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JENNIFER L. JOHNSON, ET. AL. V. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA 106 F. Supp. 2D 1362 (2000)

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FACTS

Jennifer Johnson, Aimee Bogrow, and Molly Ann Beckenhauer (Plaintiffs) are white females who applied for admission to the University of Georgia (UGA).[1] Plaintiffs alleged that they were denied admission based on their race and gender,[2] and further contended that UGA's admission policy violates 42 U.S.C. § 2000d (Title VI) and 20 U.S.C. § 1681 (Title IX) because the policy favored some applicants over others based on race and sex.[3]

UGA had a three-tiered admissions process in which applicants were evaluated based on their Academic Index (AI), Total Student Index (TSI), and Edge Reading (ER).[4] In the first tier, UGA used an applicant's high school grade point average (GPA) and standardized test scores [ACT or SAT] to calculate the AI.[5] In 1999, when the plaintiffs were denied admission, applicants with an AI of at least 2.86 (or 2.81 from a "most difficult" high school curriculum) and a "specified minimum SAT score" were automatically admitted.

In the second tier, applicants who had not been automatically admitted, but whose AI was above 2.40, were re-ranked using their TSI.[6] To calculate an applicant's TSI, UGA added "points" or "plus factors" to the applicant's AI for certain characteristics, including gender and race.[7] Non-white applicants received 0.5 TSI points and male applicants received 0.25 TSI points.[8] Based on this new score, UGA automatically admitted those with TSIs above 4.92 and denied admission to those with TSIs below 4.66.[9] In the third tier, UGA analyzed applicants with TSIs between 4.66 and 4.92 under the ER process.[10] In this process, readers scrutinized the applications of applicants who were "at the 'edge' of the admissions pool," to find "qualities that might not have been apparent at the AI and TSI stages" of the admissions process.[11]

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1. Johnson v. University of Georgia, 106 F. Supp. 2d 1362 (S.D. Ga. 2000).
2. *Johnson*, 106 F. Supp. 2d at 1367.
3. 106 F. Supp. 2d at 1366 (using the term "gender"instead of "sex" in Title IX. However, this case note uses the term "sex.")
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1367.
9. *Id.*
10. *Id.*
11. *Id.* (citing Tracy v. Bd. of Regents, 59 F. Supp. 2d 1314, 1317 (S.D.Ga. 1999)).

Plaintiff Johnson was assigned a TSI of 4.10 and denied admission.[12] If she were a non-white male, her TSI would have been 4.85[13] and she would have had her application analyzed under the ER process and might have been offered admission. Plaintiff Beckenhauer received a TSI of 4.06 and would have been assigned a TSI of 4.81,[14] were she a non-white male. Like Johnson, Beckenhauer's application would have been subjected to ER analysis if she had been awarded additional points for race and gender.[15] Plaintiff Bogrow received a TSI of 4.52 and would have been admitted had she received 0.75 points for being a non-white male.[16]

Plaintiffs each brought a claim against UGA under 42 U.S.C. § 2000d, which prohibits racial discrimination, and 20 U.S.C. § 1681, which prohibits sex discrimination.[17] The claims were consolidated by the United States District Court for the Southern District of Georgia, Savannah Division.[18] Plaintiffs, defendant, and defendant-intervenors all moved for summary judgment.[19]

HOLDING

The United States District Court for the Southern District of Georgia held that UGA's interest in "diversity" was not compelling.[20] Its policy of assigning TSI points for race and gender violated 42 U.S.C. § 2000d and 20 U.S.C. § 1681.[21] The court denied the Defendant's motion for summary judgment and granted Plaintiffs' motion for summary judgment, in part.[22]

ANALYSIS

The court began by analyzing the appropriate standard of review for Plaintiffs' Title VI racial discrimination claim. Section 601 of Title VI provides, "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of,

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12. 106 F. Supp. 2d. at 1367.
13. 4.10 (TSI) + 0.50 (non-white "plus factor") + 0.25 (male "plus factor") = 4.85.
14. 4.06 (TSI) + 0.50 (non-white "plus factor") + 0.25 (male "plus factor") = 4.81.
15. *Johnson*, 106 F. Supp. 2d at 1367.
16. *Id.* (4.52 + 0.50 (non-white "plus factor") + 0.25 (male "plus factor") = 5.27).
17. *Id.*
18. 106 F. Supp. 2d 1362, 1365 n.1.
19. *Id.* at 1365.
20. *Id.* at 1375.
21. *Id.*
22. *Id.* at 1380 (denying plaintiffs' motion for summary judgment, in part, on the ground that the plaintiffs were not entitled to recover damages for infliction of emotional distress).

or be subjected to discrimination under any program or activity receiving Federal financial assistance."[23]

The court determined that claims arising under Title VI should be analyzed exactly the same as claims arising under the Equal Protection Clause of the Fourteenth Amendment.[24] First, Plaintiffs had to establish that UGA acted with discriminatory intent.[25] Racial discrimination claims under the Equal Protection Clause are evaluated under a strict scrutiny standard, so the same standard must be applied to Title VI racial discrimination.[26] Under strict scrutiny, UGA should have established that it had a compelling government interest which justified its race-conscious admissions policy.[27] Furthermore, UGA had to establish that its means were narrowly tailored to further the compelling interest.[28] The court applied strict scrutiny by stating that, "[t]he threshold issue is whether UGA is justified in using any kind of racial preference"[29] and "the manner in which the plan considers race goes only to the issue of whether the plan is 'narrowly tailored.'"[30]

After determining the appropriate standard of review for the racial discrimination claim, the court discussed what should be the appropriate standard for the Title IX gender discrimination claim.[31] The language of Title IX provides, "no person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[32] The court explained that the language used in Titles IX and Title VI is identical, except that the word "sex" in Title IX replaces the phrase "race, color, or national origin" in Title VI.[33] The court noted that the drafters of Title IX patterned the statute after Title VI of the Civil Rights Act of 1964[34]

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23. 42 U.S.C. § 2000d. The parties do not dispute that this statutory section applies to UGA's admissions process. UGA receives federal funds and considers applicants' race during the admissions process.

24. *Johnson*, 106 F. Supp. 2d. at 1366; *see* Sandoval v. Hagan, 197 F.3d 484, 501 (11th Cir. 1999); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1405-06 n.11 (11th Cir. 1983); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Brennan, White, Marshall, and Blackmun, JJ, concurring); *see also* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 610-11 (1983) (noting that the view that Title VI claims should be analyzed identically to Fourteenth Amendment claims held the majority in *Bakke*).

25. *Sandoval*, 197 F.3d. at 501.

26. *Johnson*, 106 F. Supp. 2d at 1366.

27. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (holding that the use of race as a classification must serve a compelling government interest narrowly tailored to further that interest).

28. See Adarand, 515 U.S. at 235.

29. 106 F. Supp. 2d at 1369.

30. *Id.*

31. *Id.* at 1367.

32. 20 U.S.C. § 1681.

33. 106 F. Supp. 2d at 1366.

34. *Id.*

and "assumed that it would be interpreted and applied as Title VI had been."[35] The court stated, "it is settled that analysis of the two statutes is substantially the same."[36] Therefore, the standard of analysis for the Title IX claim should also be strict scrutiny.[37]

But the court acknowledged that a different standard would be applied to gender discrimination claims under the Fourteenth Amendment.[38] Gender discrimination claims are analyzed under an intermediate scrutiny standard.[39] Under that standard, a gender-based classification is valid if it furthers an "important" government interest, and the classification is only "substantially related" to this interest.[40] Despite the lower standard applied to gender discrimination claims, the court determined that the higher strict scrutiny standard would apply to gender discrimination claims under Title IX.[41] Because identical language was selected in Title IX and Title VI, they should be interpreted to require the same level of review.[42] Therefore, the court determined that UGA's interest in promoting diversity in higher education must also be "compelling."[43]

UGA relied heavily on the plurality opinion authored by Justice Powell in Regents of the University of California v. Bakke[44] to support its position that diversity in university admissions policy constituted a compelling state interest.[45] In Bakke, a white male applicant twice denied admission to the medical school of the University of California at Davis sued the institution because of its dual-track admissions program that ensured the admission of certain minority students, including those with lower test scores and grades than Bakke.[46] The high court decided the set aside program violated the Fourteenth Amendment, but also decided that race was a permissible factor in admissions decisions.[47]

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35. *Id.* at 1367 (citing Cannon v. University of Chicago, 441 U.S. 677, 694-96 (1979)).

36. *Id.* (quoting Franklin v. Gwinnett County Pub. Schs., 911 F.2d 617, 619 (11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992)).

37. *Id.*

38. *Id.* (citing Jeldness v. Pearce, 30 F.3d 1220, 1247 n .4 (9th Cir. 1994)) (noting that a gender-based classification is upheld if the government can show that it is substantially related to an important governmental interest).

39. Jeldness v. Pearce, 30 F.3d at 1227.

40. *Jeldness*, 30 F.3d at 1227 n.4.

41. *Johnson*, 106 F. Supp. 2d at 1367 (citing Klinger v. Department of Corrections, 107 F.3d 609, 614 (8th Cir. 1997)).

42. 106 F. Supp. 2d at 1367.

43. *Id.*

44. Regents of the University of California v. Bakke, 438 U.S. 265, 269-71 (1978).

45. 106 F. Supp. 2d at 1367.

46. *Bakke*, 438 U.S. at 269.

47. 438 U.S. at 320.

Justice Powell wrote that "the interest of diversity is compelling in the context of a university's admissions program," then analyzed whether a race-conscious university admissions process was a permissible means of obtaining that goal.[48] Powell indicated that "'a properly devised admissions program involving the competitive consideration of race and ethnic origin' could pass constitutional muster."[49]

UGA asserted that an interest in promoting diversity was "compelling," and contended that Justice Powell's opinion in Bakke was binding on the district court. UGA also cited Marks v. United States[50] in support of its claim that Powell's opinion was a binding precedent of the Court.[51]

The district court found that UGA mischaracterized the Powell opinion.[52] Powell stated that diversity that furthers a compelling state interest considers a wide variety of characteristics.[53] Racial and ethnic origin was just one of many important characteristics which should be considered.[54] Therefore, a university admissions process may favorably consider a candidate's racial and ethnic background, but background alone could not be dispositive of the decision to offer or deny admission.[55]

The court found that UGA not only misintrepreted Powell's opinion in Bakke, UGA's reliance on the opinion was misguided.[56] First, no other justice joined that part of Powell's opinion.[57] Second, UGA's misconstrued Marks.[58] Five Justices held that the admissions policy of the University of California at Davis was invalid,[59] and the "narrowest ground for this decision was the Stevens group's statutory, Title VI reasoning, rather than Powell's constitutional holding."[60] Third, the Powell opinion is mere dicta because Powell had not addressed the facts at issue in Bakke.[61] Powell's comments were addressed to the validity of a "Harvard-style" admissions system, which uses "plus factors" for various attributes, such as race, as a basis to consider

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48. *Id.* at 314.

49. *Johnson*, 106 F. Supp. 2d at 1368 (citing *Bakke*, 438 U.S. at 320).

50. 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the results enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'").

51. *Id.* (citing *Bakke*, 438 U.S. at 269-72).

52. *Id.*

53. *Johnson*, 106 F. Supp. 2d at 1369.

54. *Id.*

55. *Id.* Race or ethnic background may be considered a "plus" but it cannot insulate an applicant from comparison with all other applicants.

56. *Id.*

57. *Id.* at 1369.

58. *Id.* at 1368.

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

60. *Id.* (citing *Bakke*, 438 U.S. at 411) (Stevens, J., concurring) ("Our settled practice, however, is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground.").

61. *Johnson*, 106 F. Supp. 2d at 1368.

applicants separately, rather than UGA's tiered system which used plus-factors such as race to rank all applicants in a single process.[62] Fourth, other Justices held that Powell's opinion could be valid only as a remedy, "so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.'"[63] The Johnson court also cited the assertion of Hopwood v. Texas[64] that Powell's diversity argument, "never represented the view of a majority of the Court in Bakke or any other case."[65]

Once the court disposed of UGA's claim that Bakke was binding, it attempted to "glean from Bakke and other cases the status of the law regarding the non-remedial use of diversity to justify race-based preferences."[66] In none of the cases cited by UGA did a majority of the Court hold "diversity" to be a compelling interest.[67] UGA had cited Justice O'Connor's concurrence in Wygant v. Jackson Board of Education[68] for its proposition that racial diversity in higher education is a compelling interest. But O'Connor acknowledged that whether or not racial diversity in higher education is a compelling state interest was not at issue.[69] In Wygant, four justices determined that even if the state's "asserted prior discrimination purpose" was compelling, the means of achieving that interest was not narrowly tailored.[70] In Richmond v. J.A. Croson Co,[71] the Court did not reach the issue of whether the interest was compelling, the program at issue was not narrowly tailored to meet that objective. UGA relied on Metro Broadcasting, Inc. v. FCC[72] for the proposition that an interest in racial diversity was "compelling." However, Metro Broadcasting held that racial diversity was only an "important" state interest. Furthermore, Metro Broadcasting was overruled by Adarand Constructors, Inc. v. Pena.[73]

The court concluded that four principles emerge from "diversity" jurisprudence. First, courts are suspicious of explicit racial classifications, particularly those serving non-remedial interests.[74] Second, mere racial balancing (i.e., proportional racial representation as an end its and of itself) is

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62. 106 F.2d at 1369.
63. *Id.* at 1369 (emphasis added by *Johnson* court).
64. Hopwood v. Texas, 78 F. 3d 932 (5th Cir. 1996).
65. *Johnson*, 106 F. Supp. 2d at 1369 (describing the holding of Hopwood v Texas, 78 F.3d 932, 942).
66. *Id.*
67. *Id.* at 1370.
68. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
69. *Wygant*, 476 U.S. at 288.
70. *Id.* at 274, 277-84.
71. Richmond v. J.A. Croson Co., 488 U.S. 469, 485-86 (1989).
72. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).
73. Adarand Constructors, Inc. v. Pena, 500 U.S. 200, 227 (1995).
74. *Johnson*, 106 F. Supp. 2d at 1371.

clearly unconstitutional.[75] Third, to justify race-conscious classifications, a state must prove that its interest in promoting racial diversity is "compelling."[76] As a general matter, an interest that is "ill-defined" or "amorphous" is insufficiently compelling to justify such classifications.[77] Fourth, a majority of the Court has never held that an interest in racial diversity is "compelling."[78]

After the court determined that no court has ever explicitly held that an interest in racial diversity is compelling, it then asked whether UGA's claimed interest should be found compelling.[79] It answered in the negative and determined that the state interest in diversity is "amorphous at best."[80]
The court asserted that the term diversity had been "been loosed from its denotative moorings" and used in various contexts to justify many different constitutionally questionable policies.[81] The court contended that "diversity" is often "exploited by government officials to avoid answering tough questions."[82] The court found UGA's definition of "diversity" was clearly unconstitutional "diversity" because "diversity" was synoymous with "racial proportionality."[83] UGA admitted that the goal of its admissions procedure was "to be representative of the total population of the state" and that it wanted "particularly to increas[e] the representation of African-Americans within the University of Georgia student body."[84]

To establish the educational benefits of a diverse student body, UGA relied on testimonials from several school officials, including university president Charles Knapp.[85] Knapp testified that after graduation, students must work cooperatively with people from "different ethnic and cultural backgrounds," that the skill "cannot be fully acquired by students whose educational and life experiences have been racially or culturally homogenous," that students "benefit educationally and economically from interaction with

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75. *Johnson*, 106 F. Supp. 2d at 1368 (*See Metro Broadcasting*, 497 U.S. 547, 612 (O'Conner, J., dissenting) (citing *Croson*, 488 U.S. at 507).

76. 106 F. Supp. 2d at 1370.

77. *Id.* at 1371.

78. *Id.* at 1375.

79. *Id.* at 1369.

80. *Id.* at 1371.

81. *Id.* (citing Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir. 1998)) (explaining "how much burden the term 'diversity' has been asked to bear in the latter part of the 20th century in the United States"); *See also* Tracy v. Bd. of Regents, 59 F. Supp. 2d at 1321-22 (cited by the *Johnson* court for the proposition that "the very concept of 'diversity' has 'become so malleable that it can instantly be conscripted to march in any ideologue's army, and exploited by government officials to avoid answering tough questions.'")

82. *Johnson*, 106 F. Supp. 2d at 137 (quoting *Tracy*, 59 F. Supp. 2d at 1321-1322).

83. *Id.*

84. *Id.*

85. *Id.* at 1371.

peers drawn from diverse backgrounds and experiences," and contended that racial diversity "fosters and awareness of commonalities and enables students to make friends, forge relationships, and develop group identities on bases other than shared ethnic, geographic, or socioeconomic background."[86] Knapp relied on his experiential knowledge as a university instructor and administrator and on his interactions with other members of UGA's faculty to prove his point.[87]

The district court found that argument deeply flawed. It said Knapp's assertions were based on "syllogism and mere speculation.[88] It characterized Knapp's testimony as constitutionally questionable because it relied on the very same stereotypes the law explicitly condemns,[89] and that "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause." The court said that UGA's presumption was that all members of a particular race think and act in the same way as other members of that race, and that non-whites think and act differently than whites.[90] It was this difference which UGA presumed would contribute to students' educational experience.[91] However, that presumption was based on impermissible racial stereotypes.[92] Further, the court determined that UGA's "amorphous" interests had "no principled stopping point,"[93] whereas an "interest capable of justifying race-conscious measures must be sufficiently specific and verifiable, such that it supports only limited and carefully defined uses of racial classifications."[94] The court concluded that UGA's interest in "student body diversity" could not meet that high standard because UGA had not defined when or how that goal would be met.[95] UGA admitted that it had "never been given a numeric or a percentage target . . . I don't know if it would end tomorrow or a hundred years from tomorrow."[96]

After analyzing the Title VI race discrimination claim, the court applied the same analysis to the gender discrimination claim, and invalidated the use

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86. *Id.* at 1371-1372.
87. *Id.* at 1372.
88. *Id.*
89. See Miller v. Johnson, 515 U.S. 900, 920 (1994) (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)) ("[Courts] may not accept as a defense to racial discrimination the very stereotype the law condemns.").
90. *Johnson*, 106 F. Supp. 2d at 1373.
91. *Id.* at 1372.
92. *Id.* at 1372 (quoting *Metro Broadcasting*, 497 U.S. at 602) (O'Conner, J., dissenting) (stating that a state "may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think").
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1373.

of "plus factors" for gender.[97] The bases for this decision were the same as those applied to the Title VI claim.[98]

CONCLUSION

The question of whether racial diversity is sufficiently compelling to justify non-remedial race-based classifications reveals a clear rift between the circuits. The Fifth Circuit in *Hopwood* and now a district court in the Eleventh Circuit in *Johnson* have held that diversity in education is not a compelling state interest. District courts in the Sixth Circuit[99] have reached inapposite decisions on the same case. Meanwhile, the Ninth Circuit[100] reaffirmed the "diversity" holding in Bakke.

Race-based classifications which remedy the lingering effects of past discrimination are constitutionally permissible. Few cases involving non-remedial consideration of race addressed the threshold question of whether racial diversity is sufficiently compelling to pass strict scrutiny analysis.

The Ninth Circuit addressed both the issues of non-remedial racial consideration and whether a state's interest in it was compelling in *Hunter v. Regents of the University.*[101] The *Hunter* court concluded that the state's interest in considering the race and ethnicity of children admitted to a research-oriented elementary school devoted to improving urban public schools was compelling. The lower court noted that the defendant-school present "an unexhaustive list of such issues and challenges[that] includes limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values, and racial and ethnic conflict among families and children."[102]

The district court agreed with the school's director when he concluded that, "There is no more pressing problem facing California, or indeed the nation, than urban education; for it is in the urban school system that the majority of California's future citizens will be educated (either well or poorly), creating the basic fabric for the society of the future."[103]

After answering the question affirmatively, the circuit moved to the next prong in the analysis: whether the manner in which the state considers race is

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97. *Id.* at 1376.
98. *Id.*
99. Gratz v. Bd of Regents of the Univ. of Michigan, 122 F. Supp. 2d 811 (2000).
100. Hunter v. Regents of the Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999), *cert. denied* 121 S.Ct. 186, October 2, 2000.
101. Hunter v. Regents of the Univ. of Cal., 190 F.3d 1061.
102. *Hunter*, 190 F.3d at 1064.
103. *Id.* at 1065.

narrowly tailored to further this compelling interest. The Ninth Circuit found that the research school's "consideration of race/ethnicity in its admissions process was narrowly tailored to further that interest," because, "[i]t would not be possible, nor would it be reasonable, to require the defendants to attempt to obtain an ethnically diverse representative sample of students without the use of specific racial targets and classifications."[104]

In the United States District Court for the Eastern District of Michigan, two judges addressed these issues in a case that nearly mirrors the facts of *Johnson*, *Gratz v. Board of Regents of the University of Michigan*[105] and *Grutter v. Board of Regents of the University of Michigan*[106] In diametric opposition to the Georgia district court, the Gratz court held, "To the extent that the University Defendants assert *Bakke's* holding to be that "'a properly devised admissions program involving the competitive consideration of race and ethnic origin'" is constitutional, this Court agrees."[107] Further, the court expressly rejected the Fifth Circuit reasoning in *Hopwood*, first by asserting that the Hopwood court is the only circuit to have discarded the concept of diversity as a compelling interest, and second, by utilizing the language of the "vigorous" Hopwood dissent, that reports of *Bakke's* demise were premature.[108]

Gratz addressed Michigan's undergraduate admission program. *Grutter* addressed the similiarly-structured admissions policy at Michigan's law school. The Grutter court concluded, "Justice Powell's discussion of the diversity rationale is not among the governing standards to be gleaned from *Bakke*. . . *Bakke* does not stand for the proposition that a university's desire to assemble a racially diverse student body is a compelling state interest."[109] The court enjoined the law school from continuing the current admissions policy, but the Sixth Circuit stayed the injunction, pending appeal.[110]

Although the high court denied certiorari in *Hopwood* and *Hunter*, the day draws inexorably closer as to when the high court will settle the racial diversity matter once and for all.

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104. *Id.*
105. Gratz v. Bd. of Regents of the Univ. of Michigan, 122 F. Supp. 2d 811 (2000).
106. Grutter v. Bd. of Regents of the Uni. of Michigan, 2001 U.S. Dist. LEXIS 3256.
107. *See Gratz*, 122 F. Supp. 2d 811, 819 (citations omitted).
108. 122 F. Supp. 2d at 819.
109. *Grutter*, 2001 U.S. Dist. LEXIS 3256, at 77.
110. Grutter v. Bollinger, 2001 U.S. App. LEXIS 5606.