Case Nos. 01-1447 and 01-1516

In the United States Court of Appeals for the Sixth Circuit

Barbara Grutter,
for herself and all others similarly stiuated,
Plaintiffs-Appellee (01-1447 and 01-1516),

v.

Lee Bollinger, et al.,
Defendants-Appellants (01-1447),

Kimberly James, et al.,
Intervening Defendants-Appellants (01-1516).

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

FINAL BRIEF OF APPELLEE

Statement of Corporate Affiliations and Financial Interest

Pursuant to 6th Cir. R. 26.1, Plaintiff Barbara Grutter makes the following disclosure:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation? No.

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

_____

Kirk O. Kolbo

Dated: July 27, 2001

Table of Contents

Table of Authorities

Federal Cases

Docketed Cases

Federal Statutes and Rules

Secondary Sources

Statement in Support of Oral Argument

Oral argument is requested. This class action involves issues of great public importance affecting the named plaintiff and thousands of individuals similarly situated who have a constitutional right to have their applications for admission to law school, colleges, and universities considered without discrimination on the basis of race or ethnicity. Plaintiff believes oral argument would be of value to the Court.

. . . . . .

Statement of The Issues

1. Did the district court correctly determine that "diversity" is not a compelling governmental interest that can justify the use of racial preferences in the Law School's admissions?

2. Are the district court's factual findings in support of its conclusion that the Law School's racial preferences are practically indistinguishable from a quota system clearly erroneous?

3. Are the district court's factual findings in support of its conclusion that the Law School's racial preferences are not narrowly tailored to achieve an interest in diversity clearly erroneous?

Statement of The Case

I. Procedural History

This action commenced in December 1997. The Complaint alleged that defendants operated an admissions system in the University of Michigan Law School ("Law School") that illegally discriminated on the basis of race in violation of 42 U.S.C. §§ 1981, 1983, and 2000d. (R1 Complaint, pg. 1, JA-84-95)

The district court heard the parties' motions for summary judgment on December 22, 2000. At the conclusion of the hearing, the district court indicated that it would reserve and decide as a matter of law whether diversity was a compelling state interest that could justify racial preferences in the Law School's admissions. (R330 SJ Tr., pg. 93, JA-7180) It also indicated that it would conduct a trial on (1) the extent to which race was considered in the Law School's admissions policies; (2) whether the Law School imposed a race-based double standard in admissions; and (3) whether (as intervenors' argued) race should be considered in the Law School's admissions process in order to create a "level playing field." (R330 SJ Tr., pg. 93, JA-7180)

II. The District Court's Findings of Fact and Conclusions of Law

The district court conducted a 15-day bench trial commencing January 16, 2001. It issued its 90-page Findings of Fact and Conclusion of Law and Order on March 27, 2001. Among the district court's findings of fact were the following:

1. The Law School gives a preference based on race to applicants from certain racial groups—African Americans, Mexican Americans, and Native Americans—which it considers to be underrepresented in the Law School. (R311 Opinion, pg. 30, JA-125)

2. The Law School's stated reason for giving the racial preference to these groups is that it desires a racially diverse student body, and the average LSAT test scores and undergraduate grades of applicants from the underrepresented minority groups are lower than the scores of students from other racial and ethnic groups, *e.g.*, Caucasians and Asians, so that few from the underrepresented minority groups would be admitted in a system "based on the numbers." (R311 Opinion, pg. 30-31, JA-125-26)

3. The Law School places a "very heavy emphasis" on an applicant's race in the admissions process. Race is an "enormously important" and "extremely strong" factor in the admissions process. (R311 Opinion, pg. 31, 33, JA-126, 128)

4. The Law School seeks to enroll what it calls a "critical mass" of underrepresented minority students. In practice, this has meant that the Law School attempts to enroll an entering class consisting of 10-17% underrepresented minority students. (R311 Opinion, pg. 31, JA-126)

5. The Law School also seeks to ensure that each year's entering class consists of a <u>minimum</u> of 10-12% underrepresented minority students. This has meant that each year, the Law School "effectively reserve[s]" 10% of the entering class for students from the underrepresented minority groups, and those numbers of seats are "insulated from competition." (R311 Opinion, pg. 50-51, JA-145-46)

6. There is no time limit on the Law School's use of race as a factor in the admissions process. (R311 Opinion, pg. 50, JA-145)

The district court also considered expert statistical evidence in resolving the parties' factual dispute about the "extent" to which race is a factor in the admissions process. The district court "adopt[ed]" the expert statistical analysis of plaintiff's expert, Dr. Kinley Larntz, Professor Emeritus and former chairman of the Department of Applied Statistics at the University of Minnesota. (R311 Opinion, pg. 33, JA-128) It rejected (R311 Opinion, pg. 33, JA-128) criticisms of Dr. Larntz's analysis by the Law School's expert witness, Dr. Stephen Raudenbush, a professor employed by defendant Board of Regents of the University of Michigan.

The district court concluded as a matter of law that the Law School's stated interest in achieving diversity in the student body was not a compelling interest that could justify its racial preferences in admissions (R311 Opinion, pg. 36-49, JA-131-144) It also held that even if diversity were compelling, the Law School's racial preferences were not narrowly tailored to achieve that interest (R311 Opinion, pg. 49-54, JA-144-49). The district court also rejected the alternative arguments of intervenors. (R311 Opinion, pg. 73-88, JA-168-83) Accordingly, the district court ordered an injunction regarding the Law School's use of race in the admissions process to achieve a diverse student body. (R311 Opinion, pg. 90, JA-185)

Defendants moved in the district court on March 28, 2001, for a stay of the district court's injunction, pending appeal. (R312 Motion, JA-4182-83) Defendants also filed in this Court an Emergency Motion for Stay. The district court denied the defendants' motion for stay on April 3, 2001. (R318 Opinion, JA-4208-16) In the order denying the stay, the district court noted, among other things, that there was "overwhelming evidence" that the Law School's admissions process was not narrowly tailored to achieve an interest in a diverse student body. (R318 Opinion, pg. 6, JA-4213) The district court also made clear the scope of the injunction: "This court's injunction should not be understood as prohibiting 'any and all use of racial preferences,' . . . but only the uses presented and argued by defendants and intervenors in this case—namely, in order to assemble a racially diverse class or remedy the effects of societal discrimination." (R318 Opinion, pg. 5, JA-4212) A motions panel of this Court nonetheless granted the stay on April 5, 2001.

Statement of Facts

I. Plaintiff

Plaintiff Barbara Grutter is a white resident of the state of Michigan who applied in December 1996 for admission into the fall 1997 first-year class of the Law School. (R1 Complaint, pg. 1, JA-84) At the time of her application, Ms. Grutter was 43 years-old and had graduated from college 18 years earlier. (R95 Affidavit, Ex. B Application, JA-272-98) She applied with a 3.8 undergraduate grade point average and an LSAT score of 161, representing the 86th percentile nationally. (R95 Affidavit-Exhibits, Ex. B Application, JA-272-98) Ms. Grutter was notified by letter dated April 18, 1997 from defendant Dennis Shields, then Assistant Dean and Director of Admissions, that the Law School had placed her application on a "waiting list for further consideration should space become available." (R95 Affidavit-Exhibits, Ex. B Application, 4/18/1997 letter, JA-274-75)

By letter dated June 25, 1997, the Law School wrote again to Ms. Grutter and informed her that it was unable to offer her a position in the class. (R95 Affidavit-Exhibits, Ex. C 6/27/1997 letter, JA-299) Ms. Grutter has not subsequently enrolled

in law school elsewhere. (R95 Affidavit-Exhibits, Ex. A Grutter Dep. pg. 118-19, JA-271)

II. Law School Admissions Policies and Practices

A. . . . . Overview

Defendants admit that they use race as a factor in making admissions decisions and that the race of plaintiff Grutter was not a factor that "enhanced" the consideration of her application. (R8 Answer, pg. 5, JA-197) Defendants also admit that the Law School is the recipient of federal funds. (R8 Answer, pg. 4, JA-196)

Defendants justify the use of race as a factor in the admissions process on one ground only: that it serves a "compelling interest in achieving diversity among its student body." (R95 Affidavits-Exhibits, Ex. D, Defendants' Responses to Interrogatories, pg. 10-11, JA-305-06) Many more students apply each year than can be admitted, and the Law School rejects many qualified applicants. (R331 Munzel 1TR, pg. 174-76, JA-7265-67)

B.

The Law School Policy

The formal written policy ("Policy") at issue in this case was adopted by the Law School faculty in the spring of 1992. It has remained in effect, unchanged

since that date. It was received into evidence as Exhibit 4, and was the subject of extensive testimony. (R346 Ex. 4 Policy, JA-4229-44) Among other things, it stated that the Policy was intended "as much to ratify what had been done and to reaffirm our goals as it is to announce new policies." (R346 Ex. 4 Policy, pg. 13, JA-4242) The consideration of race in admissions was one of the practices of the past that the Policy continued or "ratified." Prior to adoption of the Policy, the Law School had an explicitly named "special admissions program" to ensure adequate representation in the class from members of designated "underrepresented minority groups," namely African Americans, Mexican Americans, and Native Americans. (R346, Ex. 55 1988-89 Law School Announcement, pg. 85-86, JA-4922-23)

Pursuant to resolutions adopted by the faculty, the Law School had prior to 1992 a written goal of enrolling at least 10-12% of its students from these minority racial groups. (R346 Ex. 53 Special Admissions History, pg. 16, 19, 22, 27, 31, 34, 45, 48-50, 57, JA-4866, 4869, 4872, 4877, 4881, 4884, 4895, 4898-4900, 4902; R331 Stillwagon 1TR, pg. 96-97, JA-7207-08) The Law School receives many more applications for admission than it has spaces available. Generally, grades and test scores are important factors in the Law School's admissions process. (R331 Munzel 1TR, pg. 140, JA-7231) Applicants from the underrepresented minority groups have historically scored lower on average on those criteria than students

from other racial and ethnic groups. (R331 Stillwagon 1TR, pg. 95-96, JA-7206-07) Accordingly, the "special admissions program" was intended to permit the Law School to admit and enroll its desired level of minority students by placing less emphasis on the LSAT scores and undergraduate grades of underrepresented minority students relative to students from other racial and ethnic groups. (R331 Stillwagon 1TR, pg. 90-100, JA-7201-11)

The 1992 Policy abandoned use of the term "special admissions program." It continued, however, the Law School's reliance on the importance of grades and test scores (measured by a composite known as "selection index") and the Law School's explicit consideration of race in the admissions process. With respect to the consideration of race, the Policy states that the Law School has 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 the student body in meaningful numbers." (R346 Ex. 4 Policy, pg. 12, JA-4241) (emphasis added) Elsewhere on the same page, the Policy referenced the importance of enrolling a "critical mass" of minority students. (R346 Ex. 4 Policy, pg. 12, JA-4241)

The Policy referenced and attached a "grid" of admissions decisions plotted by different combinations of undergraduate grades and test scores. (R346 Ex. 4 Policy, Figure 1, JA-4244) It noted that the upper right portion of the grid, with the highest combinations of grades and test scores, characterized these credentials for the "overwhelming bulk of students admitted." (R346 Ex. 4 Policy, pg. 7, JA-4236) The Policy listed reasons, however, that the Law School had, and should continue, to admit students "despite index scores that place them relatively far from the upper corner of the grid." (R346 Ex. 4 Policy, pg. 8, JA-4237) (emphasis added) One of these reasons is to "help achieve diversity" in the student body, including "one particular type of diversity"——racial and ethnic diversity. (R346 Ex. 4 Policy, pg. 12, JA-4241)

C.

The Law School Admissions Data

Extensive evidence was introduced at trial concerning the manner and extent to which the Law School considers race in the admissions process. This included testimony from Law School faculty and administrators. It also included actual admission data for a six year period—1995-2000. The data are voluminous and were presented in a number of different forms. Among these, was a presentation that plotted on grids—in a manner similar to Figure 1 appended to the Policy—

admissions decisions characterized according to different combinations of LSAT scores and undergraduate grades of applicants, and also by racial group. The Law School had produced such a grid for the first-year class that enrolled in the fall of 1995. Using the Law School's database, plaintiff's expert statistical witness, Dr. Kinley Larntz, created similar grids for years 1995-2000. (R346 Ex. 137 Larntz Report, KL0001-0068, JA-5238-5305; Ex. 138 Larntz 2/21/2000 Report, App., JA-5311-5350; Ex. 139 Larntz 3/20/2000 Report, Ex. A, JA-5385-5402; Ex. 141 Larntz 12/10/2000 Report, Ex. A, JA-5461-5478; Ex. 143 Larntz slides 16-25, 47-51, JA-8939-8948, 8970-8974)

Excerpts from the grids constructed from the Law School's database illustrate the way in which the Law School's policy of considering race in the process is reflected in admissions outcomes (Applications ("Apps") versus Admissions ("Adm")). The following two charts reproduce the data from the grids for two years (1997 and 2000) for students whose undergraduate grade point averages and LSAT scores are at least 3.0 and 148, respectively. (R346, Ex. 137 Larntz 12/14/1998 Report, KL0038, 0041, 0045, JA-5275, 5278, 5282; R346, Ex. 141 Larntz 12/10/2000 Report, Ex. A, pg. 4, 7, 11, JA-5465, 5468, 5472) The admissions outcomes can be easily compared among the following racial groups for which the Law School maintains data: (1) Selected Minority Students (African Americans,

Mexican Americans, and Native Americans); (2) Caucasian Americans; and (3) Asian/Pacific Island Americans:

1997 - Final LSAT & GPA Admission Grid
Selected Minorities
(African Americans, Native Americans, Mexican Americans)

	148-150 Apps Adm	151-153 Apps Adm	154-155 Apps Adm	156-158 Apps Adm	159-160 Apps Adm	161-163 Apps Adm	164-166 Apps Adm	167-169 Apps Adm	170-Above Apps Adm	Total Apps Adm
3.75 & Above	3 0	0 0	4 1	7 5	5 5	**7** **7**	1 1	3 3	2 2	39 24
3.50 - 3.74	3 0	7 2	5 3	**16** **11**	4 4	5 4	**10** **10**	1 1	2 2	63 37
3.25 - 3.49	6 1	10 2	**9** **6**	22 15	**8** **6**	16 10	4 4	3 3	6 6	107 54
3.00 - 3.24	11 0	15 2	9 1	13 4	5 3	11 8	5 5	1 1	0 0	102 24

Caucasian Americans

3.75 & Above	6 0	20 0	29 0	29 2	37 3	**88** **17**	123 62	91 90	118 115	553 292
3.50 - 3.74	6 0	27 1	23 0	**51** **5**	40 3	97 6	**148** **42**	105 97	123 120	642 279
3.25 - 3.49	15 0	20 0	**15** **0**	45 3	**26** **1**	80 9	103 17	70 52	76 74	466 157
3.00 - 3.24	6 0	7 0	14 0	22 1	13 1	19 0	27 4	24 7	20 13	162 26

Asian/Pacific Island Americans

3.75 & Above	3 0	2 1	5 0	8 0	7 1	**13** **1**	10 5	10 9	11 11	70 28
3.50 - 3.74	0 0	3 0	4 0	**16** **1**	10 1	20 0	**25** **8**	20 20	11 10	113 40
3.25 - 3.49	4 0	5 0	**2** **0**	8 1	**10** **1**	23 1	16 9	14 11	13 11	100 35
3.00 - 3.24	1 1	1 0	3 0	3 0	4 0	5 0	6 0	6 3	5 4	36 8

2000 - Final LSAT & GPA Admission Grid
Selected Minorities
(African Americans, Native Americans, Mexican Americans)

	148-150 Apps Adm	151-153 Apps Adm	154-155 Apps Adm	156-158 Apps Adm	159-160 Apps Adm	161-163 Apps Adm	164-166 Apps Adm	167-169 Apps Adm	170-Above Apps Adm	Total Apps Adm
3.75 & Above	1 0	2 1	2 1	3 2	3 3	**8** **7**	2 2	2 2	1 1	30 19
3.50 - 3.74	5 1	12 5	3 2	**12** **10**	4 2	8 8	**7** **7**	5 5	0 0	71 40
3.25 - 3.49	10 2	15 6	**5** **4**	14 10	**11** **5**	6 3	7 7	4 4	3 3	91 44
3.00 - 3.24	13 1	8 2	9 5	10 10	4 3	4 2	4 3	1 1	0 0	70 28

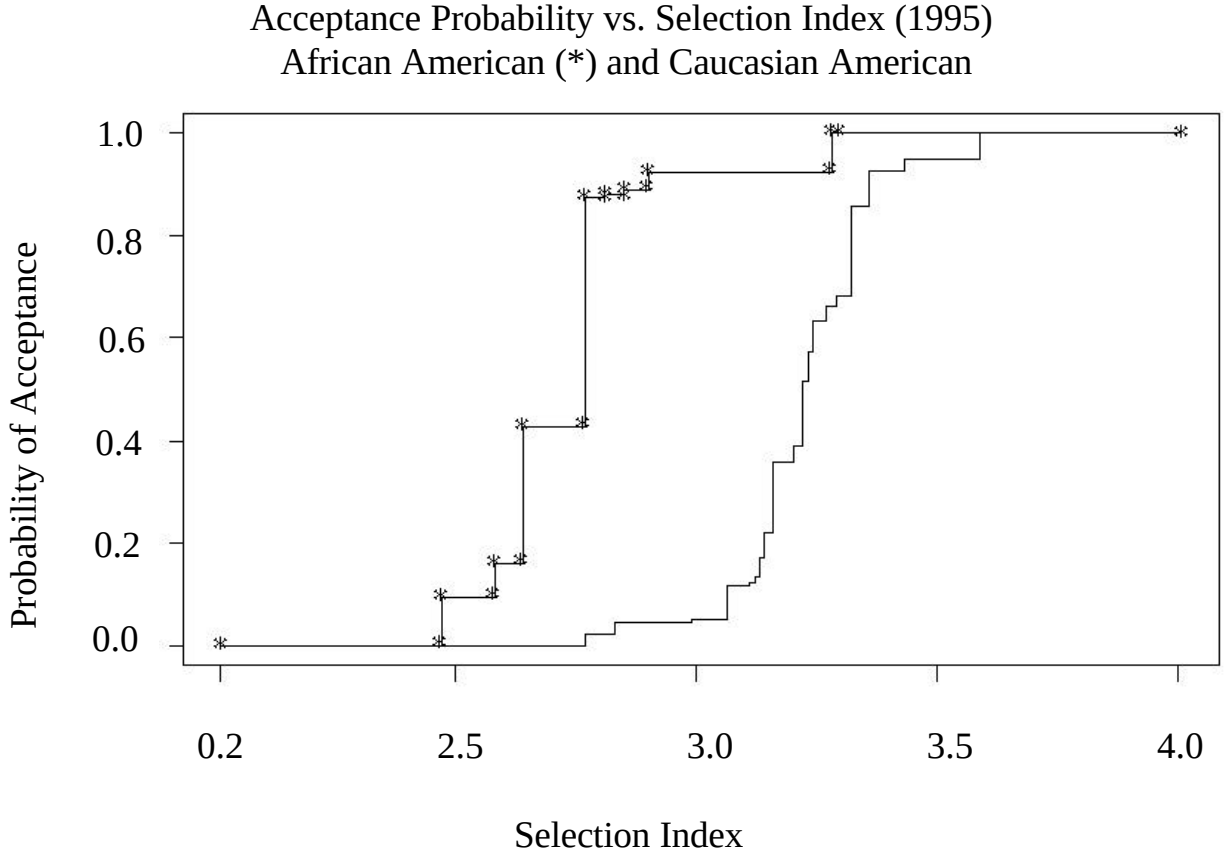
Caucasian Americans

3.75 & Above	8 0	21 2	23 1	37 2	40 3	**107** **31**	138 95	85 85	92 91	561 311
3.50 - 3.74	10 0	22 0	28 0	**59** **0**	42 3	135 17	**164** **90**	102 99	76 74	650 284
3.25 - 3.49	8 0	15 0	**20** **0**	49 2	**34** **1**	77 6	**77** 24	54 46	34 34	385 114
3.00 - 3.24	11 0	5 0	10 0	21 0	14 0	43 0	31 3	23 10	24 21	189 34

Asian/Pacific Island Americans

3.75 & Above	2 0	2 0	2 0	2 0	3 0	**14** **4**	14 10	10 10	11 11	62 35
3.50 - 3.74	2 0	7 0	11 1	**11** **0**	9 0	33 5	**25** **15**	24 24	13 13	139 58
3.25 - 3.49	4 0	11 0	**5** **0**	19 0	**12** **1**	26 2	27 10	15 11	7 7	131 31
3.00 - 3.24	0 0	6 0	0 0	5 0	3 0	7 0	15 4	1 0	3 2	46 6

The admissions data were presented in a number of other forms at trial. One of these is a graphic showing comparative probabilities of admission for various racial groups compared to Caucasians Americans based on selection index (grades and test scores) for years 1995-2000. The following is a reproduction of one such comparison: African Americans and Caucasian Americans for 1995:



(R346 Ex. 143 Larntz slide 40, JA-8963)

In addition, Dr. Larntz computed for years 1995-2000 the relative odds[1] of admission for different racial groups, controlling for undergraduate grades, LSAT scores and other factors. The following depicts his results for the year 1995:

1995 Relative Odds of Acceptance
(Controlling for GPA x LSAT Grid Cell plus Other Factors)

Factor / Ethnic Group	estimated relative odds	standard deviations
Michigan Residency	6.59	10.67
Female	1.91	5.40
Fee Waiver	1.07	0.28
Within Cell GPA (per 0.1 point)	1.25	2.89
Within Cell LSAT	1.32	5.13
Native American	116.98	7.93
African American	513.29	14.92
Caucasian American	1.00	----
Mexican American	183.81	13.03
Other Hispanic American	1.39	0.70

[1] Dr. Larntz provided a detailed explanation of what relative odds (or "odds ratios") represent; how they are calculated; the uses they serve in statistical analyses, and the significance of differing magnitudes of relative odds. (R332 Larntz 2TR, pg. 49-91, JA-7379-7421) In medical research, when a drug is being studied for its efficacy in curing disease, relative odds of even 2 are large. (R332 Larntz 2TR, pg. 66-69, JA-7396-99) Here, the relative odds were often enormous, as the table for 1995 demonstrates.

Factor / Ethnic Group	estimated relative odds	standard deviations
Asian/Pacific Island American	1.56	2.33
Puerto Rican	73.26	5.63
Foreign	0.65	- 0.88
Unknown Ethnicity	1.23	1.26

(R346 Ex. 143 Larntz slide 36, JA-8959)

Summary of Argument

The district court's order should be affirmed. It correctly decided as a matter of law that diversity is not a compelling state interest. Significantly, even if this Court rules that diversity is compelling, it must still affirm—as not clearly erroneous—the district court's detailed findings that the Law School has maintained the practical equivalent of a quota system and that its racial preferences are not narrowly tailored to achieve an interest in diversity. Indeed, as the district court noted, there is "overwhelming" evidence supporting its findings. An order enjoining the illegal aspects of the Law School's policies was, therefore, proper.

Finally, the district court properly rejected the intervenors' alternative remedial arguments. These rationales admittedly were not the rationales that motivated the Law School to adopt its racial preferences, which they must have

been in order to justify the preferences. Moreover, binding Supreme Court precedent forecloses these rationales as compelling interests that may justify racial preferences.

Standard of Review

The district court's findings of fact can be reversed only if they are found to be clearly erroneous. *See Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc.*, 240 F.3d 534, 541 (6th Cir. 2001). Where two logically permissive interpretations of the evidence exist, the trial judge's selection cannot be adjudged clearly erroneous on appeal. *Id.* Its conclusions of law and ruling on the motions for summary judgment are reviewed de novo. *See, e.g., Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98, 100 (6th Cir. 1990); *Rafferty v. City of Youngstown*, 54 F.3d 278, 279 (6th Cir. 1995).

Defendants suggest that this Court should review the district court's findings de novo because the district court's conclusions were allegedly based on "undisputed facts." Defs.' Br. at 33. This is absurd. Defendants have disputed, among other things, that the Law School's 1992 policy effected no substantive change in its admission system, that the Law School reserves a minimum number or range of spaces in the class in order to enroll its "critical mass" of minority students, and the statistical evidence offered by plaintiff, including Dr. Larntz's analyses.

See, e.g., *Johnson v. United Stated Department of Health and Human Services*, 30 F.3d 45, 48 (6th Cir. 1994) (district court's findings on discrimination claim based upon statistical evidence reviewed under "clearly erroneous" standard); *Scales v. Bradford and Co.*, 925 F.2d 901, 907 (6th Cir. 1991) (same).

The Supreme Court's recent decision in *Hunt v. Cromartie*, 121 S. Ct. 1452 (2001), did not change the applicable standard of review. That case, moreover, involved a short trial, *id.* at 1459, and arose in the very different context of election redistricting, where the burden is heavy on the party challenging a facially neutral law to show that the law cannot be explained on grounds other than race, *id.* at 1458. Here, the district court conducted a 15-day trial and heard substantial evidence. Unlike in *Hunt*, there was no dispute here that strict scrutiny applied to defendants' use of race, placing the burden on defendants to come forward with evidence to justify their racial preferences.

Argument

I. The District Court Correctly Determined That "Diversity" Is Not A Compelling State Interest

A. Justice Powell's "Academic Freedom" Rationale Was Not the Rationale For the Holding of the Court in *Bakke.*

Defendants and plaintiff agree on this: the Law School's racial preferences must be narrowly tailored to achieve a compelling governmental interest. The existence of a "compelling interest" is a question of law. *E.g.*, *Young v. Crystal Evangelical Free Church*, 82 F.3d 1407, 1419 (8th Cir. 1996), *vacated on other grounds, Christians v. Crystal Evangelical Free Church*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998). Justice Powell, whose opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), defendants cling to, did not base his legal conclusion that "diversity" is a compelling interest on factual findings or "social science." He derived his singular conclusion from his analysis of the scope of an educational institution's right to "academic freedom" under the First Amendment. *See Bakke*, 438 U.S. at 311-312 (Powell, J.).

No other Justice in *Bakke* joined in Justice Powell's analysis concerning the diversity rationale. Defendants argue, however, that Powell's diversity analysis constitutes the rationale for the holding of the Court based on the separate opinion

authored by Justice Brennan and joined in by Justices Marshall, White, and Blackmun ("Brennan group"). But Justice Powell's diversity rationale was not concurred in by the Brennan group, and the Supreme Court has never adopted it. *See Bakke*, 438 U.S. at 326 n.1, 379 (Brennan, J., concurring and dissenting). *See also Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (Brennan opinion "implicitly rejected Justice Powell's position"). Indeed, it is significant that the Brennan group, while recognizing that no one opinion spoke for the Court, described the "central meaning" of the various *Bakke* opinions as follows:

> Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

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

Conspicuously, the Brennan group did not state that the "central meaning" of the opinions in *Bakke* was that race could be considered to achieve intellectual diversity or any other purported goal of a college pursuant to its interest in academic freedom. And in the only portion of Justice Powell's Equal Protection analysis joined in by the Brennan group, Part V-C, nothing was said about "diversity" or "academic freedom." *Id.* at 320.

The district court properly rejected defendants' argument that Justice Powell's diversity rationale should be considered the rationale for the Court in *Bakke* under the "narrowness" analysis of *Marks v. United States*, 430 U.S. 188, 193 (1977). As the district court noted, the diversity and remedial rationales are simply different rationales; neither one is a subset of the other and there is no common denominator between them. (R311, Opinion, pg. 44, JA-139)

That the Brennan group subjected the Davis plan to a purportedly lesser standard of review than Justice Powell does not change anything about the fact that the separate interests that they considered to be constitutionally permissible were different in kind. Although the Brennan group would have upheld the Davis plan, which identified and benefitted disadvantaged minorities, Justice Powell did not insist on that limitation.

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

Justice Powell's assertion of principles of "academic freedom" notwithstanding, the Court has never accepted any "right" to consider race or sex based in the First Amendment. *See Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (private club's right to associate for expressive purposes must yield to the State of Minnesota's interest

in eradicating discrimination). A fortiori, a state's interest in First Amendment freedoms—a far more problematic idea, since the First Amendment is usually thought of as a source of rights for the people against the state, and not the other way around[2]—should have even less weight when compared to principles of non-discrimination.

Subsequent to *Bakke*, the Court has made clear that any form of race discrimination must be justified by a compelling governmental interest and be narrowly tailored to meet that interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235-36 (1995). Of particular concern to the Court has been the possibility that a justification could permit the use of race in an unlimited way, *i.e.*, without numerical or temporal constraints. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505 (1989).

The Court has never found any "compelling" interest other than a "remedial" one; it has specifically rejected non-remedial interests like an interest in providing "role models" on the ground that they would permit undefined racial preferences endlessly into the future. *Croson*, 488 U.S. at 497-98 (O'Connor, J.) ("because the role model theory had no relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to 'justify' race-based

[2] *E.g.*, *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990).

decisionmaking essentially limitless in scope and duration") (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion)); *Croson*, 488 U.S. at 520 (opinion of Scalia, J.). Indeed, the Court has said that any non-remedial "interest" would suffer from similar defects. *Croson*, 488 U.S. at 493 ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.") (O'Connor, J.) (emphasis added); *id.* at 520 (Scalia, J.).

It is strange that defendants rely on the Court's opinion in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), to support their view that diversity is a recognized compelling interest. Even in the context of that case, diversity was not held to be a compelling interest. The Court's opinion is neither helpful nor authoritative on the question of whether diversity in admissions is compelling, particularly since the Court's acceptance of a lower threshold for assessing whether racial classifications are "constitutionally permissible," *id*. at 564, was overruled in *Adarand*, 515 U.S. at 227.

While accusing the district court of improperly "read[ing] tea leaves," Defs.' Br. at 28, defendants do just that in trying to divine the Supreme Court's intent from the isolated statement of a single Justice in *Wygant*. Justice O'Connor wrote only

for herself in *Wygant* and cited to Justice Powell's opinion and its diversity rationale without either expressing approval or identifying it as a rationale on which a majority of the Court agreed. *See Wygant*, 476 U.S. at 286; *see also Hopwood v. Texas*, 78 F.3d 932, 945 n.27 (5th Cir. 1996).

Defendants misleadingly suggest that this Court has previously held that Justice Powell's diversity rationale stated a holding for the Court in *Bakke*. *See* Defs.' Br. at 26, 29. It has not. *Cf. Associated Gen. Contractors of Ohio v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000) ("The only cases found to present the necessary 'compelling interest' sufficient to 'justif[y] a narrowly tailored race-based remedy' are those that expose . . . 'pervasive, systematic, and obstinate discriminatory conduct.'") (citations omitted). In discussing *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983), defendants neglect to point out that the case involved the review of a plan to remedy prior race discrimination by a school board; it neither discussed, nor held, anything regarding "diversity." In its brief reference to *Bakke*, the court only distinguished the means of taking race into account—a "quota"— versus something "more flexible." *Id.* at 763. In *Jacobson v. Cincinnati Board of Education*, 961 F.2d 100 (6th Cir. 1992), the Court cited not to Justice Powell's opinion, but instead to the Brennan group opinion for the proposition that the "intermediate level of scrutiny is the proper one." *Id.* at 103.

The Sixth Circuit in *Jacobson* also based its decision in part on the district court's finding that the policy at issue was "race neutral," which led the court of appeals to conclude that it did not involve race "preferences," propositions that are demonstrably not true in this case.[3] *Id.* at 102-03. Finally, defendants cite to *United States v. Ovalle,* 136 F.3d 1092 (6th Cir. 1998), a case which does not itself even contain a citation or reference to *Bakke,* much less to the "diversity" or "academic freedom" rationale of Justice Powell.

C.The Law School Has Not "Proved" That Racial and Ethnic Diversity Are Compelling Interests.

Contrary to defendants' assertion, *see* Defs.' Br. at 30, plaintiff has nowhere conceded either that achieving racial and ethnic diversity is a compelling interest or that defendants have proven that it is through empirical evidence. On motions for summary judgment, plaintiff assumed for the sake of argument that diversity had the benefits claimed for it by defendants. (R330 SJ Tr., pg. 8, JA-7095) All reasonable people can agree that remedying societal discrimination and providing good role models to school children are worthy objectives. But it is beyond dispute

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

that those objectives cannot, as a matter of law, support racial preferences. So too, whatever value diversity may have, it cannot rise to a compelling interest.

If (contrary to the positions of plaintiff and defendants) the question of whether diversity is a compelling interest is not a question of law, then the question cannot be decided for either side on motions for summary judgment, where all doubts and reasonable inferences must be resolved in favor of the nonmoving party. *See, e.g., Fonseca v. Consolidated Rail Corp.*, 246 F.3d 585, 587 (6th Cir. 2001). Plaintiff submitted reports of experts challenging the proposition that racial and ethnic diversity have significant educational benefits. (R230 Affidavit-Exhibits, Ex. B, Professor Gail Heriot Report, JA-2911-2928; Ex. C Professor Charles Geshekter Report, JA-2929-48) Indeed, these experts opined that using racial preferences to achieve diversity is harmful. Many in the academic community have expressed agreement with plaintiff's experts. (R221 Amicus Br. of National Association of Scholars ("NAS"), JA-2768-2802)[4]

[4] *See also, e.g.,* Shelby Steele, A DREAM DEFERRED 136 (1998) ("A law professor says, 'I want blacks in my classroom when I teach constitutional law. The diversity of opinion helps us better understand the Constitution.' But are blacks human beings or teaching tools? Is it good for human beings to be made to play this role, to be brought in, often in defiance of standards, because their color is presumed to carry a point of view that diversifies classroom comment? And doesn't this transform even those blacks who win their place purely by merit into factotums of racial sentiment?").

What "social science" defendants have tried to muster in support of their brief for diversity is, for the reasons discussed above, beside the point. But its quality is revealing of how slim a reed defendants hang on to while invoking slogans in support diversity. The methodology and conclusions of University of Michigan professor Patricia Gurin have been devastated both in arguments to the district court (R221 NAS Br., pg. 7-12, JA-2780-2785; R330 SJ Tr., pg. 4-5, 8, 21-29, JA-7901-02, 7095, 7108-16) and in searching critiques conducted by others.[5] Similarly, the report of Derek Bok, based on a book co-authored with William Bowen, consists of little more than the authors' opinions on the value of diversity. *See* William Bowen & Derek Bok, THE SHAPE OF THE RIVER (Princeton Univ. Press 1998). The book itself presented essentially no objective data on the alleged benefits of diversity or

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[5] *See, e.g.*, Thomas Wood & Malcolm Sherman, "*Is Campus Racial Diversity Correlated with Educational Benefits?*" in RACE AND HIGHER EDUCATION (available at http://www.nas.org/rhe.html) (appended to NAS brief filed in *Gratz v. Bollinger* (Nos. 01-1333, 01-1418)).

Among the many methodological flaws in the Gurin study are the following: (1) Gurin never actually measured racial diversity in her studies at the University of Michigan (R221 NAS Br., pg. 8-9, JA-2781-82); (2) her assessment of "learning outcomes" does not measure educational outcomes (R221 NAS Br., pg. 10-11, JA-2783-84); (3) that even on the face of Gurin's analysis, the effects purportedly associated with racial diversity were extremely small (R221 NAS Br., pg. 11-12 & n.11, JA-2784-85); (4) and that Gurin made no effort to ascertain <u>how much</u> diversity is necessary to achieve the purported educational benefits, or how educational outcomes would be affected by marginal changes in racial diversity. (R221 NAS Br., pg. 8-9, JA-2781-82)

racial preferences in the classroom or on campus because the authors did not study that issue. They report no data, for example, comparing relative educational benefits achieved among campuses with differing levels of diversity. The data for what they did study (mostly outcomes after college or professional school) do not even permit an assessment of whether or how the benefits are distributed to the beneficiaries of racial preferences, or whether these benefits would still accrue in the absence of racial preferences. (R267 Motion, Ex. E Professor Finis Welch Report, JA-3272-98; R330 SJ Tr., pg. 27-29, JA-7114-16)[6]

II. Defendants' Admissions Policies Are Not Narrowly Tailored To Achieve the Interests In "Academic Freedom" And "Diversity" Recognized By Justice Powell in *Bakke*.

The district court correctly found that the Law School's racial preferences are illegal even if diversity is a compelling interest. They do not pass muster even under Justice Powell's analysis. As the district court concluded, (R318 Opinion, pg. 6, JA-4213) the evidence is indeed "overwhelming": the Law School

[6] For incisive scholarly critiques of the Bok and Bowen study, see generally Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874 (1999); Curtis Crawford, *Racial Preference in College Admissions*, SOCIETY 71-80 (May/June 2000); Stephen and Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. REV. 1583 (1999).

operates an admissions policy that violates Justice Powell's strictures as well as the traditional requirements of narrow tailoring applicable to all racial classifications.

A.
Defendants' Admissions System Does Not Meet the Requirements of Justice Powell's Analysis in *Bakke.*

Justice Powell made clear that in his view a lawful admission system is one in which individualized consideration of race still permits applicants to compete on the "same footing" in a process in which race is "weighed fairly." *Bakke,* 438 U.S. at 317-18 (Powell, J.). He disapproved of a process in which a defendant's policies result in "systematic exclusion" based on race or amount to the "functional equivalent of a quota." *Id.* at 318-19 & n.53.

The evidence on the size of the racial preference in the Law School's admissions process is voluminous and overwhelming. It consists of the Law School's own admissions data for the last six entering classes; descriptive and inferential statistical analyses performed by plaintiff's expert, Dr. Kinley Larntz; analyses by the Law School's own statistician that largely confirms plaintiff's position; the written policy itself; and the testimony of Law School witnesses on the importance of race in the process. Race looms so large that in no meaningful sense can it be said that race is "weighed fairly" or that applicants from the preferred and non-preferred races compete on the "same footing." *Bakke*, 438 U.S. at 317-18. As

the district court correctly found, the Law School operates the "functional equivalent of a quota." *Id.* at 318.

. . . . . **1.**

"Critical Mass": The Law School's Quota.

Prior to adoption of the 1992 policy, the Law School had an explicit policy of admitting at least 10-12% "underrepresented minority" students through either regular or "special admissions." (R346, Ex. 53 Special Admissions History, pg. 48-49, JA-4898-99; R331 Stillwagon 1TR, pg. 96-97, JA-7207-08) As the 1992 policy says, it was "intended as much to ratify what has been done and to reaffirm our goals as it is to announce new policies." And indeed, the evidence is abundant that the Law School continued, in furtherance of one of its goals, to focus on numbers of the specified minority students.

The Law School did introduce a term—"critical mass"—into the language of the Policy in place of a reference to a specific number or range of minority students. Defendants have seized on this substitution and the marvelous versatility of the term "critical mass" to accomplish multiple purposes. They use it to identify an objective they proclaim to be essential to their educational mission. They also use the term both to deny that it is a "quantitative concept" (hence not a "quota"), Defs.' Br. at 43-44, and simultaneously to argue that its loss would occur through a reduction in

the numbers of enrolled minority students. Of course, nowhere in Justice Powell's opinion (or in the opinion of any other Justice in any Supreme Court case to consider racial preferences), is there any mention, much less endorsement, of the concept of "critical mass."

The Law School's "critical mass" is focused on achieving "simple" racial and ethnic diversity. It is, hence, "discrimination for its own sake." *Bakke*, 438 U.S. at 307, 315. Just as at Davis, where only certain specified racial minorities (albeit also disadvantaged, unlike at the Law School) could compete for the 16 spots in the class, only certain racial minorities (R346 Ex. 4 Policy, pg. 12, JA-4241) can compete for spaces in the Law School class that go to achieving critical mass. Barbara Grutter, solely because she is white, was not eligible to be considered as part of the Law School's "critical mass" of minority students. (R346 Ex. 4 Policy, pg. 12, JA-4241)

That the Law School also considers factors and admits students for reasons unrelated to achieving critical mass (just as Davis also considered factors, and awarded most spaces in the class, not based on race) does not alter that fact that the Law School makes a "commitment" each year to achieving "one particular type of diversity" that excludes most students from consideration because it is a "commitment to racial and ethnic diversity." (Ex. 4 Policy, pg. 8, JA-4237) The

Law School's commitment to "inclusion," because it is defined solely in racial terms, is also a commitment to exclusion.

Ultimately, the Law School can only find safe refuge if there is a meaningful and tenable distinction between a system designed to allow racial minorities to fill an explicitly articulated number of spaces in the class, like the illegal Davis system, and a system that is committed to ensuring enrollment of a "critical mass," defined solely in racial terms. There is not. "Critical mass," as defendants sometimes concede, is a concept based on numbers. The 1992 policy says as much, referring interchangeably to "critical mass" and the Law School commitment to minority "represent[ation] in our student body in meaningful numbers." (R346 Ex. 4 Policy, pg. 12, JA-4241 (emphasis added))

Just as the formerly explicit "special admissions program" had a target range (10-12%) and not a hard, single number, the Law School's "critical mass" represents a numerical range of minority students that it still seeks to enroll. That range, as the district court found, is between 10-17%.[7] (R311 Opinion, pg. 31-32,

[7] In this sense, the Law School's "critical mass" is similar to its reservation each year of a "reasonable proportion"of the spaces in the class for Michigan residents. The Policy itself does not mention numbers, but each year the Law School sets aside about one-third (not a fixed or rigid number) of the class for residents. (R346 Ex. 4 Policy, pg. 2, JA-4231; R331 Munzel 1TR., pg. 143, JA-7234)

JA-126-27) The chairman of the faculty admissions committee that wrote the 1992 policy admitted that "based on committee discussion" a minority enrollment of 11% "sort of captured a sense of what one needed at a minimum for critical mass." (R333 Lempert 3TR, pg. 179, JA-7572; R306 Lempert Dep., pg. 137-38, JA-6711; R346 Ex. 34 Draft, pg. 13, JA-4832) Another member of the faculty committee testified that if a draft reference to a target range of 11-17% had been left in the 1992 policy, it "wouldn't have been a different policy. . . . It would have been a better statement of the policy." (R306 Regan Dep., pg. 59, JA-6835) (emphasis added)[8] It was this same faculty member who wrote that "candor" was one reason to leave reference to the target range in. The committee, and Law School, of course rejected "candor" in favor of the evasive "critical mass." (R346 Ex. 32 Draft, pg. 1, JA-4802)

[8] Defendants misleadingly suggest that the district court's findings regarding the existence of the Law School's quota were based on simple averaging of graduation statistics. It was not. The district court also cited to the testimony of the witnesses and "actual admissions" statistics, both amply supporting the district court's findings. (R311 Opinion, pg. 31, 50-51, JA-126, 145-46)

The actual admissions data bear out the conclusion that "critical mass" means a range between 10-17%. Since adoption of the 1992 policy, the percentage of students enrolled from "historically discriminated against" minority groups has never fallen below 11%. (R346 Ex. 98 Admissions Data, JA-5066; Ex. 189 Raudenbush Chart, JA-6047; R334 Shields 4TR, pg. 218-19, JA-7694-95; R335 Lehman 5TR, pg. 170, JA-7760) Indeed, as the policy promised, it largely ratified the pre-1992 system insofar as post-1992 minority admissions and enrollments are not significantly different from the numbers enrolled under the "special admissions program," with its 10-12% target range. (R346 Ex. 111 1988 Visitors' Report, JA-5067-74; Ex. 112 1989 Visitors' Report, JA-5075-82; Ex. 113, 1990 Visitors' Report, JA-5083-90; Ex. 114 1991 Visitors' Report, JA-5091-5100)

It simply does not matter that the Law School's numerical objective for enrollment of the preferred minorities is a range of numbers, rather than a "fixed" and "rigid" number like the 16 spaces at Davis. *See DeFunis v. Odegaard,* 416 U.S. 312, 332-333 (1974) (Douglas, J., dissenting) (where law school had target range of 15% to 20% minority applicants, "[w]ithout becoming embroiled in a semantic debate over whether this practice constitutes a 'quota,' it is clear that, given the limitation on the total number of applicants that could be accepted, this policy did reduce the total number of places for which DeFunis could

compete—solely on account of his race.") Under any logical or reasonable reading of *Bakke* or Justice Powell's opinion, the Davis system would have been illegal even if it had committed to enrolling a range of 10-17% minority students.[9] Defendants have even admitted this to be true: "Professor Richard Lempert, as chair of the committee that drafted the Policy, addressed why the drafters of the Policy chose not to define critical mass as a specific number or target range, explaining that they believed such numbers would be inconsistent with *Bakke*. Defs.' Br. at 44 (emphasis added). And so it is.

A "functional equivalent of a quota," *Bakke*, 438 U.S. at 318 (Powell, J.), is just that; one that works like a quota even if it is not labeled one. As this Court has noted, "quotas and preferences are easily transferred from one to the other." *Middleton v. City of Flint*, 92 F.3d 396, 412 (6th Cir. 1996). The Law School's system, with its commitment to enrolling a "critical mass" of racial minorities is just as the district court described it—"practically indistinguishable from a quota system." (R311, Opinion, pg. 50, JA-145; R318 Opinion, pg. 7, JA-4214) Its findings to that effect certainly are not clearly erroneous.

[9] Indeed, the Davis program did not guarantee sixteen spaces to disadvantaged minorities, and other minorities could be admitted through the regular admissions program. *Bakke*, 438 U.S. at 288-89 n.26.

2.There Is Overwhelming Statistical Evidence Supporting the District Court's Findings on the Extent to which the Law School Considers Race and the Existence of a Double Standard.

In achieving its desired "critical mass," the Law School is confronted with the problem that it is highly selective, particularly with respect to criteria—test scores and undergraduate grades—that are very important in the selection process, but for which there are substantial average differences in performance among racial groups. To solve the dilemma the Law School has adopted race-based double standards in admissions. This way the Law School maintains its reputation for being "highly selective," since most students are admitted whose test scores and grades are on the upper-right corner of the grid, while at the same time the Law School can get its quota—its critical mass—of minority students, since the practice is to accept these students with generally lower test scores and grades. Indeed, the Law School and its witnesses have admitted as much:

Dennis Shields

> Q.And in order to achieve that critical mass of minority students the practice was and the policy called for, a willingness to admit minority students from generally lower academic qualifications [than] majority students, isn't that a fair statement?
>
> A.[Shields]: I think that's a fair statement.

(R334 Shields 4TR, pg. 206, JA-7684; R306 Bollinger Dep., pg. 157-58, JA-6506; R306 Lempert Dep., pg. 132-33, JA-6710, 6709)

Although there was extensive expert statistical evidence offered at trial, the huge role that race plays in the Law School's admissions process is apparent from a layperson's glance at the data. It shows up dramatically in, among other places, the grids that plot admissions decisions for different combinations of grades and LSAT test scores. The current and former deans of admission who testified both acknowledged that the grids reflect information about the extent to which race is used in the admissions process:

Dennis Shields

> Q. Would it be fair to assume . . . the average here, the difference here in terms of decision making with respect to African Americans in these cells [Ex. 15] and Caucasians can generally be explained by the extent to which race is taken into account in the admissions process?
>
> A. Generally, yes.

(R334 Shields 4TR, pg. 213-15, JA-7689-91; R331 Munzel 1TR, pg. 198-99, JA-7289-90; R335 Lehman 5TR, pg. 211, JA-7784)

The grids paint such a devastating picture for the Law School that, not surprisingly, it stopped generating them after 1995. But they can be easily reproduced from the Law School's admissions database, and that is what plaintiff's

expert did for each of the six years for which he had data (1995-2000). In cell after cell, year after year, one can actually "see" how enormously important race is as a factor in the Law School's admissions process.

Defendants weakly respond to the damaging evidence contained in the grids by arguing that the "Law School does not use any such [grid] mechanism" when it "makes admissions decisions." Defs.' Br. at 40 (emphasis added). This is hardly responsive. The grids are highly relevant because of what they demonstrate—they are evidence of how important race is in the process and what an enormous difference race makes, systematically, in defendants' process. The grids do indeed, as defendants concede, "reflect the results" of the Law School's past admissions decisions. Defs.' Br. at 40. Controlling for factors that everyone agrees are very important—grades and test scores—the grids show nicely how different racial groups are held to very different standards with respect to grades and test scores.

Defendants complain about the grade and test-score combinations depicted in the grids as reconstructed by Dr. Larntz. *See* Defs.' Br. at 41. But he merely reproduced the same combinations that appeared in the 1995 grid constructed by the Law School itself. (R332 Larntz 2TR, pg. 50-51, JA-7380-81) As one can see in the complete set of grids, the stark difference in treatment of applicants of different races within the same cell shows up for more than "a fairly small number of

applicants." Defs.' Br. at 41. Hundreds of students each year have grades and test scores that fall in one of the many cells where admissions rates are not at all "quite similar" among racial groups. *Id.* Defendants and their expert witness tried to mislead the district court on this point by arguing that the overall admission rates without controlling for grades and test scores are comparable between the favored and disfavored races.[10] But it is different treatment for similarly situated individuals that is at the heart of any discrimination case.

Most of the Law School's arguments concerning the expert statistical testimony of Dr. Kinley Larntz relate to his computation of relative odds of admission (calculated through logistic regression technique) for the different racial groups, controlled for such factors as grades and test scores. Relative odds and logistic regression are standard statistical technique, and the defendants' expert, Stephen Raudenbush, used them himself. (R334 Raudenbush, 4TR, pg. 37-40, JA-7587-90) Dr. Larntz's statistical analyses involved more than relative odds comparisons, however. The extreme size of the racial preferences also showed up

[10] They argue, for example, that if the grid cell combinations (devised originally by the Law School) were enlarged, different outcomes and odds ratios would be reported. *See* Defs.' Br. at 40-41. Obviously, the less one controls for grades and test scores, the less apparent will be the different treatment according to race because the double standard exists primarily in the standard to which students are held to for grades and test scores.

in the large differences in means and medians and percentile ranges of test scores and grades among admitted applicants of different racial groups. (R346 Ex. 143 Larntz slides 2-15, JA-8925-38) It also showed up in the often extremely large differences in probabilities of acceptance at given levels of the selection index. (R346 Ex. 137 Larntz 12/14/1998 Report, figs. 9-40, JA-5172-5203; R346 Ex. 139 Larntz 3/20/2000 Report, figs. 3-10, JA-5377-84; Ex. 141 Larntz 12/10/2000 Report, figs. 3-10, JA-5453-5460; Ex. 143 Larntz slides 39-46, JA-8962-69)

Defendants' criticisms of Dr. Larntz's odds ratio analyses are based on a series of misleading and fallacious statements about the work that he performed.[11] They utterly misrepresent the record in stating that Dr. Larntz "agreed" that his analysis "did not reveal anything about how much weight admissions officers" give to race. Defs.' Br. at 38. Time and time again, he reiterated that his conclusion was that the Law School gives an "incredibly large" preference for race. (R332 Larntz 2TR, pg. 19, 114, 182, 213, JA-7349, 7444, 7470, 7476) Defendants seem to think, however, that no valid conclusions can be drawn about the importance of race in

[11] Defendants citation to Federal Rules of Evidence 702 and 703 and *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 597 (1993) is mysterious. Defs.' Br. 40 n.29. At no time did defendants or intervenors object to the admissibility of Dr. Larntz's expert opinion testimony or otherwise argue that it does not meet the standards laid down in Rules 702 and 703 and *Daubert*. They have waived any such objection, *see* Fed. R. Evid. 103(a)(1); *Bartleson v. United States*, 96 F.3d 1270, 1277-78 (9th Cir. 1996), which has no merit in any event.

their process unless it can be first established how much race enters into the decision for each applicant. Such a micro-analysis is not necessary, however, to ascertain whether defendants' system is set up so that applicants of different races are able to compete on the "same footing"; whether a double standard is applied in the process, and whether the result is "systematic exclusion" of applicants because of their race.

The Law School's overall defense on the issue of how much "weight" race is given in the process is, moreover, hopelessly riddled with inconsistency. Presented with a choice—whether to deny plaintiff's claims about the magnitude of the extent to which race is a factor in the admissions process or to defend the extent to which race is a factor—the Law School insists on having it both ways. Thus, the Law School and its witnesses took great pains at trial (as they still do) to note that one cannot measure the "extent" to which race is a factor in admissions, suggesting even that it may be no more than the weight of a "feather,"[12] Defs.' Br. at 39 n.27, while in the next breath (and without apparent embarrassment) arguing that race is so important that removal of just this one factor would have a "dramatic," "sharp,"

[12] Defendants' "seesaw" analogy is another attempt at misdirection. If, as it is intended to suggest, race is only a slight factor in the admissions process that considers many other factors, then why do the data show an overwhelming and consistent pattern whereby outcomes are so dramatically different when compared by race?

"substantial," and even "devastating" impact on the racial composition of the class.[13] (R334 Raudenbush 4TR, pg. 14, 60, 108, 123-25, 143, 145-46, 155-56, JA-7583, 7602, 7638, 7639-41, 7647, 7648-49, 7651-52; R331 Munzel 1TR, pg. 180-81, 186-88, JA-7271-72, 7277-79) If, as the Law School's witnesses testified, removing only the factor of race from the admissions process would have the dramatic consequences urged by the Law School, the only reasonable explanation is that race is truly an enormous factor in the process.

Defendants' argument that the district court and Dr. Larntz looked at only a "fraction of the data" is also specious. Defs.' Br. at 39. First, as he testified, his analyses considered data reported for all applicants in the Law School's database. (R332 Larntz 2TR, pg. 121, JA-7446; R342 Larntz 12TR, pg. 86, JA-8605) For his relative odds analysis, which was just one part of Dr. Larntz's analyses, odds were computed for all cells in which there was any comparative information, *i.e.*, cells in which there was any difference in outcomes across racial groups. Approximately 84-88% of applicants across the years studied by Dr. Larntz had grades and test scores in cells with comparative information. (R342 Larntz 12TR, pg. 25-33, JA-

[13] Throughout the trial, defendants engaged in comical sophistry about how there is a difference between measuring the "extent" to which race is a factor and the "impact" that race has on the process. (R334 4TR Raudenbush, pg. 12-13, 26, 45, 47, 61-62, 90-91, 99, JA-7581-82, 7586, 7595, 7603-04, 7627-28, 7633) They continue with their routine.

8566-74; R346 Ex. 225 Larntz Chart, JA-8982-88) For all other analyses that he did, including reporting on means, medians and probability of acceptance rates, the results are based on all reported test scores and grades.

That many minority students, particularly those with very low grades or test scores, are rejected does not in the least diminish the very distinct double standard that is particularly apparent when the applicant grades and test score combinations are in or around the middle of the grid, *e.g.*, 3.0 grade point average and higher and 150 LSAT score and higher.[14] In *Bakke*, the vast majority of minority applicants were also denied admission under the illegal Davis system. *Bakke*, 438 U.S. at 273-276 n.2, 5, 6.[15]

Although Raudenbush takes issue with Dr. Larntz's methodology, Raudenbush actually contributed greatly to confirming the correctness of the Larntz analyses. Raudenbush graphically illustrated the extent to which race is considered

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[14] Or, to put the point another way, the fact that a large preference is given does not mean it will change the outcome in every case.

[15] So too, in *Bakke*, there was no evidence that the minorities admitted through the special admissions system were not "qualified" to attend the Davis Medical School. *See Bakke*, 438 U.S. at 275 (candidates for special admissions program could be rejected for failure to meet course requirements or other deficiencies). Thus, defendants toss out another red herring with their argument that their system is legal since they admit only applicants considered "qualified," *i.e.*, who can be expected to graduate. Defs.' Br. at 24.

(and the existence of a double standard) through the separate regression equations that he testified best predict admission outcomes of minority and non-minority (*i.e.*, white and Asian-American) applicants using logistic regression and the same variables of grades, test scores, residency, and gender used by Dr. Larntz for his odds ratio analyses. (R334 Raudenbush 4TR, pg. 137-140, JA-7643-46; R346 Ex. 146 Raudenbush Report, table A-1, JA-5552) And, of course, Raudenbush's testimony about the "impact" of race in the Law School's admissions is essentially confirmatory of the "enormous" role that it plays.

Ultimately, defendants' denial that race is a heavy factor in their admissions process is, as the district court found, overwhelmingly contradicted by the evidence.

B.
The District Court Correctly Determined that Defendants' Admissions System Does Not Meet the Requirements of Narrow Tailoring Required by Strict Scrutiny.

The Supreme Court and this Court have made clear that a number of factors should be assessed in determining whether defendants have met their burden on narrow tailoring. These include (1) whether the defendant has considered race-neutral means of achieving the compelling interest; (2) the efficacy of less drastic, alternative possibilities; (3) the flexibility and duration of the remedy (4); the relationship of the means to the goal; and (5) the impact of the remedy on rights of

third parties. *See, e.g.*, *Croson*, 488 U.S. at 507-08; *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Middleton v. City of Flint*, 92 F.3d 396, 409 (6th Cir. 1996). Contrary to the Law School's assertion, the district court plainly considered and applied these factors in striking down the Law School's admission system (assuming diversity is a compelling interest); it certainly did not "invent[ ] its own narrow tailoring test." Defs.' Br. at 42.

The Law School seems to have reduced Justice Powell's strictures on narrow tailoring to just this: so long as its consideration of race is justified by a diverse student body, and the Law School reads every file, it has fully satisfied the requirement to "proceed[] 'on an individualized, case-by-case basis'" and should be immune from judicial interference in its consideration of race. Defs.' Br. at 42-43. All the other "details of how decisions are made must be left to the school." *Id.* at 42. That is, to say the least, a severely bowdlerized and false version of Justice Powell's analysis. It ignores what he actually wrote. It also ignores the Supreme Court's subsequent statements—in the intervening years since *Bakke* was decided—about what is necessary to demonstrate narrow tailoring.

The Law School's argument that it has defined "critical mass" with "sufficient particularity" to make it amenable to narrow tailoring cannot be taken seriously. Defs.' Br. at 43-46. The evidence supports the district court's finding

that critical mass, as defined *sub rosa* by the Law School, is a minimum 10-11% quota. But that, among other things, is what makes the system illegal. It does not imply, moreover, that the concept has any reasonably objective standard or meaning apart from a numerical one. Indeed, the parties in this case who consider "critical mass" compelling—defendants and the intervenors—cannot even agree on what it means. The Law School says that it has achieved critical mass; the intervenors say that it has not. (R331 Munzel 1TR, pg. 165, JA-7256; R333 Lempert 3TR, pg. 129, JA-7526; R345 Massie Closing, 15TR, pg. 73-74, JA-8851-52) What it means is really whatever a law school, educational institution, or admissions dean wants it to mean.

On the issue of duration of the Law School's preferences (*see* Defs.' Br. at 46-47), there is no evidence from which it can meaningfully be ascertained whether or when the Law School's use of preferences will terminate. The Law School certainly did not demonstrate the preferences to be "temporary." *See, e.g.*, *Croson*, 488 U.S. at 510 ("Proper findings . . . . defin[ing] both the scope of the injury and the extent of the remedy . . . serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a <u>temporary</u> matter.) (emphasis added); *see also Drabik*, 214 F.3d at 738 (affirming district court determination that racial preferences in award of construction contracts "with no set

expiration" were not narrowly tailored). The argument that the "Law School only intends to consider race and ethnicity to achieve diversity until it becomes possible to enroll a critical mass of underrepresented minority students through race-neutral means" merely begs the question. Defs.' Br. at 46. Since there is no evidence for when or how that will occur, or even how the point in time will be recognized, the district court correctly concluded that "[s]uch indefiniteness weighs heavily against a finding of narrow tailoring."[16] (R311 Opinion, pg. 50, JA-145)

The problem of indefiniteness is an intractable one for defendants because the nature of their purported interest in diversity makes it unsuited to temporal bounds, unlike a specifically identified remedial interest, which contains the seeds of its own destruction, terminating when the injury has been removed.[17] But as has been said elsewhere, the diversity rationale as articulated by defendants is a "permanent and

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[16] The Law School argues that one temporal "check" on its use of race in making admissions decisions is that "within a given admissions cycle" there may come a point when the relevance of race had been diminished or exhausted. Defs.' Br. at 46-47. That is an argument (and concession) that their racial preferences are perennial, not temporary. It also strongly suggests that the goal is racial balancing, not intellectual diversity. The latter ought not to have a ceiling. Indeed, in any event, Davis could have said the same thing about its illegal system—that it stopped considering race after it filled its quota of minority students each "admissions cycle."

[17] In this sense, of course, the diversity rationale is much broader than a remedial one. *Cf. Marks v. United States*, 430 U.S. 188, 193-94 (1977). There will always be some racial group or ethnic group in short supply.

ongoing interest" that lives on "perpetually." *Gratz v. Bollinger*, 122 F. Supp.2d 811, 823-24 (E.D. Mich. 2001) (emphasis added).

Another way in which defendants failed to meet their burden on narrow tailoring is the failure to show a relationship and a closeness of fit between means and ends. This problem manifests itself in several respects. First, the "enormous" size of the preference is inconsistent with narrow tailoring. *See Middleton*, 92 F.3d at 412 ("It seems obvious that a plan's tailoring is less 'narrow' if it results in a very large degree of preference for minority group members (and corresponding disadvantage for non-minority group members) than if the degree of preference is smaller.")

In addition, the strange limitations placed on the kinds of racial diversity that the Law School's racial preferences are designed to foster, extended, for example, to Puerto Ricans born on the United States mainland, but not those born in Puerto Rico[18]—statistics tracked daily on, and preferences maintained, for some racial

[18] Defendants misleadingly challenge this finding of the district court on the ground that "[t]here was no testimony" on the point. Defs.' Br. at 50 n.32 (emphasis added). But, of course, evidence is received other than through testimony. Here, evidence of this strange racial distinction (penalizing native-born Puerto Ricans) came in through admission of the Law School's brochure on admissions for the 1995-1997 and 1996-1997 academic years. (R346 Ex. 6 1996-1997 Bulletin, pg. 81, JA-4292; R346 Ex. 7 1995-1997 Bulletin, pg. 81, JA-4403) None of the Law School's witnesses disputed or denied the statement contained in this rather obviously authoritative source.

groups, but not others, *e.g.*, Arab Americans (R311 Opinion, pg. 52-53, JA-147-48)—is evidence that the means employed are not closely fit to a goal of attaining the kind of diversity that Justice Powell approved. Ultimately, it demonstrates that the defendants' real objective is likely to be racial balancing or racial politics, *i.e.*, guaranteeing that certain favored racial groups (but not others) will be represented in the class in numbers satisfactory to the defendants. *See Wessman v. Gittens*, 160 F.3d 790, 799 (1st Cir 1998) ("Underrepresentation is merely racial balancing in disguise—another way of suggesting that there may be optimal proportions of races and ethnic groups in institutions."); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 352 (D.C. Cir. 1998) ("The very term 'underrepresentation' necessarily implies that if such a situation exists," defendant "falls short of the desired outcome.")

The district court correctly found that the Law School had "fail[ed]" to consider race-neutral alternatives to its admissions policies. (R311 Opinion, pg. 53, JA-148) Rather than give "serious consideration" to that issue (R311 Opinion, pg. 53, JA-148), the Law School's witnesses merely asserted that they could not get their desired level of racial diversity without the use of racial preferences. This failed yet another of the traditional narrow-tailoring tests. The Law School now engages in post-hoc rationalizations about how the experiences of California and

Texas confirm the Law School's judgment about its need to engage in race discrimination. In fact, there was evidence that contradicted the Law School's hypothesis about the "devastating" impact that a race-neutral system would have. The Dean of the Graduate School of Education at the University of California at Berkeley testified that his school in the last few years—post Proposition 209—has enrolled classes consisting of 28-30% "underrepresented" minority students. (R341 Garcia 11TR, pg. 84-86, JA-8516-18) That is double the level of such enrollments at the Law School with its use of racial preferences. At Boalt Law School, for example, nearly 10% of the class in the last couple of years have consisted of the Law School's preferred racial minorities. (R346 Ex. 132 California Enrollments, JA-5127-28) At UCLA law school, more than 10% of the Fall 2000 class consisted of underrepresented minority students. (R346 Ex. 132 California Enrollments, JA-5127-28)[19] The recent admissions statistics at the University of Texas Law are comparable. (R346 Ex. 131 Texas Enrollments, JA-5123-26)

Defendants leave unsaid the real reason that would explain any significant drop in minority admissions if they adopted a race-neutral system. It is, of course,

[19] Defendants and intervenors object, however, that aggregate levels of underrepresented minority enrollments are not sufficient; that each of the subgroups must also be represented in adequate numbers. This only reiterates that what defendants really have in mind is racial balancing.

that the Law School chooses to be highly selective on criteria—undergraduate grades and LSAT test scores—on which applicants from the selected minority groups perform on average at substantially lower levels than other racial groups. Thus, the Law School's cryptic and otherwise unintelligible statement that "given the pool of minority applicants, there is no race-neutral alternative." Defs.' Br. at 52. And, hence, the double standard.

The Law School twists and misrepresents the district court's opinion by suggesting that it requires the Law School to become less selective, thereby infringing on its "academic freedom." It made no such requirement. It did recognize that the Law School has obligations under the strict-scrutiny analysis that is required of all racial classifications, and that if it chooses to use race in the admissions process, then it must, among other things, explain why a less restrictive means is not available.

Neither the Law School nor its witnesses have explained why it is important or compelling to be as selective on test scores and grades as the Law School currently is, or to remain as selective on these criteria as schools such as Boalt, UCLA, or other highly selective law schools. Indeed, the Law School has made clear that its enrolled underrepresented minority students, even with their lower average test scores and grades on admission, are all qualifed students who make fine

contributions to the Law School. If so, the Law School knows better than any one that an excellent student body can be composed with students whose test scores and entering grades are much lower than what the Law School's selectivity on those criteria requires for most students.[20] Ultimately, the Law School is free to "retain its character" for being highly selective. But it is not free to sacrifice the constitutional rights of others, like Barb Grutter, just so that the Law School can achieve its desired level of racial diversity.

Finally, in any narrow tailoring analysis, the Court must consider the impact of defendants' racial preferences on the rights of third parties. Here it is great, as the foregoing demonstrates. Defendants try to minimize the consequences by arguing that the removal of race as a factor will significantly impact the admission of minority students, but have little impact on the admission of other groups, such as whites and Asian Americans. The mode of analysis is revealing: the Law School defines and measures the impact of its polices on racial "groups," rather than on individuals. As Raudenbush conceded, however, the absolute number of individuals affected by a change in policy from a race-conscious to a race-neutral system

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[20] Indeed, Professor Lempert testified for the intervenors about his study showing no relationship between "selection index"—entering grades and test scores—and post-law school professional success and performance. (R344 Lempert 14TR, pg. 50-51, JA-8687-88; R346 Ex. 165 Lempert Report, JA-5851-81)

necessarily corresponds on a one-to-one basis between minority and non-minority students. (R334 Raudenbush 4TR, pg. 147, JA-7650)[21]

III. Intervenors' "Level Playing Field" Arguments Cannot Justify the Law School's Racial Preferences.

Intervenors argue that remedial interests justify the Law School's use of racial preferences in admissions. The district court properly rejected these rationales and its decision should be affirmed for all the reasons given in the district court's opinion. (R311 Opinion, pg. 59-88, JA-154-83)

A. The Law School Was Not Motivated by Intervenors' Remedial Interests in Adopting the Racial Preferences.

The remedial interests sponsored by intervenors (promoting "integration" and "leveling the playing field" with respect to criteria like grades and test scores) are not the interests that the Law School asserted in adopting its racial preferences. Indeed, the Law School has again made this point plainly in its brief on appeal. *See* Defs.' Br. at 3-4 n.3 ("The Law School has not argued, and does not argue, that its consideration in race is motivated by an interest in remedying past discrimination.").

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[21] The Law School's "group impact" reasoning when applied to the facts of the *Bakke* case demonstrates that opening 16 seats for the more than 2,000 non-minority applicants obviously had only a negligible impact on the admission probabilities for the group as a whole. But the Constitution and Title VI of the Civil Rights Act of 1964 protect individual, not group, rights.

Accordingly, under settled Supreme Court precedent, intervenors' remedial justifications cannot constitute compelling interests justifying the Law School's racial preferences. *See, e.g., See Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996); *Cf. Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 & n.16 (1982) (rejecting interest asserted at trial to justify gender classification when state failed to prove that the interest was the "actual purpose"); *United States v. Virginia*, 518 U.S. 515, 535-36 (1996) (interest sufficient to justify gender discrimination must be the "actual state purposes, not rationalizations for actions in fact differently grounded").

B.
The Law School Does Not Have a Compelling State Interest in Racial Balancing.

Although Intervenors assert that the Law School has a compelling state interest in "integration," relying on the Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), they fundamentally misapprehend the nature and scope of that decision. *Brown* and its progeny concern remedies for past, intentional discrimination, such as that practiced by school districts that had a history of excluding students on the basis of race. The Court has never recognized a compelling interest or duty to promote "integration" for its own sake, to the extent that term means race-based assignments or preferences not

designed to remedy identified, intentional discrimination. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 496-97 (1992) ("The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the de jure violation being remedied.") It is clear, moreover that the state cannot justify consideration of race in order to accomplish racial balancing. *See, e.g., Freeman*, 503 U.S. at 494 ("Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation.") *See also Croson*, 488 U.S. at 507 (rejecting racial preference that "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing"). The Court has never adopted racial balancing remedies from its grade-school segregation jurisprudence and applied it to higher education. To the contrary. *United States v. Fordice*, 505 U.S. 717, 730 n.4 (1992) (noting impropriety of racial balancing remedies for system of higher education; constitutional violations exist only where policies rooted in a de jure system continue to have segregative effects); *id*. at 745 (Thomas, J. concurring) (noting that the standard in higher education is "far different from the one adopted to govern the grade-school context.")[22]

[22] Intervenors' reliance on *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 20 (1971), is misplaced, because that case concerned past, intentional race discrimination by the defendant school district.

The evidence at trial about minority admissions in the University of California system and at the University of Texas, does not, for reasons already discussed, support an argument that the Law School must or should be permitted to continue using racial preferences. As noted above, moreover, the evidence actually belied the claim that these schools have become "resegregated." *See supra* text at 51-52. (R311 Opinion, pg. 84-85, JA-179-80)

C.
The Intervenors' "Level Playing Field" Rationale Cannot Justify the Law School's Racial Preferences.

The intervenors' "level playing field" rationale is just a proxy for an argument based on the need to remedy the effects of societal discrimination. It rests on intervenors' contentions about "race and racism" generally in American society. Such an amorphous, generalized interest cannot, of course, constitute a compelling interest justifying racial preferences. *See Croson*, 488 U.S. at 498-99 ("Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."). Accordingly, evidence and testimony offered by intervenors concerning historical patterns and effects of residential and K-12 segregation, or "racial climate" on campus,[23] cannot be used to justify the Law School's racial preferences in admissions. As the district court noted, one of intervenors' witnesses, John Hope Franklin, eloquently "expressed the belief that academic

[23] The district court properly decided that it was "unable to give any weight" to the study of Professor Walter Allen on "racial climate" and its purported effect on minority students. (R311 Opinion, pg. 76-77, JA-171-72) The study was methodologically flawed. Among other things, it used an obviously biased, non-random sample for the "focus groups" work which was at the heart of Dr. Allen's study.

standards should not be lowered for minority students, and that all people should be judged on their individual merits." (R311 Opinion, pg. 67, JA-162; R337 Franklin 7TR, pg. 130-31, 142, 144, JA-8047-48, 8052, 8054)

To the extent that intervenors' argument is directed at specific admissions criteria that the Law School chooses to be highly selective on, *e.g.*, grades and LSAT scores,[24] it is essentially a "disparate impact" argument. As noted in the foregoing discussion of the Law School's arguments, the narrowly-tailored remedy to such an impact is the removal or mitigation of the criteria responsible for the disparate impact. *See e.g.*, *Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir. 1994) (en banc). Moreover, as the district court noted, "[t]here is no basis in logic or in the evidence for assuming that all members of some racial groups are victims of adverse circumstances, or conversely, that all members of other racial groups are beneficiaries." (R311 Opinion, pg. 83, JA-178) Nothing—certainly not the Constitution—prevents the Law School from awarding special consideration in the

[24] The district court properly rejected the testimony of intervenors' witnesses Jay Rosner, David White, and Martin Shapiro on the subject of alleged "test bias." (R311 Opinion, pg. 79, JA-174) Similarly, due to the "sparseness of the evidence" and other flaws noted by the district court in Claude Steele's study of "stereotype threat," it was not clearly erroneous for the district court to reject this theory as a justification for racial preferences. (R311 Opinion, pg. 79-81, JA-174-76)

admissions process to a disadvantaged student, viewed as "an individual whose personal history is unique." (R311 Opinion, pg. 82, JA-177)

IV. The Arguments of the Law School's Amici Cannot Justify the Law School's Racial Preferences.

Many of the Law School's amici simply repeat the Law School's and each others' arguments, adding nothing new to the case except paper volume. Some are notable only for their eccentricity, *e.g.*, Amicus Brief of the NOW Legal Defense and Education Fund (arguing that international law authorizes the Law School's racial preferences), or arrogance, *e.g.*, Amicus Brief of National Asian Pacific American Bar Association, *et al.* ("Asian American Group") at 19 (purporting to speak on behalf of the "Asian Pacific American Legal community").[25]

Several of the amici support the Law School's position that diversity is a compelling interest because of the amici's belief that racial and ethnic diversity is either lacking in other areas of society, *e.g.*, K-12 education and residential patterns, or because of their belief that educational diversity will foster diversity in the

[25] Contrary to the argument in the amicus brief of the Asian American Groups, plaintiff has never purported to represent all Asian Americans or used Asian Americans as "wedge group," or held any group up as a "role model" minority. The certified class includes all students who applied to the Law School and whose race was disfavored in the process. The Asian American groups do not identify a single Asian American rejected applicant who has objected to inclusion in the class.

workplace. *See generally* Amicus Brief of General Motors, *et al.* These arguments actually illustrate plaintiff's points that the diversity rationale is essentially boundless in scope and a proxy for a rationale grounded in remedying social ills or discrimination. Hence, the corporate amici's defense of preferences as a means to further business objectives makes it hard to understand where diversity's "logical stopping point" is that would prohibit racial preferences from reaching into all walks of American life and society (*e.g.*, housing, K-12 education, employment, contracting).

The amicus brief of the several law school deans tries to justify the diversity rationale and the viability of the Powell opinion on several grounds. The first is their unfounded distinction between racial preferences in contracting and education that they assert in *ipse dixit* fashion to be constitutionally significant. The law deans also make a strange argument that the diversity rationale should be upheld as controlling based on asserted distinctions between racial "classifications" and "considerations" that they attribute primarily to Justice O'Connor. Apart from its merits, the argument appears to be, in effect, a prediction simply about what one Justice (and not necessarily the Court) would conclude about the diversity rationale. Even with respect to that one Justice, however, its distinction is unfounded. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (O'Connor, J.,

concurring in the judgment) ("This Court's decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both the society and the individual.") (emphasis added)).

Finally, the American Bar Association (ABA) can be commended for its statement that "[t]he legal and judicial systems in Michigan can be judged, to a large extent, by the ability of all attorneys, regardless of their race or ethnic background, to attain positions of status, authority and economic benefit." Brief of Amicus American Bar Association at 13 (emphasis added) (quoting Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts). Unfortunately, the ABA devotes the rest of its brief to undermining that statement of principle.

The ABA, not satisfied with resting the justification for racial preferences on an "intellectual diversity" rationale, in the classroom or elsewhere, argues for the need to ensure diversity in the legal profession and/or judicial system. Such diversity is crucial, they contend, so that minorities will trust their lawyers and the legal system. *See also* Amicus Brief of John Conyers, *et al.* This argument, of course, bears a striking resemblance to one of the rationales asserted by Davis in *Bakke* and dismissed by Justice Powell. *See Bakke*, 438 U.S. at 310-11 (Powell, J.). It also resembles the "role model" theory rejected in *Wygant*: include minorities in

positions of leadership so that other minorities can see people "like them" in such positions and react positively (to either school, as in *Wygant*, or our system of justice, as the ABA urges). *Wygant*, 476 U.S. 274-77. Needless to say, this social justification, like the one rejected in *Wygant*, and like the profit-based one urged by General Motors, *et al.*, is essentially limitless in time and scope. It easily can be applied to the medical profession or journalism profession, or anything else. It cannot pass muster under modern Equal Protection analysis.

Conclusion

For the foregoing reasons, plaintiff respectfully requests this Court to affirm the district court's order enjoining defendants' illegal admissions system.

Dated: July 27, 2001 . . . . . .

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Designation of Joint Appendix Contents

Appellee, pursuant to the 6th Circuit Rule 30(b), hereby designate the following filings in the district court as items to be included in the joint appendix:

DESCRIPTION OF ITEM	RECORD NO.	FILING DATE
Complaint	1	12/03/97
Answer	8	12/22/97
Plaintiff's Motion for Partial Summary Judgment on Liability and Brief	94	05/03/99
Affidavit of Kirk O. Kolbo and Exhibits in Support of Plaintiff's Motion for Partial Summary Judgment on Liability	95	05/03/99
Ex. A - Barbara Grutter Deposition	95	05/03/99
Ex. B - Law School Application File of Barbara Grutter	95	05/03/99
Ex. C - Letter dated June 25, 1997	95	05/03/99
Ex. D - Defendants' Objections and Responses to Interrogatory Number One (1), Two (2), and Eight (8) through Ten (10) of Plaintiff's Interrogatories to Defendants (Set I)	95	05/03/99
Ex. E - April 22, 1992 Report and Recommendations of the Admissions Committee	95	05/03/99
Ex. F - Allan Stillwagon Deposition	95	05/03/99
Ex. G - Law School Announcement 1991-92	95	05/03/99

DESCRIPTION OF ITEM	RECORD NO.	FILING DATE
Ex. H - Law School Announcement 1988-89	95	05/03/99
Ex. I - Defendants' Submission in 1991/1992 to the American Bar Association (ABA) on the Law School's compliance with ABA Standard 212	95	05/03/99
Ex. J - Richard Lempert Deposition	95	05/03/99
Ex. K - Lee Bollinger Deposition	95	05/03/99
Ex. L - Dennis Shields Deposition	95	05/03/99
Ex. M - Jeffrey Lehman Deposition	95	05/03/99
Ex. N - Theodore Shaw Deposition	95	05/03/99
Ex. O - Erica Munzel Deposition	95	05/03/99
Ex. P - Memorandum authored by Dennis J. Shields, dated October 13, 1992, entitled, "The Gospel According to Dennis."	95	05/03/99
Ex. Q - Susan Eklund Deposition	95	05/03/99
Ex. R - American Bar Association's (ABA) Standard 211 (formerly Standard 212) on "Equal Opportunity Effort"	95	05/03/99
Ex. S - Excerpts from the Law School's "Self Study"	95	05/03/99
Ex. T - Excerpts from the ABA Report on University of Michigan Law School, February 9-12, 1992 (pages 1, 31-34, 37-40)	95	05/03/99

DESCRIPTION OF ITEM	RECORD NO.	FILING DATE
Ex. U - Letter from Edward H. Cooper, Associate Dean for Academic Affairs, dated August 14, 1992 to James P. White, Consultant on Legal Education, Indiana University	95	05/03/99
Ex. V - The University of Michigan Law School Admissions Office, Admissions Grid of LSAT and GPA for all Applicants, 1995 Final Grid	95	05/03/99
Ex. W - Kinley Larntz Deposition	95	05/03/99
Ex. X - Admission Grids of LSAT and GPA for All Applicants prepared by Dr. Kinley Larntz	95	05/03/99
Ex. Y - Donald Herzog Deposition	95	05/03/99
Ex. Z - Descriptive Data of Entering Class 1998-97, as prepared by the Law School and Submitted to the American Bar Association	95	05/03/99
Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment	121	06/01/99
Affidavit of Kirk O. Kolbo and Exhibits	122	06/01/99
Ex. A - Kinley Larntz, Ph.D. Expert Report dated December 14, 1998	122	06/01/99
Ex. B - Law School's Bulletin for the Academic Years 1996-1997	122	06/01/99
Ex. C - Excerpts from the Introduction to the Compilation of Defendants' Expert Reports	122	06/01/99

DESCRIPTION OF ITEM	RECORD NO.	FILING DATE
Ex. D - Order of The Honorable Thomas Zilly, dated February 22, 1999	122	06/01/99
Ex. E - Order of the Ninth Circuit, filed on April 1, 1999	122	06/01/99
Ex. F - LSAT Percentile Tables - 120 to 180 Scale, June 1995-February 1998	122	06/01/99
Ex. G - Richard Lempert Deposition	122	06/01/99
Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment on Grounds of Qualified Immunity	192	07/20/00
Affidavit of Kirk O. Kolbo and Exhibits	193	07/20/00
Ex. A - April 22, 1992 Report and Recommendations of the Admissions Committee	193	07/20/00
Ex. B - Dennis Shields Deposition	193	07/20/00
Ex. C - Lee Bollinger Deposition	193	07/20/00
Ex. D - American Bar Association's (ABA) Standard 211 (formerly Standard 212) on "Equal Opportunity Effort"	193	07/20/00
Ex. E - Defendants' Submission in 1991/1992 to the American Bar Association (ABA) on the Law School's Compliance with ABA Standard 212	193	07/20/00

DESCRIPTION OF ITEM	RECORD NO.	FILING DATE
Ex. F - Law School's "Self Study," Submitted to the American Bar Association (ABA) as Part of its Accreditation Review of the Law School in 1992 (pages 1, 5, 7)	193	07/20/00
Ex. G - ABA Report on University of Michigan Law School, February 9-12, 1992 (pages 1, 31-34, 37-40)	193	07/20/00
Ex. H - Letter from Edward H. Cooper, Associate Dean of Academic Affairs, dated August 14, 1992 to James P. White, Consultant on Legal Education, Indiana University	193	07/20/00
Ex. I - The University of Michigan Law School Admissions Office, Admissions Grid of LSAT and GPA for all Applicants, 1995 Final Grid	193	07/20/00
Ex. J - Kinley Larntz, Ph.D. Deposition	193	07/20/00
Ex. K - Admission Grids of LSAT & GPA for All Applicants Prepared by Kinley Larntz, Ph.D.	193	07/20/00
Ex. L - Kinley Larntz, Ph.D. Report Dated December 14, 1998	193	07/20/00
Ex. M - Defendants' Law School Bulletin for 1996-1997	193	07/20/00
Ex. N - Susan Eklund Deposition	193	07/20/00
Ex. O - Descriptive Data of Entering Class 1998-87	193	07/20/00

DESCRIPTION OF ITEM	RECORD NO.	FILING DATE
Ex. P - Defendants' Objections and Responses to Interrogatory Numbers One (1), Two (2), and Eight (8) through Ten (10) of Plaintiff's Interrogatories to Defendants (Set I)	193	07/20/00
Ex. Q - Richard Lempert Deposition	193	07/20/00
Plaintiff's Renewed Motion for Partial Summary Judgment on Liability and Brief	220	10/10/00
Affidavit of Kirk O. Kolbo and Exhibits	220	10/10/00
Ex. A - April 22, 1992 Law School Admissions Policy	220	10/10/00
Ex. B - Admission Grid of LSAT & GPA for Applicants to the Fall 1999 First-Year Law School Class Prepared by Kinley Larntz, Ph.D.	220	10/10/00
National Association of Scholars' Motion and Brief in Support of Plaintiff's Motion for Partial Summary Judgment on Liability	221	10/11/00
Plaintiff's Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment	229	11/03/00
Affidavit of Kirk O. Kolbo and Exhibits	230	11/03/00
Ex. A - Second Supplemental Report of Kinley Larntz, Ph.D. dated March 20, 2000	230	11/03/00
Ex. B - Report of Expert Testimony of Gail Heriot, dated August 29, 2000	230	11/03/00

DESCRIPTION OF ITEM	RECORD NO.	FILING DATE
Ex. C - Report of Expert Testimony of Charles L. Geshekter, dated January 22, 1999	230	11/03/00
Plaintiff's Reply Memorandum	260	12/19/00
Plaintiff's Motion in Limine to Strike Any Testimony or Expert Opinion (including of Derek Bok) Based on a Consideration of the College and Beyond Database; Memorandum; Affidavit of Kirk O. Kolbo and Exhibits	267	12/21/00
Ex. A - Expert Report of Derek Bok, dated December 15, 1998	267	12/21/00
Ex. B - Appendix A to the Book Authored by Drs. Derek Bok and William Bowen entitled, "*The Shape of the River*"	267	12/21/00
Ex. C - Plaintiff's Request for Production of Documents to Defendants (Set IV)	267	12/21/00
Ex. D - Defendants' Objections and Response to Plaintiff's Request for Production of Documents to Defendants (Set IV)	267	12/21/00
Ex. E - Expert Report of Dr. Finis Welch, dated May 26, 2000	267	12/21/00
Order	268	12/28/00
Plaintiff's Deposition Designations	306	02/28/01
Plaintiff's Memorandum in Opposition to Defendants' Objection to Certain Deposition Designations	307	02/28/01

DESCRIPTION OF ITEM	RECORD NO.	FILING DATE
Plaintiff's Post-Trial Brief	308	02/28/01
Findings of Fact and Conclusions of Law	311	03/27/01
Defendants' Motion for Stay	312	03/28/01
Opinion and Order	318	04/03/01
Transcript of Summary Judgment Hearing	330	04/27/01

DESCRIPTION OF ITEM	TRANSCRIPT PAGE NUMBER	DATE FILED OR ADMITTED IN DISTRICT COURT
Selected Trial Transcripts--01/16/01-02/16/01		
Testimony of Erica Munzel	Vol. I, 126-208, 261-273	1/16/01
Testimony of Allan Stillwagon	Vol. I at 89-100	1/16/01
Testimony of Kinley Larntz	Vol. II at 7-115, 121, 182, 213; Vol. XII at 19-55, 86	1/17/01; 2/10/01
Testimony of Richard Lempert	Vol. III at 125, 129, 171-80; Vol. XIV at 50-51, 100-01, 126-29, 134-39	1/18/01; 2/15/01
Testimony of Dennis Shields	Vol. IV at 206-09, 213-15, 218-19	1/19/01
Testimony of Jeffrey Lehman	Vol. V at 134-35, 138-39, 170, 177-78, 180, 187-88, 197-206, 211	1/22/01

DESCRIPTION OF ITEM	TRANSCRIPT PAGE NUMBER	DATE FILED OR ADMITTED IN DISTRICT COURT
Testimony of Steven Raudenbush	Vol. IV at 12-14, 16, 20, 26, 37-40, 42-43, 45, 47-49, 60-62, 90-91, 99, 108, 123-25, 134, 137-40, 143, 145-47, 155-56; Vol. XII at 43-47	1/19/01; 2/10/01
Testimony of Eugene Garcia	Vol. XI at 57-58, 83-107	2/9/01
Testimony of John Hope Franklin	Vol. VII at 131, 136-37, 139, 142-44	1/24/01
Testimony of Kent Syverud	Vol. V at 38-39, 56-60, 70, 73-74, 84-86	1/22/01
Testimony of Lee Bollinger	Vol. III at 73	1/18/01
Testimony of Eric Foner	Vol. X at 231-32, 245-46	2/8/01
Testimony of Gary Orfield	Vol. VI at 160-61, 173, 195-96	1/23/01
Testimony of Walter Allen	Vol. X at 4-110	2/8/01
Testimony of David White	Vol. XI at 118-20	2/9/01
Testimony of Jay Rosner	Vol. VIII at 91-92, 154	2/06/01
Testimony of Martin Shapiro	Vol. VIII at 78-79	2/06/01
Remarks by John Payton	Vol. I at 40-42, 44, 48, 59-60; Vol. XV at 41	1/16/01; 2/16/01
Remarks by Miranda Massie	Vol. XV at 73-74	2/16/01

DESCRIPTION OF ITEM	TRANSCRIPT PAGE NUMBER	DATE FILED OR ADMITTED IN DISTRICT COURT
Remarks by Stuart Delery	Vol. XII at 103	2/10/01
List of Selected Trial Exhibits:		
Exhibit 4 - Admissions Policy		01/16/01
Exhibit 5 - The Gospel According to Dennis		01/19/01
Exhibit 6 - The University of Michigan Bulletin 1996-97		By Stipulation
Exhibit 7 - The University of Michigan Bulletin - 1995-97		By Stipulation
Exhibit 8 - The University of Michigan Bulletin - 1997-99		By Stipulation
Exhibit 10 - Law School Admissions Office - Daily Summary of Applicant Status (Final Daily 9/97)		01/16/01
Exhibit 11 - The University of Michigan Law School Admissions Office Daily Summary of Candidate Status		01/16/01
Exhibit 12 - Admissions Office Daily Summary of Applicant Status		01/16/01
Exhibit 14 - Means and Medians for Selected Groups - Undergraduate Grade Point Average / Average LSAT - Starting Class (1994-95)		01/16/01

DESCRIPTION OF ITEM	TRANSCRIPT PAGE NUMBER	DATE FILED OR ADMITTED IN DISTRICT COURT
Exhibit 15 - The University of Michigan Law School Admissions Office Admissions Grid of LSAT & GPA for All Applicants		01/16/01
Exhibit 16 - The University of Michigan Law School Admissions Office Admissions Grid of LSAT & GPA for All Applicants - 1995 Final Grid		01/17/01
Exhibit 18 - Report from the Admissions Office-1995 Committee of Visitors		By Stipulation
Exhibit 19 - Memo from Shields Re: Information Disseminated on Recruitment Trips		By Stipulation
Exhibit 24 - Draft Admissions Policy		02/15/01
Exhibit 29 - The University of Michigan Law School - Committee of Visitors		By Stipulation
Exhibit 32 - Memorandum to Rick Lempert, et al. from Don Regan Re: Admissions Committee Memo to Faculty		01/18/01
Exhibit 33 - Draft Admissions Policy		02/15/01

DESCRIPTION OF ITEM	TRANSCRIPT PAGE NUMBER	DATE FILED OR ADMITTED IN DISTRICT COURT
Exhibit 34 - Draft Admissions Policy		01/18/01
Exhibit 35 - Draft Admissions Policy		02/15/01
Exhibit 53 - The History of Special Admissions at The University of Michigan Law School (1966-1981)		01/16/01
Exhibit 54 - The University of Michigan Bulletin - Law School Announcement 1991-92		02/15/01
Exhibit 55 - Law School Announcement 1988-89		02/15/01
Exhibit 68 - Supplementation of the Expert Report of Kinley Larntz		01/17/01
Exhibit 76 - Deposition of Lee Bollinger in *Hopwood* Case		By Stipulation
Exhibit 77 - Defendant Summary of Expert Testimony: Lee C. Bollinger		By Stipulation
Exhibit 78 - The University of Michigan Law School - Faculty Handbook		01/21/01

DESCRIPTION OF ITEM	TRANSCRIPT PAGE NUMBER	DATE FILED OR ADMITTED IN DISTRICT COURT
Exhibit 98 - Ex. B of Defendant-Intervenors' Brief in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment (11/20/00) - Chart Re: Ethnicity by Graduation Years 1950-1999		01/24/01
Exhibit 111 - Law School Committee of Visitors - 1988 - Report to the Committee of Visitors Admissions Statistics University of Michigan Law School - September 1988		01/18/01
Exhibit 112 - Law School Committee of Visitors - 1989 - Report of the Committee of Visitors Admissions Statistics University of Michigan Law School - September 1989		01/16/01
Exhibit 113 - Law School Committee of Visitors - 1990 - Report to the Committee of Visitors Admissions Statistics University of Michigan Law School - September 1990		By Stipulation

DESCRIPTION OF ITEM	TRANSCRIPT PAGE NUMBER	DATE FILED OR ADMITTED IN DISTRICT COURT
Exhibit 114 - Law School Committee of Visitors - 1991 - Report to the Committee of Visitors Admissions Statistics University of Michigan Law School - September 1991		01/18/01
Exhibit 117 - LSAT Percentile Tables - 120 to 180 Scale, June 1995 - February 1998		01/16/01
Exhibit 130 - Defendants' Objections and Responses to Interrogatory Numbers One, Two, and Eight Through Ten of Plaintiff's Interrogatories to Defendants (Set I)		By Stipulation
Exhibit 137 - Plaintiff Expert: Expert Report of Kinley Larntz, 12/14/98		01/17/01
Exhibit 138 - Plaintiff Expert: Supplemental Expert Report of Kinley Larntz, 02/21/00		01/17/01
Exhibit 139 - Plaintiff Expert: Second Supplemental Expert Report of Kinley Larntz, 03/20/00		01/17/01
Exhibit 140 - Plaintiff Expert: Third Supplemental Expert Report of Kinley Larntz, 10/28/00		01/17/01

DESCRIPTION OF ITEM	TRANSCRIPT PAGE NUMBER	DATE FILED OR ADMITTED IN DISTRICT COURT
Exhibit 141 - Plaintiff Expert: Fourth Supplemental Report of Kinley Larntz, 12/10/00		01/17/01
Exhibit 142 - Plaintiff Expert: Fifth Supplemental Report of Kinley Larntz, 01/04/01		01/17/01
Exhibit 143 - Larntz Powerpoint Presentation		01/17/01
Exhibit 178 - Orfield Diversity Survey - Student Comments		01/23/01
Exhibit 215A - Bakke Resurrected		02/09/01
Exhibit 216 - UCLA Document Re: Enrollment: "UCLA Data Show Minority Student Admission Increase"		02/09/01
Exhibit 225 - Larntz Packet of Information (7 pages) Admissin Grid 1995 (through 2000) and Table Re: Relative Odds		02/10/01
Exhibit 226 - Larntz Flipchart Notes		02/10/01
Exhibit 227 - Larntz Flipchart Notes		02/10/01
Exhibit 229 - Wu Radio Appearance		02/12/01

DESCRIPTION OF ITEM	TRANSCRIPT PAGE NUMBER	DATE FILED OR ADMITTED IN DISTRICT COURT
Listing of Objectionable Trial Exhibits:		
Exhibit 58 - Self-Study Re: ABA Accreditation		
Exhibit 60 - ABA Report on University of Michigan Law School		
Exhibit 61 - Correspondence Re: Site Evaluation of Feb. 9-12, 1992		
Exhibit 79 - 1990-91 ABA Law School Site Evaluation Questionnaire		
Exhibit 80 - Attachment to Site Evaluation Questionnaire: Admissions Standard (Excerpt)		
Exhibit 81 - Attachment to Site Evaluation Questionnaire: Qualitative Admissions Requirements (Excerpt)		
Exhibit 82 - Attachment to Site Evaluation Questionnaire: Qualified Applicants (Excerpt)		

DESCRIPTION OF ITEM	TRANSCRIPT PAGE NUMBER	DATE FILED OR ADMITTED IN DISTRICT COURT
Exhibit 83 - Attachment to Site Evaluation Questionnaire: Admission Procedure (Excerpt)		
Exhibit 84 - Attachment to Site Evaluation Questionnaire: Standard 212 (Excerpt)		