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FACTS

Plaintiffs, three white females, applied for admission to the University of Georgia's ("UGA" or "the university") Fall 1999 freshmen class.[1] All three plaintiffs were denied admission to UGA.[2] Thereafter, plaintiffs brought suit against UGA alleging that the university's intentional use of race and gender in its admissions decisions violated the Equal Protection Clause of the Fourteenth Amendment, as well as 42 U.S.C. § 1981 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IX.[3] Plaintiffs requested the following relief: "an injunction compelling their admission to UGA; prospective injunctive relief against future use of race and gender in admissions process; certification of compliance with requested relief; and damages."[4]

UGA denied the plaintiffs' claims and stated that its admissions policy did not unlawfully discriminate on the basis of race.[5] Rather, UGA asserted that its admissions policy served a compelling state interest to promote, obtain, and maintain a diverse student body and was narrowly tailored to survive a strict scrutiny analysis.[6]

History of the Affirmative Action Policy at the University of Georgia

UGA was in existence for 160 years before it admitted the first African-American students in 1961.[7] In 1969, Office of Civil Rights ("OCR") determined that the university maintained a dual-track education system based on race that perpetuated racial segregation within the university system.[8] Consequently, OCR ordered the university's Board of Regents to desegregate its classrooms and to implement an affirmative action program to alleviate the discrimination present at the university.[9]

In 1989, OCR lifted UGA's mandatory desegregation and affirmative action regulations.[10] OCR concluded that UGA had substantially implemented

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1. Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1237 (11th Cir. 2001).
2. *Johnson*, 263 F.3d at 1237.
3. *Id.* at 1238. Note, race discrimination is the sole issue on appeal.
4. *Id.*
5. *Id.* at 1237.
6. *Id.* at 1237.
7. *Id.* at 1239.
8. *Id.* at 1239-1240.
9. *Id.* at 1240.
10. *Id.*

the prescribed remedial measures and was in compliance with Title VI.[11] OCR warned UGA that despite its formal lift of the desegregation regulations, UGA was still prohibited from discriminating against applicants "on the basis of race, color or national origin" in any of its future admissions policies.[12]

From 1990 to 1995, UGA administered two different admissions policies to applicants based on whether the applicant identified herself as "black" or "non-black."[13] Both policies were based on objective academic criteria, however the pre-determined minimum scores for "black" applicants were lower than the minimum scores for "non-black" applicants.[14] In 1995, UGA changed its race-based, dual-track admissions policy in response to the growing concern throughout the country regarding the constitutionality of racial classifications and admissions policies.[15] UGA introduced its new three-step admissions policy in 1996.[16] This policy was in use when plaintiffs applied for admissions to UGA in 1999 and is the policy that plaintiffs challenged in their suit against the university.[17]

UGA's Fall 1999 Admissions Policy

The "First Notice" stage of UGA's admissions policy used a strictly objective academic criteria to evaluate each applicant.[18] An applicant's race was not considered in the First Notice stage of the admissions process.[19] The Admissions Committee considered an applicant's Scholastic Aptitude Test ("SAT") and academic index ("AI").[20] If an applicant's SAT score and AI exceeded pre-determined minima, UGA offered the applicant admission.[21] To gain admission to UGA's fall 1999 freshman class at the First Notice stage, applicants had to achieve "(1) AIs of 2.86 or above; and (2) SAT scores of at least 450 Verbal, 450 Math and 1000 overall."[22] Of the applicants that failed

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* Notably, in 1995, the Fifth Circuit Court of Appeals of the United States ruled the University of Texas' admissions policy which classified applicants on the basis of race violated the Equal Protection Clause of the 14th Amendment. Hopwood v. Tex, 78 F.3d 932, 944 (5th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). It seems highly probable that the Hopwood decision influenced UGA to re-think its admissions policy at that time.
16. *Johnson*, 263 F.3d at 1240.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* The SAT tests students' abilities in both Verbal and Math skills, with one essay. Students are scored separately for each portion of the test and then their scores are combined to give them a total evaluative score. "The AI is a statistic that weighs and combines an applicant's SAT scores and GPA."
21. *Id.* at 1240.
22. *Id.* at 1241.

to meet the requirements, those with AIs and SAT scores above a particular number proceeded to the next step of UGA's admissions evaluation process.[23] In 1998 through 1999, applicants with an AI above 2.40 and SAT scores totaling over 950 were passed onto the second stage; those applicants with scores below these two minima were rejected.[24]

In stage two of UGA's admissions process, the university calculated a Total Student Index ("TSI") for each applicant.[25] The TSI was composed of each applicant's "weighted academic, extracurricular, demographic, and other factors."[26] During the TSI stage, UGA "expressly consider[ed] an applicant's race" for the first time in the admissions process.[27] Similar to the First Notice stage, applicants whose TSI scores met a particular pre-set minimum threshold were admitted to UGA; applicants whose TSI scores fell below the pre-set minima were rejected.[28] Applicants with scores between the pre-set minimum and the pre-set threshold passed on to the third stage where admissions officers would evaluate each applicant on an individual basis.[29]

The university's fall 1999 criteria for the TSI stage considered a total of twelve factors, with a maximum score of 8.15.[30] An applicant's TSI is calculated based on four objective academic factors – (1) SAT score; (2) GPA; (3) AI score; and (4) curriculum quality – for a maximum 5.40 points (approximately 67%) of the maximum points available at the TSI stage.[31] In addition to an applicant's academic performance, already considered in the First Notice stage, five leadership/activity or other factors, *based on information self-reported by the [applicant]*, affected an applicant's chances of gaining admission to UGA.[32] The following leadership/activity factors were considered for applicants attempting to gain admission to UGA's Fall 1999 freshmen class: "parent or sibling ties to UGA, hours spent on extracurricular activities, hours spent on summer work, hours spent on school-year work, and, first-generation college.[33] Applicants could gain a total of 1.5 points (18%) toward their TSI based on these leadership/activity factors.[34]

Finally, three demographic factors – "race/ethnicity (*i.e.* non-Caucasian),

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23. *Id.* at 1240.
24. *Id.* at 1241.
25. *Id.* at 1240.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 1241.
31. *Id.*
32. *Id.*
33. *Id.* Note, of the five leadership/activity factors, UGA gave the greatest weight (0.5 points) to "both parents no college education."
34. *Id.*

gender [preference was given to male applicants], and Georgia residency" – were considered at the TSI stage and gave applicants who qualified up to an additional 1.25 points, (15%) towards their final TSI.[35] Applicants who *voluntarily* defined themselves on their application as non-Caucasian – defined as "Asian or Pacific Islander, African-American, Hispanic, American-Indian, or Multi-cultural" – received 0.5 points toward their total TSI.[36]

According to the Fall 1999 criteria, UGA admitted all candidates with a TSI of 4.93 or above.[37] Applicants with a TSI below 4.66 were rejected.[38] Applicants with TSIs between 4.66 and 4.92 proceeded to the final Edge Read ("ER") stage.[39]

During the ER stage, admissions officers evaluated the remaining applicants on an individual, qualitative basis, rather than on a mechanical basis found solely on an applicant's academic scores and basic application form.[40] Each remaining applicant in the ER stage begins with a score of zero, and as the admissions officers discover qualities that might have been overlooked during the two previous stages, an applicant's score is increased.[41] The race of an applicant does not affect his or her score in the ER stage."[42] Applicants with a score above a certain number were admitted; those with scores below that number were rejected.[43]

Plaintiffs challenged the constitutionality of the discrepancies in Caucasian and non-Caucasian applicants' scores and contended that had they received additional 0.5 points awarded to applicants of color, they too would have been offered admission to UGA's Fall 1999 freshmen class.[44] As stated before, UGA's Fall 1999 scoring criteria required an applicant to have a TSI score of 4.93 or higher. However, due to the 0.5 points awarded to non-Caucasian students based on race, it was possible for a non-Caucasian applicant to gain admission to UGA with a TSI of 4.43, instead of the 4.93.[45] Because non-Caucasian applicants could qualify for an automatic 0.5 points towards their TSI score by virtue of identifying themselves as non-Caucasian, the non-

35. *Id.*

36. *Id.* The appellate court referred to the 0.5 points reserved for persons designated as non-Caucasian as the "race factor" or "race bonus." *Johnson*, 263 F.2d at 1241 n.6. Because this terminology may be misleading it is not used in this case note.

37. *Id.* at 1241.

38. *Id.* at 1241-2342.

39. *Id.* at 1242.

40. *Id.* at 1241.

41. *Id.* at 1240,1241.

42. *Id.* at 1241.

43. *Id.* The court's opinion did not state the requisite ER score for an applicant to gain admission to UGA's fall 1999 freshman class.

44. *Id.* at 1242.

45. *Id.*

Caucasian applicants could gain admission to UGA with a TSI of 4.43 and not the higher score of 4.93. Moreover, non-Caucasian applicants could advance to the ER stage with a TSI of 4.16, rather than 4.66, also as a result of the 0.5 points awarded non-Caucasian applicants.[46]

Procedural History

The district court concluded that UGA's Fall 1999 freshman admissions policy violated Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d, and consequently the Equal Protection Clause of the Fourteenth Amendment.[47] The district court rejected UGA's argument that Justice Powell declared student body diversity to be a compelling state interest in his lone opinion in *Regents of the University of California v. Bakke*[48] ("*Bakke*").[49] The district court also concluded that the Supreme Court's post-*Bakke* decisions expressed "*hostility*" toward classifying diversity as a compelling interest.[50]

The district court disregarded the testimony of former UGA President Charles Knapp regarding the numerous benefits and attributes of student body diversity as "syllogism and speculation"[51] though there was no evidence presented to refute Knapp's testimony.[52] The district court's opinion concluded that diversity on UGA's campus was not a compelling state interest.[53] Consequently, the district court concluded that UGA violated the plaintiffs' rights to Equal Protection and thus granted plaintiffs' motions for summary judgment.[54]

The university appealed on grounds that its freshman admissions policy did not violate plaintiffs' equal protection rights.[55] In its appeal, the university argued that its policy was narrowly tailored to advance the compelling state

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46. *Id.*

47. *Id.*

48. 438 U.S. 265 (1978) (ruling that that a race-conscious admissions programs at a state-funded higher education facility failed the two-part strict scrutiny test of the Equal Protection Amendment, and hence was unlawful. Justice Powell cast the deciding the deciding vot in a sharply divided court. Chief Justice Burger, along with Justices Stevens, Stewart and Rehnquist concluded that the race-conscious admissions program at University of California at Davis Medical School was unconstitutional however they did not address the issue of whether race can ever be a factor in making admissions decisions. A second plurality opinion written by Justice Brennan, joined by Justices Marshall, White, and Blackmun upheld the Medical School's race-conscious admissions program because its purpose was to rectify past societal racial discrimination. *Id.* at 362.

49. *Johnson*, 263 F.3d at 1239.

50. *Id.* (emphasis added).

51. *Id. quoting* Johnson v. Board of Regents of the University of Georgia, 106 F. Supp. 2d 1362 (S.D. Ga 2000) at 1372.

52. *Johnson*, 263 F.3d at 1239.

53. *Id.*

54. *Id.*

55. *Id.* at 1237.

interest of promoting student body diversity and hence survives strict scrutiny analysis.[56] Plaintiffs cross-appealed the district court's refusal to grant their request for prospective injunctive relief against UGA's use of race in its admissions process and the district court's de-certification of plaintiffs' case as a class action lawsuit.[57]

HOLDING

The Eleventh Circuit Appellate Court affirmed the district court's ruling for summary judgment, but on different grounds.[58] The district court ruled that UGA's attempt to obtain a diverse student body did not constitute a compelling state interest and therefore was unconstitutional under strict scrutiny analysis.[59] However, the Eleventh Circuit declined to determine whether student body diversity might ever qualify as a compelling state interest.[60] Instead, the Eleventh Circuit concluded that UGA's Fall 1999 admissions policy was not narrowly tailored to achieve the university's interest of student body diversity, and therefore the policy failed the two-part, strict scrutiny test.[61] Throughout the Appellate Court's opinion, Judge Marcus, writing for the majority, indicated that the confusion surrounding the constitutionality of racial classifications in university admissions policies, particularly whether a diverse student body may ever qualify as a compelling state interest in order to survive application of the strict scrutiny standard would be best handled by the Supreme Court.[62]

ANALYSIS

Judge Marcus explained that the court must review the district court's grant of summary judgment de novo, pursuant to Rule 56.[63] Hence, the appellate court must apply the same standards implemented by the district court in its analysis of the case.[64] Summary judgment is awarded to a moving party in cases where "no genuine issues as to any material fact [are present]"

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56. *Id.*
57. *Id* at 1243.
58. *Id.* at 1264.
59. *Id.*
60. *Id.* at 1250.
61. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224, (holding that strict scrutiny analysis is required of all racial classifications – "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").
62. *Id.* at 1250, 1251.
63. FED R. CIV. P. 56(c).
64. *Johnson*, 263 f.3d at 1242.

and thus the moving party is entitled to a "judgment as a matter of law."[65] The appellate court, in reviewing a grant for summary judgment, must analyze the factual inferences of the case in the light most favorable to the non-moving party, UGA.[66] Furthermore, UGA must satisfy its burden of proof in order to defeat the lower court's summary judgment ruling according to Rule 56(c).[67] Specifically, UGA must prove that its Fall 1999 freshmen admissions policy survived a strict scrutiny analysis as required for Equal Protection cases.[68]

In regard to the substance of the case, the Eleventh Circuit had to determine whether UGA's Fall 1999 freshman admissions policy which instituted racial classifications "[served] a compelling interest, and if so, whether UGA ha[d] met its burden of showing that its policy [was] narrowly tailored to serve that interest."[69] As stated in Adarand Constructors, Inc. v. *Pena*,[70] government-authorized racial classification must be strictly scrutinized under the law[71] because "classifications of citizens solely on the basis of race 'are by their very nature odious to a free people.'"[72] Racial classifications survive strict scrutiny analysis and are constitutional *only if* "(1) the racial classification serves a compelling state interest, and (2) it is narrowly tailored to further that interest."[73] UGA, as the proponent of its race-based admissions program, had the burden of proving that its policy met both requirements of the strict scrutiny standard.[74] As the appellate court noted, "UGA's burden [was], therefore, substantial."[75]

First, the appellate court asked, "when, if ever, may student body diversity be a compelling interest?"[76] Yet, rather than answer this question, the court invoked the principle of judicial restraint[77] and refused to answer its own question.[78] The court justified its action by concluding that UGA's admissions policy failed the second prong of strict scrutiny because it was not narrowly tailored to further a compelling interest. Consequently, the court had no

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65. *Id.*, *quoting* Fed. R. Civ. P. 56(c).
66. *Id.* at 1243. *See*, Burton v. City of Belle Glade, 178 F.3d 1175 (11th Cir. 1999).
67. FED R. CIV. P. 56(C).
68. *Johnson*, 263 F.3d at 1243. F.R. Civ. P. 56(c); *see also*, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).
69. *Johnson*, 263 F.3d at 1242.
70. 515 U.S. 200 (1995) at 224. ("Adarand")
71. *Johnson*, 263 F.3d at 1243 (citing *Adaran*d, 515 U.S. at 224).
72. *Id.* (quoting, Shaw v. Reno, 509 U.S. 630 (1993)).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1244.
77. *Id.* at 1245; *see* Burton v. United State, 196 U.S. 283 (1905). *See also*, Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dept. of Health and Rehab. Servs., 225 F.3d 1208, 1227 n.14 (11th Cir. 2000) (applying principle that "constitutional questions should not be resolved *unless necessary to the decision.*") (emphasis added).
78. *Johnson*, 263 F.3d at 1251.

reason to examine the issue further.[79] Instead, the court punted the issue to the Supreme Court stating that the "great importance [of whether student body diversity is a compelling government interest] warrant[ed] consideration by the Supreme Court.[80]

The Eleventh Circuit's Interpretation of Bakke[81] ~ *Compelling Interest Undefined*

While the Eleventh Circuit avoided answering its own question of whether student body diversity could ever be a compelling state interest, it nevertheless addressed UGA's use of *Bakke* as justification of the university's race-conscious admissions policy.[82] However, the Eleventh Circuit ultimately concluded that the Supreme Court's now famous holding in *Bakke* did not apply to the case at hand.[83]

In *Bakke*, the Supreme Court struck down the University of California at Davis Medical School's (the "medical school") use of a dual-track, quota system for admitting non-white students to achieve a diverse student body.[84] A fractured Supreme Court issued a confusing plurality opinion that lower courts have been grappling with since the day it was issued.[85]

Notably, lower courts across the nation have issued numerous conflicting and confusing opinions regarding the constitutionality of race-conscious admissions policies in higher education as a result of their (mis-) understandings of Justice Powell's multifaceted *Bakke* opinion.[86] In *Bakke*, Justice Powell joined Chief Justice Burger and Justices Stevens, Stewart and Rehnquist to affirm the California Supreme Court's ruling that the medical school's admissions system was unconstitutional.[87] Yet, a different grouping

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79. *Id.* at 1245.

80. *Id.*

81. *Bakke*, 438 U.S. 265 (1978).

82. *Johnson*, 263 F.3d at 1244-1251.

83. *Id.*, 263 F.3d at 1248, n.12 (quoting Nichols v. United States, 511 U.S. 738, 745-46 (1994) "No binding rule may be taken from a fractured decision and ... is ultimately not useful" (citing, Marks v. United States, 430 U.S. 188 (1977))).

84. *Johnson*, 263 F.3d at 1246.

85. *Id.* at 1249, n.13. Courts across the nation, both trial and appellate, have reached conflicting conclusions regarding the use of racial classifications as a result of the High Court's amorphous holding in *Bakke*. *See e.g.*, Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000) (holding that under *Bakke*, student body diversity "is a compelling governmental interest that meets the demands of strict scrutiny."); Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (*appeal pending*) (stating that "*Bakke* does not stand for the proposition that a university's desire to assemble a racially diverse student body is a compelling state interest.") *Grutter* has since been joined with *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mi. 2001); oral arguments in the combined cases were heard, *en banc*, at the Sixth Circuit Court of Appeals, on December 6, 2001.

86. *Johnson*, 263 F.3d at 1249 n.13.

87. *Id.* .3d at 1246.

of Justices composed of Justices Powell, Brennan, White, Marshall, and Blackmun joined to "reverse the California Supreme Court's total prohibition on the university's consideration of race in admissions."[88] Thus, Justice Powell was the only vote in both majority opinions.[89]

Justice Powell began his *Bakke* opinion by affirming the lower court's conclusion that the Medical School's dual-track quota admissions system was unlawful.[90] Yet two sentences thereafter, Justice Powell also concluded that consideration of an applicant's race for admissions purposes may be permissible.[91] In one instance, Justice Powell stated

> If [the medical school's] purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid.[92]

But then, Justice Powell obfuscated this statement and wrote that the medical school's goal to attain a diverse student body was "clearly a constitutionally permissible goal for an institution of higher education"[93] as ensured by the First Amendment.[94] Hence, Justice Powell's *Bakke* conveyed two incompatible conclusions: first, that racial classifications for the purpose of attaining a diverse student population is unlawful, and second, that student body diversity is an acceptable goal for institutions of higher education.[95]

In the case at hand, UGA urged the appellate court to consider Justice Powell's *Bakke* opinion regarding the permissibility of race conscious admissions as binding precedent and hold that UGA's goal of attaining student body diversity is a compelling state interest capable of withstanding strict scrutiny analysis.[96] The Eleventh Circuit rejected UGA's argument and interpreted Justice Powell's opinion as holding that while a state may have a legitimate interest in promoting diverse student bodies in its universities, effectuation of that interest must be by a "properly devised" plan.[97] Justice Powell, in *Bakke*, had cited Harvard University's "flexible" admissions plan as an acceptable admissions policy that treats race as one factor among many

88. *Id.*
89. *Id.*
90. *Bakke*, 438 U.S. at 271.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Johnson*, 263 F.3d at 1244.
97. *Id.*

factors considered in making admissions decisions.[98] The Eleventh Circuit court found that although Justice Powell did acknowledge student body diversity as a compelling interest in *Bakke*, Justice Powell confined his holding to very narrow circumstances which were absent in UGA's case.[99]

The Eleventh Circuit also concluded that Justice Powell's opinion was not binding precedent because no other Justice expressly joined his opinion.[100] Four Justices, led by Justice Brennan, found that the medical school's admissions policy was acceptable on the grounds that the policy's purpose was to remedy past societal discrimination.[101] From their point of view, admissions policies aimed at remedying past societal discrimination were "sufficiently important to justify the use of race-conscious admissions programs."[102] But, Justice Stevens, in his opinion, declined to address the use of race-conscious admissions policies,[103] and instead, based his conclusions on Title VI criteria.[104] Therefore, the Eleventh Circuit held that Justice Powell's opinion was not binding because it lacked the support of his brethren.[105]

Furthermore, the Eleventh Circuit applied the principle that "when a fragmented Court decides a case... the holding of the Court *may* be viewed as that position taken by those [m]embers who concurred in the judgments on the narrowest grounds."[106] Under this principle, the Eleventh Circuit concluded that Justice Brennan's opinion was not founded on the narrowest principles available.[107] Rather, Justice Brennan's opinion advocated the application of intermediate scrutiny upon racial classifications, thus holding that student body diversity was an important interest, but not a compelling interest that could survive strict scrutiny analysis.[108] Hence, only Justice Powell's opinion directly addressed student body diversity under the terms of strict scrutiny and therefore qualified as the narrowest opinion supporting the notion that racial classifications violated the equal protection clause of the Fourteenth Amendment.[109]

The one definitive conclusion that the Eleventh Circuit did assess regarding student body diversity was that its status as a "compelling interest

98. *Id.* (quoting *Bakke*, 438 U.S. at 320).
99. *Johnson*, 263 F.3d at 1246.
100. *Id.*
101. *Id.* at 1246-47.
102. *Id.* (quoting *Bakke*, 438 U.S. at 362).
103. *Id.* at 1247.
104. *Id.*
105. *Id.* at 1246.
106. *Id.* at 1247 (quoting Marks v. United States, 430 U.S. 188, 193 (1977).
107. *Id.* at 263 F.3d.
108. *Id.*
109. *Id.* at 1246.

is an open question in the Supreme Court and in our Court."[110] Like Justice Powell, the Eleventh Circuit left open the possibility that student body diversity may qualify as a compelling interest when supported by a strong record.[111] However the absence of a thorough, unified opinion regarding race-conscious admissions policies in recent jurisprudence supports the notion that the Supreme Court disfavors such policies and therefore, these policies would likely be ruled unconstitutional.[112]

Narrowly Tailored

The Eleventh Circuit based its entire decision on the conclusion that UGA's admissions policy was not tailored narrowly enough to survive strict judicial scrutiny.[113] However, the court noted that the opportunity to define the boundaries of "narrowly tailored" in respect to university admissions policies has not arisen in its courtroom or in the courtroom of the Supreme Court.[114] Instead, the Eleventh Circuit adopted the contours identified in *United States v. Paradise*,[115] an employment case involving an affirmative action policy designed to remedy past discrimination.[116]

Under *Paradise*, five factors must be considered when evaluating whether a state racial classification is narrowly tailored.[117] The Eleventh Circuit adjusted these factors, slightly, to apply to university race-conscious admissions policies.[118] The revised *Paradise* guidelines[119] require courts evaluating race-conscious admissions policy to ask the following questions:

> (1) whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body; (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered and rejected as inadequate, race-neutral alternatives for

110. *Id.* at 1250.
111. *Id.*
112. *Id.* at 1248.
113. *Id.* at 1237.
114. *Id.* at 1252. The Eleventh Circuit does cite two cases that address the boundaries of narrowly tailored in employment scenarios.
115. 480 U.S. 149 (1987).
116. United States v. Paradise, 480 U.S. 149 (1987).
117. *Johnson*, 263 F.3d 1252..
118. *Id.*
119. *See* Paradise, 480 U.S. at 171.

creating student body diversity."[120]

After the court applied the adjusted *Paradise* factors to UGA's admissions policy it concluded that UGA's policy was too mechanical and rigid to qualify as a narrowly tailored admissions policy.[121] Moreover, the court concluded that UGA's admissions policy was deficient because it "excluded many race-neutral factors that would reflect an applicant's potential contributions to diversity."[122]

The court found particular dissatisfaction with the TSI stage of UGA's policy. The court found that UGA's system of awarding points in the TSI stage did not take into consideration factors such as economic backgrounds of applicants or applicants' knowledge of foreign languages.[123] The court felt that qualities other than race or in addition to race would better foster a diverse student body at UGA than its existing more generalized race-conscious admissions policy.[124] The court pointed out that under the TSI stage, UGA evaluates an applicant's work hours and not the quality or purpose of the work involved.[125] The court asserted that if UGA wants a diverse student population then it cannot do so by placing capricious or mechanical stereotypes on its applicants; the court declared that UGA must "shoulder the burden of fully and fairly analyzing applicants as individuals and not merely as members of groups when deciding their likely contribution to student body diversity."[126]

Furthermore, the Eleventh Circuit found that UGA's admissions policy as a whole to be arbitrary and disproportionate.[127] UGA failed to offer evidence to defending its policy of granting every non-white applicant 0.5 points toward their TSI.[128] The 0.5 point granted to non-white applicants was the highest point award besides the 1.0 point given to an applicant's SAT scores.[129] UGA also did not offer evidence that justified its policy to award an applicant more points for race than for working forty hours per week.[130] Hence, the Eleventh Circuit found UGA's admissions policy to be both inflexible and unreasonable in its application.[131]

UGA defended its TSI stage, particularly the 0.5 point awarded to non-

120. *Johnson*, 263 F.3d at 1253.
121. *Id.* at 1255.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1256.
127. *Id.* at 1257.
128. *Id.*
129. *Id.*
130. *Id.* at 1257-58.
131. *Id.*

white applicants, by arguing that few white applicants were affected by the policy.[132] UGA demonstrated that 85% of its Fall 1999 freshmen class had gained admission to the University in the "race-neutral,"[133] First Notice stage of the admissions process.[134] The Eleventh Circuit, however, rejected UGA's defense because UGA failed to provide any evidence to support its assertions that white applicants have not been injured by the university's admissions policy.[135] Moreover, the court held that the case at hand undermined UGA's defense and offered support to the court's conclusion that white applicants had indeed been injured by UGA's admissions policy.[136]

Lastly, UGA failed to demonstrate that its admissions policy considered race-neutral factors, such as the economic or demographic dispositions of its applicants.[137] UGA did not present evidence at trial to demonstrate that it had considered using race-neutral measures in its admissions process to promote diversity.[138] The court criticized the university for its short-sightedness and stated, "it is beyond dispute" that race-neutral factors, such as financial incentives to admittees from less advantaged homes, could create a diverse student body.[139] In support of its recommendations, the court stated that "while strict scrutiny does not require exhaustion of every possible... alternative, 'it does require 'serious, good faith considerations of race-neutral alternatives,' either prior to or in conjunction with implementation of an affirmative action plan."[140] Ironically, the court concluded that UGA's Fall 1999 freshman admissions policy was narrow-minded, rather than narrowly-tailored;[141] the court found the policy to be too limited in its scope to qualify as narrowly tailored under a strict scrutiny analysis.[142] The court held that for a policy to be narrowly tailored it must accomplish its purpose with the greatest precision and efficiency than any alternative means.[143] Hence, UGA did not develop a narrowly tailored policy that withstood strict scrutiny analysis. Since, the court struck down UGA's admissions policy on the grounds that it was not tailored narrowly enough to survive a strict scrutiny

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132. *Id.* at 1258.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1259.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* quoting Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1571 (11th Cir., 1990) at 1571.
141. *Johnson*, 263 F.3d 1260.
142. *Id.* (*citing Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), "The term 'narrowly tailored'... requires consideration of whether lawful alternatives and less restrictive means could have been used... The classification at issue must 'fit' with greater precision than any alternative means.").
143. *Id.* at 1260.

analysis the court was not obligated to determine whether a diverse student body qualified as a compelling interest under the Equal Protection Clause of the Fourteenth Amendment.[144]

The Eleventh Circuit also rejected Justice Powell's opinion in *Bakke* as binding precedent that a diverse student body could be a compelling state interest *if* properly established.[145] Instead, the Eleventh Circuit acknowledged that the Supreme Court's holding in *Bakke* offered little assistance to its task of determining whether racial classifications may be used in university admissions programs.[146] Justice Marcus made it clear that the question of whether student body diversity could ever constitute a compelling interest is a question for the Supreme Court.[147]

CONCLUSION

The Eleventh Circuit's opinion is a disappointment, legally and socially. The opinion fails to explore the credibility of race-conscious admissions policies in higher education and instead rests its reasoning on the university's failure to limit the definition of race to fit within a narrowly-tailored policy. Although the record does support a finding that UGA's admissions policy was not narrowly tailored and hence failed the second prong of a strict scrutiny analysis, the court's analysis is as weak as UGA's record in support of its attempts to narrowly define race for admissions procedures.

Further, the court's opinion gives greater support to the theory of material determinism[148] – the notion that the white elite who benefit materially from racism and working class whites who benefit psychologically from racism have little incentive to eradicate racism.[149] The Eleventh Circuit's opinion emphasizes society's resistance to change and progress. The court minimizes the educational benefit provided by the intermingling of persons of various racial and ethnic backgrounds who would not otherwise interact with one another; the mere potential for persons of different racial backgrounds to co-exist fosters tolerance, awareness and an appreciation for difference. Such teachings would greatly benefit UGA's student body, as well as society, as a whole.

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144. *Id.*
145. *Id.* at 1261.
146. *Id.*
147. *Id.* at 1251.
148. RICHARD DELGADO AND JEAN STEFANCIC, CRITICAL RACE THEORY 7 (New York University Press 2001).
149. *Id.*

The Reindeer Rule Applied to UGA's Race-Conscious Admissions Policy

While Justice Marcus states that UGA's admissions policy could not be upheld because it was not narrowly tailored so as to survive a strict scrutiny standard, his analysis is shortsighted. In an attempt to reverse the growing trend to eliminate many race-conscious admissions policies across the United States, Justice Marcus could have upheld UGA's admissions policy as a right preserved under the First Amendment of the Constitution, as first recognized by Justice Powell in his *Bakke* opinion.[150] Specifically, Justice Marcus could have applied the First Amendment "reindeer rule" to the present case and hence secularize the impact of race on UGA's admissions process.

The Reindeer Rule, first recognized in *Lynch v. Donnelly,*[151] recognizes that displays of religious symbols did not violate the Establishment Clause if secular objects accompanied them and secular figurines subdued the religious elements of the display.[152] Hence, following the Supreme Court's decision in *Lynch v. Donnelly*, many lower courts upheld crèche displays so long as they did not stand alone.[153] The theory behind the Reindeer Rule is based on the notion that a crèche's religious significance will be suppressed if surrounded by secular images and hence the risk that such display may be interpreted as the government's endorsement of Christianity is decreased.[154]

Pursuant to the Reindeer Rule developed in *Lynch v. Donnelly,*[155] the court in *Johnson* could have developed a similar principal that would have subdued the significance of race in university admissions and possibly upheld UGA's race-conscious admissions policy under the First Amendment. According to UGA's admissions policy, three demographic characteristics were examined in the TSI stage of the admissions process; (1) race; (2) gender; and (3) Georgia residency.[156] Given that an applicant's race is one factor out of three, the Eleventh Circuit could have applied the Reindeer Rule to hold that those

150. *Bakke*, 438 U.S. at 312 (finding that a university's attempt to create a diverse student body is "clearly a constitutionally permissible goal for an institution of higher education").

151. 465 U.S. 668 (1984).

152. Lynch v. Donnelly, 465 U.S. 668 (1984) analyzing the constitutionality of the nativity scene owned and maintained and displayed on the government property; *see* Joshua D. Zarroa, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477, 495 (1986).

153. *See* American Civil Liberties Union v. City of Birmingham, 588 F. Supp. 1337 (E.D. Mich. 1984) (holding that a crèche may be displayed since it was accompanied by seasonal figurines.); *see also*, McCreary v. Stone, 739 F.2d 716 (2nd cir. 1984) *aff'd mem. by an equally divided court sub nom.* Board of Trustees v. McCreary, 105 S. Ct. 1859 (1985), (holding that a crèche could not be erected in a public park if unaccompanied by a Santa Clause, reindeer or other secular figurines.).

154. *See*, George M. Janocsko, *Beyond the "Plastic Reindeer Rule:: The Curious Case of County of Allegheny v. American Civil Liberties Union,* 28 DUQ. L. REV. 445 (1990).

155. *See*, 465 U.S. 668 (1984).

156. *Johnson* 263 F.2d at 1241 citing *Lynch* , 465 U.S. 668 (1984).

two secular traits tempered the applicant's one race-based characteristic and consequently, such admissions policy would have been permissible.

Remedy Past Discrimination

The greatest disappointment regarding the near extinction of race-conscious admissions policies across the United States is the courts' failure to recognize and honor a university's First Amendment right to select its student body based on its own criteria. Specifically, Justice Powell stated in *Bakke* that a university's attempt to create a diverse student body is "clearly a constitutionally permissible goal for an institution of higher education"[157] as ensured by the First Amendment.[158] Administrators, professors and deans alike from various universities across the nation have testified to the benefits of a diverse student body.[159] Diversity – the principal that a multitude of varying perspectives, persons and beliefs – is essential to one's education and development, particularly in an environment such as higher education. Universities have both the opportunity and the responsibility to create an environment where differing viewpoints may intermingle to better educate their students through tolerance and appreciation for "the other." It is undeniable that UGA's admissions policy was not narrowly tailored to meet a strict scrutiny analysis, however the court delivered a shortsighted and deficient decision.

As a result of the recent cases finding race-conscious admissions policies unconstitutional, courts are deterring universities from promoting student body diversity regardless of methodology. The effect of such decisions can be seen in the California and Texas school systems where enrollment by students of color has decreased substantially.[160] The irony is painful. The policies once established to promote student body diversity are now the very tools being used to dismantle integrated school systems. The Supreme Court must now interfere with educational policy and clarify the holding in *Bakke*, hopefully to the benefit of student body diversity.

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157. *Bakke*, 438 U.S. at 312.

158. *Id.*

159. *See, Johnson* 263 F.3d at 1239; Grutter v. University of Michigan, 137 F. Supp. 2d 821, 827 (E.D. Mi. 2001) (*appeal pending*) (student body diversity within the law school "enrich(es) everyone's education and thus make(s) the law school class stronger than the sum of its parts." *See also*, Smith v. University of Washington Law School, 233 F.3d 1199, 1201 (9th Cir. 2000) ("Educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.")

160. *See*, Ana J. Matosantos and Melissa C. Chiu, *Opportunities Lost, The State of Public Sector Affirmative Action in Post Proposition California*, Executive Summary, at. 3 (Nov. 1998). *See also*, Sue Anne Pressley, *Texas Campus Attracts Fewer Minorities*, Washington Post, Aug. 1997, at A1 (the first-year entering law school class will have four African American students, down from forty, and twenty-six Hispanic Americans, down from sixty, in most years.)

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