 Guidelines, which was the first action taken with respect to her. *See* Exhibit BB (U of M Admission System – Application Retrieve for Jennifer Gratz); Exhibit Y (1995 Guidelines, p. 1). For a minority applicant (in-state or out-of-state) with the same combination of "GPA 2" and test score the Guidelines called for a decision to "Admit." *See* Exhibit Y (1995 Guidelines, p. 2). Patrick Hamacher had an adjusted grade point average ("Selection Index") of 3.0 and an ACT score of 28, which placed him in a cell in the 1997 Guidelines that called for "postponement" of non-minority students and delay or admission of minority students. *See* Exhibit CC (U of M Admission System – Application Retrieve for Patrick Hamacher); Exhibit AA (1997 Guidelines, p. 1); Exhibit F (Hamacher application file).

The Guidelines for all terms in 1995 and 1996 also contained a section on "Guideline Exceptions" that included the following with respect to "underrepresented minority groups": "All qualified American Indians, Black/African American, and Hispanic/Latino American applicants will be admitted as soon as high probability of success can be predicted." *See* Exhibit Y (1995 Guidelines, p. 13); Exhibit Z (1996 Guidelines, p. 12). The Guidelines for the 1997 term contained a similar provision, which reflected the use that year of a "SCUGA" factor for "underrepresented minorities": "Students whose circumstances meet the spirit of contributing to a diverse class as defined in item IV of the "U" factor in 'SCUGA' guidelines will be admitted as soon as a high probability of success can be predicted for them." *See* Exhibit AA (1997 Guidelines, p.13). The addition of a "SCUGA" factor for underrepresented minority status in 1997 had another consequence: underrepresented minorities had half a point (.5) added to their grade point average calculation used in the Guidelines tables. *See* Exhibit X ("Guidelines - SCUGA 1997," p. 3); Exhibit K (Spencer depo. pp. 127-30). This meant that underrepresented minorities applying for the 1997 class had the advantage of yet another systematic, artificial preference—race-based grade inflation—*compounding* the preference already afforded by the dual-track Guidelines tables.

The LSA Guidelines for classes commencing in 1998 dispensed with the tables and cells used in prior years. The new guidelines used a "Selection Index" calculated on a variety of factors and scored on a scale of up to 150 points. *See* Exhibit DD (1998 Guidelines, p. 1). The Guideline actions to be taken on an application are generally divided linearly as follows: 100 to 150 points (admit); 95-99 points (admit or

postpone); 90-94 points (postpone or admit); 75-89 points (delay or postpone); 74 points and below (delay or reject). *See id.* The factors used to calculate an applicant's "Selection Index" under the 1998 Guidelines are similar to factors used in prior years. Up to 80 points can be based on high school grade point average (*e.g.*, 40 points for a 2.0 grade point average; 60 points for a 3.0; and 80 points for a 4.0). *See* Exhibit EE (1998 Guidelines for Calculation of Selection Index, p. 9). Up to 12 points, representing a perfect ACT/SAT score, can be earned for performance on either of the two standardized tests; up to 10 points for quality of school; from 8 to 4 points for strength or weakness of high school curriculum; 10 points for in-state residency; 4 points for alumni relationships; 1 point for an outstanding essay; and 5 points for personal achievement or leadership on the national level. *See id.* Under a "miscellaneous" category, 20 points are added for one of several factors, including an applicant's membership in an underrepresented racial or ethnic minority group. *See id.*; *see also* Exhibit J (McKinney depo. pp. 93-96); Exhibit K (Spencer depo. pp. 156-59, 163-67).

The 1998 Guidelines, with respect to the consideration of race in the admissions process, constituted a change in form, not substance. The University adopted the 1998 Guidelines with the intent to admit and enroll the same composition of class as had been admitted and enrolled under the previous Guidelines. *See* Exhibit J (McKinney depo. pp. 77-78); Exhibit K (Spencer depo. pp. 143-45, 152-53, 205). In adopting the 1998 Guidelines, the University did not intend to increase or decrease from prior years the extent to which it considers race and ethnicity in the admissions process. *See* Exhibit J (McKinney depo. p. 103); Exhibit K (Spencer depo. p. 144). The 1998 Guidelines are those currently in use by the University in making admissions decisions for the LSA. *See* Exhibit J (McKinney depo. pp. 178-79).

The various ways discussed above in which race or ethnicity was and is a factor under the defendants' policies do not depend on any factor other than race or ethnicity. Thus, under the current Guidelines, *all* underrepresented minorities receive a 20-point bonus solely on account of their race or ethnicity, without need to show more, *i.e*, socioeconomic or other disadvantage. *See* Exhibit J (McKinney depo. p. 93). The same is true for the systematic policies to admit *all* qualified underrepresented minorities; to fill certain protected spaces only with underrepresented minorities; to consider them under different "Guidelines" in 1995-1997; to boost their GPAs by half a grade point in 1997; and to *never* place them on the "postpone list"or "automatically" reject their applications on the basis of low grades or test scores. *See* Exhibit K (Spencer depo. pp. 106-12, 115-16).

C. Actual Admissions Outcomes Under the Guidelines

For the classes that began in 1995 and 1996, OUA prepared "profiles" based on actual admission decisions. The profiles plotted applications, offers, and deposits paid onto a table divided into different cell combinations of adjusted grade point averages ("GPA 2") and test scores. The tables show, for example, that for the Fall 1995 term, 46 underrepresented minorities applied with an adjusted grade point average ("GPA 2") of 3.80 to 3.99 and ACT/SAT test scores between 24-25(ACT) or 1000-1090(SAT), and *all* 46 received offers of admission. *See* Exhibit FF ("Profile of the University of Michigan--Fall 1995--Underrepresented Minorities," dated July 11, 1995). In that same combination of scores, which is where Jennifer Gratz's scores are located, 378 "Not Underrepresented Minorities" applied, and only 121 received offers of admission. *See* Exhibit GG ("Profile of University of Michigan--Fall 1995--Not Underrepresented Minority," dated July 11, 1995). The difference in admission decisions between underrepresented minorities and non-minorities with comparable GPA 2 and test scores can be readily examined throughout defendants' profiles. Much information is contained in these tables, but in general they show that for almost every combination of GPA 2 and test scores at or above 3.0(GPA 2) and

20-21(ACT)/800-890(SAT), the admission rate for underrepresented minorities was at or above 90%. In more than half of those cells (28 out of 48), the admission rate was 100%. In another 11 cells, the admission rate for underrepresented minorities was between 90% and 99%. In comparison, a 90% or better acceptance rate for the "Not-Underrepresented Minority" group is found only at the highest combinations of GPA 2 and test scores, with either a minimum GPA 2 of 3.80 or a minimum test score of 29, or both. In many of the cells with a 90% admission rate for underrepresented minorities, the "Not Underrepresented Minority" group has an admission rate ranging between 0% to less than 50%.

The 1996 profiles prepared by the defendants convey similar information. Briefly, for the Spring-Fall 1996 term, there was *at least* a 90% acceptance rate for underrepresented minorities with minimum combinations of a 2.8 (GPA 2) and test scores of 20-21(ACT)/830-1000(SAT). *See* Exhibit LL ("Profile for University of Michigan--Spring-Fall 1996--Underrepresented Minority," dated September 9, 1996). For the "Not Underrepresented" group, a 90% or greater acceptance rate is found only in cells with either a minimum GPA 2 of 3.8 or a minimum test score of 27(ACT)/1200-1270(SAT), or both. *See* Exhibit MM ("Profile for University of Michigan--Spring-Fall 1996--Not Underrepresented Minorities," dated September 9, 1996).

ARGUMENT

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

Title VI prohibits discrimination on the basis of race or ethnicity by those receiving federal funds. *See* 42 U.S.C. § 2000d. The Supreme Court has held that Title VI prohibits the same intentional conduct as does the Equal Protection Clause. *United States v. Fordice,* 505 U.S. 717, 732 n.7 (1991); *see also Michigan Road Builders Ass'n v. Milliken,* 834 F.2d 583, 585 n.3 (6th Cir. 1987). The University is a state-operated institution which, as a recipient of federal funds, is subject to the prohibitions of Title VI. By accepting federal funds, the University has waived any defense based on sovereign immunity for claims arising under Title VI. *See* 42 U.S.C. § 2000d-7(a)(1). *Cf. Franks v. Kentucky School for the Deaf,* 142 F.3d 360, 362 (6th Cir. 1998) (Congress, through § 2000d-7(a)(1), abrogated a state's sovereign immunity for Title IX claims). Title 42 U.S.C. Section 1983 provides a remedy, including declaratory and injunctive relief, for individuals whose constitutional rights have been violated under color of state authority. *See, e.g., Will v. Michigan Department of State Police*, 491 U.S. 58, 71 n.10 (1989).

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

The second, independent argument in support of plaintiffs' motion for summary judgment on the Title VI and Equal Protection claims is that defendants do not justify their race-conscious admission policies on

the one interest that the Supreme Court recognizes as sufficiently compelling to justify use of racial classifications: action taken by a party to remedy, through narrowly tailored means, past, identifiable discrimination. Justice Powell's "diversity" or "academic freedom" rationale, as set forth in his singular opinion in *Bakke,* does not constitute and never has constituted the "holding" of the Court. No Justice other than Justice Powell, and certainly not a majority of the Court, has ever held that "intellectual diversity" or "academic freedom" are "compelling interests" justifying use of racial classifications of any kind. Defendants rely on no other purported compelling interest to justify their race-conscious admissions policies and practices. Consequently, even if defendants' admissions policies and practices met the requirements of Justice Powell's "diversity" or "academic freedom" rationale, they are illegal under controlling Supreme Court cases on racial classifications.

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

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

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

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

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

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

The constitutional interest in "diversity" that Justice Powell wrote about pertained to intellectual, viewpoint diversity: "the right to select those students who will contribute the most to the 'robust exchange of ideas'" and the "atmosphere of 'speculation, experiment and creation'-- so essential to the quality of higher education." *Id.* at 312-13 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)). It was in that context of discussing a state interest in an intellectually diverse student body that Powell concluded "[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body," *id.* at 313-14, and admonished that it was "not an interest in simple ethnic diversity," *id.* at 315.

Justice Powell made clear at several points in his opinion that in assembling a diverse or heterogenous student body, race or ethnicity was a factor that might be considered on an individualized, case-by-case basis, rather than in a systematic, generalized fashion. Thus, he reasoned that "race or ethnic background may be deemed a 'plus' in a ***particular*** applicant's file. . . . The file of a ***particular*** black applicant may be examined for his potential contribution to diversity without the factor of race being decisive." *Id.* at 317 (emphasis added). "In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the ***particular*** qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Id.* (emphasis added). In Allan Bakke's case, it was the "denial" of his "right to ***individualized*** consideration without regard to his race" that Justice Powell called "the principal evil" of the Davis special admissions program. *Id.* at 318 n.52 (emphasis added).

The Davis program, it was "evident" to Justice Powell, was guilty of a "facial intent" to discriminate. *Id.* at 318. A "facially nondiscriminatory admissions policy" would be one, he reasoned, "where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process." *Id.* "So long as the university proceeds on an ***individualized, case-by-case*** basis, there is no warrant for judicial interference in the academic process." *Id.* at 319 n.53 (emphasis added). Even under a facially nondiscriminatory policy, however, an applicant could overcome a presumption of good faith on the part of the university if the "applicant can establish that the institution does not adhere to a policy of ***individualized comparisons,*** or can show that a ***systematic exclusion*** of certain groups results." *Id.* (emphasis added).

Thus, Justice Powell found that the Davis "dual admission" or "two-track" system, *id.* at 314-15, in which a number of seats in the medical school class were reserved on the basis of "explicit racial classification," *id.* at 319, for "at least minimally qualified minority applicants," *id.* at 289, violated the Equal Protection Clause, *id.* at 319-20. It bears repeating that Justice Powell voted to invalidate the Davis program as unconstitutional even though he (alone) wrote approvingly of "diversity" as a compelling governmental interest that could justify the use of race in university admissions decisions.

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

The LSA admissions programs for all the years challenged in this lawsuit are well beyond the pale even as defined by Justice Powell. For reasons articulated by Powell, the University's policies and practices regarding admission to the LSA are facially unconstitutional. The question is not a close one. Indeed, the undisputed material facts as set forth in the foregoing pages establish the University of Michigan as a champion of illegal race discrimination, with the Davis program at issue in *Bakke* looking, by comparison, like the product of novices.

There are a number of aspects of the LSA admissions policies that would, if considered alone, be sufficient to invalidate them as illegal racial classifications under *Bakke.* When viewed as a whole, the policies resemble the design of a modern machine, with multiple "fail-safe" race norming mechanisms that guarantee the kind of "diversity" that the University strives to achieve. It is or ought to be astonishing, for example, that any university in the 1990s employs separate explicit guidelines and standards for admission for racial and ethnic minority applicants versus non-minority applicants, or that "protects" or "reserves" a "certain number of seats" each year for certain racial minorities, or that maintains a racially segregated "postpone" or "wait-list," or that adds points to the application of every member of certain racial or ethnic minority groups solely on the basis of that minority status. That one institution does *all* of these things as part of its efforts to assemble a "diverse" student body is redundant proof of that institution's willful disobedience of the law.

Race and ethnicity, as factors in LSA admissions decisions, are accounted for in a systematic manner that has decisive consequences for the way in which a student's application is considered and often in the outcome of the admissions decision. The flaw in LSA admissions, when viewed in light of Justice Powell's reasoning, is not that race or ethnicity in the consideration of a ***particular*** applicant's file might "tip the balance" in favor of that applicant in a "competitive" weighing of a variety of factors. The illegality arises from the fact that ***every*** LSA applicant who is a member of one of the preferred racial or ethnic minorities receives consideration on account of race or ethnicity under terms more favorable than those for individuals who are not members of one of the preferred minority groups. Thus, and by way of example only, it is the policy and practice of the LSA to offer admission to every "qualified" applicant who is a member of one of the preferred minorities, whereas admission of "qualified" non-minority students is constrained by "the large applicant pool." And so it also goes with "protected" spaces for minorities, the segregated wait-list, separate academic guidelines for admission, and the automatic adding of points solely on the basis of race or ethnicity. Each of these preferences is awarded as a matter of policy on a group-wide basis that requires no individual, particularized consideration of a student's application other than to ascertain the student's membership in one of the preferred racial or ethnic groups.

Justice Powell condemned the Davis program because it insulated the preferred minorities from consideration for admission in comparison to the applicants from non-preferred groups. In *Bakke*, the insulation occurred through use of a separate admissions committee and the reservation of seats. The same kind of insulation occurs in the defendants' use of separate admission guidelines and standards and "protected spaces." *See also Wessmann v. Gittens,* 160 F.3d 790, 769-809 (1st Cir. 1998) (declaring unconstitutional racial classifications used by public "Boston Latin School" in admissions).

Defendants mock Justice Powell with their race-driven admissions policies and invocation of his opinion in defense of their egregious practices. Their disingenuous interpretation of *Bakke*, if accepted, would effectively confine its meaning to the precise facts of the Davis program. It would leave universities free to engage at will in the worst kinds of race norming, so long as incantation of the appropriate slogans and code words (*e.g.*, "plus factor," "diversity," "academic freedom") occurs with sufficient frequency and volume to completely obscure the constitutional evil that is done. Plaintiffs, through this motion, seek to put an end to defendants' farcical defense of outright, illegal race discrimination, which they cloak under the guise of "diversity" and the First Amendment.

B. Defendants' Admissions Policies and Practices Are Unlawful Because They Have No Remedial Purpose.

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

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

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

> [T]his should not and must not mask the *central meaning* of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, *at least when appropriate findings have been made by the judicial, legislative, or administrative bodies with competence to act in this area.*

438 U.S. at 325 (emphasis added).

Conspicuously, the Brennan group did *not* state that the "central meaning" of the opinions in *Bakke* was that race could be considered to achieve "intellectual diversity" or any other purported goal of a university in the pursuit or exercise of its "academic freedom." *See also Hopwood v. Texas,* 78 F.3d 932, 944 (5th Cir. 1996) (citing *Bakke*, 438 U.S. at 326 n.1, for the conclusion that the Brennan opinion "implicitly rejected Justice Powell's position").

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

In *Marks v. United States,* 430 U.S. 188 (1977), the Supreme Court commented that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the 'holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* at 193. An assertion that Powell's opinion represents the "holding" of the Court finds no support in an analysis to discern the "narrowest" ground on which the opinions of Powell and Brennan concurred on the permissible use of race in the admissions process. Powell approved of using race as a "plus factor" to achieve diversity in a manner that he suggested was described by the "Harvard plan" appended to his opinion. As noted, however, the Brennan opinion did not endorse Powell's justification of diversity, and Justice Brennan's reference to the "Harvard plan" contained a restriction not present in Justice Powell's analysis. Significantly, the Brennan group stated their agreement with Justice Powell that the "Harvard plan" was constitutional "under our

approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." 438 U.S. at 326 n.1 (Brennan, J., concurring in part and dissenting in part); *id.* at 379 (noting that "Harvard plan" allocated seats to "disadvantaged minority students"). Given that express limitation placed by four of the five Justices in *Bakke* who would allow some consideration of race in the admissions process, it is surely erroneous to argue that the *narrowest* ground of concurrence is found only with reference to Justice Powell's diversity rationale.

It is not at all clear that any "narrowness" analysis can or should apply to a specific proposition or mode of analysis when a majority of the Court has rejected the analysis. *See, e.g.*, *Rutledge v. United States,* 517 U.S. 292, 298-99 (1996) (where argument that "in concert" element of crime required less of a showing than a "conspiracy" was "rejected to varying degrees, by [eight Justices]," it had not been considered precedential by lower courts). Lower courts have generally eschewed the *Marks* "narrowness" analysis when the differing opinions of the Supreme Court have no "common denominator." *See, e.g., Ass'n of Bituminous Contractors, Inc., v. Apfel,* 156 F.3d 1246, 1254 (D.C. Cir. 1998) (the "narrowest grounds" approach "does not apply unless the narrowest opinion represents a 'common denominator of the Court's reasoning' and 'embod[ies] *a position implicitly approved by at least five Justices* who support the judgment'") (emphasis added); *Rappa v. New Castle County,* 18 F.3d 1043, 1056-58 (3d Cir. 1994).

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

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

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

Although the Supreme Court has not explicitly reexamined *Bakke,* the Court has subsequently commented on its splintered nature. In *Adarand Constructors v. Pena,* 515 U.S. 200, 218 (1995), the Court noted that "*Bakke* did not produce an opinion for the Court" and that the "failure to produce a

majority opinion in *Bakke* [and other cases] left unresolved the proper analysis for remedial race-based governmental action." *Id.* at 221. In *Fullilove v. Klutznick,* 448 U.S. 448 (1980), the Court made explicit that it "di[d] not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *Bakke*." *Id.* at 492; *see also Hopwood*, 78 F.3d at 945 ("[T]here has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination.").

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

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

> [T]he Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program.

438 U.S. at 377 (Brennan, J., concurring in part and dissenting in part).

Justice Powell's rationale based on diversity requires no such showing of disadvantage. The point is not merely an academic one. Take this case, for example. Assuming, *arguendo,* that the defendants have

satisfied Justice Powell's diversity rationale, they clearly fail to satisfy the Brennan group's requirement of demonstrated disadvantage on the part of the minority beneficiaries of their admissions policies. In a number of respects defendants grant preferences to minorities on a wholesale, systematic basis, without any showing of disadvantage. Thus, by way of example only, *all* members of designated "underrepresented minority" groups receive 20 points added to their selection index score under the defendants' current guidelines, regardless of disadvantage or other circumstances. Assuming that such blunt racial balancing satisfies Justice Powell's diversity rationale, it is surely too over inclusive to meet Justice Brennan's strictures, as quoted above. Where the stated reasoning of eight of the Justices would invalidate defendants' admissions policies, as here, it cannot be seriously contended that the rationale of the ninth Justice controls the outcome.

It is meaningless and untrue, therefore, to argue that Justice Powell's vote to invalidate the Davis Program and the Brennan group's vote to sustain it proves the "narrower" scope of Justice Powell's "diversity" rationale. The facts of each case will determine which of the two rationales prove to be the "narrower" in the application. In a case of race-conscious decisionmaking that passes constitutional muster under Justice Powell's "diversity" rationale, but not under the "remedial" rationale of the Brennan group, it would be absurd to suggest that the Powell rationale is "narrower."

The only common denominator between the opinions of Justice Powell and Brennan is in their remedial analysis. The five Justices represented by Justice Powell and the Brennan group agreed that race could be taken into account in some remedial forms. And between the two opinions that expressed that view, Justice Powell's remedial analysis was clearly narrower than that of the Brennan group.

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

2. Supreme Court Cases Prior and Subsequent to *Bakke* Confirm that Remedying Identifiable Discrimination Is the Only Interest Sufficient To Justify Racial Classifications.

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

Significantly, the Court has explicitly condemned *any* non-remedial interest. *Croson,* 488 U.S. at 493 ("Classifications based on race carry a danger of stigmatic harm. Unless they are *strictly reserved* for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.") (opinion of O'Connor, J.) (emphasis added); *id.* at 520 (Scalia, J., concurring in the judgment); *see also Hopwood*, 78 F.3d at 944 ("[T]he Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs").

Justice Powell's assertions to the contrary notwithstanding, the Court has never accepted any "right" of the state to engage in race-conscious decisionmaking based on the First Amendment. In *Runyon v. McCrary,* 427 U. S. 160 (1976), the Court directly confronted the issue, concluding that although "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, . . . it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle." *Id.* at 176 (emphasis added). If a private school's First Amendment right to express racially discriminatory views through its admissions policies and practices must yield to the equal protection claims of others, *a fortiori,* a *state's* interest in First Amendment freedoms—a far more problematic idea, since the First Amendment is usually thought of as a source of rights for people against the state, and not the other way around—should have even less weight when compared to principles of non-discrimination. In any event, the Court has never held that state entities should have *more* First Amendment protection than is afforded to private individuals and organizations. *See also Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984) (noting that "the right to associate for expressive purposes is not . . . absolute," even for a *private* entity, and holding that the State of Minnesota's interest in eradicating discrimination was sufficiently important to overcome the First Amendment interest of a private organization's right of association for expressive purposes).

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

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

Title 42 Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws . . . as is enjoyed by white citizens . . ." Although its text suggests that only non-whites are the intended beneficiaries of Section 1981, the Supreme Court has held that it prohibits racial discrimination against whites to the same extent as others. *McDonald v. Santa Fe Trail Transp.*

Co., 427 U.S. 273, 295-96 (1976). A contract for educational services is a "contract" for purposes of Section 1981. *See Runyon v. McCrary,* 427 U.S. 160, 172 (1976). Section 1981(c) specifically provides that the right to contract equally without regard to race is protected from impairment under color of state authority.

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

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

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

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

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully submit they are entitled to summary judgment as

follows:

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

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

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

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