IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ AND PATRICK HAMACHER, for themselves and all others similarly situated,	)	
Plaintiffs	)	**Civil Action No. 97-75231**
	)	**Hon. Patrick Duggan**
v.	)	**Hon. Thomas A.Carlson**
LEE BOLLINGER; JAMES J. DUDERSTADT; THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,	)	
Defendants,	)	**Class Action**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the record shows that there is no genuine issue of any material fact and that 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 narrowly tailored to meet a compelling governmental interest.

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.

4. Whether the facts upon which defendants rely for their motion for summary judgment are disputed such that their motion for summary judgment should be denied.

5. Whether defendants' motion for summary judgment on the claims for damages against the individual defendants on grounds of "qualified immunity" should be denied.

6. Whether defendants' motion for summary judgment on the Title VI damages claim should be denied.

PRINCIPAL CONTROLLING AUTHORITIES

CASES

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

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

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

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

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

STATUTES

42 U.S.C. § 1981

42 U.S.C. § 1983

42 U.S.C. § 2000d

42 U.S.C. § 2000d-7(a)(1)

INDEX OF EXHIBITS

Exhibit Description

- Expert Report of Dr. Kinley Larntz, dated December 14, 1998.

- Excerpts from Introduction to defendants' compilation of expert reports.
- 1998 Guidelines Training Outline.
- Letter signed by James Duderstadt, dated November 16, 1995.
- Letter signed by James Duderstadt, dated November 21, 1995.
- Letter signed by James Duderstadt, dated June 5, 1996.
- Letter signed by James Duderstadt, dated April 11, 1996.
- Board of Regents meeting minutes, dated May 16, 1991.
- Board of Regents meeting minutes, dated January 1993.
- Board of Regents meeting minutes, dated February 1993.
- Article entitled, "The Michigan Mandate," from *Ann Arbor Observer,* December 1993.
- Order of Honorable Thomas Zilly, *Smith v. University of Washington Law School*, No. C97-335Z (W.D. Wash. Feb. 22, 1999).
- Order of Ninth Circuit in *Smith v. Washington,* No. 80036, dated April 1, 1999.
- Excerpts from deposition taken of James Duderstadt on January 8, 1999.
- Excerpts from deposition taken of Lee Bollinger on February 9, 1999.

I. INTRODUCTION

As discussed in plaintiffs' brief in support of their motion for partial summary judgment, the undisputed facts establish that the College of Literature, Science & the Arts ("LSA") operates an admissions system that violates the rights of plaintiffs and the class to the equal protection of the laws guaranteed by the Fourteenth Amendment, and the rights of plaintiffs and the class under federal civil rights statutes, 42 U.S.C. §§ 1981, 1983, and 2000d. The undisputed material facts demonstrate that defendants have and have had, for all years material to this action, an admissions system that is facially illegal. The LSA employs, in relentless, redundant fashion, different standards for admission on the basis of racial classifications. The system is illegal under the reasoning employed by Justice Powell in *Regents of Univ.*

of California v. Bakke, 438 U.S. 265 (1978). Although defendants attempt to justify their race-conscious admissions policies and practices on grounds of "diversity" and "academic freedom," the unlawfulness of their system is manifest when considered under the "diversity" or "academic freedom" analysis articulated by Justice Powell in *Bakke.*

Moreover, the only justification that defendants offer for their racial classifications--diversity--is one that has never been recognized by any Justice other than Justice Powell in *Bakke*, much less than by a majority of the Court. Consequently, defendants motion for summary judgment should be denied, and plaintiffs' motion for partial summary judgment should be granted.

Defendants' motion for summary judgment on the damages claims against the individual defendants on grounds "qualified immunity," and against the Board of Regents under Title VI, should also be denied, for reasons discussed in detail below.

II. ARGUMENT

A. The Undisputed Material Facts Entitle Plaintiffs to Summary Judgment

In their "Statement of Undisputed Facts," defendants acknowledge that the "parties agree about the University's basic admissions policies and procedures." *See* Defs. Mem. at 7. *See also* Defs. Mem. at 12 ("[T]he basic facts [of the LS&A admissions system] are undisputed."); Defs. Mem. at 23 ("The facts relating to the process of 'protected seats' are undisputed.); Defs. Mem. at 27 (The "fact is undisputed" that the University admits "virtually all qualified underrepresented minorities"); Defs. Mem. at 31 ("[T]here is little, if any disagreement between the parties about how the admissions process actually operates."). Indeed, defendants do not dispute any of the statements of "Undisputed Material Facts" set forth in plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment on Liability. These undisputed material facts are described in detail in Plaintiffs' Memorandum at pages 2-17 and include the following:

• Defendants have a policy and practice of admitting all qualified applicants from the preferred "underrepresented" minority racial and ethnic groups, *i.e.*, African Americans, Native Americans, and Hispanics, whereas admission of qualified applicants from the disfavored racial groups is "selective, meaning that many more students apply each year than can be admitted." *See* Pltfs. Mem. at 8-9; Defs. Mem. at 4.

• Defendants maintain a racially segregated "waiting list" for qualified applicants whose applications are "postponed" for review, with only applicants from the disfavored racial and ethnic groups placed on the list, and all qualified underrepresented minorities offered admission instead of being "postponed." *See* Pltfs. Mem. at 8-9; Defs. Mem. at 17.

• "[S]ufficient spaces" in each entering class are "reserved, or protected" for applicants from the underrepresented minority groups, and if these "spaces" are not "filled" or "used" by applicants from the "protected" racial groups, then those "spaces" or "slots" are "filled" with "qualified applicants off the wait list." *See* Pltfs. Mem. at 6-7; Defs. Mem. at 23.

• Admissions counselors in 1995-1997 relied on and were generally expected to conform admissions decisions to "Guideline" grids that separately treated admission outcomes of underrepresented minorities and majority students. *See* Pltfs. Mem. at 10-11.

• Beginning with the class that enrolled in Fall of 1998, defendants replaced the grids with a system, that,

among other things, added 20 of a total possible 150 points to applicants' files solely on account of their status as a member of one of the preferred racial and ethnic groups, a change from the 1995-1997 system that was one of form, not substance, in defendants' use of race in the admissions process. *See* Pltfs. Mem. at 13-14; Defs. Mem. at 20.

These facts, undisputed by defendants, devastate any pretense that defendants' admissions policies and practices conform to the principles articulated by Justice Powell in his opinion in *Bakke*. The presence of any one of the foregoing features in a university admission system would be sufficient by itself to condemn it to unlawfulness under *Bakke***.** The University of Michigan--where "race is a defining characteristic"--has pulled out all the stops to guarantee racial and ethnic diversity on its campus at the expense of the constitutional rights of those like plaintiffs.

Moreover, because defendants undisputably rely only on one purported "compelling governmental interest"--the achievement of diversity--plaintiffs are entitled to summary judgment on their second, independent legal theory: that neither a majority in *Bakke* nor any Supreme Court case before or after *Bakke* have held "diversity" to be a compelling interest justifying use of race-conscious decision making.

1. Defendants' Admissions Policies and Practices Are Illegal Under Justice Powell's "Intellectual Diversity" and "Academic Freedom" Rationale Articulated in *Bakke.*

a. Defendants Have a Dual Standard for Consideration of "Qualified" Minorities (African Americans, Hispanics, and Native Americans) Versus Non-Minorities.

Defendants marginalize *Bakke* to only two proscriptions: (1) that "fixed" or "rigid" racial "quotas" may not be used in admitting students and (2) that "only qualified applicants may be admitted." *See* Defs. Mem. at 39-47, 55-56. Plaintiffs address the first point more fully below. The second point was not even an issue in *Bakke*, as the Davis program was found illegal even though the 16 protected seats were open only to "qualified" minorities. 438 U.S. at 275-76. Moreover, defendants completely miss the point (*see* Defs. Mem. at 45-47) of plaintiffs' legal challenge concerning their policy with respect to "qualified minorities." Plaintiffs assume for the purpose of this motion that defendants, like Davis, admit only "qualified" minorities, *i.e.*, those who can be expected to receive passing grades. The nub of the matter is that the admissions policy with respect to the preferred minorities--all "qualified" will be admitted--is a preferential standard that is separate and distinct from that applied to the disfavored races.

It is meaningless for defendants to argue, as they often do, that the University only admits "qualified" students. For the disfavored races and individuals like Jennifer Gratz and Patrick Hamacher, being "qualified" is merely a necessary but certainly not a sufficient condition for admission because the University is "selective" and "there are overall enrollment targets that the University cannot exceed." *See* Defs. Mem. at 27. It is a completely different story, however, for African-American, Hispanic, and Native-American applicants, for whom being "qualified" is both a necessary *and* a sufficient condition for admission. This dual admissions standard is found explicitly in defendants' admissions guidelines and in a separate written statement on the University's "Admission Policy for Minority Students." *See* Pltfs. Mem. at 8-9, Exhibit S. Defendants' witnesses have confirmed the existence of the double standard. In their brief, defendants do not dispute the facts, but argue that plaintiffs "mischaracterize" the admitted "effect as a

'policy.'" *See* Defs. Mem. at 27. Plaintiffs do nothing more, however, than rely on the defendants' testimony and documents, the eloquence of which on this point bears repeating in part:

> . . . [M]inority guidelines are set to admit all students who qualify and meet the standards set by the unit liaison within 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 Student," at 2 (October 4, 1995)); *see also* Exhibit Y (1995 Guidelines, p. 13) ("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.").

It is, therefore, undisputably true that defendants have a differential policy of offering admission to all "qualified" applicants from the preferred races, but not to all "qualified" applicants from the disfavored races. And the two-track policy works marvelously, as defendants concede that "the University ends up admitting virtually all qualified underrepresented minorities," s*ee* Defs. Mem. at 27, which it certainly does not do for the disfavored races.

Defendants' policy and practice of admitting "all qualified" African Americans, Hispanics, and Native Americans means that there is no meaningful sense in which these applicants "compete" for places in the class or are otherwise considered for admission on the "same footing" with "qualified" applicants from the disfavored races. Once the minimum admissibility threshold is met for members of the favored races, the policy and practice is to offer admission, not to require comparison and competition with others.

b. Bakke Proscribes More Than "Fixed" and "Rigid" Racial Quotas

Ultimately, defendants' *Bakke* defense rests on their interpretation that the opinion forbids only "fixed" and "rigid" racial "quotas," which they deny using. *See* Defs. Mem. at 39-45, 55-56. This crabbed reading ignores and essentially renders meaningless virtually all else in Justice Powell's opinion, including his admonitions about using race only as a "plus factor" in "particularized" and "case-by-case" comparisons under which applicants are allowed to compete on the "same footing" in an admissions system where race is "weighed fairly," and that does not result in the "systematic exclusion" of certain groups. 438 U.S. at 295, 317-19. It is not a plausible reading of Justice Powell's opinion to conclude that he meant only one narrow, prohibited thing--fixed, rigid racial quotas--when he wrote much more expansively about what he considered a "properly devised admissions program." *Id.* at 320. In fact, Justice Powell declined himself to define a "quota," much less to distinguish between one that is illegally fixed and rigid and one that is permissibly flexible. *Id.* at 288-89.

Defendants never square their view that *Bakke* prohibits only "fixed" and "rigid" racial "quotas" with what they also acknowledge to be true: "*Bakke* prohibits the use of race in an admissions policy that operates as 'a cover for the functional equivalent of a quota system'. . . or otherwise serves as a 'two-track' admissions

system." Defs. Mem. at 55 (quoting *Bakke*, 438 U.S. at 318). The label itself is not important. *See, e.g, Middleton v. City of Flint*, 92 F.3d 396, 412 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997) ("[W]e note that quotas and preferences are easily transformed from one into the other."); *Valentine v. Smith*, 654 F.2d 503, 510 n.15 (8th Cir. 1981) ("Any distinction between goals, quotas and targets is primarily semantic.") (citing *Bakke*, 438 U.S. at 378 (Brennan, J., concurring and dissenting)). Whatever the label affixed in this case, defendants' system actually renders a "quota" superfluous because the policy is to admit "all qualified" members of the preferred races. With that absolute, ambitious preference, what need is there for a "quota" of any kind, "fixed" or flexible? The illegal Davis program ensured that a specified number of the spaces in the class would go to "qualified" minorities, although the "vast majority" of minority applicants were rejected. 438 U.S. at 275-76 & n.5. The defendants' system goes the extra marathon with a policy and practice to assure admission on account of race to 100% of the "qualified" African American, Hispanic, and Native American applicants.

Defendants' argument that *Bakke* prohibits only the kind of "fixed" and "rigid" racial "quota" that the Davis program embodied is further undone by defendants' reliance on the "Harvard" plan appended to Justice Powell's opinion, which defendants tout as the "model" that "the *Bakke* opinion specifically approved." *See* Defs. Mem. at 39. Even a casual reading of the "model" reveals that it provided for no "protected" or "reserved" spaces in the class for racial or ethnic minorities; no racially segregated wait list; no double standard whereby the policy was to admit "all qualified" members of certain racial and ethnic minorities, but not all "qualified" applicants from other groups; and no separate and systematic guidelines for making admissions decisions or adding points to the scores of applicants solely on account of their race or ethnicity. In fact, the "Harvard" plan is in striking contrast to that of the defendants. Whereas under defendants' system the policy and practice is to offer admission to "all qualified" applicants from the preferred minority groups, under the "Harvard" plan, "admissible" minorities actually compete with "admissible" nonminorities: "When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases." 438 U.S. at 316. At the University of Michigan, the race of a "qualified" African American, Hispanic, and Native American applicant is by itself sufficient to favorably determine the admissions outcome of such an applicant in every case as a matter of policy. This fact alone, although there is much more, renders the defendants' system facially illegal.

c. Defendants' Admissions Policies Embody a "Dual" or "Two-Track" Race-Based System.

The parties agree that *Bakke* prohibits a race-based "two-track" admissions system. *See* Defs. Mem. at 55. Defendants deny that they have such a dual system, but the dispute between the parties is about the legal conclusion to be drawn from the undisputed facts. The codified double standard on the admission of all "qualified" African Americans, Hispanics, and Native Americans, but not all "qualified" applicants from other races, is just one respect in which defendants operate a facially race-based dual system. Defendants racially segregated "wait list," onto which only applicants from the disfavored races are cast, is another aspect of the dual system. As Marilyn McKinney testified, the "wait list" is for those qualified applicants, other than from the preferred racial groups, whose applications are postponed for review late in the admissions cycle. *See* Pltfs. Mem. Exhibit J (McKinney depo. pp. 32-33, 115-18, 175-76). Because it is the policy and practice of the University to admit all "qualified" African Americans, Hispanics, and Native Americans, these preferred applicants do not "compete" for or run the risk of placement on the wait list. In

their brief, defendants admit as much with comic understatement: "OUA tends not to postpone decisions on their [underrepresented minorities'] applications." *See* Defs. Mem. at 17. They then flick aside any concerns about this double standard by simply labeling the preference a "recruiting device" for the underrepresented minority group with "no legal significance." *Id.* at 18. All, and especially the most egregious, forms of racial preferences could no doubt be used as a "recruiting device" for the preferred racial groups, which is hardly a legal defense. The "legal significance" is that this solely race-based classification for determining who is placed on the wait list is one of the cogs in the defendants' race-based dual admissions system that *Bakke* proscribes.

And, of course, defendants race-based two-way grids and cells for making admissions decisions are yet another part of the "two-track" system. In positively Orwellian language, defendants dismiss the two-way grids and cells as only containing differences that are "visual, not substantive," as if they are works of art, not policy and procedure. *See* Defs. Mem. at 58. Defendants' reasoning, apparently, is that since the dual system can be actually seen, it is not real. They do not deny, however, that the guideline grids and cells are used by admissions counselors in making admissions decisions and that counselors are generally expected to follow the actions called for in the guidelines. It is also undisputed that the guidelines are divided on the basis of race, with admission generally recommended for the preferred minorities at combinations of test scores and adjusted grade point averages lower than that of the disfavored races. Defendants, therefore, are not candid when they argue the guidelines are "not substantive."(1) That the grids and cells do not embody the "entire admissions policy" does not diminish their significance or undo their explicitly race-based, dual nature. *See* Defs. Mem. at 58. In fact, plaintiffs agree that the two-way grids and cells are just "one of a broad array" of the race-based factors that comprise defendants' dual admissions system. Reading the grids and cells apart from the rest of the regime would not inform someone about the racially segregated wait list, the dual standard with respect to "qualified" preferred minorities versus other races, or the "protected" minority spaces.

Defendants have the temerity to suggest that the grids actually restrain defendants from using race in the process "too much." *See* Defs. Mem. at 58. Here, it is defendants who forget that the grids and cells do not tell the whole story. One of the written policy "exceptions" to adherence to the grids and cells is that "all" African American, Hispanic, and Native American applicants are to be offered admission if they are deemed "qualified," *i.e.*, capable of receiving passing grades at the University. *See* Pltfs. Mem. at 12-13. So, if the dual-based grids do not have a preferential admission outcome for a particular applicant from one of the favored races, a determination that the applicant is otherwise "qualified" will accomplish the same objective.

For the freshman class that enrolled in the Fall of 1998, defendants abandoned the two-way grids and cells for a "linear" 150-point based "selection index." The parties agree that the change was one of form and mechanics, not substance, in the manner of consideration of race and ethnicity in the admissions process, and that there is "no legal significance" in differences between the systems. *See* Defs. Mem. at 57. The race-based dual system continued, it was just presented different "visually." In fact, defendants performed statistical analyses to end up with sufficient points (20) assigned to race on the 150-point scale to compose the same kind of class that the grids and cells had assembled. *See* Defs. Mem. at 20. This is the same kind of transparent, race-based tinkering that the Sixth Circuit disapprovingly described in *Middleton v. City of Flint*, 92 F.3d 396 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997):

> [W]e note that quotas and preferences are easily transformed from one into the other. Certainly, where the ranking criteria are already known, the correspondence is exact. In our case, if it were deemed objectionable to admit that there was 1:1 quota, exactly the same result could have been

> reached by adding 20 points to the score of each minority applicant at the 1987 exam. A pre-existing commitment to a fixed amount of preference . . . has the result, in any given case, of determining exactly the proportion of the favored group that will be selected.
>
> Even when the degree of preference is established in advance, knowledge of the general characteristics of the selection criteria and the applicant pool may well allow a close approximation, for each round of selection, of the desired quota outcomes. Thus, a 15-point preference might be known with confidence to produce approximately a 25% quota, a 20-point preference a 50% quota, and so on. Even though these figures will be more approximate and contingent than when the degree of preference is assigned after the fact, the general result and correlation will be the same.

92 F.3d at 412-13 (citing *Bakke*, 438 U.S. at 378) (Brennan, J., concurring in part and dissenting in part).

d. Defendants "Protect" or "Reserve" Seats in the Class on the Basis of Race and Ethnicity.

The defendants' defense of their "protected" space policy for the preferred racial groups is an assault on common sense and the English language. *See* Defs. Mem. at 60-62. First and foremost, however, defendants cite to plaintiffs' brief in conceding that the "facts relating to the process of 'protected seats' are undisputed." *Id.* at 23 (citing Pltfs. Mem. at 6-7). Those undisputed facts are taken directly from the statements of defendants in their answers to interrogatories, documents produced by defendants, and in a memorandum of law filed by defendants in this case. *See* Pltfs. Mem. at 6-7 & n.4. In coming to the defense of the "protected" space practice, defendants construct linguistic disguises that hide nothing, but reveal much about the bad faith in which defendants defend their illegal system. Thus, defendants spin, "protected" seats are about "estimates" of minority applicants who apply late in the process, and the "timing" or "pacing" of admissions decisions such that "attractive applicants" can be considered without "overenrolling" the class. In perhaps the most exquisitely disingenuous statement in all of defendants' brief, they argue that "protected" seats are protected not from "white applicants," but instead "from *timing,* from being swallowed up by the rolling admissions process." *See* Defs. Mem. at 61-62 (emphasis added). How these "protected" minority spaces could be "swallowed up" other than by being taken by unprotected applicants, defendants do not say. As to alleged concerns about "overenrollment," defendants offer no explanation for why there must be "protected" racial and ethnic categories in order to prevent "overenrolling" the class as a whole. The obvious and essential implication is that defendants' "enrollment management technique" of "protecting" spaces for racial minorities assures that the class will not be "overenrolled" with applicants from the disfavored racial groups.

Defendants excuse their "protected" seat policy and practice due to the demands of a "rolling admissions process," a process forced to carry the burden for much that defendants have to defend in their illegal system. *See* Defs. Mem. at 61. To read defendants' brief, one might conclude that a university's use of such a "rolling admissions process" is itself a compelling governmental interest that justifies racial classifications. What is not discernible from defendants' brief is that the doomed Davis admissions program in *Bakke* also operated on a "rolling" admissions basis. *See* 438 U.S. at 274. Moreover, defendants completely ignore their obligation to engage in "narrow tailoring" of racial classifications. If the genuine reason for the blunt practice of "protecting" spaces in the class on the basis of race was the "rolling admissions process," defendants could simply abandon it and the "protected" space practice in favor of what they acknowledge to be "the more familiar precipice system" that is "used by many undergraduate schools." *See* Defs. Mem. at 12.

Defendants mix and conflate their multifarious racial preferences when they argue that "protected" racial spaces do "not insulate any students from competition" because "minority applicants are all evaluated against the same guidelines and reviewed by the same counselors." *See* Defs. Mem. at 61. If a protected minority space is "used" or "filled" by a minority applicant, the space was never competed for by a white or other unprotected applicant. As defendants' documents, interrogatory answers, and legal memorandum undisputably establish, it is only *if* and *when* defendants cannot "use" or "fill" the spaces with protected minorities that the unused spaces "open" up for the applicants from the disfavored racial and ethnic groups. *See* Pltfs. Mem. at 6-7 & n.4. While spaces are "protected" for the preferred racial and ethnic groups, individuals like Jennifer Gratz and Patrick Hamacher do not compete at all, much less on the "same footing," for the spaces. And if and when those like Gratz and Hamacher are considered for "protected" spaces that have become "open" to the disfavored races, they are not considered under the "same guidelines" because, among other reasons, they are not considered under the policy that calls for admission of "all qualified" African Americans, Hispanics, and Native Americans.

It is completely irrelevant whether spaces are protected by name for "specific applicants." The 16 spaces in *Bakke* were protected by race, not individual applicant name. The University, like Davis, knows at the beginning of each year that it is going "protect a certain number of spaces" in the class for African Americans, Hispanics, and Native Americans, even if that number is not "fixed" and "rigid" and even if it does not know exactly how many will actually get filled with applicants from those preferred racial groups. What is legally significant is that defendants' "protected" minority seats are protected solely on account of racial and ethnic status. Similarly, it is beside the point that defendants also protect seats for other groups of applicants, such as athletes, foreign students, and ROTC candidates. An illegal racial classification does not become legitimate simply because a defendant also employs either legal or illegal classifications of another kind. *See Bakke,* 438 U.S. at 316 ("Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multitrack program with a prescribed number of seats set asisde for each identifiable category of applicants.").

e. The Data Illustrate the Admissions Process.

Plaintiffs certainly agree with defendants that the "LS&A admissions data in the record paint a picture of how the admissions process works, and the role that an applicant's race plays." *See* Defs. Mem. at 24. Even defendants' expert, Dr. Stephen Raudenbush, acknowledges that race plays an "important" part in the admission process. *See id.* at 24. The data prove the efficacy of the two-track race discrimination machine operated by OUA. Several points deserve rebuttal, however. Defendants suggest that the grid outcomes are overstated by the fact that in some cells there are relatively few minority applicants in each cell compared to majority applicants. But plaintiffs' analysis does not rely on the results of any one cell, and the results across the board are dramatic, as discussed in plaintiffs' original brief. *See* Pltfs. Mem. at 15-17. Moreover, the preferred "minorities" are by definition fewer in number than the remaining universe of applicants, a fact which surely does not excuse a dual admissions standard for the smaller group on account of race and ethnicity.

Defendants' arguments that grades and test scores are important for all applicants, regardless of race, is not a point that plaintiffs dispute or that is material to plaintiffs' motion. The material point is that the standard is differential and race-based, with comparable test scores and grades having different consequences for the preferred minorities versus the other races. It is also unnecessary for plaintiffs to prove that the grids are applied "rigidly" and in every case. Defendants have not disputed that admissions counselors are generally expected to follow the guidelines and that they do so, even if they also grant exceptions.

f. Defendants' Race-Based Policies Are Not Narrowly Tailored

The permissible use of race in the admissions process requires both a compelling governmental interest and a means of accomplishing that objective that is "necessary" to promote that objective. *Bakke,* 438 U.S. at 314 (Powell, J.). The Supreme Court requires that racial classifications be "narrowly tailored." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). Nowhere have defendants explained why their multiple race-conscious measures are "necessary" to achieve intellectual diversity. The pertinent question here is not just whether it is necessary to take race into account. The focus is on whether the particular measures are a necessary means. It is inconceivable that an admissions program narrowly tailored to achieve intellectual diversity would have so many, or any, features that are designed *solely* to promote racial diversity, as does the University. Thus, when defendants wonder how plaintiffs can object, for example, to admissions guidelines that *automatically* add 20 of a total of 150 points to an applicant's score *solely* on account of race, *see* Defs. Mem. at 57 & n.32, one obvious answer is that such a blunt, across-the board feature is the antithesis of a narrowly-tailored means of achieving all kinds of diversity, not just racial and ethnic diversity.[(2)] The same, of course, goes for the other blunt and strictly race-based classifications, such as the two-tiered admissions standard for "qualified" applicants, the "protected" minority seats, the two-tiered guidelines grids, and the racially segregated wait list.

"Narrow tailoring" requires that a state entity at least have considered race-neutral alternatives. *See Croson*, 488 U.S. at 507. When asked in interrogatories how they had accomplished "narrow tailoring," defendants merely announced that they had done so without identifying any specific, much less race-neutral, measures. *See* Pltfs. Mem. Exhibit H. Given that defendants already willingly accept all "qualified" applicants from certain select minorities, one obvious race-neutral mechanism would be to randomly select all or a portion of the class from the entire pool of "qualified" applicants, regardless of race. Such a system would avoid the constitutionally impermissible dual admission standard whereby "qualified" African Americans, Hispanics, and Native Americans compete on a completely different playing field from qualified members of the disfavored races. Defendants have placed nothing in the record, however, indicating that they have considered any race-neutral alternatives.

g. Plaintiffs Are Entitled to Summary Judgment

Plaintiffs dispute defendants' assertion that plaintiff Hamacher is no longer interested in attending school at the LSA. Plaintiffs demonstrated in connection with the motion for class certification that defendant Hamacher remains interested in applying for admission into and enrolling at the LSA. He would enroll if the Court granted him the prospective, injunctive remedial relief that he seeks. *See* Pltfs. Class Cert. Mem. at 12-13 (Hamacher depo. at 125-126). Moreover, it is immaterial, at least as far as liability issues, whether either Hamacher or Gratz kept their name on defendants' "Extended Wait List," and defendants have not contended or shown otherwise.

2. Diversity Is Not A Compelling Governmental Interest.

Defendants resort to "straw man" arguments in support of their position that Justice Powell's "diversity" and "academic freedom" rationale contain the holding of the *Bakke* opinion. First, defendants erroneously suggest that plaintiffs do not even acknowledge the judgment in *Bakke* that race may be a factor in the admissions process. Every case has a judgment, and *Bakke* was not any different. Five Justices joined in the judgment invalidating the Davis program, as discussed at length above. And another group of five Justices joined in the judgment reversing "so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant." 438 U. S. at 320. Much of the latter part of plaintiffs'

opening brief was taken up with the point, however, that the "diversity" and "academic freedom" rationale articulated by Justice Powell and relied upon by defendants to justify their race-conscious system was not joined in by any other Justice, a point that defendants do not deny. It is clear from a comparison of the Powell and Brennan group opinions that there was not agreement on what a "properly devised admissions" program meant with respect to how and under what circumstance race could be used in the admissions process. *Id.* A "competitive" use of race is one that could be consistent with either of the different rationales offered by Justice Powell and the Brennan group, or by still other rationales .[(3)]

Defendants here purport to justify their use of race for one reason only: the achievement of diversity in the student body. That interest is not one that is recognized in the small portion of Justice Powell's analysis, Part V-C, that was joined in by the Brennan group, and it is nowhere recognized in the opinion authored by Justice Brennan and joined in by three other Justices. In fact, Part V-C omits any reference to a rationale that could justify the use of race in a "competitive" admissions process. It refers to means, not ends. The salient legal dispute in this portion of plaintiffs' argument, however, is about ends, not means. The parties agree that the University must have a "compelling governmental interest" to justify its use of race in admissions. Part V-C has nothing to say about what that interest might be, whether it is the "diversity" and "academic freedom" rationale of Justice Powell, the "remedying societal discrimination" interest of Justice Brennan, or something else.

Because "no single rationale explaining the result" in *Bakke* commanded 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." *See Marks v. United States,* 430 U.S. 188, 193 (1977).

As plaintiffs noted in their opening brief, lower courts generally have applied the *Marks* analysis only where the opinions of a divided Court contain a "common denominator" in the reasoning that commands the support of the Justices concurring in the judgment. *See* Pltfs. Mem. at 26-29. There is no such "common denominator" found between the "diversity" and "academic freedom" rationale of Justice Powell and the remedial rationale of Brennan group, a point not refuted by defendants. If there is any "common denominator" between the two opinions, it is that they both recognize that some forms of remedial interests may justify race-conscious decision making; for this Justice Powell's remedial analysis was narrower than that of Brennan group. It is not true therefore, that "lawlessness" (*see* Defs. Mem. at 48) results from the determination that Justice Powell's "diversity" and "academic freedom" rationale shares no common ground with the Brennan group's remedial rationale.**[(4)]**

Strangely, defendants cite to the decision of the Supreme Court in *Nichols v. United States,* 511 U.S. 738 (1994), in support of their contention that *Marks* applies even when there is no "common denominator" among the rationales of the five Justices. *See* Defs. Mem. at 48-49. They reach that conclusion because the Court in *Nichols* concluded that its prior decision in *Baldasar v. Illinois,* 446 U.S. 222 (1980), had neither a "lowest common denominator" nor could be said to have a "narrowest grounds" rationale shared by a majority. The Court in *Nichols*, however, did not employ the *Marks* analysis; it simply reconsidered the issue that *Baldasar* had left unresolved precisely because of the absence of a common denominator. 511 U.S. at 745-46 ("This degree of confusion following a splintered decision such as *Baldasar* is itself a reason for reexamining that decision."). The *Marks* analysis, where it can be applied, is for use generally by the lower courts, not the Supreme Court. And the Court in *Nichols* commented, not disapprovingly, that a number of lower courts had not followed *Marks* in attempting to apply *Baldasar*. *Id.* at 745. As discussed in plaintiffs' opening brief, *Nichols* was in fact a review of a Sixth Circuit opinion that had quoted approvingly from a number of other circuit court opinions rejecting the *Marks* analysis in the absence of a

"common denominator." *See United States v. Nichols*, 979 F.2d 402, 416-18 (6th Cir. 1992), *aff'd*, 511 U.S. 738 (1994); Pltfs. Mem. at 28.

It is not sufficient, therefore, to apply *Marks* merely because there are five Justices whose votes constitute a judgment. That is a tautology. Under defendants' analysis, one would have to find a common denominator even if the five Justices who comprised the Powell and Brennan group majority had authored five different, mutually exclusive opinions. The cases require more. In *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), five Justices found that the Coal Industry Retiree Health Benefit Act was unconstitutional as applied to a manufacturer that had left the coal industry twenty-seven years before the Act was passed. All five relied heavily on the retroactivity of the law in finding it unconstitutional. *Id.* at 2151 (O'Connor, J.); *id.* at 2158 (Kennedy, J.). But four Justices relied upon the Takings Clause, and one relied upon the Due Process clause in holding the statute unconstitutional. Since neither one embodied a position implicitly approved by at least five Justices who supported the judgment, or was a logical subset of the other, *Marks* has been held inapplicable. *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998).

So, too, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), six members of the Court agreed that an ordinance that banned offsite outdoor sign advertising, but with enumerated exceptions, violated the First Amendment. Four members of the Court focused on the exceptions (both the enumerated ones and the general one for onsite advertising), and concluded that they created improper content-regulation, *id.* at 513-15 (White, J.); two other Justices shared some "common ground," *id.* at 524 (Brennan, J., concurring), with the plurality, but believed that the ordinance was a content-neutral prohibition of a particular means of communication without sufficient justification by the city (*id.* at 526). Again, the absence of any common ground precluded any "rationale" emerging from these opinions. *Rappa v. New Castle County*, 18 F.3d 1043, 1058 (3d Cir. 1994) (so holding; "'*Marks* is workable--one opinion can be meaningfully regarded as "narrower" than another--only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.'") (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)).

As demonstrated in plaintiffs' opening brief, a *Marks* "narrowness" analysis does not yield a conclusion that either the Powell or Brennan group rationales is narrower than the other. *See* Pltfs. Mem. at 26-32. The "academic freedom" and "diversity" rationale of Justice Powell is not a "subset" of the Brennan group rationale based on "remedying societal discrimination," and *vice versa.* The two rationales are simply different. Defendants rely on Justice Powell's application of strict scrutiny rather than the "intermediate" standard of review used by the Brennan group. But the Brennan group did not accept Justice Powell's "diversity" and "academic freedom" rationale *even under the intermediate scrutiny standard of review*, once again demonstrating the absence of common ground for their rationales.

Defendants incorrectly attribute to plaintiffs the argument that "Justice Brennan would require *detailed factual findings* of past discrimination against individual victims before he would permit a voluntary affirmative action plan." *See* Defs. Mem. at 50 (emphasis added). At several points in his opinion, as quoted and discussed in plaintiffs' opening brief, Justice Brennan made clear that race-consciousness could be justified to "remedy *disadvantages* cast on minorities by past racial prejudice" where "appropriate findings have been made," and that the Davis program passed muster under this rationale because it did "not simply equate minority status with disadvantage" and 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."[(5)] 438 U.S. at 325, 377; *see also*

Pltfs. Mem. at 25, 30-31. Nothing like that appears in Justice Powell's opinion, and nothing about Justice Powell's "diversity" and "academic freedom" rationale requires any kind of individualized showing of disadvantage in order for a minority student to contribute to "diversity." Indeed, Justice Powell's commitment to the broad concept of "academic freedom" is completely at odds with a rationale that confines that freedom to use race consciousness in behalf *only* of individual minorities who are the likely victims of past racial prejudice. That the Davis program met Justice Brennan's strictures says nothing about whether they would be met in another case, such as this one, where the University employs racial preferences independently of any demonstrated disadvantage on the part of minority beneficiaries. Consequently, the fact that the Brennan group voted to sustain the legality of the Davis program proves nothing about whether its rationale was broader or narrower than the rationale of Justice Powell.

a. Neither the Supreme Court Nor the Sixth Circuit Have Adopted the "Academic Freedom" or "Diversity" Rationale of Justice Powell.

Defendants include an audacious section in their brief entitled, "Supreme Court and Sixth Circuit Have Followed *Bakke." See* Defs. Mem. at 51-52. In support of the first part of that proposition, defendants cite *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). *Wygant* was a plurality decision in which a school board's policy of race-based layoffs of employees was held violative of the Equal Protection Clause. Justice Powell, in an opinion joined in all or part by three other Justices, cited *Bakke* only for the proposition that plaintiffs and defendants agree upon: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant*, 476 U.S. at 273 (Powell, J.) (quoting *Bakke*, 438 U.S. at 291). Justice White, who concurred in the judgment, wrote separately and made no mention of *Bakke.* For their argument, thus, defendants point only to one isolated statement of Justice O'Connor in *Wygant.* Justice O'Connor, however, wrote only for herself in that case and cited to Justice Powell's opinion and its "diversity" rationale without either expressing approval or identifying it as a rationale on which a majority of the Court agreed. *See Wygant*, 476 U.S. at 286; *see also Hopwood v. Texas*, 78 F.3d 932, 945 n.27 (5th Cir. 1996).[(6)] In contrast, Justice O'Connor expressed the view of the Court (three Justices who joined her opinion, and Justice Scalia) in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497-98 (1989), in writing that unless racial classifications are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility." *Id.* at 493. In *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 620 (1990), Justice O'Connor dissented from the decision upholding racial classifications in the award of broadcasting licences and wrote that "even if the Court's equation of race and programming viewpoint has some empirical basis, equal protection principles prohibit the Government from relying upon that basis to employ racial classifications." As noted in plaintiffs' original brief, Justice O'Connor subsequently authored the opinion in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that overruled *Metro Broadcasting.*

Defendants' reliance on *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), is completely misplaced for a variety of reasons. First, the case is one under Title VII, where different considerations apply. The presence or absence of rights being "trammeled" is a consideration sometimes used to assess "race-conscious" affirmative action plans under Title VII, but it is irrelevant to the Fourteenth Amendment analysis. *Johnson v. Transportation Agency*, 480 U.S. 616, 627 n.6 (1987) ("The *statutory* prohibition [*viz.*, Title VII] with which [a public] employer must contend was not intended to extend as far as that of the Constitution.") (emphasis in original)); *Brunet v. City of Columbus*, 1 F.3d 390, 405 (6th Cir. 1993) ("The obligations of a public employer under Title VII and under the Constitution in regard to an

affirmative action plan are not identical" and thus citation of *Johnson* in a case brought pursuant to the Constitution "is simply not helpful"); *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991) (although race-conscious hiring plan met requirements of Title VII, remand was necessary to determine whether it could meet requirements of strict scrutiny): *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 437 (10th Cir. 1990) ("The level of proof necessary to justify the consideration of race in an employer's hiring practices . . . differs depending on whether the challenge invokes the equal protection clause or Title VII. Under Title VII, an affirmative action plan must be justified by the existence of a 'manifest imbalance' in a traditionally segregated job category . . . Once this imbalance is demonstrated, the court must also consider whether the rights of the discriminatee are 'unnecessarily trammeled' by the affirmative action plan . . . By contrast, review of a claim of an equal protection violation is made under the more demanding "strict scrutiny" analysis, adopted by a majority of the Court in [*Croson*]. Under this standard, the preference given to minorities in the District's layoff decisions must be justified by a compelling governmental interest that is achieved only through narrowly tailored means"); *Keller v. Prince George's County*, 827 F.2d 952, 963 (4th Cir. 1987) ("The standards for review of affirmative action plans, for both public and private employers, are more liberal under Title VII than are the standards imposed on public employers by the fourteenth amendment in a Sec. 1983 suit").

Aside from the fact that *Johnson* was a Title VII case, the decision nowhere endorses a "compelling" interest based on diversity, and since it was not even an education case, there was, of course, no consideration of whether "academic freedom" is a sufficient interest justifying race-conscious decision making. Astonishingly, defendants have nothing at all to say about *Runyon v. McCrary*, 427 U.S. 160 (1976), a Supreme Court decision that did consider the use of race in an educational setting and in the context of the First Amendment; that produced a majority opinion; and that plaintiffs have relied upon as one of their principal controlling authorities. *See* Pltfs. Mem. at iv, 34-35.

Defendants are even more cavalier in their analysis of how *Bakke* has been considered by the Sixth Circuit. They cite *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757 (6th Cir. 1983), for the proposition that the meaning of *Bakke* is that "affirmative action admission programs of educational institutions may take race into account, but racial quotas are prohibited." *Id.* at 763. Defendants neglect to point out that *Oliver* involved the review of a plan to remedy prior race discrimination by a school board. And in its brief reference to *Bakke*, the court only distinguished *means* of taking race into account--a "quota" versus something "more flexible." *Id.* Once again, defendants miss the central point of plaintiffs' argument: regardless of the means (a "quota" or something "more flexible"), "diversity" and "academic freedom" are not compelling governmental interests that can ever justify use of race in the admission process. *Oliver* has nothing to say on that point about *Bakke*, or at all, yet defendants consider it one of their principal "controlling authorities." *See* Defs. Mem. at v.

Defendants also cite *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100, 103 (6th Cir. 1992), in support of their position on *Bakke*. *Jacobson* cited not to Justice Powell, but to the Brennan group opinion for the proposition that the "intermediate level of scrutiny is the proper one." 961 F.2d at 103. The Sixth Circuit in *Jacobson* also based its decision in part on the district court's finding that the policy at issue was "race neutral," which led the court of appeals to conclude that it did not involve race "preferences," propositions that are demonstrably not true in this case.[(7)] Finally, defendants cite to *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998), a case which does not itself even contain a citation or reference to *Bakke*, much less to the "diversity" or "academic freedom" rationale of Justice Powell.

b. Defendants Misstate the Holding of *Hopwood*.

In presenting yet another false dilemma and "straw man" argument, defendants cite to *Hopwood* and argue that this Court would be overruling *Bakke* in deciding that "diversity" and "academic freedom" are not compelling governmental interests justifying use of race in admissions. *Hopwood* did not "overrule," "override" or "disregard" *Bakke*, and plaintiffs are not asking this Court to do so.[(8)] *See* Defs. Mem. at 53. Nor did *Hopwood* focus "narrowly on whether *Bakke* had been overruled, *sub silentio*, by more recent Supreme Court decisions." *Id.* at 53 n.30. The question that defendants beg is whether Justice Powell's "diversity" and "academic freedom" rationale *ever* constituted the holding of *Bakke*. *Hopwood* described what defendants have not refuted: "Justice Powell's [diversity] argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case." 78 F.3d at 944. From that undisputable premise, the Fifth Circuit concluded that "Justice Powell's view in *Bakke* is not binding precedent on this issue." *Id.* [(9)] Subsequent Supreme Court cases have not had occasion to again address racial preferences in admissions or the rationale relied upon by Justice Powell. But that does not mean that litigants and lower courts should ignore what the Court has said since *Bakke* about how racial classifications should be evaluated. What a review of these cases reveals is that defendants rely exclusively on a purported "compelling governmental interest" that has never been recognized by a majority of the Supreme Court, either in *Bakke* or in the cases decided before or after *Bakke*.

B. The Individual Defendants Are Not Entitled to Summary Judgment on "Qualified Immunity Grounds."

Defendants Duderstadt and Bollinger, asserting a "qualified immunity" defense, have moved for summary judgment on plaintiffs' claims against them for damages in their individual capacities. The standard for qualified immunity is well established: "'[G]overnment officials performing discretionary functions generally are shielded from liability or civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Noble v. Schmitt*, 87 F.3d 157, 160 (6th Cir. 1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (emphasis omitted). It is not met in this case.

With respect to the first requirement, governmental agents are not automatically entitled to qualified immunity whenever some uncertainty exists about the precise contours of the pertinent law. "The fact that the law may have been unclear, or even hotly disputed, at the margins does not afford state actors immunity from suit where their actions violate the heartland of the constitutional guarantee, as that guarantee was understood at the time of the violation." *Stemler v. City of Florence*, 126 F.3d 856, 867 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1796 (1998). In this case, moreover, there is complete clarity that the kind of race-based, "two-track" admissions system used by defendants has been illegal for more than twenty years, since the *Bakke* decision in 1978. Plaintiffs will not repeat here the discussion of *Bakke* and its clear prohibition on the kind of system operated by defendants. Defendants' system bears little resemblance to the system envisioned by Justice Powell. In opposing summary judgment, where all the inferences favor plaintiffs, *see Taylor v. Michigan Dep't of Corrections*, 69 F.3d 76, 79 (6th Cir. 1995), it surely cannot be said that a reasonable trier of fact could not so conclude. *See Alexander v. Estepp*, 95 F.3d 312, 317-18 (4th Cir. 1996); *F. Buddie Contracting Ltd. v. Cuyahoga Comm. College Dist.*, 31 F. Supp. 2d 584, 589-90 (N.D. Ohio 1998).

In the acts for which plaintiffs seek to hold them liable, defendants acted in their capacities as policymakers and/or supervisors. Policymaking liability under § 1983 arises when a person "prescribe[s] policy--formally or de facto--that encourages improper means or ends." *Haynesworth v. Miller*, 820 F.2d 1245, 1264 (D.C. Cir. 1987); *accord Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581-82 (1st Cir. 1994). "To succeed on a policymaking theory, a plaintiff must demonstrate that the official against whom liability is asserted has the power--vested either formally or as a practical matter--to formulate policy, and has exercised that policymaking authority to generate improper practices." *Haynesworth*, 820 F.2d at 1264. There is evidence in the record from which a factfinder could easily and reasonably conclude that defendants are liable under this legal standard.

As president of the University of Michigan, Duderstadt possessed and Bollinger possesses the power to formulate policy. By his own admission, persons *below* Duderstadt set University policy. *See* Exhibit N (Duderstadt depo. at 16-17). *A fortiori*, those persons possessed power to formulate policy; and if they had it, Duderstadt as their superior must have had it, too.

Just as clearly, Duderstadt exercised that power to help create the policy that spawned the University's unlawful admissions practices: the so-called Michigan Mandate. As president from 1988 to 1996, Duderstadt played a significant role in formulating the Mandate, which advocated racial preferences under the usual euphemism of achieving diversity. *Id.* at 27-28. Although many were involved in the Michigan Mandate--"more than dozens," according to Duderstadt, *id.* at 26-27--Duderstadt played a substantial role in its creation. He wrote parts of the 1990 Mandate document himself, and made substantive changes in parts written by others. *Id.* at 23-25. Most importantly, Duderstadt included a letter in the 1990 Mandate, signed by himself, in which he represented himself as personally responsible for the Mandate in its entirety:

> It is important to state here clearly that in drafting the Michigan Mandate, I certainly did not view myself as Moses returning from the mountain with stone tablets of commandments to govern the University. Rather, this document was intended as a very personal statement of my own views and recommendations on these matters.

Id. at 38. Duderstadt also wrote that he "viewed the Michigan Mandate . . . as a road map, setting out my personal commitments to an eventual destination for our University." *Id.* at 39. Indeed, Defendants themselves admit as much in their brief, describing the Michigan Mandate as "a university-wide initiative launched by then-President James Duderstadt." *See* Defs. Mem. at 7.

Duderstadt had the power to formulate policy, and he did so in the Michigan Mandate. The University acknowledges that the Mandate generated Michigan's "focus" on "racial and ethnic diversity." *See id.* at 7-8. Thus, if a reasonable factfinder could conclude from the summary judgment record that LS&A's admissions program clearly has violated the Plaintiffs' constitutional or statutory rights, Plaintiffs will have "create[d] a genuine issue as to whether [Duderstadt] in fact committed the acts" that subject him to § 1983 policymaking liability, *Adams* v. *Metiva,* 31 F.3d 375, 386 (6th Cir. 1994), and Duderstadt's motion for summary judgment based on a claim of qualified immunity must be denied.

Defendants can also be liable for their supervisory role over the University employees who actually carried out Michigan's discriminatory admissions practices. In this circuit, *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir. 1984), states the standard under which supervisory § 1983 liability attaches. A defendant may be found liable where plaintiff shows that "a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Id.* at 421. A

supervisor may incur liability under § 1983 where his actions "amounted to a tacit authorization" of unlawful conduct. *Doe v. Claiborne County*, 103 F.3d 495, 513 (6th Cir. 1996) (citing *Bellamy*); *see also Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978); *See Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581-82 (1st Cir. 1994) (holding that a supervisor may incur § 1983 liability "by formulating a policy . . . that leads to the challenged occurrence").

Defendant Duderstadt formulated a university-wide policy that committed Michigan to increasing its enrollment of preferred minority students. He knew that this policy could not be carried out without implementing race-conscious admissions practices. *See* Duderstadt depo. at 110. He knew that the way Michigan took race into account was being criticized. *See id.* at 116, 119. In *Taylor v. Michigan Dep't of Corrections*, 69 F.3d 76, 79 (6th Cir. 1995), a prisoner sought to hold the warden liable for personal injury under § 1983. The Sixth Circuit stated that the issue was whether the warden had "failed to take reasonable steps to ensure that vulnerable inmates like plaintiff would not be transferred to a facility where a substantial risk of serious harm existed." *Id.* at 69 F.3d at 80. The warden argued "that the fact that he delegated responsibility over transfers to subordinates absolves him of liability for plaintiff's injuries." *Id.* The appellate court rejected this argument. Although mindful that § 1983 liability cannot be imposed on a theory of *respondeat superior*, the court concluded from the warden's "own deposition . . . that he was aware of and at least acquiesced in the conduct of his subordinates in approving transfers without adequately reviewing the inmate's record." *Id.* at 81. This sufficed to meet the "knowing acquiescence" component of the *Bellamy* standard quoted above. Just as the Sixth Circuit concluded that the warden was not entitled to qualified immunity where he delegated transfer decisions without ensuring that subordinates were not abusing his authority, *see id.* at 80, so also this Court ought to conclude that Duderstadt is not immune where he instituted a policy of unlawful race-conscious admissions.

Although a supervisor must be personally involved in discriminatory activity to incur individual liability under § 1981, *see Allen v. Denver Public School Bd.*, 928 F.2d at 983 (10th Cir. 1991), "[t]he element of personal involvement may be satisfied by proof that a supervisor had knowledge of the alleged acts of discrimination and failed to remedy or prevent them," *Amin v. Quad/Graphics, Inc.*, 929 F. Supp. 73, 78 (N.D.N.Y. 1996). The personal involvement requirement is plainly met in Bollinger's case. Bollinger knows that LS&A operates a two-track admissions system. He knows that LS&A admits *all* qualified preferred minority applicants, but does not admit all qualified applicants who are not preferred minorities. *See* Exhibit O (Bollinger depo. at 257-58). In other words, Bollinger knows that LS&A insulates qualified preferred minority applicants from competition with qualified non-preferred minority applicants. Yet Bollinger has left this discriminatory system in place. The only change Bollinger instigated in LS&A's admissions process is the shift from the GPA/test score grids to a point system. *See id.* at 241-43. Bollinger views this change as cosmetic: "[O]ne of the concerns I had is that the --was that the grids could be misunderstood . . . ." *Id.* at 242. Defendants admit that the change from grids to points was a change only in the form, not the substance, of LS&A's admissions system. (*See* Defendants' Mem. at 15 n.8.). Moreover, there is evidence from which it could be reasonably inferred that the change was intended to cover up the effects of the two-way grid system because of the "anti-affirmative action climate." *See* Exhibit C (1998 Guidelines Training). In sum, there is certainly at least a triable issue about the fact that Bollinger knew of the kind of admissions process LS&A was using, and instead of remedying its unlawfulness, tried to cover it up. This constitutes personal involvement in discriminatory activity for § 1981 liability, *see Amin*, 929 F. Supp. at 78, and approval or knowing acquiescence in the unconstitutional conduct of offending subordinates for § 1983 liability, *see Bellamy*, 729 F.2d at 421.

Finally, although qualified immunity normally requires that a defendant's conduct be analyzed

"objectively" to determine if the conduct was "reasonable," an exception exists for where the underlying Constitutional tort relies upon subjective motive. *E.g., Branch v. Tunnell*, 937 F.2d 1382, 1385 (9th Cir. 1991) (noting tension between "objective reasonableness" test and "cases in which the 'clearly established law' at issue contains a subjective element, such as motive or intent"); *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), *Tompkins v. Vickers*, 26 F.3d 603, 607 (5th Cir. 1994) ("Every Circuit that has considered the question has concluded that a public official's motive or intent must be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation"). Here, as shown below, the "reasonableness" of defendants' consideration of race in the defendants' admissions program depends very much on the underlying motivation for its implementation. The evidence raises a genuine issue about whether the University was motivated by a genuine interest in intellectual diversity or something else, such as promotion of racial and ethnic diversity, increasing the proportion of minorities in the school, remedying societal discrimination and segregation, or stamping out racial stereotypes. *See infra*, pp. 42-44.

In order to survive scrutiny under the Fourteenth Amendment, race-conscious decision-making had to have been implemented to achieve a recognized compelling interest. *Shaw v. Hunt*, 116 S. Ct. 1894, 1902 n.4, 1903 (1996) ("To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification"; rejecting remedial purpose for discrimination because it "did not actually precipitate the use of race in the redistricting plan"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 n.16 (1982) (rejecting gender-based discrimination allegedly designed to remedy past discrimination against women because "the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination"); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 597 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 953 (1997) (in action challenging city ordinance creating subcontracting set asides, Court holds that "[t]he party challenging the race-based preferences can succeed by showing . . . that the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role"); *Podberesky v. Kirwan*, 956 F.2d 52, 56 n.4 (4th Cir. 1992) (race-based scholarship could not be justified on diversity grounds where "it does not appear that [University] established the [scholarship] with this goal in mind"); *Davis v. Halpern*, 768 F. Supp. 968, 980 (E. D. N.Y. 1991) (in challenge by rejected white applicant to law school's consideration of race in admissions process, Court denies summary judgment to defendants where law school's affirmative action policy states that one of its goals was a more "diversified" and "representative" bar).

Here, plaintiffs have set forth evidence from which a reasonable trier of fact could conclude that defendants' consideration of race was not designed to meet the goal of a diverse student body as described by Justice Powell, but rather "ethnic diversity" (what Justice Powell called "discrimination for its own sake"), or for other reasons. No reasonable state official could reasonably believe that a scheme of racial preferences could be used to achieve an interest that is not compelling.

C. The Board of Regents Is Not Entitled To Summary Judgment on the Title VI Claim for Damages.

The motion of Defendant Board of Regents for summary judgment on plaintiffs' Title VI damages claim is based on its contention that the "legal rules" under which plaintiffs seek to hold it liable are not "clearly established." *See* Defs. Mem. at 70. Defendants are really arguing here that there is "qualified immunity" for entities as well as individuals, as defendants seek only to dismiss the *damages* claims under Title VI, not the *injunction* claims. *See* Defs. Mem. at 68-70. Of course, there is no such thing as qualified immunity for entity defendants, under Title VI or anywhere else, and plaintiffs here are not seeking Title VI damages against the individual-capacity defendants, Lee Bollinger and James Duderstadt. *Jackson v. Katy Indep.*

Sch. Dist., 951 F. Supp. 1293, 1298 n.3 (S.D. Tex. 1996). *See also Shuford v. Alabama State Bd. of Educ.*, 968 F. Supp. 1486, 1513 n.157 (M.D. Ala. 1997), *aff'd*, 152 F.3d 935 (11th Cir. 1998) (qualified immunity inapplicable in claims against Alabama colleges under, *inter alia*, Title IX); *Timmons v. New York State Dep't of Correctional Services*, 887 F. Supp. 576, 582 (S.D. N.Y. 1995) ("[t]he defense of qualified immunity is available to state actors who are sued in their *individual* capacities, not to sovereign state bodies . . . that only exist in *official* capacities" (emphasis in original)); *Rothschild v. Grottenthaler*, 716 F. Supp. 796, 801 (S.D. N.Y. 1989) (in case brought pursuant to Rehabilitation Act § 504, "[o]nly the individual defendant...may be eligible for qualified immunity").(10)

One of the cases relied upon by defendants, *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), established both that there is a private cause of action for damages under Title IX when "intentional discrimination" is alleged and that no "notice problem . . . arise[s] in a case . . . in which intentional discrimination is alleged." *Id.* at 74-75. In another of the cases cited by defendants, *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998), the Court noted that Title VI is "parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs." *Id.* at 1997. The Court in *Gebser* also commented that Title VI and "Title IX operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Id.*

Plaintiffs here state a claim under Title VI for intentional discrimination. Title VI, as the parties agree, prohibits only intentional discrimination. *See Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583, 585 n.3 (6th Cir. 1987); Plaintiffs' Mem. at 17. Consequently, if plaintiffs prove a violation of Title VI it is because they have proven that defendants engaged in "intentional discrimination," for which one of their available remedies is damages. *See also Franklin*, 503 U.S. at 70-71 ("The general rule . . . is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action."); *Hopwood*, 78 F.3d at 957; *Podberesky v. Kirwan*, 38 F.3d 147, 162 (4th Cir. 1994).

Bakke itself, of course, is a case in which five Justices found that Davis had engaged in intentional discrimination for which it was liable under Title VI. There was certainly nothing unambiguous about the case law and regulations interpreting Title VI prior to *Bakke* that would have given the Davis Medical School "clear notice" that its program was in violation of it. At the time *Bakke* was decided, Congress had just passed (in May 1977) the Public Works Employment Act of 1977, which required federal grantees thereunder to give assurances that at least 10% of their grants would be used for minority business enterprises. *Fullilove v. Klutznick*, 448 U.S. 448, 453-54 (Burger, C.J.). Lower federal courts had upheld state plans with specific minority objectives against challenges under the Constitution and Title VI. *Associated General Contractors of Massachusetts, Inc.*, 490 F.2d 9 (1st Cir. 1973) (state requirement that contractors have minority employee man-hours of at least 20% of total employee man-hours is constitutional); *Contractors Ass'n of Eastern Pennsylvania v. Sec'y of Labor*, 442 F2d 159, 173 (3d Cir. 1971 ("Philadelphia Plan promulgated by the federal government, and requiring federal contractors to submit plan to achieve specific goals for the utilization of minority manpower in sex skilled crafts, did not violate Title VI). Moreover, it is irrelevant that Allan Bakke did not seek monetary damages. The pertinent point is that the standard for damages and the standard for liability under Title VI is the same: "intentional discrimination." *Bakke* demonstrates that a lack of absolute precision in the legal standard does not preclude a finding of "intentional discrimination." Thus, defendants cannot avoid liability by erroneously arguing that they did not have "clear notice" that intentional discrimination could subject them to liability

under Title VI.

In their citation to and reliance on *Gebser*, defendants chose to omit the following rather salient point and holding: "[I]n cases like this one *that do not involve official policy of the recipient entity,* we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of the discrimination in the recipient's programs and fails adequately to respond."(11) 118 S. Ct. at 1999 (emphasis added). Thus, in *Gebser,* there was no liability for damages when no school district official had notice of a teacher's sexual relationship with a student. Here, of course, defendants cannot plausibly contend that the classifications in issue are not official policy of the University or that no responsible official of the University had knowledge of the racial classifications that plaintiffs challenge. Rather, as the rest of their brief attests, defendants and their responsible officials are quite proud of their official race-consciousness. *See, e.g., Wooden v. Bd. of Regents of Univ. System of Georgia*, 32 F. Supp.2d 1370 (S.D. Ga. 1999) (knowledge of race-conscious admissions system by the university president and its Board of Trustees met "notice" requirement of *Gebser*).

Heedless of the complete absence of textual support for their position, defendants have literally rewritten the opinions they cite by changing the rule that recovery of damages under Title VI requires proof of "intentional discrimination" to a new and different rule that such a recovery requires proof that the entity violated a "clearly established" legal right. Even if the latter was the legal standard, defendants' motion for summary judgment should be denied for the same reason that the motion as to "qualified immunity" for the individual defendants should be denied: defendants' admission system is illegal even under Justice Powell's "diversity" and "academic freedom" rationale.(12) It is not the standard, however, and defendants' alleged "good faith" belief that it has been following the law as it understands it under *Bakke* is no defense against liability. *Bakke,* 438 U.S. at 289 n.27 (Powell, J.). The conclusion is consistent with

other cases in which courts have rejected "good faith" as a defense to other causes of action involving issues of intentional discrimination. *See, e.g., Int'l United Auto. Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.* 499 U.S. 187, 199 (1991) (policy of excluding women capable of becoming pregnant from jobs involving exposure to lead violated Title VII; "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."); *United States v. Starrett City Associates,* 840 F.2d 1096 (2d Cir. 1988) (policy of treating prospective tenants differently on the basis of race in order to prevent white flight and maintain a racially-mixed apartment complex violated the Fair Housing Act); *United States v. Reece,* 457 F. Supp. 43, 48 (D. Mont. 1978) (female landlord's policy of not renting to single women without cars because of the danger of walking through a poorly lit neighborhood violated Fair Housing Act).

D. Defendants Are Not Entitled to Summary Judgment Even If Diversity Is a Compelling Governmental Interest

1. Defendants' Admissions Policies Seek Racial and Ethnic, not Viewpoint Diversity

Even assuming that the kind of diversity--intellectual, or viewpoint diversity-- described by Justice Powell in *Bakke* is a compelling governmental interest that can justify use of race in the admissions process,

defendants' policies, in a number of respects, focus instead exclusively on racial and ethnic diversity. At a minimum, there is at least a genuine issue about the real justification for defendants' race-based policies, thereby precluding defendants from entitlement to summary judgment. Year after year, documents issued in furtherance of the "Michigan Mandate" identified the objective of the mandate to be an increase in the number and proportion of underrepresented racial and ethnic minorities. *See, e.g.,* Defs. Exhibit D, at v-vii. Moreover, a number of defendants' race-based policies have a focus that is solely on racial and ethnic diversity. Thus, a policy that all "qualified" African Americans, Hispanics, and Native Americans are to be offered admission is a policy that is *solely* based on race and ethnicity, as is a policy that adds 20-points to an applicant's score *solely* because of race or ethnicity, as is a policy that protects a "certain number of seats" in the class *solely* on account of an applicant's race or ethnicity, and so on with respect to the two-track grids and cells and the racially segregated waiting lists. At a minimum, these exclusively race-based preferences and double standards create an issue about defendants' true motives in designing or implementing their policies: genuine intellectual, viewpoint diversity, or increased representation of certain racial and ethnic groups.

Defendants' brief is itself evidence that defendants are motivated by something other than intellectual diversity. Thus, defendants rely on continued racial segregation in "housing and elementary and secondary education" as one justification for seeking racial and ethnic diversity at the University. *See* Defs. Mem. at 9. They have even prepared experts to testify about "racial separation and its consequences," the history of race relations "since the 17th century," and specifically the history of African Americans and Hispanics in our nation. *Id.* at 9-10 & n.4. The University also indicts the State of Michigan and city of Detroit for their "patterns" of racial "segregation," which have fostered "misconceptions and mistrust" among the races, perpetuating "racial stereotypes." *Id.* at 9-10. Thus, defendants defend their efforts at "[b]ringing students from different races together" as something that "cannot help but challenge preconceived notions." *Id.* at 11. In this sweeping language, defendants reveal that their real interest is something different than the intellectual diversity of which Justice Powell wrote and approved as a compelling governmental interest. Indeed, defendants have at a minimum created a genuine issue about whether they are motivated at least in part, and unlawfully so, by the kinds of justifications, *i.e,* remedying societal discrimination, or the lingering effects of such discrimination, or fighting such racial stereotypes, that neither Justice Powell nor a majority of the Court have ever approved as "compelling governmental interests."[(13)]

2. Race and Ethnicity Are Not Weighed Fairly in Defendants' Admission System

Plaintiffs have already demonstrated that a variety of undisputed characteristics of defendants' admissions system makes it the kind of "two-track" system that *Bakke* prohibits and that entitles plaintiffs to summary judgment. Even putting aside the facially race-based dual nature of the system, however, an analysis of the outcomes of actual admissions decisions would by itself create, at a minimum, a triable issue on whether the factor of an applicant's race or ethnicity is "weighed fairly" in defendants' admissions process. The data appended to and discussed in plaintiffs' original brief demonstrate the extreme impact that race has in defendants' admissions process. In addition, plaintiffs rely on the report of their expert, Dr. Kinley Larntz, for the strong statistical evidence of defendants' discrimination. *See* Exhibit A (Report of Dr. Kinley Larntz, dated December 14, 1998). Such statistical evidence is sufficient to create a prima facie case of discrimination. *Hazelwood Sch. Dist. v. United States,* 433 U.S. 299, 307-08 (1977).

Defendants cannot hide behind the alleged complexity and subjectivity of the admissions process to rebut

an inference of discrimination. The law is just to the contrary. *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 867 (9th Cir. 1982) (the "rule" is that "subjective decision making *strengthens* an inference of discrimination from general statistical data" (emphasis added)), *overruled on other grounds by Antonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir 1987). This is because--as the University's disparate treatment of whites and minorities under the guise of their "diversity" factors demonstrates--subjective factors are frequently pretexts for discrimination. *Bibbs v. Block*, 749 F.2d 508, 510 (8th Cir. 1984) ("a subjective procedure may provide a 'convenient screen for discriminatory decision making'"); *Segar v. Smith*, 738 F.2d 1249, 1276 (D.C. Cir. 1984) ("subjective criteria may well serve as a veil of seeming legitimacy behind which illegal discrimination is operating"); *Coble v. Hot Springs Sch. Dist. No. 6*, 682 F.2d 721, 726 (8th Cir. 1982) ("subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse").

III. CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request the Court to deny defendants' motion for summary judgment and to grant plaintiffs' motion for summary judgment.

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1. Elsewhere in their brief, defendants contradict the statement that the grids are "not substantive" by their

statement that "the use of the grid was the 'plus'" factor for minorities.

See Defs. Mem. at 19.

2. Of course, another plain and fatal flaw of such a feature is that it creates a system in which an applicant's race is weighted, even if not always decisively so, in mechanical fashion, rather than on a "case-by-case" basis that considers whether race ought to be a factor in a "particular" applicant's file. *Bakke,* 438 U.S. at 317.

3. Even assuming that Part V-C must refer to race-conscious measures for reasons other than specific remediation--and Part V-C does not say that--the "holding" in Part V-C could be as easily justified by the "role model" theory, *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), as by anything written in *Bakke*. Defendants prove the point themselves. They rely on *Johnson v. Transportation Agency,* 480 U.S. 616, 638 (1987), for the proposition that a "competitive" system is one that passes muster under *Bakke.* Defs. Mem. at 51 & n. 28. But *Johnson*, a Title VII case, upheld the affirmative action plan under challenge in that case on *remedial*, not "diversity" grounds. The case neither said nor decided anything about whether "diversity" could constitute a "compelling governmental interest."

4. Defendants cite to the opinion of Judge Zilly in *Smith v. University of Washington Law School,* Case No. C97-335Z (W.D. Wash. Feb. 12, 1999), for the proposition that lower courts should apply *Marks* even when there is no "common denominator" among the fragmented opinions of the Court. Judge Zilly reached that conclusion, however, only after expressly rejecting the "common denominator" analysis as articulated in *Planned Parenthood vs. Casey*, 947 F.2d 682, 693 (3d Cir. 1991), *rev'd in part on other grounds,* 505 U.S. 833 (1992). *See* Defs. Exhibit Y, *Smith*, slip op. at 4. What Judge Zilly rejected about *Planned Parenthood*, however, the Sixth Circuit has quoted approvingly. *See Triplett Grille, Inc. v. City of Akron,* 40 F.3d 129, 134 (6th Cir. 1994) ("[W]here no single rationale 'enjoys the assent of five Justices,' the situation becomes more complex, but the controlling principle is the same. Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, *will necessarily produce results with which a majority of the Court from that case would agree*, that standard is the law of the land.") (quoting *Planned Parenthood,* 947 F.2d at 693) (emphasis added).

Despite his rejection of the "common denominator" analysis and denial of motions for summary judgment in *Smith,* Judge Zilly also issued an order, pursuant to 28 U.S.C. § 1292(b), certifying his earlier order to the Ninth Circuit and agreeing that "there is substantial ground for difference of opinion" about whether "educational diversity is a compelling governmental interest that meets the requirement of 'strict scrutiny.'" *See* Exhibit L. The Ninth Circuit granted the appeal, also pursuant to 28 U.S.C. § 1292(b). *See* Exhibit M.

5. As defendants concede, they do grant racial preferences, such as the 20-point bonus, solely on account of race, without *any* required showing of disadvantage. *See* Defs. Mem. at 17 n.10 ("The University is not limiting itself to giving a "plus" factor only to minority students who are disadvantaged."). Thus, defendants' system runs afoul of the strictures of 8 of the 9 Justices in *Bakke*--the Justices who comprise the Stevens and Brennan groups.

6. On the same page from *Wygant* from which defendants quote, Justice O'Connor compared "strict" and "intermediate" scrutiny and concluded that "the distinction between a 'compelling' and an 'important' governmental purpose may be a negligible one." *Wygant,* 476 U.S. at 286. Curiously, defendants found no significance in that statement when arguing that the use of different standards of review made Justice Powell's rationale narrower than that of the Brennan group.

7. In *Jacobson,* the Sixth Circuit relied upon the decision of the Third Circuit, *Kromnick v. School Dist.,* 739 F.2d 894 (3rd Cir. 1984), for the conclusion that the challenged teacher transfer policy was lawful. *Kromnick* was decided before two major Supreme Court decisions: *Wygant* and *Croson.*

8. Defendants twice falsely assert, without pointing to anything in the record, that plaintiffs "ask this Court to enter . . . an injunction . . . barring any consideration of race in the admissions process." *See* Defs. Mem. at 31-32; *see also* Defs. Mem. at 47 ("Plaintiffs have the temerity to seek, in this Court, precisely the same injunction that the *Bakke* Court reversed-- one that forbids all consideration of race.").

9. Defendants also falsely represent that "[e]vidence regarding the value of diversity was not presented to the trial court in *Hopwood* . . ." Defs. Mem. at 53 n.30. *See Hopwood v. Texas,* 861 F. Supp. 551, 571 (W.D. Tex. 1994), *vacated and remanded,* 78 F.3d 932 (Fifth Cir. 1996).

10. The Supreme Court's recent decision in *Davis v. Monroe County Sch. Bd.,* 1999 WL 320808 (U.S. May 24, 1999), although decided under an analogous statute (Title IX) rather than Title VI, further undermines defendants' argument that Title VI permits a defense similar to the qualified immunity defense. The question in *Davis* was whether a damages claim could be asserted under Title IX against a recipient of federal funds for failing to respond to peer-on-peer harassment. It was remarkably unclear before *Davis* whether Title IX covered such lapses at all. *See id.* at *6 (listing circuit court cases with varying outcomes). The Court nonetheless found that, because the statute proscribed "subjecting" students to sexual discrimination "under" an education program, it gave sufficient notice that failing to respond to peer-on-peer harassment violated the law. *See also* id. at *13 ("Congress need not 'specifically identif[y] and proscrib[e]' each condition in the legislation" (citing and quoting *Bennett v. Kentucky Dept. of Educ.,* 470 U.S. 656, 665-66 (1985)). The Court thus upheld a damages remedy for the victims of such harassment.

11. In another point that undercuts defendants' argument and reliance on *Gebser,* the Court found an analogy to the deliberate indifference standard for municipalities under Section 1983. *Gebser,* 118 S. Ct. at 1999. Municipalities are considered to display "deliberate indifference" under Section 1983 when they ignore the *factual* consequences of the acts of their representatives; it is unnecessary to establish that they also ignored the *legal* consequences. *E.g., Barber v. City of Salem,* 953 F.2d 232, 238 (6th Cir. 1992) (although there was no clearly established legal right to suicide prevention for pretrial detainees, city could still be liable if it was "deliberately indifferent to the detainee's medical needs.")

12. A "disparate treatment" claim under Title VII uses the same standard of intentional discrimination as a claim that the Equal Protection Clause has been violated. *See, e.g., Gutzwiller v. Fenik,* 860 F.2d 1317, 1325 (6th Cir. 1988).

13. Further evidence of defendants' improper motives--with its focus on racial and ethnic diversity--is found in a document that defendants authored and bound with their collected expert reports and distributed to the media. *See* Exhibit B.