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

JENNIFER GRATZ AND PATRICK HAMACHER,

for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, ET AL.,

Defendants,

and

EBONY PATTERSON, ET AL.,

Intervening Defendants.

Civil Action No. 97-75231
Hon. Patrick J. Duggan
Hon. Thomas A. Carlson

CLASS ACTION

PLAINTIFFS' COMBINED
(1) REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR CLASS CERTIFICATION AND PARTIAL SUMMARY JUDGMENT WITH RESPECT TO CERTAIN NOMINAL AND INCIDENTAL DAMAGES CLAIMS; AND
(2) MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR A STAY

INTRODUCTION

Plaintiffs filed separate motions seeking (1) partial summary judgment declaring unlawful and unconstitutional the admissions systems of defendants' College of Literature, Science & the Arts ("LSA") for years 1999-2003 and (2) partial summary judgment awarding certain nominal and incidental damages (refund of application fees); and (3) Rule 23 certification relating to compensatory damages. Defendants have filed a brief opposing the first of these motions and have mostly declined to address the merits of plaintiffs' second and third motions, instead seeking a stay of its consideration. For the convenience of the Court, plaintiffs combine in this single memorandum their reply in support of their motions and their opposition to defendants' motion for a stay.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THEIR CLAIM FOR A DECLARATORY JUDGMENT WITH RESPECT TO THE LSA ADMISSIONS SYSTEMS FOR 1999-2003

Defendants essentially offer two arguments for denying plaintiffs' motion for partial summary judgment seeking an amendment to the declaratory judgment that this Court granted on January 30, 2001. The first contention is that the motion is "wholly pointless." Defendants' Response Brief, filed January 19, 2005, at 6. The second is that the motion is premature. *See id.* at 6-11. Neither argument withstands even minimal scrutiny. As to the first, plaintiffs have not asked "this Court to simply repeat what the Supreme Court said." *Id.* at 6. Instead, what plaintiffs have asked is for this Court to order entry of a *judgment* declaring the 1999-2003 LSA admissions systems unlawful and unconstitutional, just as prayed for in the Complaint. The Supreme Court's opinion in this case definitively held defendants' LSA admissions systems for 1999-2003 to be unlawful and unconstitutional. But the Court did not itself enter a judgment in support of its opinion, instead directing this Court to conduct further proceedings consistent with

the Supreme Court's opinion. *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003). Defendants show that they understand this distinction when they believe it suits their purposes. Thus, they have argued in opposing plaintiffs' motion for an interim award of attorneys' fees and costs that the Supreme Court's opinion in this case "secured no enforceable judgment at all"; that it amounts to only a "'favorable statement of law.'" Defendants' Brief in Opposition to Plaintiffs' Motion for an Award of Attorneys' Fees and Costs Pursuant to 42 U.S.C. § 1988, filed September 8, 2004, at 4. Yet in their game-playing, defendants now take a different position, pretending that entry of judgment would be a "wholly pointless" redundancy in light of the Supreme Court's opinion.[1]

The entry of the requested declaratory judgment would be far from pointless for the reasons stated in plaintiffs' opening brief. This is a class action involving the claims not just of the named plaintiffs, but also of thousands of class members, for whose benefit it was brought. A judgment declaring the LSA admissions polices unlawful and unconstitutional for all the challenged years inures to the benefit of all class members (and promotes judicial economy) because it relieves them of the burden of having to separately seek such a judgment in a multiplicity of separate suits. *See* 2 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 5:11, at 436 (2002) ("An action for a declaratory judgment or injunctive relief in class action form may serve as the basis for ancillary damage claims or subsequent actions by class members.")[2] Having obtained that judgment on the unlawfulness and unconstitutionality of the LSA admission systems, plaintiffs and the class members can then proceed to the *next* inquiry,

[1] The contradiction in defendants' positions is a transparent effort to manufacture a Catch-22 scenario for plaintiffs. Defendants want to persuade the Court on the one hand that plaintiffs have obtained no judgment in this case (although they already have as to the 1995-1998 systems), so that they are not prevailing parties, and on the other hand, that entry of judgment would be a "wholly pointless" repetition of the Supreme Court's decision.

[2] Hence, defendants mischaracterize plaintiffs' motion as simply of means of making their victory "official." Defendants' Br. at 6 n.3.

their entitlement to damages. This process is consistent with this Court's bifurcation order and its previous order for a declaratory judgment with respect to the 1995-1998 admissions systems.[3]

Defendants do not challenge the jurisdiction of this Court to grant the requested declaratory judgment and they offer no reason why entry of judgment on plaintiffs' claim for a declaratory judgment would not be in furtherance of the Supreme Court's direction for further proceedings consistent with its opinion. They complain, however, that plaintiffs do not cite a "single case or Federal Rule of Civil Procedure" to justify their motion. Defendants' Br. at 5-6. The Rule on which plaintiffs rely in their clearly identified motion and memorandum for "summary judgment" is Federal Rule of Civil Procedure 56. *See* Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment on Liability at 2 ("Controlling Authorities"). First, plaintiffs have shown as required by the Rule that "there is no genuine issue as to any material fact" about the unlawfulness and unconstitutionality of the LSA's admissions systems for 1999-2003. Defendants do not contest this point, and they certainly could not plausibly do so in light of the Supreme Court's decision in this case. Second, plaintiffs have met the Rule 56 requirement that they are "entitled to judgment as a matter of law" on their request for a declaratory judgment, which is all that the present motion addresses. Plaintiffs are entitled to this judgment for the same reason that this Court properly entered a judgment in January 2001, declaring the 1995-1998 LSA admissions systems unlawful following its December 13, 2000, decision. *See* December 13, 2000, Opinion; *see* January 30, 2001, Order.

Defendants' next position—that plaintiffs' motion is premature—is as much at war with this Court's past order granting a declaratory judgment as it is with plaintiffs' current motion. At

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[3] Defendants seem to object less to amending the Court's earlier declaratory judgment to encompass the 1999-2003 admissions systems than they do about whether the judgment is characterized as "final." Defendants' Br. at 6, 9. The concern is not legitimate. The "finality" of a judgment declaring the 1999-2003 admissions unlawful and unconstitutional means only that there is nothing left to decide about the appropriateness of that judgment. A later judicial determination that one, some, or all of the class members are not entitled to damages or other remedial relief would not alter the finality of the judgment declaring the admissions system unlawful and unconstitutional.

the time of the earlier declaratory judgment, just as now, there had been no judicial determination that any plaintiff or class member would have been admitted under a lawful system. Thus, for defendants to be correct that entry of a declaratory judgment with respect to the 1999-2003 admissions systems is "premature," it must also be true that this Court's grant of declaratory judgment as to the 1995-1998 systems was equally premature and in error. Tellingly, defendants do not make that point or even muster an effort to square the prior granting of a declaratory judgment (1995-1998 admissions systems) with their opposition to entry of the same kind of judgment with respect to the 1999-2003 systems.[4]

Defendants' curious injection of *standing* as a reason to preclude entry of a declaratory judgment is thoroughly confused. First, the Supreme Court expressly held in this case that Hamacher had standing to challenge the admission systems for which plaintiffs now seek declaratory judgment. *See Gratz*, 539 U.S. at 262. Second, plaintiffs' allegations of damages in the Complaint are sufficient to give them standing to seek compensatory damages. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210 (1995). In the one Sixth Circuit case relied upon by Defendants, the plaintiffs "sought no forward-looking relief" and it "appeare[d] beyond debate" that absent the discriminatory criteria, the plaintiff employees would not have received the sought-after promotions. *Aiken v. Hackett*, 281 F.3d 516, 519 (6th Cir. 2002), *cert. denied*, 537 U.S. 817 (2002). Similarly, in *Anderson v. City of Boston*, 375 F.3d 71 (1st Cir. 2004), relied upon by defendants, the court had made determinations about which plaintiffs had received school assignments on the basis of race. The facts of those cases are a far cry from the present action, which seeks both prospective relief and damages on behalf of a certified class,

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[4] At no time during the briefing or argument of the summary judgment motions heard and decided by this Court in 2000 did the defendants argue or even suggest that plaintiffs' motion for a declaratory judgment should be denied as premature. Instead, they opposed the motion only on the asserted grounds that their admissions systems were lawful. It is only now that this argument has been vanquished that defendants seek a procedural escape from entry of the same declaratory judgment for the 1999-2003 admissions systems that this Court earlier entered for the 1995-1998 systems.

and for which defendants have not even yet attempted to prove, much less actually proven, that no plaintiffs[5] or class members are entitled to damages. Similarly, in the other cases cited by defendants, neither of them class actions, it was undisputed and judicially established that plaintiffs would not have received the benefit in the absence of the discriminatory barrier. *Texas v. Lesage*, 528 U.S. 18, 20 (1999); *Cotter v. Boston*, 323 F.3d 160, 166 (1st Cir. 2003), *cert. denied*, 540 U.S. 825 (2003). None of these cases, certainly neither *Texas v. LeSage* nor *Aiken v Hackett*, preclude entry of a declaratory judgment on behalf of a certified class where such relief has been sought. And *LeSage* expressly held that a "plaintiff who challenges an on-going race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered." *Texas v. LeSage*, 528 U.S. at 21.

Finally, defendants' argument that plaintiffs have not adequately pled entitlement to a judgment for themselves and the class in their favor is a frivolous one, which perhaps explains why defendants make it for the first time more than six years after the case was filed and four years after this Court entered a judgment declaring the 1995-1998 admission systems unlawful. *See* Defendants' Brief at 10 and n.7. The Complaint specifically alleges that plaintiffs' applications were "rejected" as a result of defendants' discriminatory procedures and practices. *See* Complaint at ¶ 25. It alleges in four separate places that plaintiffs are seeking damages. *See* Complaint at ¶¶ 1, 13, 25, pp. 8-9 ("Relief"). It specifically alleges that plaintiffs and the class members have also sustained damages because of defendants' unlawful activities. *See id.* at ¶

[5] Notwithstanding their gratuitous assertion "in passing," the record does not contain "substantial evidence casting doubt" about whether Gratz and Hamacher are entitled to damages, and, of course, defendants cite to no such evidence. *See* Defendants' Br. at 14 n.9.

13. For defendants to now contend that these allegations are not sufficient to give the plaintiffs and class members standing for their claims is absurd.[6]

II. THE COURT SHOULD GRANT PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND PARTIAL SUMMARY JUDGMENT WITH RESPECT TO CERTAIN NOMINAL AND INCIDENTAL DAMAGES CLAIMS.

A. The Motion for Class Certification Should be Decided Before Adjudication of Remaining Issues Related to the Plaintiffs' and Class Members' Entitlement to Compensatory Damages.

Defendants' opposition on procedural grounds to consideration at this time of plaintiffs' motion for class certification has at least two serious problems. First, defendants merely assume as a premise for their motion to stay one of the issues that the certification motion addresses and that a decision on certification will resolve. Defendants assert that what remains to be decided in the next stage are only "individualized" issues with respect to the two named plaintiffs. Of course, if defendants really believe this, then they should have no objection to a prompt consideration of the certification motion. But they are wrong for reasons made plain in plaintiffs' opening brief and which defendants do not acknowledge or rebut. Second, defendants are the ones who have things procedurally backwards by contending, contrary to well-established law, that the merits of the named plaintiffs' claims should be litigated before the propriety of class certification is considered and decided.

Defendants want the next stage of the litigation to focus only on what they label "liability" issues with respect to just the two named plaintiffs, Gratz and Hamacher. The trouble with this position is that regardless whether such a trial is labeled about "liability" or "damages," it will decide issues that are common to plaintiffs and class members alike. It is for just that reason that plaintiffs have asked the Court to modify its existing class certification so that these

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[6] Ironically, however, defendants' Answer does not allege that they would have made the same admission decision with respect to plaintiffs or class members even in the absence of the discriminatory admission systems, an issue on which they have the burden. *See Texas v. LeSage*, 528 U.S. 18, 20-21 (1999).

remaining common issues can be decided on a class-wide basis. As explained in plaintiffs' opening brief, issues common to the plaintiffs and class members to which the certification motion relates include those such as what burdens[7] and legal standards apply in deciding *whom* defendants are *liable* to for compensatory damages. *See* Plaintiffs' Memorandum in Support of Motion for Class Certification and Partial Summary Judgment with Respect to Certain Nominal and Incidental Damages Claims (hereinafter referred to as "Plaintiffs' Class Certification and Partial Summary Judgment Brief"), filed December 8, 2004. As also explained, the proposed certification would in addition address the common fact question of how many subclass members would be entitled to compensatory damages. *Id.* at 21. Defendants have made no argument that these issues are individualized and not common to the class. They have just ignored them, instead pretending that plaintiffs' certification motion is about determining the amount of damages to which plaintiffs and class members are entitled.[8]

The procedural defect in defendants' motion for a stay of the class certification decision until *after* the claims of the two named plaintiffs have been tried is that defendants are calling for the opposite of what Rule 23 and established practice contemplate. Not surprisingly, they do not cite to a single case in which a court deferred a motion for class certification until *after* disposition of the merits of the named plaintiffs' claims. Defendants' proposal conflicts with the explicit requirement of Rule 23 that the class determination be made "at an early practicable

[7] Defendants persist in arguing that plaintiffs and the class members will have the burden to prove they would have been admitted under a lawful admission system. *See, e.g.*, Defendants' Br. 14-15. As already noted, the explicit holding of the case relied upon by defendants is to the contrary. *See Texas v. LeSage*, 528 U.S. 18, 21 (1999) ("The government can avoid liability by proving that it would have made the same decision without the impermissible motive.")

[8] Defendants' argument for a stay—dependent as it is on their assumption that liability for damages can only be decided on the basis of case-by-case individualized determinations of who would have been admitted to the LSA under a lawful system—also fails completely to address plaintiffs' points and authorities on how many courts have used the class-action procedure to apply the *pro rata* approach to determining liability damages, which eschews such individualized inquiries. *See* Plaintiffs' Class Certification and Partial Summary Judgment Brief at 16-18.

time." Fed. R. Civ. P. 23(c)(1)(A).[9] The reason for the rule is clear. If the Court decides the merits of the named plaintiffs claims *before* addressing class certification, then class members have not been provided an effective or meaningful opportunity to receive notice and opt out of the class. Plaintiffs' motion contemplates notice to the class on the claims for compensatory damages, whether the claims are certified under Rule 23(b)(1)(B), 23(b)(2), or 23(b)(3). Accordingly, if Defendants' procedure is followed and the claims of Gratz and Hamacher are tried *before* consideration of the pending certification motion, then either the class members must be free to re-litigate the same common issues and claims decided in that trial, or they must be denied their due process rights, which a prior certification and notice are designed to protect.

It is important to note that no judicial efficiency would be achieved by defendants' reverse certification proposal. The opposite would be true. Regardless of the outcome of any proceeding limited to the claims of Gratz and Hamacher, the class members would still possess their own claims for which the certification is sought, but the certification decision would then be made late rather than early in the process. Common issues and claims tried in a prior proceeding with respect to Gratz and Hamacher *alone* would now need to be tried *again* as to the class members.

B. The Court Should Grant the Class Certification Motion

Apart from their misguided effort to avoid altogether the question of class certification, defendants offer few reasons for opposing plaintiffs' motion. They devote all of two paragraphs to simply asserting that plaintiffs have not met the Rule 23(a) requirements of (1) numerosity; (2) common questions of law or fact; (3) typicality; and (4) adequacy of representation. *See* Defendants' Br. at 12. Defendants do not even attempt to square their position with the fact that plaintiffs are seeking only to certify a subclass of a class that has already been decided by this

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[9] It also conflicts with the well-settled principle that the merits of plaintiffs' claim should be assumed to be true at the time of the class certification motion. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

Court to meet the requirements of Rule 23(a). In any event, it can be easily demonstrated that the class meets all four prerequisites.

Defendants misunderstand the numerosity requirement, implying incorrectly that the number of class members is defined by the number of students who would have been admitted under a lawful system. *See* Defendants' Brief at 12. Instead, the class consists of those individuals who have *claims* for damages.[10] There has never been any doubt that this requirement is met in this case, as the parties have stipulated and defendants have often argued that "many" more qualified students apply for admission than can be admitted. *See* Plaintiffs' Class Certification and Partial Summary Judgment Brief at 22 (citing to the record on numerosity).

Nor can there be any serious question about the existence of common questions of fact or law. Defendants confuse the inquiry by suggesting incorrectly that there is a "predominance" requirement for Rule 23(a). *See* Defendants' Brief at 12. Plaintiffs have already demonstrated the existence of common issues of fact and law, including questions about the appropriate burdens of proof and legal standards to be applied in deciding entitlement of the plaintiffs and class members to damages, and the common fact question concerning how many subclass members are entitled to compensatory damages. *See* Plaintiffs' Class Certification and Partial Summary Judgment Brief at 21. These easily satisfy the commonality requirement of Rule 23(a). Defendants turn a blind eye to these points, making no refutation of them and sticking only to their conclusory argument that common issues do not exist.

Typicality and adequacy of representation are shown by the fact that plaintiffs Gratz and Hamacher meet all the characteristics that comprise the class and proposed subclass definition.

[10] Accordingly, satisfying the numerosity prerequisite for the original certification did not require a showing that there were numerous class members who would have ultimately been admitted absent defendants' unlawful practices.

They undisputedly applied for and were rejected for admission to the LSA; were members of one of the races disfavored by the defendants; and were informed in the course of their rejection that they were otherwise "qualified" for admission. It is quite clear that the claims of Gratz and Hamacher meet the typicality requirement because they "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members, and . . . are based on the same legal theory." *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996). Defendants once again mischaracterize the Rule's requirement and the nature of the certification sought in this case by contending that if Gratz and Hamacher are not themselves ultimately entitled to compensatory damages, then they cannot represent a class. This is no more true now than it was at the time the case was first certified and their claims found to be typical. Whether or not the plaintiffs or any particular class member ultimately succeed on a claim for damages does not alter the fact that the claims of Gratz and Hamacher present issues that are common and typical of the class.[11]

Defendants' only remaining argument in opposing certification of a compensatory damages class is that "highly individualized liability issues plainly predominate over common or typical ones." Defendants' Br. at 12. Although defendants do not acknowledge so, their argument bears only on a certification under 23(b)(3). Defendants have offered no argument opposing certification under 23(b)(1)(B) or 23(b)(2), which do not contain any predominance requirement. In any event, plaintiffs' proposed certification under 23(b)(3) satisfies the predominance condition for several reasons.

[11] Accepting defendants' argument that the claims of Gratz and Hamacher are not typical would mean that class treatment is never appropriate when there are more claimants than those who will ultimately be entitled to damages. This flies in the face of the many class certifications of such cases in employment and other contexts, *see* Plaintiffs' Class Certification and Partial Summary Judgment Brief at 16-17 (citing cases employing the class-wide pro rata method where there are many claimants for few positions). It would also mean the effective repeal of Rule 23(b)(1)(B), which is addressed precisely to this scenario and is one of alternatives under which plaintiffs have sought class certification.

Defendants never come to grips with a number of points made and supported with authorities in plaintiffs' opening brief. The first of these is that the common question of the lawfulness of the LSA admissions system is the most important and predominant issue in the lawsuit, a point not challenged by defendants, and the Court's existing certification leaves no doubt that this is a common, not individualized issue. Second, predominance is not defeated merely because there are differences and individualized questions about the class members' entitlement to damages. *See* Plaintiffs' Class Certification and Partial Summary Judgment Brief at 25-26 (citing, *e.g.*, *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988)). This is particularly true when, as here, plaintiffs are not seeking a certification that will determine either aggregate or individual damages on a class-wide basis.[12] Third, defendants never respond to the point that a Court can assure satisfaction of the predominance requirement by certifying class treatment with respect to certain issues for which predominance is met. *See* Fed. R. Civ. P. 23(c)(4)(A). Hence, there can be no serious question (and defendants raise none) that a certification of a class with respect to the common issues of burden of proof, legal standards for determining who is entitled to damages, and the number of class member entitled to damages, would easily satisfy the predominance requirement of Rule 23(b)(3); the answers to these questions do not depend on the individual circumstances of each class member.[13]

Finally, defendants also duck the question of whether a class-wide determination under 23(b)(3) would be superior to many separate trials of the same common issues. *See* Fed. R. Civ.

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[12] Defendants complain that plaintiffs have not gone into detail about the types of damages available to class members. They would be entitled, of course, to pursue the same types of damages, both intangible and economic, available to all plaintiffs whose constitutional and other rights have been violated. For the purposes of this motion for class certification, the relevant point is that plaintiffs are not asking the Court to decide or award on a class-wide basis damages arising from the defendants' refusal to grant admission to any plaintiffs or class members. It is a non sequitur, therefore, for defendants to argue that individualized questions about damages preclude class certification.

[13] Using the *pro rata* method for determining which class members are entitled to compensatory damages would also avoid the need to engage in individualized determinations about which class members are entitled to damages. Hence, under such an approach used by many other courts, individualized issues would not be present, much less predominant, in the class-wide adjudication.

23(b)(3). They never explain why it would be better to require the parties and the Court to litigate separately in successive class-member lawsuits the common questions of burden, legal standards, and the number of class members entitled to compensatory damages. They never undertake to rebut plaintiffs' argument that the pro rata approach used by other courts as part of class-wide determinations, would be a far more effective and efficient means of resolving issues that would otherwise require many successive individualized determinations. These and the reasons discussed above and in plaintiffs' opening memorandum make a class-wide approach to these remaining common issues far superior to separately filed individual suits.

C. Plaintiffs and the Class Members Are Entitled to Partial Summary Judgment on their Claim for Nominal and Incidental (Application Fee) Damages.

The only specific remedial relief which plaintiffs have sought on a class-wide basis is for an award of nominal damages and a refund of the application fees paid by each class member. Plaintiffs are entitled to these items of relief regardless whether the defendants are successful in later proving that they would have made the same decision even absent their unlawful conduct. The relief is sought under the existing Rule 23(b)(2) certification because these damages are clearly only incidental to the predominant purpose for which the case was certified—a determination of the lawfulness and constitutionality of the defendants' admissions systems. Now that the LSA admissions systems for all years at issue in this case have been finally adjudicated to be unlawful and unconstitutional, it is appropriate to award this relief, which flows directly from the judicially-established violations of the constitutional rights of the plaintiffs and the class members. Defendants seek, however to defer the motion until the Court has ruled on defendants' argument—asserted in the context of this and other motions filed by plaintiffs—that plaintiffs have not even established liability yet, despite this Court's judgment with respect to the 1995-1998 admissions systems; the Supreme Court's decision invalidating the 1999-2003

admission systems; and the defendants' acknowledged "substantial" changes to its admission system made as a result of the Court's ruling.

As a procedural and practical matter, defendants' request to stay the consideration of plaintiffs' motion makes no sense because it would likely produce piecemeal litigation both in this court and potentially in the court of appeals. There is no reason to have possibly several briefing submissions and multiple hearings on a simple claim for relief, just so that defendants can be spared for now the work required to respond to plaintiffs' motion. Defendants' proposed staggered approach is particularly unwarranted given that plaintiffs' entitlement to nominal damages and refund of application fees can be decided as a matter of law on the basis of the existing record. The Court is of course free in its discretion to decide what arguments need to be addressed in ultimately deciding the motion. But it should not be for defendants to assume the role of gatekeeper for the arguments that the Court will have before it to consider in making its decision.

Plaintiffs have explained elsewhere in other briefing why defendants are wrong in contending that plaintiffs have not yet established liability in their favor. *See* Plaintiffs' Reply Brief in Support of Their Motion for an Interim Award of Attorneys' Fees and Costs Pursuant to 42 U.S.C. § 1988, filed October 1, 2004, at 3-4; Plaintiffs' Class Certification and Partial Summary Judgment Brief, at 10-12. These points will only be summarized here, rather than repeated in detail. Defendants' position flows from its unwarranted interpretation and extension of the Supreme Court's decision in *Texas v. LeSage*, 528 U.S. 18 (1999). First, the Court's per curiam decision did not address or hold anything with respect to nominal damages. Second, it certainly did not purport to overrule the holding in *Carey v. Piphus*, 435 U.S. 247 (1978), that a plaintiff whose constitutional rights have been violated is entitled to an award of nominal damages even if the defendant would have taken the same action but for the constitutional

violation. *See also, e.g., Hopwood v. Texas*, 236 F.3d 256, 277-78 and n.80 (5th Cir. 2000) (affirming district court's award of nominal damages to plaintiffs who would have been denied admission under a race-neutral admissions system). Third, the Court's decision was expressly confined to a claim under 42 U.S.C. § 1983, whereas plaintiffs' claims here arise under Title VI, 42 U.S.C. § 2000d. Defendants are simply wrong in arguing that the parties have treated the standards under the statutes to be the same. What plaintiffs have contended and what the Supreme Court held in this case is that the same showing of intentional discrimination establishes substantive violations of the Equal Protection Clause of the Fourteenth Amendment, Title VI, and 42 U.S.C. § 1981. The parties have always recognized that a different, more stringent standard applies to finding violations of Section 1983, a distinction relied upon by this Court when it granted defendants' motion for summary judgment on qualified immunity grounds. Moreover, as explained by Plaintiffs in their opening brief, Section 1983 is designed as a tort remedy, whereas Title VI, under which plaintiffs' claim for nominal and incidental damages is made, is analogous to a contract remedy, where nominal damages are readily available. *See* Plaintiffs' Class Certification and Partial Summary Judgment Brief, at 12. Defendants have not disputed or refuted this point.

Defendants also completely ignore and thus fail to rebut that portion of plaintiffs' argument which seeks the application fee refund as incidental to this Court's *equitable* authority arising from the equitable relief in the nature of declaratory judgment that it has already granted. To this extent, then, the motion does not depend on a determination of liability for "compensatory damages," even if defendants' stretched interpretation of *Texas v. LeSage* were accepted. Nor for the same reason does Plaintiffs' entitlement to this equitable-type of relief turn on whether, after promising non-discriminatory treatment and taking the class members' money, defendants would have denied admission for other reasons.

Plaintiffs have cited to a half-dozen cases decided after *Texas v. LeSage*, in which courts awarded nominal or incidental damages even though it was determined that the defendant would have made the "same decision" absent the unlawful conduct. Plaintiffs' Class Certification and Partial Summary Judgment Brief, at 10-11 and n.5. A class-wide award of this same type nominal-incidental relief is appropriate here. *See also Jordan v. Dellway Villa of Tennessee, Ltd.*, 661 F.2d 588, 594 (6th Cir. 1981).

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request the Court to (1) grant their motion for partial summary judgment amending the Court's January 30, 2001, Order by declaring the 1999-2003 admissions systems unlawful and unconstitutional; (2) grant their motion for partial summary judgment awarding certain nominal and incidental damages; (3) grant their motion for class certification with respect to compensatory damages; and (4) denying defendants' motion for a stay of briefing and hearing.

Dated: January 28, 2005

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RE: *Jennifer Gratz and Patrick Hamacher v. Lee Bollinger, et al.*
Court File No.: 97-75231

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2005, I electronically filed

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with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Mail the papers to the following non-ECF participants:

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