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' REPLY BRIEF REGARDING (1) BURDEN OF PROOF; (2) LEGAL STANDARD; AND (3) STANDING

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I. Burden of Proof and Standing.

Defendants' positions on standing and burden are patently incoherent. They insist that to demonstrate *just* Article III standing, plaintiffs must allege and *prove* that they would have been admitted under a constitutional admissions system. Yet once standing is established, defendants concede that plaintiffs need only demonstrate that race was a "substantial or motivating" factor in the denial of their admission before the burden shifts to defendants to prove that they would have made the same decision to deny admission even absent the illegal consideration of race. Of course this means that the burden of proof never actually shifts to defendants because plaintiffs necessarily will have already shown—just to demonstrate standing—that defendants would not have made the "same decision," (*i.e.* that plaintiffs would have been admitted). This is a nicely self-serving and convenient procedure for defendants, but it does not come remotely close to accurately stating the law.

Defendants chastise plaintiffs for turning first to the question of burden of proof, then themselves devote the first two pages of their argument on "standing" to the Supreme Court's decision in *Texas v. Lesage*, 528 U.S. 18 (1999), which explicitly addressed burden of proof on what even defendants refer to as a "foundational *liability* issue": whether defendants would have made the "same decision" in the absence of the illegal consideration. Defs.' Br. 6 (emphasis added). When defendants get around to discussing burden of proof, they never take issue with the clear holding of *Lesage*: that the analysis adopted in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), applies to such cases, so that "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." *Lesage*, 528 U.S. at 20-21.[1]

Having conceded this fundamental point, defendants seek refuge in a frivolous argument that plaintiffs have not yet demonstrated that race was a "substantial or motivating" factor in the decision to reject their applications. There is undisputed evidence in the record that the defendants for all years at issue systematically treated applicants differently on the basis of race. There was a written, official policy to offer admission to all applicants belonging to one of the designated "underrepresented" races or ethnicities who met minimum qualifications for admission.[2] In contrast, there was no such policy for applicants from the disfavored races and ethnicities, who competed for admission on the basis of the limited seats available. Accordingly, from the very moment that defendants determined that Jennifer Gratz, Patrick Hamacher, and other class members were qualified for admission,[3] race became for them a "substantial or motivating" factor in the admissions-making process; had they only been members of one of the preferred races, they would have, as a matter of policy and practice, been offered admission. In addition, the University's consideration of race meant that for class members who applied from 1995-1997, separate written guideline "grids" were used in making admissions decisions; for class members applying between 1995-1998, the University employed racially segregated wait-

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[1] As plaintiffs' have set forth elsewhere, *Lesage* addressed Section 1983 claims only and neither considered nor held anything about nominal damages awardable under *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

[2] This policy is expressed in several places, including a memorandum written in 1995 by the director of admissions, *see* Vol. I, Ex. S to Plaintiffs' Motion in Support of Summary Judgment, filed April 1999; and in the written guidelines for admission, *see Gratz v. Bollinger*, 539 U.S. 244, 256 (2003). The University stipulated that the policy achieved its intended effect. *Id.* at 253-54.

[3] As noted in plaintiffs' opening brief, it is undisputed that both Gratz and Hamacher received letters from the University informing them that they were qualified for admission. *See* Pltfs.' Br. 13-14. Moreover, the subclass that plaintiffs have separately moved to certify is limited to those class members who received such letters identifying them as qualified for admission. *Id.* at 14 n.8. Hence, in the cases of Gratz, Hamacher, and the proposed subclass members, there will be no occasion for defendants to argue that race was not a substantial or motivating factor in the decision to deny them admission.

lists, and it "protected seats" which could be filled *only* by members of the preferred minority groups, and *not* by class members who otherwise were qualified for admission; and for class members applying in years 1998 to 2003, the University automatically and mechanically awarded 20 points for race to members of the favored racial groups.

Hence, the burden shifts to defendants in this case for the same reason that it did in *Hopwood v. Texas*, 78 F.3d 932, 956 (5th Cir. 1996), and *Johnson v. Board of Regents of the University System of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001). Defendants' argument that in *Johnson* the plaintiffs actually carried the burden of proving they would have been admitted is an appallingly disingenuous and misleading account of what happened in that case. The admissions system under consideration in *Johnson* involved a three-part process, in which applicants could receive points in the second part for being a member of a favored race or gender. During the second part of the process, some students would be rejected, some admitted, and others went on to a third stage for discretionary admissions determinations. What the court held in *Johnson* was that of the three plaintiffs, all of whom had been rejected during the second part of the process, two would have gone on to the third part for *further review* if they had been awarded the points for race and gender. The third plaintiff would have been admitted after the second part of the process, *if* she had been awarded the race/gender bonus points. *Id.* at 1365-66. Far from what defendants suggest, then, none of these plaintiffs proved or were required to prove, that they would have been admitted under a "constitutional" system that still considered race, or that the illegal system was a "substantial factor" in their denial. Rather, they met their *Mt. Healthy* burden by showing only that they would not have been rejected at the second stage had they been treated like those who had been given preferential treatment.

Applying the *Johnson* mode of analysis to this case means that the *Mt. Healthy* burden shifts to defendants once it is determined Gratz and Hamacher and any other class member would have had some decreased likelihood of rejection had they been given the favorable treatment awarded to the preferred minority groups. From the factors discussed above, it is clear that every class member whom the defendants deemed at least "qualified" for admission, which includes Gratz and Hamacher and plaintiffs' proposed subsclass members, would have been subject to much different and more favorable admission standards had their applications been considered under the policy and practice applicable to the preferred minority groups—which was *to offer admission*, rather than postponing or denying admission. This policy and practice alone—without need to even consider further the multi-layered system of other rigid racial preferences—easily gets Gratz, Hamacher and the proposed subclass members past their initial threshold under the first part of the *Mt. Healthy* test.

Defendants try to shirk their burden under *Mt. Healthy* by requiring plaintiffs to carry it on the preliminary question of standing. They describe *Texas v. Lesage* as "dictat[ing]" that "these Plaintiffs can establish [Article III] 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." Defs.' Br. 8. Of course for that statement to have any credibility, defendants must explain away what the Supreme Court actually said and held in *Lesage*: "The *government* can avoid liability *by proving* that it would have made the same decision without the impermissible [racial] motive. . . . [T]he *government's conclusive demonstration* that it would have made the same decision absent the alleged discrimination precludes any finding of liability." *Lesage*, 528 U.S. at 21 (emphasis added). Defendants

instead chose to simply ignore this holding. They certainly make no direct effort to square it with their contentions on standing.

Defendants set up and knock down a straw-man argument based on a distinction between standing for injunctive and declaratory relief and standing for damages. See Defs.' Br. 8-10. But plaintiffs are not arguing that they have standing to seek compensatory damages or other remedial relief on the basis of their undisputed standing to challenge ongoing constitutional violations. Plaintiffs and the class members have standing to seek damages or other remedial relief specific to them because they have alleged past injury in fact—that that they were treated unequally because of defendants' unlawful, unconstitutional conduct. This is the same basis for standing that Allan Bakke had in his case, and defendants' argument to the contrary is transparently fallacious. They characterize Bakke's standing as based on a challenge to an "ongoing constitutional violation," Defs.' Br. 9, when in fact the authority they point to in *Bakke* demonstrates that Bakke was seeking relief for past injury done to him: He sought "injunctive, and declaratory relief *compelling his admission* to the Medical School." *Regents of the University of California v. Bakke*, 438 U.S. 265, 278 (1978) (emphasis added). This remedy for past injury to Bakke (Davis' rejection of his applications for admission in 1973 and 1974) did not depend on whether at the time Bakke filed his suit, or any time thereafter, Davis operated an illegal admission system; Bakke would have been entitled to the same remedy for past injury that he obtained even if Davis had adopted a lawful admissions system the year after Bakke's rejection. *See also Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1265-68 (11th Cir. 2001) (plaintiffs who had been awarded damages for denial of admission lacked standing to obtain an injunction against the UGA's ongoing use of race in admissions). For the same reasons, plaintiffs and the class members in this case likewise have standing to seek

relief, including compensatory damages, for past injury done them, even if defendants no longer operate an illegal admissions program.

Defendants' erroneous reading of *Bakke* on the issue of standing is also evident in the way that the Court decided *Lesage*. It is clear that the Court in *Lesage*, when it explicitly held that the defendant had the burden of defeating liability with the "same decision" defense, was considering *only* the plaintiff's claim for redress of a past injury to him. The Court did not have before it a challenge to the ongoing admissions policy of the defendants. *See Lesage*, 528 U.S. at 22 ("It . . . appears, although we do not decide, that Lesage has abandoned any claim that the school is presently administering a discriminatory admissions system."). If defendants' strange view of standing requirements were correct, then before even reaching the merits, Lesage would have had the burden of proving that he would have been admitted under a constitutional system. Of course, the Court held just the opposite—clearly and expressly placing the burden on the defendant.

Ultimately, defendants' hopes for shifting their burden under *Mt. Healthy* to plaintiffs rests on their misreading of *Aiken v. Hackett*, 281 F.3d 516 (6th Cir. 2002). They ignore what *Aiken* actually *held*, which is that conclusive, *i.e.* "beyond debate," evidence established that the plaintiffs in that case would not have received the promotions they sought even if race had not been a factor in the promotion considerations. *Id.* at 519. This is the same result the Supreme Court reached in *Lesage*, and for defendants to obtain it here there would need to be conclusive evidence that defendants would have made the "same decision" to deny admission to the plaintiffs and the class members. *Aiken* of course does not have the authority to modify the Supreme Court's decision in *Texas v. Lesage*, which is what defendants in effect argue for when they contend that plaintiffs must prove but-for causation just to establish Article III standing. What defendants' propose is an absurd, useless, and unauthorized exercise—that plaintiffs must

first prove that there *is* but-for causation as part of standing, before the burden shifts under *Mt. Healthy* to defendants to prove that there *is not* but-for causation. Neither *Lesage* nor *Aiken* contemplates this illogical, untenable approach.

II. Legal Standard

Although this Court asked for briefing on the question of what standard applies to determining whether the burden has been carried on but-for causation, defendants devoted four pages of their brief to this issue without taking a direct position on what that standard is.[4] Instead, they skirted around the question by challenging some of plaintiffs' points and authorities and by vaguely asserting that, plaintiffs' authorities to the contrary, defendants *are too* entitled to employ some undefined "hypothetical" approach to deciding but-for causation. Interestingly, in their discussion of legal standard, defendants expressly deny that they take the position attributed to them by plaintiffs—that defendants seek to determine but-for causation by determining what would have happened to applicants under a system that passes muster under *Grutter v. Bollinger*. Yet despite these protestations to the contrary, defendants have made clear elsewhere in their brief (and in briefs previously filed) that their intention is to have but-for causation determined with reference to admissions standards existing under a "constitutionally narrowly tailored" use of race consistent with *Grutter*. *See* Defs.' Br. 7, 16. This is precisely the kind of hypothetical approach that has been authoritatively rejected, including by the Sixth Circuit.

Tellingly, defendants have nothing to say about the Sixth Circuit's decision in *Jordan v. Dellway Villa of Tennessee*, 661 F.2d 588 (6th Cir. 1981), which expressly foreclosed the notion that a defendant's liability for damages is measured by what would have happened had all the members of a class been treated in a lawful manner. *Id.* at 593-94 n.9, 595. They suggest that

[4] In fact, although the Court asked for briefing on this question, defendants have taken it upon themselves to decide that "it is neither necessary nor appropriate for the Court to address the specifics of how Defendants would meet [their] burden." Defs.' Br. 16.

the Sixth Circuit's decision in *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985), supports their position, but it does not. Nothing in *Blalock* authorizes a defendant to hypothesize how a new employment policy—not in effect at the time of the discrimination—would have resulted in the same employment decision as the one made under the illegal policy. Instead, it permits a defendant to prove that non-racial factors—those considered at the time of the original decision—would have resulted in the same decision absent the discrimination. *Blalock* quoted, paraphrased, and endorsed the language employed by Justice Powell in *Bakke* which prohibits hypothesizing about "what might have happened if [the University] had been operating the type of program described as legitimate in Part V" of *Bakke*, or for that matter, in *Grutter v. Bollinger*.[5] *Blalock*, 775 F.2d at 712 n.12.

The burden imposed on defendants is indeed a difficult one for it to carry, as courts have recognized that it should be for a proven, intentional violator of civil rights laws. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 274-79 (1989) (O'Connor, J., concurring). But it is not a "logically impossible one to carry." Defs.' Br. 19. In accord with the authorities that plaintiffs have cited, defendants may defeat plaintiffs' claims by proving that non-racial factors actually considered at the time of plaintiffs' and class members' applications would have resulted in the same decision to reject their applications under the admissions policies then in effect.

CONCLUSION

For all the foregoing reasons, plaintiffs respectfully request the Court to determine (1) that plaintiffs have standing to assert their damages claims; (2) that the burden has shifted to defendants under *Mt. Healthy*; (3) that this requires defendants to prove that plaintiffs and class

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[5] Defendants protest that in *Bakke* there was no question about whether the reason for Allan Bakke' rejection was due to race. But no court had determined how Bakke's application would have been acted upon if race had been used in the manner proposed by Justice Powell, who himself made clear that "[n]o one can say how—or even if—Davis would have operated its admissions process if it had known that legitimate alternatives were available." *Bakke*, 438 U.S. at 320-21 n.54.

members would have been denied admission, even absent the illegal consideration of race, in order to avoid those damages directly caused by defendants' denials of admission.

Dated: April 6, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2005, I electronically filed

PLAINTIFFS' REPLY BRIEF REGARDING (1) BURDEN OF PROOF; (2) LEGAL STANDARD; AND (3) STANDING

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