IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

FILED
OCT 10 2000
CLERK'S OFFICE
U.S. DISTRICT COURT

BARBARA GRUTTER, Plaintiff,	Civil Action No. 97-75928
v.	Hon. Bernard Friedman
LEE BOLLINGER, *et al.*, Defendants.	Hon. Virginia Morgan

DEFENDANTS MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56 and Local Rule 7.1, and for the reasons set forth in the attached Memorandum, defendants hereby move this Court for the entry of summary judgment.

As set forth more fully in the accompanying Memorandum of Law, at the close of extensive discovery in this matter there is no genuine dispute as to any material fact. All of the record evidence confirms that the University of Michigan Law School's admissions processes fully comply with the standards set out in the Supreme Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Defendants are entitled to summary judgment on all of plaintiff's claims.

In addition, a separate doctrine bars all of plaintiff's damages claims against the Board of Regents. The doctrine protecting the recipients of federal funds from being sued for money damages where it is not "obvious" that they will be liable in damages applies to the damages claim against the Board of Regents under Title VI. Accordingly, summary judgment in defendants' favor is appropriate on plaintiff's claims for damages, because there is no material

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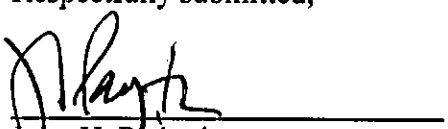
dispute -- indeed, there is no evidence at all -- that defendants violated plaintiff's "clearly established" constitutional rights.

Pursuant to Local Rule 7.1(a), defendants state that on April 29, 1999, concurrence in this motion and the relief sought was requested from plaintiff's counsel and that such concurrence was not granted.

Respectfully submitted,



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Dated: October 9, 2000

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BARBARA GRUTTER, Plaintiff, v. LEE BOLLINGER, *et al.*, Defendants. and KIMBERLY JAMES, *et al.*, Intervening Defendants	Civil Action No. 97-75928 Hon. Bernard Friedman Hon. Virginia Morgan

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the defendants are entitled to summary judgment on all of plaintiff's claims because the undisputed factual record shows that the admissions practices of the University of Michigan Law School -- which involve the "competitive consideration of race" as a "single though important factor" in order to achieve the benefits of a diverse student body -- comport with the standards set out in Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

2. Whether the Board of Regents of the University of Michigan is entitled to summary judgment on plaintiff's damages claims brought under Title VI because it would not have been "obvious" to the Board of Regents that, by accepting federal funds, it was subjecting itself to liability in damages on account of an admissions system that complies fully with Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

CONTROLLING AUTHORITIES

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

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Jaimie Winkler, *Expert Witnesses Discuss Diversity*, Michigan Daily, March 18, 1999 at 7a 12

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Exhibit	Description
A.	University of Michigan Law School Bulletin: 1995-1997 (Deposition Exhibit 7).
B.	Law School Admissions Office: Daily Summary of Applicant Status ("Daily Report") (Deposition Exhibit 10).
C.	University of Michigan Law School Bulletin: 1997-1999 (Deposition Exhibit 8).
D.	Law School Admissions Policy (Deposition Exhibit 4).
E.	Letter, dated December 8, 1997, from Jeffrey S. Lehman (Deposition Exhibit 59).
F.	"The Gospel According To Dennis" (Deposition Exhibit 5).
G.	Tables 5 and 6 of Expert Report submitted by plaintiff's expert, Kinley Larntz.
H.	*Smith v. University of Washington Law School*, No. C97-335Z (W.D. Wash. Feb. 12, 1999).
I.	Law School Announcement: 1988-89 (Deposition Exhibit 55).
J.	Standard 212 (Deposition Exhibit 84).
K.	American Bar Association Report on the University of Michigan Law School: February 9-12, 1992 (p. 38) (Deposition Exhibit 60).
L.	Memorandum from Don Regan (Deposition Exhibit 32).
M.	Letter, dated August 16, 1992, from Edward H. Cooper to James P. White (included in Deposition Exhibit 61).
N.	Report of Kinley Larntz, plaintiff's expert (p. 9); charts produced by Larntz (Deposition Exhibit 68).
O.	The University of Michigan Law School Admissions Office Grid of LSAT & GPA (Deposition Exhibit 15).

*/ Certain of the documents included in Volume 1 of the Appendix were designated by defendants as confidential pursuant to the Unopposed Stipulation and Protective Order Concerning Confidentiality, entered May 28, 1998. Pursuant to ¶ 5 of that Order, defendants waive their confidential designations for any materials included in the Appendix.

P. ABA Standards For approval of Law Schools (Deposition Exhibit 30).

Q. Association of American Law Schools (AALS) 1994 Handbook (Deposition Exhibit 31).

R. Letter to Dr. Don Michael Randel, President, University of Chicago, from Linda A. McGovern, Director, Chicago Office, Midwestern Division, Office for Civil Rights, U.S. Department of Education, re: OCR Complaint #05-97-2044 (August 14, 2000).

Volume 2: Deposition Excerpts[**]

Deponent	Deposition date
Lee Bollinger	February 9, 1999
Susan Eklund	June 2, 1998
Donald Herzog	August 26, 1998
Kinley Larntz	February 2, 1999
Jeffrey Lehman	January 21, 1999
Richard Lempert	November 5, 1998
Alissa Leonard	November 2, 1998
Marcea Metzler	February 5, 1999
Erica Munzel	June 1, 1998
Stephen Raudenbush	March 9, 1999
Donald Regan	August 27, 1998
Theodore Shaw	February 3, 1999
Dennis Shields	December 7, 1998
Allan Stillwagon	November 6, 1998
Jean Wong	July 21, 1998

[**] Some of the deposition testimony included in Volume 2 of the Appendix was designated by defendants as confidential pursuant to the Unopposed Stipulation and Protective Order Concerning Confidentiality, entered May 28, 1998. Pursuant to ¶ 5 of that Order, defendants waive their confidential designations for any materials included in the Appendix.

Volume 3: Expert Witness Reports

Expert Witness

Derek Bok

Albert Camarillo

Eric Foner

Patricia Gurin

Stephen Raudenbush (with Supplemental Reports)

Claude Steele

Thomas Sugrue

Kent Syverud

Robert Webster

INTRODUCTION

For more than 20 years, the consideration of race as a factor in university admissions has been constitutional. The United States Supreme Court so held in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), stating that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320. The Court recognized in *Bakke* that achieving the educational benefits of a racially and ethnically diverse student body is a compelling interest. And, since that decision, institutions of higher education across the country -- including the University of Michigan and its Law School -- have established admissions programs and policies that use race as one of many factors in admissions decisions. Over and over again, these institutions have found that the educational benefits that flow from having a student body consisting of individuals from diverse backgrounds and experiences enhance their respective educational missions by fostering vibrant intellectual debate and the exchange of ideas and perspectives.

Plaintiff Barbara Grutter and her class now seek to change the law pertaining to the consideration of race as a factor in admissions. They urge this Court to disregard completely the Supreme Court's holding in *Bakke* and to find that *any* consideration of race in admissions violates the Constitution. This Court should deny plaintiff's request. In the years since it decided *Bakke*, the Supreme Court has never overruled or even reconsidered its decision in that case. The Fifth Circuit is the only appellate court to conclude that a university may not seek to obtain the educational benefits of diversity by considering race and ethnicity as one of many factors to enroll a diverse group of students. That Court's *Hopwood* decision invalidating the admissions program formerly in use at the University of Texas Law School, however, has been

widely criticized as wrong and beyond its power. The Sixth Circuit, in contrast, has consistently recognized *Bakke* as controlling authority.

This Court is not free to ignore *Bakke* or the unbroken line of authority on which it is grounded, which recognizes the discretion and academic "freedom of a university to make its own judgments as to . . . the selection of its student body" -- including how to foster "[t]he atmosphere of 'speculation, experiment and creation'" that is "so essential to the quality of higher education," *id.* at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). The Supreme Court has long noted the fact that universities, through the educational judgments they make concerning everything from admissions to curriculum issues, play a unique role in encouraging the expression of diverse voices. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (noting that, in the university setting, the government "acts against a background of thought and experiment that is at the center of our intellectual and philosophic tradition"); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (holding that academic freedom "thrives . . . on the independent and uninhibited exchange of ideas among teachers and students," as well as on "autonomous decisionmaking by the academy itself"); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (emphasizing the importance of education and the nation's commitment "to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned").

There is no basis in law, or in the undisputed factual record, to tamper with the manner in which the University of Michigan Law School has exercised its discretion. The undisputed facts contained in the extensive record developed in the nearly three years since plaintiff first filed her Complaint reveal that the Law School has consistently and conscientiously

complied with the standards set forth in the Court's decision in *Bakke*. It enrolls only qualified individuals and does not employ racial quotas or targets in selecting an entering class of diverse individuals each year. Indeed, it applies only what *Bakke* squarely permits -- the competitive consideration of race as one of many factors in deciding who among the many individuals who apply each year should be admitted. Defendants therefore renew their motion for summary judgment on plaintiff's claims for injunctive and declaratory relief, and for money damages against the Board of Regents. Like the individual defendants whose renewed motion for summary judgment on grounds of qualified immunity has already been filed with this Court,[1/] they are entitled to summary judgment on all of plaintiff's claims.

STATEMENT OF UNDISPUTED FACTS

The University of Michigan is a government institution created by the constitution of the State of Michigan, *see* Mich. Const., art. 8, § 4. The University of Michigan Board of Regents is the body responsible for making decisions concerning the University and the vast array of undergraduate colleges, graduate programs, and professional schools of which it consists. *See* Mich. Const., art. 8, § 5. One of those professional schools, the University of

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1/ The parties have filed a series of memoranda in support of or in opposition to summary judgment in this case. *See, e.g.*, Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment on Liability, May 3, 1999; Defendants' Memorandum of Law in Support of Motion for Summary Judgment, May 3, 1999; Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment, May 28, 1999; Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, May 30, 1999. On June 14, 2000, defendants filed a renewed motion for summary judgment on qualified immunity grounds on behalf of the individual defendants in this case. *See* Defendants' Memorandum of Law in Support of Renewed Motion by Defendants Bollinger, Lehman, and Shields for Summary Judgment on Grounds of Qualified Immunity, June 14, 2000. That motion has been fully briefed and is now pending before the Court. *See, e.g.,* Plaintiff's Memorandum in Opposition to the Renewed Motion by Defendants Bollinger, Lehman, and Shields for Summary Judgment on Grounds of Qualified Immunity, July 18, 2000; Defendants' Reply in Support of Renewed Motion by Defendants Bollinger, Lehman, and Shields for Summary Judgment on Grounds of Qualified Immunity, August 11, 2000.

Michigan Law School, has emerged as one of the nation's premier law schools. Founded in 1859, the Law School enrolls approximately 1200 students and "offers a curriculum that prepares its students for legal practice anywhere in the United States and throughout much of the world." Ex. A at 8-9.[2/] That curriculum "reflects the view that a life in the law calls for knowledge and capacities which cannot be reduced to a single set." *Id.* at 9. Thus, while the Law School admits only those applicants likely to succeed, it does not simply rank order the applicants with the highest undergraduate grade point averages and standardized test scores in choosing the best entering class possible. Instead, the Law School "encourages independence and diversity of thought, which together provide the most solid intellectual and ethical basis for any professional career." *Id.*

The process of assembling a student body that embodies these characteristics requires a broad range of objective and subjective judgments to select students from a wide range of diverse backgrounds who are intellectually gifted, highly motivated, and independent-minded, and who are likely to become deeply committed professionals. To serve these objectives, one of the many factors that the Law School considers in admissions is how an individual applicant will contribute to the racial and ethnic diversity of the class. The Law School achieves the degree of racial and ethnic diversity that it now enjoys without using quotas, set asides, separate admissions systems, or any other technique that is even arguably proscribed by the *Bakke* decision. As the extensive record developed in this case indicates, the Law School has strictly adhered to the standards outlined in the Court's decision in that case.

2/ The documents and materials cited in this Memorandum are reproduced in Volume I of the Appendix hereto, and are cited, *e.g.*, as "Ex. A at __." Referenced deposition testimony, organized by deponent, is reproduced in Volume 2 of the Appendix, and is cited, *e.g.*, as "Wong Dep. at __." Expert witness reports are reproduced in Volume 3 of the Appendix and are cited, *e.g.*, as "Steele Expert Rep. at __."

1. The Faculty Admissions Policy.

Since 1992, and therefore at all times relevant to this lawsuit, the criteria employed by Law School officials in rendering admissions decisions have been set forth in the Law School's Admissions Policy ("the Policy"), *see* Ex. D, which was adopted by vote of the Law School faculty on April 22, 1992, on the recommendation of the Faculty Admissions Committee.[3/] The Law School faculty adopted and implemented the 1992 Policy well aware that any admissions decisions made by the Law School had to comply with the Supreme Court's decision in *Bakke*. Bollinger Dep. at 45-46. The Policy explains why the Law School values a diverse student body; why racial diversity is an important aspect of the overall diversity that the Law School seeks to achieve; and the steps the Law School's admissions office should take to achieve that diversity.

In the years prior to 1992, no single document outlined the Law School's admissions policies or articulated the educational values to be served by the admissions process. A few resolutions from the 1960s and 1970s had established a "special admissions" program that set a target range for the number of underrepresented minority students that the Law School would seek to enroll, but these aspects of the prior admissions policy, among others, were eliminated by the adoption of the 1992 Admissions Policy. Shaw Dep. at 138-42. The 1991-92 Faculty Admissions Committee decided, after discussing the issue, not to include any goal or

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3/ The Faculty Admissions Committee was convened during the 1991-92 school year by then-Dean Bollinger "to examine the [admissions] policy, to think about what our educational views and values were and what was required under the Constitution and the law." Bollinger Dep. at 110. Over the course of discovery in this case, plaintiff has deposed every member of the Faculty Admissions Committee. Those committee members include: Professor (now Dean) Jeffrey S. Lehman, Professors Donald Herzog, Richard O. Lempert, Donald H. Regan, then-Professor Theodore M. Shaw, then-Assistant Dean and Director of Admissions Dennis J. Shields, and then-Associate Dean for Student Affairs Susan M. Eklund.

target for the admission of underrepresented minorities in the new admissions policy. Shields Dep. at 107-08. Instead, the Policy describes the traits, qualities, and characteristics of applicants that the admissions office should consider in the admissions process.

a. General Objectives.

The Admissions Policy adopted by the Law School faculty in 1992 -- whose implementation plaintiff challenges in this case -- establishes the goals that govern the admissions process: "to admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year." Ex. D at 1. It recognizes the important role that students play in the education of their classmates. In conducting classes, law professors "depend on prepared and articulate students to advance the discussion." *Id.* At the same time, a great deal of the learning that occurs in law school actually takes place outside the classroom, "in informal conversations" and in the Law School's many journals, student organizations, and "diverse political groups of the left, right and in between." *Id.* at 2. The Law School therefore seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other," and who can assist the Law School in achieving its educational mission. *Id.* at 1. In making admissions decisions, the Law School values "people who have shown the capacity to be self-educating and to contribute to the learning of those around them." *Id.* at 2.

b. Grades, Test Scores, and Their Limitations.

Under the 1992 Policy, the goals of the admissions process employed by the Law School include "maximizing competence" and selecting a class of students likely to lead "distinguished legal career[s]." *Id.* at 3. Achieving this goal is an extremely difficult task. To select the 339 students enrolled in 1997, for example, the Law School had to cull through nearly

3400 applications. It was, however, only able to offer admission to 1163 students. Ex. B at UML025657.

In attempting to choose from the many students who apply for admission each year, the Law School's admissions office relies on two assumptions: *first*, that students who receive high grades in law school are more likely to distinguish themselves as lawyers, and, *second*, that there is some statistical correlation between an applicant's undergraduate grades and scores on standardized tests (such as the LSAT exam), on the one hand, and the grades that applicant will ultimately earn in law school, on the other. The Policy notes, however, that these assumptions are quite imperfect. Ex. D at 3. The Law School believes that the educational experience of the entire Law School community is improved, and that its students are more likely to enjoy successful careers as lawyers, if its admissions decisions result in the composition of a diverse class of students that will create a rich and vibrant learning environment.

Consequently, the Policy establishes that grades and test scores (which are translated into an "index score") are important, but by no means the exclusive, admissions criteria. While the Policy generally recognizes that "the higher one's index score, the greater should be one's chances of being admitted," it does not envision or permit admissions decisions to be reduced solely to grade point averages and LSAT scores. *Id.* at 4. The Policy recognizes that many applicants to the Law School have very high index scores. *Id.* As a result, "[w]hen the differences in index scores are small, we believe it is important to weigh as best we can not just the index, but also such file characteristics as the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty

of undergraduate course selection." *Id.* at 5.[4/] Because each application is considered in its entirety, it very often turns out to be the case that applicants with lower grades and test scores "are accepted while those who seem to have more attractive credentials are denied admission." *Id.* at 7. The Policy acknowledges that this pattern of decisionmaking is inevitable whenever "qualities not captured in grades and test scores figure in the evaluation of an application."[5/] However, the Policy maintains that a "minimal criterion" that applies to all admissions decisions is that no student will be admitted unless the expectation is that the applicant will "do well enough to graduate without serious academic problems." *Id.* at 2, 10.

c. Treating Each Applicant as an Individual.

In addition to addressing the role that quantitative factors should play in the admissions process, the Policy considers the importance of non-quantitative factors in admissions decisions. It offers two ways in which reliance on factors that are not reflected in the "index" serves the Law School's larger purpose of assembling the strongest possible law school class. *Id.* at 8. *First*, the Policy explains that there are some applicants for whom the admissions

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[4/] The Policy also addresses *who* should exercise the discretion to rely on non-quantitative factors in making admissions decisions. Prior to the time he left the Law School in 1990, Assistant Dean and Director of Admissions Allan Stillwagon made most admissions decisions, "with little formal input from the faculty." Ex. D at 7; *see also* Stillwagon Dep. at 17-18. But the Policy explains that since Director Stillwagon's departure, "the Dean of Admissions has consulted with the faculty on a portion of the admissions decisions. This has allowed the faculty as represented by its admissions committee to tell its Dean of Admissions how a mix of faculty evaluate the different kinds of strengths and weaknesses that are found in applicant files." *Id.* at 7-8.

[5/] One of the factors that figures into admissions decisionmaking is state residency. The 1992 Policy notes that the Law School has a special commitment to admit residents of the State of Michigan, in light of the "special claims of Michigan residents to a Michigan Law School education." Ex. D at 2. As "part of a publicly funded university," the faculty concluded, a "reasonable proportion of our places should go to Michigan residents, even if some have qualifications lower than those of some applicants from outside Michigan." *Id.* In fact, the Dean of the Law School informed the Director of Admissions each year what proportion of the class should be consist of Michigan residents. Shields Dep. at 92-95.

office will have reason to doubt a prediction based solely on index scores: "imagine an applicant whose undergraduate course selection seems relentlessly dull, whose personal statements and [essays] are thin or incoherent, and whose letter[s] of recommendation damn with faint praise." *Id.* at 4-5. Such an applicant might be denied admission despite his or her high grades and test scores. At the same time, there are other students whom the admissions office believes are likely to excel in the study and practice of law, despite relatively low index scores. For example, the Policy refers to a student whose college performance exceeded what one might have predicted based on his standardized test scores, and who was applying to law school with a similarly low LSAT score. *Id.* at 9. The Law School concluded that this student's performance on standardized tests would likely be a poor predictor of his academic success, and therefore admitted him despite his comparatively low "index" score. *Id.*

Second, the admissions office, by not limiting admissions review to grades and test scores, places the Law School in a position to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Id.* at 9-10. The Policy provides three concrete examples of applicants with compelling experiences and backgrounds for whom the Faculty Admissions Committee recommended admission "influenced by diversity considerations." *Id.* at 10-11. After citing these examples, the Policy explains that individual members of the faculty may place different values on different achievements and characteristics. One faculty member might, for example, accord a great deal of weight to the fact that an individual was awarded an Olympic gold medal or a Ph.D. in physics, whereas another might place more emphasis on an applicant's experience as a Vietnamese boat person. *Id.* at 11. While the Policy places the principal responsibility for deciding which characteristics will enhance the Law School learning environment in the hands of

the Dean of Admissions and the Faculty Admissions Committee, it clearly states that "[t]he varied perspectives from which different [faculty] committees will interpret the concept 'diversity' should further enrich our school." *Id.* at 11-12.

d. The Role of Racial and Ethnic Diversity.

As part of the overall goal of enrolling an intellectually vibrant and diverse class of law students, the Policy notes that there is "a commitment to one particular type of diversity that the school has long had and which should continue. This is a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." *Id.* at 12. The Policy explains that students from such racial and ethnic minority groups "are particularly likely to have experiences and perspectives of special importance to our mission," and that by "enrolling a 'critical mass' of minority students, we have ensured their ability to make unique contributions to the character of the Law School." *Id.*

This said, the Policy emphasizes that the faculty do not "mean to define diversity solely in terms of racial and ethnic status." *Id.* Rather, the Policy's concern with achieving racial and ethnic diversity is an inextricable part of the Law School's broader goal of enrolling "students with distinctive perspectives and experiences," in order to improve the educational experience for all of the students enrolled in its classes. *Id.* at 9-10. It is, however, the Law School's judgment that, among the types of diversity to be valued, having a racially and ethnically diverse group of students will improve legal education and the quality of lawyering, and ultimately improve our society. As Jeffrey Lehman, the Dean of the Law School, has explained, the Law School's view is that the "quality of the intellectual experience that our

students enjoy" is improved by bringing together, in the law school classroom, students with a broad array of perspectives, experiences and insights, including those derived from experiences related to race. Ex. E at UML024996. Having a diverse student body furthers the Law School's central educational mission -- "to cultivate in our students the ability to understand an issue from many perspectives." *Id.*

This view is widely shared in legal education and in the legal profession. For example, Kent Syverud, who is Dean of Vanderbilt Law School and Editor of the Journal of Legal Education, states in the expert report he prepared in this case that "all law students receive an immeasurably better legal education, and become immeasurably better lawyers, in law schools and law school classes where the student body is racially heterogeneous." Syverud Expert Rep. at 2. "[R]acial heterogeneity dramatically enhances the ability of the best active, Socratic teaching to achieve its purposes" of requiring law students to "see any set of facts from different points of view." *Id.* at 3.

Similarly, Judge Robert B. Webster, a former President of the Michigan State Bar and former Chief Judge of the Oakland County Circuit Court, adds that racial and ethnic diversity in legal education is essential both to a law school's mission in training effective lawyers, and to the perception that our legal system is able to administer equal justice. Judge Webster notes that "the ability to empathize and work effectively with people of diverse races and backgrounds is critical to our profession. It is an ability that must be developed as proficiently, and as soon, as it possibly can." Webster Expert Rep. at 5. Judge Webster further notes, drawing on a number of studies of the Michigan court system, that "when diverse classes of law school students enter the legal profession it enhances the appearance that our system is just, unprejudiced, and equally available to people of all races." *Id.* at 5-7. Derek Bok, former

Dean of Harvard Law School and former President of Harvard University, echoed this point in his expert report, stating that the "bar has made clear that it views the participation of minority attorneys as essential to public confidence in the machinery of justice." Bok Expert Rep. at 23.

Additional expert testimony submitted by the Law School in this case provides unrebuted empirical proof for the common sense judgment that racial and ethnic diversity improves education.[6/] Patricia Y. Gurin, a Professor of Psychology at the University of Michigan with more than 34 years of experience in her field, has conducted an extensive empirical analysis of how diversity in higher education affects students. Using national and Michigan undergraduate student databases, Professor Gurin demonstrates that students learn better when they are educated in racially and ethnically diverse environments. Her analysis shows that students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with other students showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and improvement in a range of academic and intellectual skills. *See* Gurin Expert Rep. at 35-38. These findings -- which strongly indicate that students educated in diverse environments are better prepared to participate in our pluralistic democracy because they are more equipped to understand different

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[6/] Plaintiff's counsel has made the extraordinary -- and constitutionally erroneous -- statement that "[a]ny evidence or any report that shows, or purports to show, that racial diversity has educational value is besides the point," Peter Schmidt, *U. of Michigan Turns to Scholars to Bolster Its Defense of Affirmative Action*, Chronicle of Higher Education, April 2, 1999 at A38 (quoting Terence J. Pell, of the Center for Individual Rights). *See also* Jaimie Winkler, *Expert Witnesses Discuss Diversity*, Michigan Daily, March 18, 1999 at 7a (quoting Pell to the same effect). But, as explained earlier, the Law School's common sense educational judgment regarding diversity lies at the heart of what *Bakke* permits and is part of a well-established line of Supreme Court precedent recognizing the autonomy that universities, consistent with the First Amendment, have to pursue their educational mission. Defendants' expert case, which confirms the correctness of *Bakke* and the Law School's educational judgment, therefore, cannot be viewed as "besides the point."

perspectives, deal with conflict, and appreciate the ways in which differences can be harnessed in pursuit of a common goal, *id.* at 18-21 -- are applicable to undergraduate and law school education alike. *See* Syverud Expert Rep. at 3-4.[7/]

The reason for the educational benefits that diversity produces is -- as the reports submitted by defendants' other experts in this case make clear -- that race still matters a great deal in American life. Indeed, in some areas, such as housing and elementary and secondary education, our society is as racially separate today as it was before *Brown v. Board of Education*, 347 U.S. 483 (1954), and the landmark civil rights legislation of the 1960s. *See* Sugrue Expert Rep. at 7-8, 19-44; *see also* Foner Expert Rep. at 48-49; Camarillo Expert Rep. at 23-26. Americans of different races reside in different communities, attend separate elementary and secondary schools, and rarely have sustained, meaningful contact with one another. Sugrue Expert Rep. at 19-44. This persistent racial separation fosters misconceptions that make it nearly impossible for individuals outside of the higher education context to break racial stereotypes, *id.* at 67, and has an extremely negative impact on student experiences, perspectives, and worldviews.

At a very concrete level then, racial separation provides the backdrop against which the Law School necessarily makes it admissions decisions. As they approach their first year of law school, most students will have had few opportunities to benefit from exposure to the ideas and perspectives of people from backgrounds and racial groups different from their own.

7/ The strong evidence regarding the educational benefits that accrue from having a racially and ethnically diverse student body submitted by defendants distinguishes this lawsuit from cases such as *Johnson v. Board of Regents of the Univ. of Ga.*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), in which a district court, *inter alia*, recently invalidated a university admissions plan on the grounds that there was only "amorphous" evidence of diversity's educational benefits. Like *Hopwood, Johnson* disregards *Bakke* and applicable restraints on judicial authority. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

See Gurin Rep. at 4. Of course, some students will have received their undergraduate training from racially diverse institutions. But others will not have enjoyed this benefit. And, even among those who did, very few, if any, will have had the opportunity to discuss, in a diverse setting, the specific issues raised by the law school curriculum. *See id.*

Thus, bringing students from different races together in a law school class cannot help but challenge preconceived notions. For example, in his expert report, Judge Webster indicates that his first experiences with racial diversity gave rise to "encounters [that] exposed and destroyed racial stereotypes I did not even know I harbored. . . . I found myself exposed to new perspectives, new kinds of life experiences, new ways of looking at the world." Webster Expert Rep. at 4-5. It is encounters such as the ones described by Judge Webster -- encounters that ultimately help students to appreciate the similarities they share as well as the differences that separate them -- that create the educational opportunity for more complex and active thinking. *See* Gurin Expert Rep. at 15. For a law school such as the University of Michigan, creating a diverse student body in which all students can interact with members of different groups comprises a central part of the institution's overall educational mission. *See* Ex. E at UML024996; *see also* Ex. D. Without diverse experiences, students are not likely to develop the skills needed to move beyond the misconceptions created by racial separation and to succeed in the modern legal environment of our increasingly pluralistic society.

2. The Admissions Process: Implementing the Admissions Policy.

The vast majority of the work involved in carrying out the admissions process at the Law School each year is completed by a relatively small staff of admissions professionals who work closely together in reviewing application files. The admissions office is directed by the Assistant Dean and Director of Admissions, currently Erica Munzel, *see* Munzel Dep. at 7,

who receives assistance in reviewing files from only two or three other file readers, and makes most of the final admissions decisions.[8/] The extensive record evidence developed in this case makes clear that the professional staff of the Law School's admissions office has done what it has been directed to do: carry out the Admissions Policy adopted by the faculty in 1992.[9/]

a. File-By-File Review.

The Law School receives a large but fairly manageable number of applications each year. For example, between 1995 and 1997, the number of applications ranged from 3373 to 4063. Ex. B at UML025657. Each application comes to the admissions office with an accompanying report from the Law School Data Assembly Service, a national clearinghouse that summarizes each law school applicant's grades and test scores, and provides some information about the relative strength of undergraduate institutions. Metzler Dep. at 78-79. Because it receives a manageable number of applications accompanied by information compiled and presented in a consistent manner, the admissions office -- with its relatively small staff of professional admissions counselors -- is able to review application files without having to rely on

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8/ Although final decisions are generally made by the Assistant Dean and Director of Admissions, Dennis Shields -- who served in that position from July 1991 until January 1998, Shields Dep. at 9-10, 13 -- sometimes authorized the Associate Director to make final admissions decisions. Shields Dep. at 53-56. An Assistant Director also reviewed applicant files during this time, but did not make final admissions decisions. Metzler Dep. at 19; Leonard Dep. at 32-33.

9/ Plaintiff has deposed almost the entire admissions staff: Olivia Birdsall (who served as a senior admissions counselor from 1981 to 1993); Susan M. Eklund (who served as Associate Dean, and oversaw the admissions office in 1990-91); Kurt Kaiser (who, for a time, had responsibility for the admissions office computer system); Alissa Leonard (who worked in the admissions office as a receptionist, secretary, and admissions counselor from 1990 to 1996); Marcea Metzler (who worked as an admissions counselor from 1996 to 1998); Erica Munzel (who served as an admissions counselor from 1994 to 1998, and who was named Assistant Dean and Director of Admissions in 1998); Dennis J. Shields (who was Assistant Dean and Director of Admissions from 1991 to 1998); Allan Stillwagon (who was Assistant Dean and Director of Admissions from 1979 to 1990); Kirsten Vandenburg (who worked as an admissions counselor in 1991-92); and Jean Wong (who has served, since 1996, as the admissions office's file clerk and office manager).

a set of formal guidelines (beyond those established in the Policy itself) to direct the admissions staff in the exercise of their discretion. Shields Dep. at 132. Indeed, the only document other than the Policy provided to new file readers in the admissions office was a brief memorandum, *see* Exhibit F, written by Admissions Director Shields. *See* Shields Dep. at 59; Metzler Dep. at 14-19.

The memorandum prepared by Director Shields instructs file reviewers to seek out "from an especially well credentialed pool of candidates, those that show the most promise." Ex. F at 4. Making those determinations "requires more than a mere review of the numbers (LSAT and GPA), credentials." *Id.* This is not to say that grades and test scores are unimportant. Indeed, the memorandum recognizes, as the Policy does, that, in many cases, "we will ultimately be swayed . . . by the strength of the numbers." *Id.* at 6. But the Law School receives applications from an extremely talented and accomplished pool of candidates, *id.* at 4, and does not rely heavily on narrow distinctions between candidates on the basis of grades and test scores. Indeed, an applicant's grades and test scores merely "pu[t] a context on the file as you read it." *Id.* at 80. The "index score," which is calculated using an applicant's undergraduate grades and LSAT score, is used principally as a way to "sort" files, such that admissions staff would review a "batch of files" in the same index range. Shields Dep. at 72-73; *see also* Metzler Dep. at 26-29. As the Policy provides, "if the numbers are high there's more of a chance that a person will be admitted." Ex. F at 81.

However, because "many of the numbers will be so close to the same," the admissions staff is required to dig deeper into the applications, to review the essays and letters of recommendation, "to look for candidates that show intellectual talent, leadership ability, and academic acumen which augers for a lively intellectual educational community and important

contributions to the profession." Ex. F at 4. The Law School's process for making admissions decisions is more of an art than a science. In order to make a decision on any given applicant, an admissions counselor must "read a file and look at the essays, look at the transcripts, look at the letters of recommendation," and decide how the particular applicant would contribute to the Law School class. Shields Dep. at 23.

b. Race as a Single Though Important Element.

In addition to conducting an individualized, file-by-file review of applications, the admissions staff also implements the 1992 Policy by considering the way in which an applicant would likely contribute to the diversity of the law school class, which includes racial diversity. It is undisputed that race is one of many important factors in the admissions process. Applicants to the Law School are not required to disclose their race when applying. But where they do, Admissions Director Shields observed, that "would be one of the things amongst all of those things that would be part of what you thought about as you made a judgment about a file." Shields Dep. at 23.

In selecting students for admission to the Law School, the admissions office has not defined a "critical mass" of underrepresented minority students necessary to achieve the full benefits of a diverse student body. Nor have admissions decisions been made to assure that a particular number of underrepresented minority students are admitted or enrolled. Shields Dep. at 101. Instead, the Director of Admissions makes individual admissions decisions on an individual, file-by-file basis. For example, Admissions Director Dennis Shields has said that, while he was "concerned about there being a good representation of students of color in the class," *id.*, there was "no precision" about what a "critical mass" or a "good representation"

would be. *Id.*[10/] Simply put, the Law School does not employ quotas or enrollment targets as part of its admissions process.

c. The Data.

The data reveal a number of important facts about the admissions process. First, over the years, the pool of underrepresented minority applicants has represented a relatively small proportion of the total group of applicants to the Law School. *See* Ex. B. Additionally, the rate of admission for underrepresented minority students is similar to that for majority students. Further, the number of underrepresented minority students admitted to the Law School has varied considerably from year to year, demonstrating quite clearly that the Law School does not rely upon racial quotas or enrollment targets in making admissions decisions. In 1994, for example, a year in which it received an unusually large number of applications from African American students, the Law School offered admission to 138 of the 639 African American applicants. *Id.* at UML025659. The following year, however, it offered admission to only 97 such applicants, a thirty percent drop in the number admitted from the year before.

Likewise, the Law School's so-called yield rates vary modestly by race from year to year. *See, e.g., id.* "Yield" refers to the proportion of students who accept an offer of admission and actually choose to enroll. The intense competition among highly selective

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10/ Over the course of the admissions cycle, the admissions office monitors the flow of applications, admissions decisions, and enrollment deposits. In doing so, the office pays attention, among other things, to the status of the School's minority applicants, as the Policy requires. In particular, the admissions office relies on a report on the status of the applicant pool -- the daily report, Ex. B -- to provide descriptive data, which compares the current year's pool of applicants to those in preceding years. The daily report "allows you to see what the statuses are in your applicant pool at any point in time." Munzel Dep. at 159. It is "a way of tracking what is occurring." Shields Dep. at 141. Admissions Director Shields made clear -- and his testimony is not refuted -- that the "numbers" reflected in the daily report "[did not] drive the decisions that I make or made." *Id.* "[N]o matter what this tells me, I've still got to go read the files and decide whether or not somebody should be admitted." *Id.* at 142.

institutions like the Law School essentially means that less than a third of the students admitted to the University of Michigan Law School each year will ever enroll. To illustrate, in 1997, the yield rate for white students was 29.9 percent. *Id.* at UML025660. In other words, less than one in three white students offered admission to the Law School in 1997 actually enrolled. For African American students, the yield rate for that year was even lower -- with 25.2 or only one in four students offered admission actually enrolling in school. *Id.* at UML025659.

Finally, the data show that, while there is some difference between the average grades and test scores of admitted majority and admitted minority students, the average grades and test scores for all admitted students at the Law School are quite high. *See* Ex. G. For example, of those applicants in 1998 who were admitted to the Law School, the median LSAT and GPA of the Caucasian applicants was 168 (on a scale of 120 to 180) and 3.66, while for African American applicants the medians were 159 and 3.41.[11/] *See id.* Given this information -- which highlights the fact that the Law School implements its Policy solely to admit applicants who are likely to succeed at the School and thereafter -- and the other undisputed facts in this case, there is no doubt that the Law School complies with *Bakke*.

11/ As Claude Steele, Chair of the Psychology Department at Stanford University and an expert witness for defendants in this matter, observes in his expert report, even much larger differences than these in standardized test scores would "represent[] a very small difference in skills critical to grade performance." Steele Expert Rep. at 5.

ARGUMENT

Plaintiff seeks to effect a sea change in the law pertaining to the academic freedom enjoyed by university officials in making decisions -- designed to further the educational objectives of their institutions of higher education -- to enroll a diverse class of students with the skills and experiences needed to succeed in the modern university context. In effect, plaintiff urges this Court to ignore the Supreme Court's holding in *Bakke*, which expressly permits the competitive consideration of race in university admissions, and to hold that race may *never* be employed as a factor in admissions. But this Court is without the authority to make such a dramatic break with precedent. The Supreme Court's decision in *Bakke* has not been overruled or even reconsidered in the more than 20 years since that case was decided, and it is controlling here.[12/] Moreover, there is nothing in the extensive record developed in this case to suggest that the Law School has failed to adhere to the standards set forth in *Bakke* in carrying

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12/ Like *Bakke*, the instant case is about the use of race as a factor in admissions to achieve the educational benefits of having a racially diverse student body. Thus, cases concerning the use of race to remedy past discrimination do not bear directly on the question presented here: whether achieving the benefits of diversity in higher education is a compelling interest. Moreover, recent Supreme Court decisions, such as those in the municipal and federal construction contract context, holding that all racial classifications are subject to strict scrutiny and must be narrowly tailored to serve a compelling interest are consistent with and do not question *Bakke*. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Justice Powell's pivotal opinion in *Bakke* is wholly consistent with this approach, as he also applied "the most exacting judicial examination," 438 U.S. at 291, and concluded that the use of race must be "precisely tailored to serve a compelling governmental interest," *id.* at 299. It is therefore understandable that the Supreme Court has not questioned the core holding of *Bakke*. *See, e.g.*, Akhil Reed Amar and Neal Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1746 (1996) ("Because our public universities should be places where persons from different walks of life and diverse backgrounds come together to talk with, to learn from, and to teach each other, each person's unique background and life experience may be relevant in the admissions process -- thus, absolute color-blindness is not constitutionally required in the education context."); *see also* Brief of the United States as Amicus Curiae at 3 (explaining that *Bakke* permits race to be considered as one of many factors in admissions and controls the question presented in this case).

out the 1992 Admissions Policy. The undisputed facts in the record demonstrate conclusively that, consistent with its articulated objective of achieving the educational benefits that having a racially diverse body brings, the Law School employs only what *Bakke* expressly permits -- the competitive consideration of race and ethnicity as one of many factors in admissions. As a result, defendants are entitled to summary judgment on all of plaintiff's claims.

I. CONTROLLING PRECEDENT PERMITS THE COMPETITIVE CONSIDERATION OF RACE IN LAW SCHOOL ADMISSIONS.

For nearly a century, the Supreme Court has recognized the special role and mission of educational institutions in our democracy. As early as 1907, Justice Holmes referred to education as "one of the first objects of public care." *Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U.S. 79, 87 (1907). Since that time, the Court has repeatedly acknowledged the government's "special role as educator," *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 921 (1982) (O'Connor, J., dissenting), and observed that this "special role" carries with it an obligation to participate "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests," *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Indeed, the Court has made it clear that the "Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs." *Pico*, 457 U.S. at 876 (Blackmun, J., concurring). For this reason, the Supreme Court recognized, in its landmark desegregation decisions, that an education that encourages students to "engage in discussions and exchange views with other students," *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950), is "the very foundation of good citizenship," *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

This long history of recognizing not only the importance of education, but also the special role of educators in preparing students for participation in our society, provides the

backdrop against which the Court rendered its seminal decision in *Bakke*. Justice Powell's opinion in that case, which held that the goal of attaining the educational benefits of diversity is a compelling state interest that justifies the consideration of race as a factor in university admissions, provides controlling authority for the actions taken by the Law School in administering the 1992 Admissions Policy at issue in this case.

A. A Properly Devised Admissions Program Involving the Competitive Consideration of Race and Ethnic Origin Is Constitutional.

The Supreme Court's decision in *Bakke* concerned the constitutionality of the admissions policy of the University of California at Davis Medical School. In contrast to the University of Michigan Law School's Admissions Policy, Davis operated a two-track admissions system, in which fixed numbers of seats were explicitly reserved for majority and minority applicants -- 16 seats in a class of 100 were allocated for minority students, while 84 went to majority students. 438 U.S. at 275. Allan Bakke, a white applicant twice rejected by Davis, challenged the medical school admissions policy, claiming that it violated his rights under both the Equal Protection Clause and Title VI of the Civil Rights Act. *Id.* at 277-78. The California Supreme Court invalidated the plan, holding that race can *never* be considered as a factor in admissions and ordering Allan Bakke admitted to the medical school.

A sharply divided Supreme Court rendered a judgment reversing the California Supreme Court decision. Four justices would have reversed the entire judgment and upheld the entire Davis admissions system, including the reservation of a fixed number of seats for minority applicants exclusively;[13/] four others would have affirmed the entire judgment, holding that Title

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13/ *Bakke*, 438 U.S. at 324-79 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.)

VI of the Civil Rights Act forbids any consideration of race.[14/] Justice Powell delivered the judgment of the Court and authored the pivotal opinion, which invalidated the Davis admissions system, but held that achieving the academic benefits of a diverse student body is a compelling interest that justifies the competitive consideration of race as a factor in university admissions. *See id.* at 314-15. Significantly, Part V.C. of Justice Powell's opinion was joined by four other Justices (Brennan, White, Marshall, and Blackmun, JJ.), establishing a majority of the Court for the following critical passage, which states *Bakke*'s central holding and judgment regarding the use of race in university admissions:

> In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a ***properly devised admissions program involving the competitive consideration of race and ethnic origin.*** For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant ***must be reversed.***

Id. at 320 (emphasis added). Thus, after *Bakke*, there can be no doubt that "a properly devised admissions program involving the competitive consideration of race and ethnic origin" is constitutional.

B. Diversity Is a Compelling Interest in the University Admissions Context.

Justice Powell's opinion in *Bakke* articulates a number of important principles. The first of these is that "the interest of diversity is compelling in the context of a university's admissions program," 438 U.S. at 314, because "our tradition and experience lend support to the view that the contribution of diversity is substantial," *id.* at 313. Justice Powell emphasized that "[t]he atmosphere of 'speculation, experiment and creation' -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body." *Id.* at 312. Justice Powell understood that a university is essentially a "marketplace of ideas" that functions

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14/ *Bakke*, 438 U.S. at 408-21 (Stevens, J., joined by Burger, C.J., Rehnquist, and Stewart, JJ.).

only where there is a rich variety of voices available to offer a diversity of perspectives. This variety cultivates the "robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Id.* (citations omitted)

Because of the salience of race in American life, and because the vibrant exchange of ideas so essential to university life cannot occur without the presence of individuals of different backgrounds and experiences, Justice Powell concluded that racial and ethnic diversity is an essential element of this mix.[15/] In stating this point, Justice Powell quoted from the Supreme Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950): "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." *Bakke*, 438 U.S. at 314. In quoting this passage, Justice Powell recognized that the benefits of having a diverse student body reflect the values protected by the First Amendment -- the "robust exchange of ideas which

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15/ Justice Powell's *Bakke* opinion quoted an article by Dr. William Bowen, then the President of Princeton University, in which Dr. Bowen explained why providing students with "exposure" to a diverse group of students was essential to a university's educational mission:

> [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, "People do not learn very much when they are surrounded only by the likes of themselves."

Bakke, 438 U.S. at 312-13 n.48.

discovers truth out of a multitude of tongues," *id.*, 438 U.S. at 312 (citation and internal quotation marks omitted).

The principle that diversity constitutes a compelling interest that justifies the competitive consideration of race in university admissions has its roots in a rich heritage of cases, dating back more than two decades before the *Bakke* decision, that recognize that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. 312. This line of cases establishes that a university has an important interest in creating a campus environment that includes people from a wide array of backgrounds, perspectives, and beliefs in order to encourage a vigorous and healthy learning environment. Indeed, in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), the Court emphasized that "[n]o one should underestimate the vital role in a democracy that is played by those who guide and train our youth." In an often-quoted passage from his concurring opinion in *Sweezy*, Justice Frankfurter expounded still further on the importance of academic freedom to universities:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Id. at 263 (citation omitted). Thus, in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), the Court concluded that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." Significantly, the Court has specifically applied these principles to the University of Michigan itself in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n. 12 (1985), where it

held that "academic freedom thrives . . . on the independent and uninhibited exchange of ideas among . . . students," as well as "autonomous decisionmaking by the academy itself."

The academic freedom discussed in the Court's cases incorporates two important components. First, it acknowledges that the discussion and debate of diverse views, by students of diverse backgrounds, is an essential part of the mission of an institution of higher education principally because it forms the foundation for the "robust exchange of ideas," *Bakke*, 483 U.S. at 312 (quoting *Keyishian*, 385 U.S. at 603), protected by the First Amendment. In *Healy v. James*, 408 U.S. 169, 180-81 (1972), for example, the Court noted that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom" (citations omitted). Since *Bakke*, the Court has repeatedly reaffirmed the significance of such free-ranging discussions in a university. Recently, in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), the Court held that the exclusion of a particular viewpoint from campus debate would not only violate the First Amendment's free speech guarantee, but would also undermine the very purpose of education. In the university setting, the Court explained, the government "acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Id.* at 835 (citations omitted). It also noted that encouraging "free speech and creative inquiry" improves the educational experience on our nation's campuses, which are "vital centers for the Nation's intellectual life." *Id.* at 836; *see also Board of Regents of Univ. of Wis. v. Southworth*, 120 S. Ct. 1346, 1356 (2000) (observing that a university "may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall"); *Rust v.*

Sullivan, 500 U.S. 173, 200 (1991) ("[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society.").

Second, the notion of academic freedom recognizes both that educational institutions should be accorded discretion when making judgments that affect their educational mission and that judges should exercise a corresponding amount of restraint when reviewing such judgments. The rationale for according universities this sphere of independent academic decision making lies both in the importance of education to our pluralistic democracy and in the expertise educators have in determining how the goals of education can best be achieved. *See, e.g., Southworth*, 120 S. Ct. at 1355 ("It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning"); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (noting that there are a variety of educational decisions, such as "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum," that may not be second-guessed in federal court on the grounds that they represent a bias in favor of or against a set of ideas); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (observing that because of the principle of academic freedom, courts are "reluctan[t] to trench on the prerogatives of state and local educational institutions"); *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (identifying the freedom of a university to "determine for itself on academic grounds . . . who may be admitted to study").[16/]

[16/] Thus, under the Court's cases, judicial supervision of primarily educational decisions -- such as decisions concerning the intricacies of a university's admissions processes -- violates the principle of deference to educational institutions and intrudes unnecessarily into an area where courts lack expertise. The decisions of the Sixth Circuit support this conclusion. *See Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100, 102 (6th Cir. 1992) (observing that "school authorities have broad discretion to implement educational policy"); *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir. 1989) (noting that "[a]cademic freedom thrives not only on the robust and

Justice Powell was therefore on firm ground when he said in *Bakke* that "universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas'" and emphasized that, by attempting to foster diversity among its student body, a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S. at 313. In light of the profound role that race has played in our history and continues to play in American life today, Justice Powell was also on firm ground in determining that a university may properly conclude that it is better able to reflect a rich variety of experiences, backgrounds, and insights, if it is permitted to include *racial* and *ethnic* diversity among the types of diversity it values and seeks to achieve. Defendants have marshaled abundant evidence that demonstrates that Justice Powell was *right* about the connection between educational excellence and a racially and ethnically diverse student body -- and that the hundreds of institutions of higher learning that have relied on his opinion in crafting their admissions policies to achieve such diversity are right as well. As we have discussed, *see supra* at 10-14, racial and ethnic diversity on campus enhances the academic skills and civic preparedness of *all*

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uninhibited exchange of ideas between the individual professor and his students, but also on the 'autonomous decisionmaking [of] . . . the academy itself.'") (citation omitted). Similarly, the constitution of the State of Michigan recognizes the need for autonomous decision making in the university setting. It expressly vests the authority to govern the University of Michigan in the Board of Regents of the University of Michigan and insulates that body from the control of the state's political branches of government. *See* Mich. Const., art. 8 (1963); *cf. Federated Publications, Inc. v. Board of Trustees of Michigan State Univ.*, 594 N.W.2d 491, 495-96 (Mich. 1999) (noting that the "Michigan Constitution confers a unique constitutional status on our public universities and their governing boards"). Significantly, Congress and the Supreme Court have also recognized the importance of allowing state and local educational institutions to make judgments regarding the manner and conditions in which their students will be educated without interference from federal agencies and officials. *See* 20 U.S.C. § 1232a ("No provision . . . shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction . . . over the curriculum, program of instruction, administration, or personnel of any educational institution . . . ."); *see also Wheeler v. Barrera*, 417 U.S. 402 (1974) (recognizing statutorily imposed limits on federal involvement in administration of state education programs); *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983) (same).

students -- minorities and non-minorities alike. Contrary to what plaintiff argues in this case, valuing such diversity is *not* to assert that one's race determines or preordains the views that any particular person will hold regarding any given subject. Indeed, there may be no better way to debunk stereotypes than by exposing students -- in a racially diverse educational setting -- to the wide array of viewpoints that are very often held by members of a single racial or ethnic group, or to confront students with the fact that members of other racial groups have similar views to their own when differences are expected.

C. *Bakke*'s Limitations on the Consideration of Race in University Admissions.

Although he held that public universities generally have a compelling interest in achieving the benefits of a diverse student body, Justice Powell concluded that the Davis policy at issue in *Bakke* was not precisely tailored to achieve that objective. *Bakke* permits colleges and universities to consider race as a factor in admissions, but imposes certain limitations on the manner in which race may be employed.

First, Justice Powell's opinion makes clear that the "fatal flaw" in the Davis admissions system was not the consideration of race, but rather the fact that minorities were rigidly insulated from competition with other applicants. 438 U.S. at 319-20. The Davis program was deemed to violate the Constitution because it shielded minority applicants from non-minority applicants. *Bakke* provides that, in an admissions system "in which a *specified percentage* of the student body is in effect guaranteed to be members of selected ethnic groups," *id.* at 315 (emphasis added), minority applicants are impermissibly insulated "from comparison with all other candidates," *id.* at 317.[17/] Racial quotas are thus incompatible with the

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17/ In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989), Justice O'Connor underscored this reading of *Bakke*. She described the flaw identified by a majority of

"competitive consideration" of race as a factor in admissions upheld as constitutional in *Bakke* because they create a "two-track," separate admissions system in which minority applicants are compared only with one another and non-minority applicants are compared only with one another.

Additionally, as Justice Powell described, racial quotas are an inexact means of achieving the kind of diversity that constitutes a compelling interest. Reliance on rigid quotas "misconceives the nature of the state interest that would justify consideration of race or ethnic background." *Id.* at 315. Admissions systems that rely on racial quotas do not regard applicants of any race as individuals. Instead, they treat them solely as representatives of groups, improperly reflecting an interest in "simple ethnic diversity," without regard to the variety of other factors that contribute both to diversity and to educational excellence. *Id.* In sum, using racial quotas ignores the fact that the "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.*

Bakke's prohibition on rigid quotas, or a system that operates as a "functional equivalent" of a racial quota, *id.* at 318, does not invalidate a policy that takes race into account in a systematic way in order to realize the benefits of a diverse student body. As Justice Powell explained, the fact that a university includes race as one of many factors to be considered under an admissions policy or concerns itself with the number of minority students to whom it offers admissions does not render its program unconstitutional. *See id.* Indeed, Justice Powell's explicit approval of the Harvard admissions plan, which expressly treated race and ethnic

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the Court in the Davis plan as the "complete[] eliminat[ion] [of] minorities from consideration for a specified percentage of opportunities." *Id.* at 496.

background as a "plus" factor, plainly forecloses such an argument. Discussing the Harvard policy, Justice Powell wrote:

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Bakke, 438 U.S. at 318.

Moreover, the fact that race is a decisive factor in certain applications cannot, without more, render an admissions plan unconstitutional under *Bakke*. The consideration of race in admissions is not an end in itself. Rather, a racially diverse student body is the "end" that constitutes a compelling state interest. Therefore, the consideration of race and ethnicity in the admissions process is constitutional precisely *because of* -- not in spite of -- the fact that it is designed to enroll more minority students and produce a diverse student body, which is essential to a university's mission. If this factor made no difference whatsoever in selecting a student body, no university would bother to include it as a "phantom" factor in the admissions process. *Bakke*, then, must be read to mean what it says. Fixed quotas that insulate minorities from competition with non-minority applicants are forbidden, but systematic efforts to achieve a racially and ethnically diverse student body -- which requires each applicant to compete with the other applicants in the pool -- are permissible.

Second, in addition to limiting the manner in which race can be considered in a university admissions process, *Bakke* also limits the use of race as a factor in admissions to the extent that it eradicates threshold qualifications. Justice Powell's *Bakke* opinion makes clear that a "properly devised" admissions system is one that considers race as a factor in choosing among

"otherwise qualified" applicants. 438 U.S. at 320.[18/] Accordingly, race cannot be weighed so heavily in the admissions process that it warrants the admission of applicants who are not deemed capable of succeeding at the university. This said, *Bakke* clearly does not require that all factors be weighed equally. "[T]he weight attributed to a particular quality or attribute may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." *Bakke*, 438 U.S. at 317-18 (emphasis added). So long as an admissions program is "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration" it will pass constitutional muster, *id.* at 317. Under principles of academic freedom, courts must respect the academic judgments made by university officials who decide what the proper balance of factors, including race, should be in the admissions process, where they adhere to *Bakke*'s requirements regarding the manner and extent to which race can be considered as a factor in the admissions process.

D. *Bakke* Is Binding Precedent.

As previously noted, four other Justices joined Part V.C. of Justice Powell's opinion expressly holding that a "properly devised admissions program involving the competitive consideration of race and ethnic origin" is constitutional. 438 U.S. at 320. Thus, there can be no question that this holding by a majority of the Court constitutes binding

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18/ Similarly, in *United States v. Paradise*, 480 U.S. 149 (1987), the Court upheld a racial set-aside that had been designed to remedy a showing of discrimination, but also set out a limitation on the extent to which race may be used: "the basic limitation, that black troopers promoted must be qualified, remains. Qualified white candidates simply have to compete with qualified black candidates." *Id* at 183.

precedent.[12/] In the years since *Bakke*, the Court has never overruled or even reconsidered its holding in that case. Indeed, the Court has recognized *Bakke*'s essential holding on a number of occasions. In her concurring opinion in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), for example, Justice O'Connor noted that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Id.* at 286 (citing *Bakke*).

Similarly, *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), a case involving an alleged violation of Title VII of the Civil Rights Act of 1964, also recognized *Bakke*'s primary holding. In that case, the Court noted that a promotion plan that considered the gender of an employee as one of a range of factors was similar to the Harvard plan "approvingly noted by Justice Powell" in *Bakke*. *Johnson*, 480 U.S. at 638. Upholding the promotion plan, the Court observed that, despite its consideration of gender, the plan "requires women to

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[12/] As the "narrowest grounds" offered in support of the result, Justice Powell's opinion also represents the holding of the Court under the Supreme Court's decision in *Marks v. United States*. 430 U.S. 188, 193 (1977). *See also* Ex. H (*Smith v. University of Wash. Law Sch.*, No. C97-335Z (W.D. Wash. Feb. 12, 1999)) (holding Justice Powell's opinion controlling under a *Marks* analysis). The Sixth Circuit has adopted an interpretation of *Marks* that supports the conclusion that *Bakke* provides controlling authority on the use of race in university admissions. *See Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 132 (6th Cir, 1994) ("In light of the Supreme Court's instruction that '[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the 'narrowest grounds.'"") (citations omitted) In *Bakke*, Justice Powell's diversity rationale -- announced in Part V.C. of the Court's opinion and joined by four other Justices to reverse the part of the California Supreme Court's decision prohibiting any consideration of race in admissions -- stands not only as the holding of the Court, but also as the "narrowest grounds" in support of the judgment. The opinion authored by Justice Brennan was much broader in approach than Justice Powell's. Justice Brennan's opinion would not have applied strict scrutiny, as Justice Powell's decision did, to "benign" racial classifications and would have upheld not only a Harvard-style admissions plan, but also the two-tiered Davis plan at issue.

compete with all other qualified applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Id.* Thus, endorsing *Bakke*'s precedential value and its reasoning, a five-member majority concluded that the consideration of gender was lawful.

Significantly, the opinions of the Sixth Circuit have consistently relied on the *Bakke* opinion as controlling authority. In *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757 (6th Cir. 1983), for example, the court cited *Bakke* for the proposition that "affirmative action admission programs of educational institutions may take race into account, but racial quotas are prohibited." *Id.* at 763. Referring to *Bakke*, the Sixth Circuit invalidated a court-imposed racial quota for minority teachers and expressly stated that a "wiser approach is a more flexible affirmative action program rather than a hiring quota." *Id.* More recently, in *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100, 103 (6th Cir. 1992), it relied on *Bakke* in upholding Cincinnati's policy of transferring teachers to balance the racial composition of its schools "to achieve a racially integrated faculty throughout the Cincinnati public school system."[20/]

20/ Other appellate courts have also agreed that *Bakke* is controlling precedent. *See, e.g., Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 131 (4th Cir. 1999) (concluding that *Bakke* permits considering race in admissions and assuming that diversity is a compelling interest, but invalidating a magnet school transfer system as not narrowly tailored to achieve that objective); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 705 (4th Cir. 1999) (same as to a school admissions system); *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (assuming *Bakke* is controlling Supreme Court authority, but invalidating race-conscious admissions program because the school would have achieved meaningful racial and ethnic diversity even without consideration of race as a factor in admissions); *Winkes v. Brown Univ.*, 747 F.2d 792, 799 (1st Cir. 1984) ("In *Bakke*, the Court held that some consideration of race in a medical school's admissions criteria was permissible, but that the use of a rigid quota was not."); *see also Smith v. University of Wash. Law Sch.*, 2 F. Supp.2d 1324, 1334 (W.D. Wash. 1998) ("The attainment of a diverse student body . . . is a compelling interest and constitutionally permissible goal for a university or graduate program. Thus, an institution of higher education may take race into account in achieving 'educational diversity.'") (citing *Bakke*); *Davis v. Halpern*, 768 F. Supp. 968, 975 (E.D.N.Y. 1991) ("While the court [in *Bakke*] explicitly rejected the use of strict numerical quotas to achieve diversity, it endorsed the plans of many colleges and universities

The Fifth Circuit is the only appellate court that has failed to adhere to *Bakke*. In *Hopwood v. State of Texas*, 78 F.3d 932, 944 (5th Cir. 1996), that court rejected *Bakke*'s diversity rationale as inconsistent with more "recent Supreme Court precedent." Its decision in that case, however, was wrong and beyond its power. While the Supreme Court has -- since *Bakke* -- made clear that all racial classifications, even those that benefit racial minority groups, are subject to strict scrutiny, *see, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), it has never rejected *Bakke*'s holding that there is a compelling interest in achieving a racially diverse student body, and that the competitive consideration of race in admissions is narrowly tailored to achieve that interest.

Thus, in rejecting Bakke's conclusion that an institution of higher education has a compelling interest in enrolling a racially diverse student body, the Fifth Circuit completely disregarded the constraints on its authority. Under existing case law, it is clear that the *Hopwood* court lacked the authority to override or disregard the Supreme Court's decision in *Bakke*. *See, e.g., Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *State Oil Company v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (only the Supreme Court can overrule its own precedents); *Rodriguez De*

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which consider race or ethnic background as one of many factors in weighing a candidate's strength."); *University and Community College Sys. v. Farmer*, 930 P.2d 730, 734 (Nev. 1997) (*Bakke* held that "an attempt to attain a diverse student body through a preferential treatment admissions policy is not per se unconstitutional so long as race is one of several factors used in evaluating applicants. Quotas, however, are proscribed.") (citations omitted), *cert. denied*, 523 U.S. 1004 (1998); *cf. Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000) (denying preliminary injunction in challenge to race-conscious elementary school transfer program because plaintiffs were not likely to be able to establish that that program is unconstitutional).

Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (same). As a result, its decision in *Hopwood* cannot provide a basis for effecting the drastic change in the law urged by the plaintiff in this case.

II. THE LAW SCHOOL COMPLIES WITH THE *BAKKE* STANDARD.

The record evidence compiled after extensive discovery in this case permits only one conclusion -- that the Law School's admissions process is a properly devised system within the meaning of *Bakke*. The testimony of the Law School admissions personnel is unrefuted: that, as in the Harvard system approvingly discussed by Justice Powell in *Bakke*, race is considered as one of a number of important factors in admissions decisions, and that the admissions office carefully examines each application and makes an individual judgment, based on the entire file, about how the applicant would contribute to the law school class. After extensive discovery, the facts show that:

- The Law School has no two-track admissions system. Shields Dep. at 104; Munzel Dep. at 125-26; Eklund Dep. at 49.
- The Law School does *not* utilize racial quotas -- either in form, or in effect. Shields Dep. at 104; Munzel Dep. at 125-26; Eklund Dep. at 49.
- The admissions office *does not* physically separate applications by race. Wong Dep. at 29.
- It *does not* assign minority applications to underrepresented minority student reviewers or particular readers within the admissions office. Munzel Dep. at 60.
- It applies the same academic standards to all of its students. Lempert Dep. at 174.
- The Law School considers race as a single, though important factor in admissions. Shields Dep. at 23.

In short, no genuine issues of fact exist with respect to what the 1992 Policy says and the actions taken by the admissions office in carrying out that policy. The Law School has clearly complied with *Bakke* in administering its Admissions Policy.

The Law School's compliance with governing legal standards is not surprising given the fact that all of the record evidence demonstrates that a major purpose of the 1992 Admissions Policy was to ensure that the Law School complied with the standards set forth in the *Bakke* decision. When Lee Bollinger became Dean of the Law School in 1987, Allan Stillwagon was Assistant Dean and Director of Admissions, a position he had held since 1979. Stillwagon Dep. at 8-9. During Stillwagon's tenure as Director of Admissions, the Law School employed a number of strategies designed to address the "racial imbalance now existing in the legal profession" and to make "the [Law] School a livelier place to learn." Ex. I at 85. One such strategy, referred to as a "special admissions" policy, had as its explicit goal the enrollment of a first-year class that consisted of between 10 and 12 percent minority students. Another strategy, employed by the admissions office from 1979 to 1990, consisted of a "pool" system under which approximately half of the students admitted to the entering class were admitted primarily "on the numbers," while the other half of the class was chosen from a group of applicants with slightly lower grades and test scores, on the basis of non-quantifiable factors such as extracurricular or charitable activities, or "remarkable or interesting ethnic or national backgrounds." Stillwagon Dep. at 22-23. Where this "pool system" did not yield a class with a sufficient number of minority students -- and during Stillwagon's tenure it typically would not, Stillwagon Dep. at 30-31, 39-43 -- the admissions officer would, employing the "special admissions" policy, admit a sufficient number of minority students to maintain the Law School's goal at that time of achieving an entering class composed of 10 to 12 percent minority students. *See* Stillwagon Dep. at 22-24, 37-39.[21/]

[21/] For students admitted under the "special admissions" program, "qualifications predicting success beyond the LSAT and GPA [were] somewhat more emphasized in the selection process in order to yield [greater] numbers of members of these groups in the entering

However, the "pool system" and the "special admissions" policy, like practices such as using underrepresented minority students to review the files of underrepresented minority applicants, were eliminated by the Admissions Policy adopted by the Faculty Admissions Committee in 1992,[22/] which, as explained previously, was formed by then-Dean Bollinger.[23/] In adopting the 1992 Policy, the Committee chose not to rely on the "special admissions" program and "pool" system utilized by the previous admissions program. Instead, it adopted an approach to diversity that did not include numerical goals or targets for any group other than Michigan residents, Bollinger Dep. at 107-08; Lempert Dep. at 70, and that valued

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class." Ex. J at 2. In addition, "[m]embers of minority student organizations read files and [made] recommendations to the admissions staff, who [made] the final admissions decisions." Ex. K at 38.

22/ During the faculty committee's deliberation, Professor Don Regan circulated a memorandum suggesting that the Policy include a "target range" of minority students. *See* Ex. L. The full committee, however, ultimately determined not to include such a "target range." Regan Dep. at 59-60. Professor Don Herzog, who opposed the inclusion of a "target range" in the Policy, explained that he did not believe that a judgment to value diversity lent itself to "quantitative glosses." Herzog Dep. at 137. He stated:

> [R]efer to the example of letters of recommendation, some students are admitted to the University of Michigan Law School on their strength -- who otherwise would not get in but for the letters of recommendation, but it would be crazy to think that we say six percent or six to ten percent or eight to 20 percent of our students are admitted on the basis of letters of recommendation.
>
> We could still have a meaningful discussion about whether the admissions office is paying too little or too much attention to them, but any attempt in that context, to specify a range of numbers, would seem to me on its face absurd, and I have very much the same view about the use of race and ethnicity.

Herzog Dep. at 137-38.

23/ As Admissions Director Dennis Shields explained during his deposition in this case, President Bollinger expressed "general concerns about . . . not really understanding special admissions and not really approving of the way it was articulated" fairly early in his tenure as Dean of the Law School. Shields Dep. at 37-38, 41-42.

diversity not "to increase the numbers of minorities in the legal profession," but rather for the "purpose of providing the best educational experience for our students." Bollinger Dep. at 107; Lempert Dep. at 76.

During the course of discovery in this case, plaintiff all but lost interest in the actual policy at issue here -- the 1992 Admissions Policy adopted by the Faculty Admissions Committee. The reason for this is clear: the 1992 policy plainly complies with *Bakke*. Plaintiff has therefore spent the vast majority of her time conducting discovery of old policies irrelevant to this litigation, deposing former administrators not involved in the implementation of the current policy, and scrutinizing statements made by Law School officials to the ABA in a desperate attempt to manufacture a violation for which she might be able to extract damages from the Law School.[24/] Her efforts have, however, been in vain. At the end of the day, there is

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[24/] At the same time that the admissions committee was drafting the Admissions Policy, the Law School was required to describe its admissions policies to the American Bar Association and the Association of American Law Schools as part of their process of accrediting the Law School, a process that takes place once every seven years. Thus, in a "self study" and other documents submitted to the ABA/AALS committee in January of 1992, the Law School described its "special admissions policy," which was still in effect at that time. This committee then visited the Law School in February 1992, and met with various Law School officials. In the committee's report relating to the Law School's admissions process -- which the Law School received in July 1992, three months after the new Policy had been adopted by the faculty -- the ABA committee described the "special admission" program. Referring to the review of admissions policies, which had been in progress at the time of the ABA committee visit, the ABA committee stated that the "new Assistant Dean for Admissions . . . is conducting a study of the school's special admission program . . . but that the basic thrust of the special admissions program will be maintained." Ex. K at 38. Plaintiff has seized on that language.

After receiving this report from the ABA, Professor Edward Cooper, then the Associate Dean for Academic Affairs, responded to the ABA committee by noting that "[s]everal changes have been made in our statement of admissions policy since the time of the team visit," including a "general change" to the "diversity component of our statement of admissions policy." Cooper's letter then quotes the sections of the Admissions Policy that describe the Law School's interest in enrolling a student body that is diverse in many ways, including with respect to race and ethnicity, making no reference to the former special admissions program. *See* Ex. M at AALS 008-009.

no genuine issue of fact as to what the 1992 Policy says; there is no genuine issue of fact on whether the admissions office has followed that Policy; and there is no question that the 1992 Policy and its application comply with *Bakke*.

Because there is no question that the manner of the Law School's consideration of race in admissions decisions complies fully with the requirements set forth in *Bakke*, the plaintiff is reduced to a focus on a very different question -- whether race can somehow be characterized as a "predominant factor in the admissions process." She alleges that "[d]efendants did not merely use race as a 'plus' factor" but "[r]ather, race was one of the predominant factors (along with scores on the Law School Admissions Test and undergraduate grade point averages) used for determining admission." Compl. ¶ 23. But *Bakke* does not envision that courts are to decide whether one factor in the admissions process "predominates" over another. Rather, in addressing the manner in which race may be employed, the question *Bakke* ultimately asks is whether the school at issue seeks only to admit qualified applicants. And on this point, the record in this case is more than clear -- the admissions office does not admit any student whom it does not believe to be qualified to succeed at the Law School.

Moreover, nothing in the record developed in this case supports a conclusion that race "predominates" over other factors in the admissions process. Because race is an "important element" in the admissions process, *see, e.g.*, Answer ¶ 19, it is, of course, true that the potential ability to contribute to the racial diversity of the Law School will sometimes make a difference for some applicants -- just as for other applicants it will be in-state residency, grades, test scores, a powerful essay, or some unique experience or talent that will lead to a favorable admissions decision. To say this, however, is to say nothing more than that race is one of many factors in the admissions process, a fact defendants fully concede and a policy that *Bakke* plainly permits.

Nevertheless, in a rather curious effort to prove this undisputed point, plaintiff's expert Professor Larntz has created a series of charts using database information produced in this litigation. *See* Ex. N. These charts divide the pool of applicants to the Law School into 120 cells, with each cell on the chart representing a narrow range of undergraduate grade point averages and standardized test scores. A separate chart is generated for each of the demographic groups for which data is available, in each of the four separate academic years at issue in this litigation -- 1995 through 1998.[25/] These charts demonstrate that, if all you know about an applicant is his or her 1) undergraduate grade point average; 2) LSAT scores; and 3) race, it turns out that being a member of an underrepresented minority increases the chances of a small number of applicants being admitted. Based on only some of the data contained in these charts, *see* Larntz Dep. at 119-20, Larntz drew the conclusion that "membership in certain ethnic groups is an extremely strong factor in the decision for acceptance." Ex. N at 9.

However, the notion that race is an important factor in the admissions process does not mean that it is the predominant factor, as plaintiff asserts. *See* Complaint ¶ 23. Indeed, plaintiff's own expert conceded this point after analyzing the same data: "[f]or the applicants as a whole . . . I think grade point average and LSAT are more important than any other factors" in the admissions process. Larntz Dep. at 90. Clearly, a factor cannot "predominate" if at least two other factors are more important considerations in the process. The manner or extent to which race is considered in the admissions process cannot fairly be measured by examining plaintiff's charts, or by merely comparing the grades and test scores of majority and minority students. Such an artificial, two-dimensional comparison necessarily excludes many other factors that bear on admissions decisions.

25/ At one point, the Law School also regularly generated such charts. *See, e.g.*, Ex. O. However, it has not done so since 1995. *See* Metzler Dep. at 104-07.

Defendants' expert, Professor Stephen Raudenbush, a nationally recognized Professor of Education at the University of Michigan, agrees, stating that "one cannot reasonably conclude that [race] predominates over other factors in the admissions process." Raudenbush Supp. Expert Rep. at 5. Moreover, as Professor Raudenbush noted, any analysis of the extent to which the Law School considers race as a factor in admissions is put in perspective by the fact that the overall proportion of minority students admitted each year is similar to the admissions rates for majority students. Raudenbush Expert Rep. at 6; Raudenbush Supp. Expert Rep. at 2. In 1997, for example, the Law School offered admission to 38.1 percent of the Caucasian applicants, but admitted only 31.1 percent of the African American applicants for that year. *See* Ex. B at UML025659-25660. These basic descriptive statistics belie the notion that race is a "predominant" factor in the admissions process.

Further, as Professor Raudenbush also pointed out, in order to draw a responsible global conclusion relating to the use of race in admissions, one would have to compare the results from the current admissions system with those from a hypothetical system in which race was *not* considered as a factor. *See* Raudenbush Dep. at 41-44. Professor Larntz has not conducted such an analysis. Professor Raudenbush observed that the underrepresented minority applicant pool represents a relatively small proportion of the total group of applicants to the Law School. Accordingly, if the Law School were to abandon its policy of considering race as a factor in admissions, the likelihood that any given minority applicant would be admitted would decline dramatically, while at the same time the likelihood that any given majority applicant would be admitted would increase only slightly. Raudenbush Supp. Expert Rep. at 6-11.

Finally, as previously indicated, in examining the extent of the Law School's consideration of race as an admissions factor, one must also acknowledge that the University of

Michigan Law School competes for top students -- both majority and minority -- with its peer institutions. This competition is reflected in the fact that the yield rate -- *i.e.*, the percentage of admitted students who accept the Law School's offer to enroll -- is somewhat lower for minority students than for majority students. That lower yield rate presumably reflects the fact that, even given the somewhat lower grades and test scores earned by some of the minority applicants to whom the Law School offers admission, many of those students are declining the University of Michigan's offer of admission, electing instead to attend another highly-regarded law school. Ex. B at UML025659; *see* Raudenbush Expert Rep. at 6 (emphasizing that yield rates must be considered in any effort to compose a diverse student body).

In sum, plaintiff's efforts to generate a factual dispute that might block defendants' claims for summary judgment in this case have been a resounding failure. The facts in this case are clear and undisputed. The record plainly demonstrates that the Law School has fully and conscientiously complied with *Bakke* in implementing its Admissions Policy. This Court should therefore grant defendants' claims for summary judgment.

III. THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN IS ALSO ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S DAMAGES CLAIMS UNDER TITLE VI OF THE CIVIL RIGHTS ACT.

In addition to seeking to enjoin the implementation of the Law School's Admissions Policy, plaintiff has, as noted previously, brought damage claims against the individual defendants -- whose defense of qualified immunity was addressed in an earlier filing with this Court -- and the Board of Regents of the University of Michigan. Like her claims for declaratory relief and her efforts to obtain damages from the individual defendants in their personal capacity, however, plaintiff's claims against the Board of Regents, which have been brought under Title VI of the Civil Rights Act, *see* Complaint ¶ 33, must fail. As an arm of the

state of Michigan, the Board of Regents generally enjoys Eleventh Amendment immunity from suit for damages in federal court. *See Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 217 n.3 (1985); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Estate of Ritter v. University of Mich.*, 851 F.2d 846, 847 n.4 (6th Cir. 1988). The Board cannot be understood to have waived its immunity and, therefore, cannot be held liable for damages in this case.

Under existing precedent, a state generally has immunity from suits brought under Title VI. A state, however, may effect a waiver of that immunity as a condition on its receipt of federal funds. *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also Horner v. Kentucky High Sch. Athletic Ass'n*, 206 F.3d 685, 692 (6th Cir.), *cert. denied*, No. 99-2023, 2000 WL 795898 (U.S. Oct. 2, 2000). The Supreme Court has made clear that Title VI, like Title IX, provides a damages action against entities that receive federal funds. *See Franklin v. Gwinnet County Pub. Sch.*, 503 U.S. 60 (1992). "The two statutes [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." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). In short, Title VI, like statutes such as Title IX, expressly abrogates the Board of Regents' sovereign immunity. *See* 42 U.S.C. § 2000d-7. Thus, through its acceptance of federal funds, the University of Michigan has effectively entered into an agreement that permits it to be sued, under certain circumstances, for damages in federal court. The question here, of course, is how broadly should that agreement be read -- what, in effect, is its *scope*.

Title VI's "contractual nature has [certain] implications for [any] construction of the scope of available remedies." *Lago Vista*, 524 U.S. at 287. Accordingly, a court must "examine closely the propriety of private actions holding the recipient liable in monetary

damages for noncompliance with the condition." *Id.* Specifically, where a state's liability is inferred from its acceptance of federal funds, the state must "voluntarily and knowingly accept[] the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17; *see also Horner*, 206 F.3d at 692.[26/] Because there can "be no knowing acceptance if a State is unaware of the conditions," *id.*, a damages action is permitted under Title VI only where it would be "obvious that the grantee was aware that it was administering the program in violation of the [law]." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598 (1983). Put differently, damages are not available against the recipient of federal funds unless the recipient can reasonably be said to be on notice that its conduct will *obviously* subject it to liability in damages.

Read together then, the Supreme Court's decisions in *Guardian, Franklin, Pennhurst* and *Lago Vista* essentially forbid the imposition of a damages remedy against a state as the recipient of federal funds where the recipient's conduct does not violate *clearly established* legal principles. *Cf. United States v. Lanier*, 520 U.S. 259, 270 (1997) (where Congress would not intend to impose liability without giving the defendant "fair warning," liability will not be imposed unless "the contours of the right violated are sufficiently clear that a reasonable official would understand that what he is doing violates that right") (citation omitted). This standard plainly bars the claims for damages plaintiff now asserts against the Board of Regents. Where, as in this case, a recipient of federal funds establishes a policy that is fully consistent with the Supreme Court's statement of the governing legal principles, it is "sensible to

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[26/] The abrogation of a state's sovereign immunity may also occur as the result of congressional action under the Fourteenth Amendment. In *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998), the Sixth Circuit held that Title IX represents an abrogation of state sovereign immunity. But as the Supreme Court's subsequent *Lago Vista* decision makes clear, the question of the *scope* of that abrogation is governed by Spending Clause principles: a recipient of federal funds is liable in damages only insofar as -- by accepting federal funds -- it "voluntarily and knowingly accept[s] the terms of the contract."

assume that Congress did not envision a recipient's liability in damages." *Lago Vista*, 524 U.S. at 275.

The University of Michigan Law School's Admissions Policy, as demonstrated more fully above, is a flexible policy that does not employ racial quotas and requires all applicants to compete against one another according to the same standards and measures of achievement. It complies with *Bakke*, and therefore cannot be said to be in violation of "clearly established" legal rules. Plaintiff's claims to the contrary are belied by the fact that the United States, which has primary responsibility for enforcing Title VI, has made clear that *Bakke* supports the competitive consideration of race in admissions in order to attain the educational benefits of a diverse student body. In this Court, as it has in others, the United States concludes that the "interest in obtaining the educational benefits of a diverse student body supports an appropriately structured plan under which [a] University may take race into consideration as one of many factors in making its admissions decisions." Brief of the United States as Amicus Curiae at 3. Moreover, the Department of Education ("DOE"), which disburses the Title VI funds at issue here, has published guidelines in the Federal Register -- guidelines on which universities across the country, including the University of Michigan, rely in administering their admissions programs -- that recognize the continued vitality and importance of *Bakke* in the university context. *See* 59 Fed. Reg. 8756, 8761 (1994) ("[C]olleges have a First Amendment right to seek diversity in admissions to fulfill their academic mission through the 'robust exchange of ideas' that flows from a diverse student body.").

Earlier this year, the Office for Civil Rights, a division of the Department of Education that is, *inter alia*, responsible for monitoring compliance with Title VI, relied upon those guidelines in concluding that the University of Chicago Law School's admissions policies

for 1997-98, which considered race as one of many factors in admissions, violated neither Title VI nor its implementing regulations. *See* Ex. R (Letter to Dr. Don Michael Randel, President, University of Chicago, from Linda A. McGovern, Director, Chicago Office, Midwestern Division, Office for Civil Rights, U.S. Department of Education, re: OCR Complaint # 05-97-2044 at 1 (August 14, 2000) ("OCR concluded that, according to the evidence, the Law School's admissions practices for the 1997-98 entering class included the consideration of race and national origin in a manner that was narrowly tailored to achieve its compelling interest in attaining the educational benefits of a diverse student body.")) There can be no doubt then that defendants have not violated any clearly established law in operating their *Bakke*-compliant admissions program.

That the vast majority of law schools in this country utilize admissions programs designed -- consistent with the guidelines set forth in *Bakke* -- to achieve education-enhancing diversity also attests to the lawfulness of defendants' action in this case. Both the American Bar Association and the Association of American Law Schools require, as a condition of accreditation and membership, that a law school demonstrate a commitment to having a racially diverse student body. See Ex. P (ABA Standard 211) ("Consistent with sound legal education policy and the Standards, a law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the professions by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms."); Ex. Q (AALS Bylaws Section 6-4(c)) ("A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex."). These accrediting legal institutions are hardly likely to adopt requirements that violate clearly established constitutional law.

Finally, the fact that the academic legal community has also assumed that race-conscious admissions policies are constitutional under *Bakke* is significant here. *See, e.g.*, Akhil Reed Amar and Neal Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1779 (1996) ("[O]ur [analysis of the case law] suggests that educational affirmative action on a Harvard-plan model may pass Supreme Court muster. There are sound reasons why this is so -- reasons that we believe are at the heart of *Bakke*."). The prevailing view is clearly that admissions programs operated in accordance with *Bakke* are constitutional.

In light of this, it cannot be seriously maintained that the Board of Regents -- as a consequence of the decision making authority it wields over the Law School and the other academic components of the University of Michigan system -- has violated "clearly established" legal principles. Such an outlandish claim is simply not supported by the record or the law. The Law School's Admissions Policy comports with *Bakke*'s requirements and, therefore, the Board of Regents of the University of Michigan -- at the very least -- is entitled to summary judgment on the claims for monetary damages plaintiff advances. It plainly has not waived its sovereign immunity in this case.

* * *

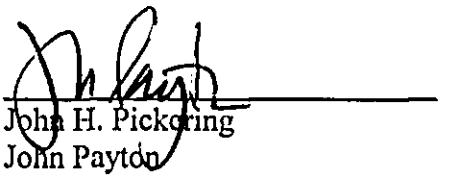
The Law School and the University of Michigan's Board of Regents are entitled to summary judgment on all of the claims for relief -- monetary, as well as declaratory and injunctive -- brought by the plaintiff in this case. Plaintiff's challenge to any use of race in admissions is foreclosed by *Bakke*'s holding, in which a majority of the Court expressly permitted the "competitive consideration" of race as a factor in admissions. And plaintiff's claim that the Law School violates *Bakke* just cannot be squared with the undisputed facts in the record. The extensive record developed in this litigation confirms that the Law School fully

complies with *Bakke*. Race is considered as one among many factors in the Law School's admissions process, in order to achieve a diverse student body. Summary judgment in the defendants' favor is therefore appropriate.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' motion for summary judgment.

Respectfully submitted,



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Dated: October 9, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2000, I caused a copy of the foregoing Renewed Motion For Summary Judgment to be served, by courier, on:

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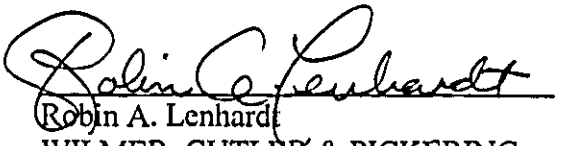

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