UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and **PATRICK HAMACHER,**

vs.

LEE BOLLINGER, et al.,

Defendants,

and

EBONY PATTERSON, et al.,

Intervening Defendants.

_____/

Case No. 97-75231

Hon. Patrick J. Duggan

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DEFENDANTS' RESPONSE TO PLAINTIFFS' BRIEF REGARDING (1) STANDING, (2) BURDEN OF PROOF, AND (3) LEGAL STANDARD

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2. If Plaintiffs do have standing, then what burden of proof rests upon them, and when and how does the burden shift to the Defendants?

3. What is the legal standard for carrying the burden of proof?

INTRODUCTION

On January 31, 2005, this Court requested briefing on these three questions: First, do Plaintiffs have standing to pursue the remaining liability and damages issues in this case? Second, if Plaintiffs do have standing, then what burden of proof rests upon them, and when and how does the burden shift to the Defendants? And, third, what is the legal standard for carrying the burden of proof?

Plaintiffs' Brief addressing these questions is a confused and confusing document. It takes these questions out of logical order, for example leaving the fundamental question of standing for last. It assumes Plaintiffs have proved things they have not. It rushes past basic requirements for Plaintiffs to prevail as if those requirements did not exist. It misstates the issues surrounding Defendants' burden, if and when that burden arises. And it misreads almost every single case it cites.[1] Ironically, this includes the *Bakke* decision, which Plaintiffs have spent much of this litigation maligning, and which Plaintiffs now badly misuse.

Defendants appreciate that this litigation has had a fairly lengthy and complex history. Defendants have no interest in unnecessarily prolonging it. But neither the Defendants nor this Court have the luxury of disregarding the failings of Plaintiffs' case simply because doing so might lead to a more expedient resolution. These Plaintiffs, like all plaintiffs, must show they have standing and must prove their case. To date, they have done neither.

PROCEDURAL HISTORY

On October 14, 1997 Plaintiffs Jennifer Gratz and Patrick Hamacher filed their Complaint in this matter. The Complaint alleged that the University of Michigan considered

[1] Plaintiffs' Brief also, improperly in our view, reiterates damages issues that have already been briefed and on which the Court did not request further briefing here. *See* Plaintiffs' Brief at 5. Defendants rely on their prior briefing of these issues.

race in making undergraduate admissions decisions (Complaint at ¶ 18), that the University had no compelling interest in doing so (Complaint at ¶ 23), and that, if the University did have such an interest, then it had still violated the law by failing to try to achieve that interest through race-neutral means (Complaint at ¶ 24). The Complaint did not allege that the University should have considered race in a more narrowly tailored way, and did not allege that the University would have admitted Gratz or Hamacher if it had done so. Nor did the Complaint allege that the University would have admitted any of the putative class members under a system that considered an applicant's race in a more narrowly tailored manner.

On October 9, 1998, Plaintiffs moved for class certification and to bifurcate the liability and damages phases of this case. In the course of briefing that issue, Plaintiffs argued that "Whether or not plaintiffs Hamacher and Gratz or others would have been admitted under even a lawful system, they are entitled to seek damages."[2] Defendants agreed with the request for bifurcation but expressed this disagreement:

> Defendants agree that any genuine damages issues in this case ... should be bifurcated ...
>
> Defendants disagree, however, with the suggestion that the question whether the named plaintiffs would have been admitted to the University in the absence of an admissions policy that includes the conscious consideration of race relates only to damages, and not to liability ... [D]efendants submit that with respect to plaintiffs' claim for damages, the question whether plaintiffs would have been admitted to the University under an admissions system that did not involve the conscious consideration of race is more properly understood as a question bearing on liability, rather than damages.[3]

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[2] *See* Plaintiffs' Reply Memorandum in Support of Motion for Class Certification and for Bifurcation of Liability and Damages Trials, filed November 17, 1998, at 16.

[3] Defendants' Reply Memorandum of Law in Support of Defendants' Motion for Order Denying Class Certification and in Opposition to Plaintiffs' Motion to Certify a Class Action and to Birfucate Liability from Damages, filed October 30, 1998, at 26-27.

In other words, the parties agreed that the case should be bifurcated into liability and damages phases, but disagreed as to which phase would encompass the question of plaintiffs' actual prospects for admission. On December 23, 1998, this Court bifurcated the case but did not resolve this disagreement; indeed, the Court did not need to do so at that time.

This Court also certified a class. It did so based upon Plaintiffs' representation that they sought "declaratory and injunctive relief." December 23, 1998 Opinion at 8. It was solely by reference to the fact that Hamacher sought such relief that the Court determined he had standing to maintain a class. *Id.* at 12. The Court expressly refused to certify a class for a damage award and deferred all issues related to that question for another day. *Id.* at 13, 15.

The parties subsequently filed cross-motions for summary judgment that, like the Complaint, focused on the issues of compelling interest and narrow tailoring. On December 13, 2000 this Court issued its Opinion on the parties' motions. In that Opinion, this Court described the precise issues before it:

> As previously mentioned, this phase of the litigation has been explicitly limited to the issue of 'liability,' defined as 'whether Defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution,' as well as Plaintiffs' request for injunctive and declaratory relief ...
>
> [T]he two issues this Court must decide in resolving the parties' motions for summary judgment are: (1) whether Defendants have asserted a compelling governmental interest in support of LSA's use of race and (2) whether the measures by which the LSA has used race as a factor in admissions decisions were narrowly tailored to serve such interest.

Opinion at 6-8. The Motions did not *ask* this Court to decide – and this Court did *not* decide – whether Gratz, Hamacher, or any member of the certified class would actually have been admitted to the University of Michigan in the absence of the programs under scrutiny. The

Motions did not *ask* the Court to decide – and this Court did *not* decide – whether Gratz, Hamacher, or any member of the certified class had standing to pursue damages. Accordingly, this Court focused on the specific questions of compelling interest and narrow tailoring, in the particular context of a request for injunctive and declaratory relief.

In its Opinion, this Court went on to conclude that "a racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny." Opinion at 25. This Court further concluded that the 1999-forward admissions systems qualified as "narrowly tailored," although the 1995-1998 systems did not. Opinion at 26-44. On January 30, 2001 this Court issued an Order implementing these rulings, "declar[ing] unconstitutional" the programs in existence from 1995 through 1998, and upholding the programs in place for 1999 and 2000.

Plaintiffs appealed and, on June 23, 2003, the United States Supreme Court issued its Opinion. Like the Opinion of this Court, the Opinion of the Supreme Court was limited and specific:

> We conclude ... that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. We further find that the admissions policy also violates Title VI and 42 U.S.C. § 1981. Accordingly, we reverse that portion of the District Court's decision granting respondents summary judgment with respect to liability and remand the case for proceedings consistent with this opinion.

Gratz v. Bollinger, 539 U.S. 244 (2003). Thus, the Supreme Court – like this Court – expressed no view on the question of whether Hamacher or Gratz or any class member would be admitted under a system that considered race in a more narrowly tailored way. The Supreme Court – like

this Court – expressed no view on the question of whether Hamacher or Gratz or any class member had standing to seek damages.[4] To the contrary, the Supreme Court did nothing more than reverse this Court's decision with respect to narrow tailoring. Plaintiffs seem to believe that this was the end of their case against the University of Michigan; in fact, like any case in which an appellate court reverses summary judgment for a defendant, it was just the beginning.

ARGUMENT

I. Standing

As noted above, when Plaintiffs filed their motion to bifurcate the liability and damages phases of this case they argued that they were entitled to seek damages regardless of "[w]hether or not plaintiffs Hamacher and Gratz or others would have been admitted under even a lawful system ...." [5] In support of that argument, Plaintiffs relied in part on the decision of the Fifth Circuit in *Lesage v. Texas*, 528 U.S. 18 (1999) and triumphantly declared that courts had "specifically reject[ed] the contention that [this question] has anything to do with liability."[6] In other words, at that time Plaintiffs believed that if they showed the admissions systems in question to be unconstitutional then that would settle the liability issue and the only remaining issue would pertain to damages. Whatever the merits of Plaintiffs' position at that time, subsequent legal developments proved them wrong.

While Plaintiffs' case was pending, the United States Supreme Court reversed the Fifth Circuit decision in *Lesage* on which Plaintiffs had relied. In doing so, the Court made clear that,

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[4] Plaintiffs have suggested that the Supreme Court disposed of all standing issues. This is not true. The only standing issue addressed by the Court pertained to whether Hamacher had standing to pursue *injunctive relief* in light of the fact that he had not actually applied for admission as a transfer student. *See Gratz v. Bollinger*, 539 U.S. 244 (2003). That issue has nothing to do with the standing issues raised here.

[5] Plaintiffs' Reply Memorandum in Support of Motion for Class Certification and for Bifurcation of Liability and Damages Trials, filed November 17, 1998, at 16.

[6] *Id.* at 18.

in fact, the question of whether Hamacher, Gratz, or a class member would have been admitted under a lawful system has everything to do with liability.

In *Lesage*, the plaintiff applied for admission to the Ph.D. program in counseling and psychology at the Department of Education at the University of Texas. The school rejected his application and offered admission to at least one minority candidate. It was undisputed that the school considered plaintiff's race at some stage during the review process. Defendant sought summary judgment, offering evidence that – even if the admissions process had been completely colorblind – the plaintiff would not have been admitted. The district court granted the motion, ruling that "any consideration of race had no effect on this particular individual's rejection," and that there was "uncontested evidence that the students ultimately admitted to the program had credentials that the committee considered superior to [plaintiff's]." The Fifth Circuit reversed.

Subsequently, however, the United States Supreme Court issued a *per curiam* decision reversing the Fifth Circuit. In pertinent part, the Supreme Court held as follows:

> Insofar as the Court of Appeals held that summary judgment was inappropriate on Lesage's § 1983 action seeking damages for the school's rejection of his application for the 1996-1997 academic year even if petitioners conclusively established that Lesage would have been rejected under a race-neutral policy, its decision is inconsistent with this Court's well-established framework for analyzing such claims. Under *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S. Ct. 568 (1977), even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat *liability* by demonstrating that it would have made the same decision absent the forbidden consideration ... The government can avoid *liability* by proving that it would have made the same decision without the impermissible motive.

Texas v. Lesage, 528 U.S. 18 (1999) (emphasis supplied). Cases decided after *Lesage* reiterate the principle that whether or not plaintiff would have received the governmental benefit-in-suit is a foundational liability issue. *See, e.g., Anderson v. City of Boston*, 375 F.3d 71 (1st Cir.

2004)("Lesage makes clear that when the governmental entity would have made the same decision even without the impermissible consideration of race ... there is no deprivation of constitutional rights at all ... Without a deprivation of constitutional rights, liability will not attach, and damages – nominal, compensatory, or otherwise – cannot be imposed").

But, even more importantly for purposes of this brief, cases decided after *Lesage* make clear that -- when a plaintiff seeks damages for a past violation rather than declaratory and injunctive relief against ongoing conduct – proof as to whether plaintiff would have received the governmental benefit is not just a foundational *liability* issue; it is a foundational *standing* issue. Of particular interest in this regard is the Sixth Circuit decision in *Aiken v. Hackett*, 281 F.3d 516 (6th Cir. 2002). In that case – actually a collection of consolidated actions – plaintiff white police officers challenged the affirmative action program of the City of Memphis. The district court entered partial summary judgment for the City because the officers could not show an injury in fact and therefore could not prove standing. The Sixth Circuit affirmed, stating as follows and citing *Lesage*:

> When plaintiffs allege a violation of the Equal Protection Clause in the context of a government program, courts must evaluate whether the claimed injury is one that invades a legally protected interest. If the plaintiffs allege that a racial preference cost them some benefit under a government program, those plaintiffs may have alleged an injury in fact. But if those same plaintiffs cannot also allege and show that 'under a race-neutral policy' they would have received the benefit, those plaintiffs have not alleged an injury in fact because they have not alleged an invasion of some interest that the law protects ... Those plaintiffs lack Article III standing ...

Id. at 519 (citations omitted). Of course, by "race-neutral policy" *Lesage* and *Aiken* mean "constitutionally valid policy," which in light of the Supreme Court decision in *Grutter* means a policy that considers race in a sufficiently narrowly tailored way.

Aiken went on to distinguish the standing requirements just described, which apply to plaintiffs seeking damages for past violations, from the standing requirements that apply to plaintiffs seeking declaratory and injunctive relief:

> If, however, the plaintiffs allege some kind of on-going constitutional violation and seek forward-looking relief to level the playing field, then the plaintiffs need only show that the racial preference hinders their ability to "compete on an equal footing." That plaintiffs would not have received the benefit even absent the preference is irrelevant to an Equal Protection analysis. *See* Lesage, 528 U.S. at 21

Id. See also Cotter v. City of Boston, 323 F.3d 160, 167 (1st Cir. 2003)(relying on *Lesage* and holding that "plaintiffs lack standing to sue for damages if they cannot show that they would have benefited had the government not considered race").

In other words, under *Lesage* and *Aiken* Plaintiffs here may have established standing for purposes of pursuing declaratory and injunctive relief, but they plainly have *not* established standing for purposes of pursuing damage claims. As *Lesage* and *Aiken* dictate, these Plaintiffs can establish such standing only if they can "allege and show" an injury in fact – the purported injury in fact for these purposes being that they would have been offered admission by the University of Michigan under a system that considered race in a more narrowly tailored way than the policies in place. Plaintiffs have neither "alleged" nor "shown" any such thing. As noted above, Plaintiffs' Complaint does not even make the claim that they would have been admitted under a policy that considered race in a constitutionally permissible manner.[7]

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[7] *Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987) outlines the relevant procedure. A plaintiff must adequately allege standing in the complaint. If the plaintiff fails to do so the complaint must be dismissed for want of standing. If the court is uncertain as to the sufficiency of the pleadings, it can order evidentiary hearing on its own motion and then rule on the standing question. If the pleadings meet the requirements of Article III standing, then the court has jurisdiction over the matter. Defendant may, however, at that time challenge the evidentiary basis of the pleadings. This would be addressed through a motion for summary judgment for

Plaintiffs' Brief offers several responses in defense of their failure to allege and show facts sufficient to establish standing. All of them are without merit.

Plaintiffs' first response is to ignore *Lesage* and *Aiken* entirely and to redirect this Court's attention to *Bakke*. In sum, Plaintiffs argue that they have standing in their case because Allan Bakke had standing in his case. *See* Brief at 14-15. The argument is obviously wrong, however, because it fails to recognize that different standing requirements apply to those who seek injunctive relief based upon ongoing constitutional violations and those who seek damages based upon past conduct. *See* Brief at 14, 16. Plaintiffs, as they say over and over again in their Brief, seek the latter. Allan Bakke, in contrast, sought declaratory and injunctive relief.

In arguing that an allegation of a constitutional violation suffices to create standing, Plaintiffs excerpt the following from *Bakke*:

> The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. . . . Hence the constitutional requirements of Art. III were met. The question of Bakke's admission vel non is merely one of relief.

See Brief at 14, quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978). But Plaintiffs fail to note the critical fact that Allan Bakke sought declaratory and injunctive relief against an ongoing constitutional violation. *See id.* at 278 ("After the second rejection, Bakke filed the instant suit in the Superior Court of California. He sought mandatory, injunctive, and declaratory relief compelling his admission to the Medical School."). As

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want off standing. The parties may need to conduct discovery relevant to this motion. *Id.* at 903-904. Therefore, at this juncture Plaintiffs must either (a) indicate that they stand on their Complaint as filed so this Court can make a standing determination, or (b) seek leave to amend their Complaint so the Court can do so.

discussed above, when a plaintiff seeks damages based upon past conduct a different standard applies than applied in *Bakke*. *Bakke* is thus irrelevant to this discussion.[8]

Plaintiffs' second response is to suggest that this Court ignore the Sixth Circuit's guidance on this critical standing issue. Plaintiffs acknowledge – twice – that the Sixth Circuit in *Aiken* addressed the question of standing. *See* Plaintiffs' Brief at 15 ("While the Sixth Circuit addressed the matter as one of Article III standing ...") and at 16 ("Although the Sixth Circuit in *Aiken* made reference to Article III standing requirements and plaintiffs' pleading sufficiency..."). Plaintiffs nevertheless invite the Court to ignore these rulings on the basis that the *Aiken* Court dismissed the plaintiffs' claims because it appeared "beyond debate" the City would not have promoted them even in the absence of the forbidden criterion.

Plaintiffs do not explain why their argument makes sense, and, in fact, it does not. If Plaintiffs mean to suggest that this Court should ignore what the Sixth Circuit said about standing because plaintiff in *Aiken* did not dispute evidence on a critical point then they have offered nothing more than a glaring non sequitur. If Plaintiffs mean to suggest that this Court should declare that the Sixth Circuit misread *Lesage*, or that this Court should declare that the Sixth Circuit did not mean what it said, then Plaintiffs invite this Court to exceed its jurisdiction. Besides, for the reasons discussed above it is clear that the Sixth Circuit's decision is perfectly consistent with *Lesage*.

Plaintiffs' third response is that they have complied with *Aiken* because their Complaint alleges they have suffered damages. Brief at 17. This misses the point entirely. *Aiken* expressly requires that Plaintiffs "allege and show" injury in fact – the "injury in fact" here being that they

[8] Plaintiffs' misunderstanding of the distinction at work here also prompts them to argue that *Lesage* did not, and *Aiken* could not, overrule *Bakke*. Of course, those cases did not do so and did not need to do so. For the reasons discussed, *Bakke* is simply distinguishable.

were denied admission under the policies in place but would have been offered admission under a system that considered race in a more narrowly tailored way. *See Aiken* at 519 ("But if those same plaintiffs cannot also allege and show that 'under a race-neutral policy' they would have received the benefit, those plaintiffs have not alleged an injury in fact...") As noted above, the Complaint includes no such allegation, and Plaintiffs have offered nothing to "show" this to be the case.[9]

Plaintiffs' final response is that the Court has certified a class and so, surely, someone within the class must have standing. Brief at 18. Putting aside its logical failures, the main problem with this argument is that it ignores the procedural history of this case. As noted above, at the time this Court certified a class it also bifurcated the proceedings into liability and damages phases, and "defined" the liability phase as addressing "whether Defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution, as well as Plaintiffs' request for *injunctive and declaratory relief* ...." Further, the Court expressly reserved all damages related issues for another day. In other words, this Court has never addressed the question of whether any plaintiff has standing to pursue damage claims or whether certification of a class to do so makes any sense; nor *could* this Court have addressed this question, since these Plaintiffs have never made the necessary allegations to raise it.

[9] Plaintiffs promise they will address any shortcomings in their Complaint by seeking leave to amend it. Brief at 17. In light of other positions Plaintiffs have taken in their Brief this promise is troubling. In their Brief, Plaintiffs maintain that it is impossible to reconstruct what would have happened if a different policy had been in place when they applied. Brief at 10-14. If Plaintiffs believe this to be true then they cannot – consistent with Rule 11 – amend their Complaint to allege they would have been admitted under a policy that considered race in a more narrowly tailored way. If Plaintiffs do not believe this to be true then it is distressing that they spend four pages of their Brief advancing the argument.

Defendants respectfully suggest that this Court need go no further at this stage than to address this issue. If Plaintiffs can "allege and show" they meet the standing requirements, then the other issues discussed in this Brief come into play. If Plaintiffs cannot do so, however, then it does not make any sense to expend the time and energy of the parties or this Court on other matters. Defendants therefore ask that this Court direct Plaintiffs to "allege and show" that they can meet the fundamental standing requirements set forth in *Lesage* and *Aiken*. If they cannot, then this case is over. If they can, then the other two questions addressed here, as well as questions of whether this matter should proceed as a class action, arise. [10]

II. Burden of Proof

Plaintiffs argue that "once a plaintiff demonstrates that a defendant has operated an illegal discriminatory system, the burden shifts to the defendant to prove that it would have denied the benefit to the plaintiff (made 'the same decision') even in the absence of the discrimination." Brief at 7. This, they claim, is a fair account of the standard first articulated *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and now applied to cases under the Equal Protection Clause. Plaintiffs are wrong.

Plaintiffs' summary of the law misstates the *Mt. Healthy* standard by glossing over the substance of *their initial* burden. A straightforward reading of *Mt. Healthy* demonstrates this. In *Mt. Healthy*, plaintiff claimed that a public employer had refused to rehire him because he had engaged in protected First Amendment conduct. The Court held that plaintiff had the burden of showing two things: first, that the Constitution protected his conduct, and, second, that his conduct was a "substantial factor" or "motivating factor" in the denial of the government benefit:

[10] As Defendants have discussed in prior briefing, the question of whether any specific applicant would have been admitted under a constitutional policy obviously turns on numerous individual considerations and cannot be answered on a class-wide basis. As this is not one of the questions currently at issue, Defendants will not repeat their arguments on this point here.

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him.

Id. at 287 (emphasis supplied). Of course, this is all a plaintiff need prove in a First Amendment retaliation case: that they engaged in constitutionally protected conduct and that the retaliation occurred, in substantial part, as a result of that conduct. *Mt. Healthy* recognized that, once a plaintiff proved their case then the burden shifted to the defendant to prove they would have made the same decision regardless of the protected conduct:

> Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Id. at 287 (emphasis supplied). In other words, *Mt. Healthy* does not *excuse* a plaintiff from any part of their burden of proof – the plaintiff still must prove both (1) protected conduct and (2) substantial / motivating factor causation. Rather, *Mt. Healthy* simply recognizes that, in response to a plaintiff's case, a defendant may be able to disprove causation by showing they would have made the same decision in any event.

The cases cited by Plaintiffs do nothing but underscore the point that *Mt. Healthy* does not impose any burden on the defendant until *after* the plaintiff has carried their burden and proved their case. For example, Plaintiffs rely heavily upon *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985) in arguing that the burden of proof has now shifted to the Defendants. *See* Brief at 9. *Blalock*, however, clearly held that a "plaintiff's case has already been established before the burden shifts ..." *Id.* at 712. And Plaintiffs omit this holding from their selective quotations from that case:

> Accordingly, we hold that in order to prove a violation of Title VII, a plaintiff need demonstrate by a preponderance of the evidence that the employer's decision to take an adverse employment action was more likely than not motivated by a criterion proscribed by the statute. Upon such proof, the employer has the burden to prove that the adverse employment action would have been taken even in the absence of the impermissible motivation, and that, therefore, the discriminatory animus was not the cause of the adverse employment action.

Id. at 712. Plaintiffs also rely upon *Johnson v. Bd of Regents*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000) in support of their argument that the burden has shifted to the Defendants. It is true that, in *Johnson*, the burden had shifted to the university. But, again, Plaintiffs do not fairly characterize the case. In *Johnson*, the court found that plaintiffs there had proven that they would have been accepted to the university had they been reviewed in a constitutional manner – in other words, they had already proven that the constitution deficiency was a "substantial factor" in the denial of admission. *See id.* at 1376 ("Because the plaintiffs were rejected during the race- and gender-conscious phase of UGA's admissions process, but would not have been rejected had they been awarded the race and gender bonus points, see doc. # 38 PP 34, 38, 42-43, they have shown that they were harmed by the admissions scheme's statutory violations"). Plaintiffs additionally rely upon *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996) to emphasize the nature of Defendants' burden. This is a particularly odd case for Plaintiffs to cite, because the *Hartsel* court did not just hold that plaintiff had to prove her case before the burden shifted – it further held that she had failed to do so:

> Hartsel correctly notes that if a plaintiff produces evidence that her protected expression was a "substantial" or "motivating" factor in a defendant's decision to terminate employment, the burden of proof shifts to the defendant to prove that it would have made the same decision in the absence of the protected conduct. . . . In this case, Hartsel has not shown that her support of Billy Grace in the May 1991 mayor's race at the debate was a substantial or motivating factor in Keys's decision to select a candidate with computer

> experience and proficiency, and therefore she has not carried her initial burden of proof.

Id. at 803. The other cases cited by Plaintiffs do not hold differently.[11]

In their rush to make Defendants prove their case Plaintiffs have ignored the fact that *Mt. Healthy* first requires them to prove their own. *Mt. Healthy* and its progeny tell us that Plaintiffs must prove causation – that is, that the impermissible consideration of race was a "substantial factor" or "motivating factor" in the denial of a benefit. Plaintiffs' Brief misses this requirement entirely.

A further note of clarification is important, particularly in light of some confusion Plaintiffs have demonstrated in the past. Plaintiffs cannot carry their burden simply by showing that the consideration of race was a "substantial" or "motivating" factor. That is the case Plaintiffs wanted to win but did not. Rather, because the Supreme Court decision *Grutter* (and incorporated in *Gratz*) did not strike down *all* consideration of race, Plaintiffs must show that the *impermissible* consideration of race was a substantial or motivating factor in the University's decisions. To meet this burden, Plaintiffs obviously must isolate the difference between the improper consideration of race and the proper consideration of race, and then prove that *that difference* was a substantial or motivating factor in the denial of a benefit.

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[11] Plaintiffs cite other First Amendment cases that perform the *Mt. Healthy* analysis in precisely the same fashion. *See Wicker v. Board of Educ.*, 826 F.2d 442, 449 (6th Cir. 1987) ("Under *Mt. Healthy* a plaintiff must show that he engaged in constitutionally protected activity and that the activity was a substantial or motivating factor behind the discharge. The burden then shifts to defendants to show that discharge would have occurred despite any political bias"); *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 450 (6th Cir. 1984) ("Under *Mt. Healthy*, where both permissible and impermissible reasons for disciplining a public employee are established, the court must decide whether 'the Board has shown by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff's] reemployment even in the absence of the protected conduct'") (citation omitted).

If Plaintiffs do so then the burden shifts to Defendants, but, here again, Plaintiffs have clearly misread *Mt. Healthy*. It is true that Defendants could, at that point, carry their burden by showing that they would have made the same decision under a policy that considered race in a constitutionally narrowly tailored way. But Defendants could carry their burden other ways as well, for example by showing that, even in the absence of consideration of race, they would have made the same decision because of Plaintiffs' grades, or test scores, or other qualifications, or because of the keen competition of the applicant pool in a given year.[12] For present purposes, however, it is neither necessary nor appropriate for the Court to address the specifics of how Defendants would meet this burden. It is only necessary that the Court recognize that there are various ways for Defendants to try to do so, and that Defendants' obligation to do so does not arise until after Plaintiffs have proved much, much more than they have to date.

III. Legal Standard

The above discussion makes three points clear: first, the burden shifts to Defendants if and only if Plaintiffs establish standing and prove their case; second, Defendants could then carry their burden by showing they would have made the same decision in any event; and, third, Defendants might show this in any number of ways.

In the "legal standard" portion of their Brief, Plaintiffs ascribe a position to the University that it has not taken: that, if the burden shifts, the University will try to prove it would have made the same decision by contriving some elaborate imaginary system that did not exist at

[12] Plaintiffs Brief offers some speculation about what Defendants may or may not be able to prove based upon existing records and so on. Plaintiffs' Brief at 13-14. Defendants take exception to those speculations, but such issues are not before the Court now and would be addressed as evidentiary issues if this case proceeds. Plaintiffs also mischaracterize the record, for example suggesting that the University advised class representative Patrick Hamacher that he was "highly qualified" for admission. Plaintiffs' Brief at 14. Defendants do not believe the record in this case to reflect any such thing.

the time the decisions were made. Plaintiffs then devote most of their energy to assailing this position. Along the way, Plaintiffs make sweeping statements to the effect that the cases do not allow for a "hypothetical approach" (Brief at 10) and that Defendants' proofs must focus on "what actually occurred" (Brief at 12). And then Plaintiffs conclude by declaring that "defendants will not be able to satisfy their burden by retroactively applying some different or later admissions standard, such as the one they have adopted only in 2003 in response to the Supreme Court's decision in this case." Brief at 14. Again, Plaintiffs are deeply confused and have grossly overreached. This is clear for two reasons.

First, Plaintiffs' broad declarations condemning "hypothetical" approaches and limiting Defendants to "what actually occurred" are facially inconsistent with *Mt. Healthy* itself. After all, *Mt. Healthy* and its progeny allow a defendant to show "that it would have reached the same decision" anyway, which necessarily invites a somewhat "hypothetical approach" that will not focus on "what actually occurred." If Plaintiffs' understanding of *Mt. Healthy* were correct then there would be no point in shifting the burden of proof to the defendant, because the defendant would be precluded from trying to carry it.

Second, Plaintiffs badly misread the cases they cite to this Court in support of their argument. Let's start with Plaintiffs' reliance on footnote 54 in *Bakke*, which they claim bars "hypothical" approaches. *See* Plaintiffs' Brief at 10. The text of Footnote 54, quoted here in full, shows that it simply does not mean what Plaintiffs claim it means:

> There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate in Part V, supra. Cf. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 284-287 (1977). *In Mt. Healthy, there was considerable doubt whether protected First Amendment activity had been the "but for" cause of Doyle's protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection – purposeful racial*

> *discrimination in the form of the special admissions program. Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result. See Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S., at 265-266. No one can say how -- or even if -- petitioner would have operated its admissions process if it had known that legitimate alternatives were available. Nor is there a record revealing that legitimate alternative grounds for the decision existed, as there was in *Mt. Healthy*. In sum, a remand would result in fictitious recasting of past conduct.

See Bakke, 438 U.S. at 320-21 n. 54 (emphasis supplied). In other words, in *Bakke* there was "no question" that the quota system in place there was *the cause* – in the words of the Court, the "sole reason" – for Bakke's rejection. Bakke had thus not only proved his own case, which required proof that the quota system was *a* substantial or motivating cause of his rejection; he had disproved the defendants' case, by showing that the quota system was *the* cause of his rejection. Plaintiffs here have neither proved their own case nor disproved the University's and *Bakke* is irrelevant to the discussion at issue.

Consider also Plaintiffs' curious reliance on *Blalock*. In that case, the Sixth Circuit explicitly acknowledged that the defendant there could carry their burden of proof by showing what they "would have" done "even if" the facts had been different:

> Since Blalock has demonstrated that religious discrimination was a motivating factor in his discharge, the burden of proving that even in the absence of discrimination Blalock would still have been discharged falls upon Metals Trades. That is, Metals Trades may avoid all liability by showing that even had Blalock maintained his initial religious views, his work performance was so intolerable to Metals Trades that he still would have been discharged.

Id. 775 F.2d at 713. Or consider *Johnson v. Board of Regents of University System of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001), which recognized that the university could carry its burden by proving that it "would have made the same

decision," and could do so by reference to "the actual plan used, minus (only) the prohibited race and gender factors" – in other words, by reference to a "hypothetical" plan that did not reflect what "actually occurred."[13]

Thus, in the "standing" and "burden of proof" sections of their Brief, Plaintiffs essentially ignore the very substantial obstacles they face in proceeding. And in the "legal standard" section of their Brief, Plaintiffs attempt to redefine Defendants' burden in so crabbed a way as to make it logically impossible to carry. As demonstrated above, however, as to each of these issues the law is simply not what Plaintiffs wish it to be.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court (1) direct Plaintiffs to "allege and show" facts sufficient to establish standing, and, if necessary, (2) declare the respective burdens of proof and legal standard as set forth in this Brief.

Respectfully submitted,

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[13] *See also Id.* at 1376, where *Johnson* quotes *Hopwood*, 78 F.3d at 957 for the proposition that Defendants can carry their burden by showing that Plaintiffs "would not have been admitted ... under a constitutional admissions system..."

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and **PATRICK HAMACHER,**

Case No. 97-75231

vs.

Hon. Patrick J. Duggan

LEE BOLLINGER, et al.,

Defendants,

and

EBONY PATTERSON, et al.,

Intervening Defendants.

_____/

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PROOF OF SERVICE

On March 23, 2005, Debby Bailey Miller caused to be served a copy of Defendants' Response to Plaintiffs' Brief Regarding (1) Standing, (2) Burden of Proof, and (3) Legal Standard and Proof of Service in the above-captioned matter on: Kirk O. Kolbo, Esq., Maslon Edelman Borman & Brand, LLP, 3300 Wells Fargo Center, 90 South Seventh Street,

Minneapolis, MN 55402 via first class mail. I also caused a copy of said Response to be served today on Kirk Kolbo via fax at: (612) 672-8397.

Debby Bailey Miller