Nos. 00-14382-C, 00-14382-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Defendant-Appellant,

and

ANTOINE HESTER, et al.,

Defendant-Intervenors/Appellants,

v.

JENNIFER JOHNSON, et al.,

Plaintiffs-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE BOARD OF REGENTS AND DEFENDANT-INTERVENORS

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, counsel for the United States as Amicus Curiae hereby certify that the following persons and entities may have an interest in the outcome of the case:

1. Michael F. Adams, former Defendant
2. American Council on Education, Amicus Curiae
3. American Association for Higher Education, Amicus Curiae
4. American Association of Colleges for Teacher Education, Amicus Curiae
5. American Association of Colleges of Nursing, Amicus Curiae
6. American Association of Collegiate Registrars and Admissions Officers, Amicus Curiae
7. American Association of Community Colleges, Amicus Curiae
8. American Association of State Colleges and Universities, Amicus Curiae
9. American Association of University Professors, Amicus Curiae
10. American College Personnel Association, Amicus Curiae
11. American Dental Education Association, Amicus Curiae
12. ACT, Inc., Amicus Curiae

13. Association of Academic Health Centers, Amicus Curiae

14. Association of American Colleges and Universities, Amicus Curiae

15. Association of American Law Schools, Amicus Curiae

16. Association of American Medical Colleges, Amicus Curiae

17. Association of American Universities, Amicus Curiae

18. Association of Catholic Colleges and Universities, Amicus Curiae

19. Association of Community College Trustees, Amicus Curiae

20. Association of Governing Boards of Universities and Colleges, Amicus Curiae

21. Association of Jesuit Colleges and Universities, Amicus Curiae

22. Thurbert E. Baker, Attorney General (Ga.), Counsel for Defendant/Appellant

23. Molly Ann Beckenhauer, Plaintiff/Appellee

24. John W. Bellflower, Jr., Counsel for Plaintiffs/Appellees

25. Board of Regents for the University System of Georgia, Defendant/Appellant

26. Elise C. Boddie, Counsel for Defendant-Intervenors/Appellants

27. Aimee Bogrow, Plaintiff/Appellee

28. Ashley Bolden, Defendant-Intervenor/Appellant

29. Victor A. Bolden, Counsel for Defendant-Intervenors/Appellants

30. Patricia A. Brannan, Counsel for American Council on Education, et al., Amici Curiae

31. Janell M. Byrd, Counsel for Defendant-Intervenors/Appellants

32. Norman J. Chachkin, Counsel for Defendant-Intervenors/Appellants

33. Leroya Chester, Defendant-Intervenor/Appellant

34. John M. Clark, Counsel for Defendant-Intervenors/Appellants

35. Coalition for Christian Colleges & Universities, Amicus Curiae

36. College and University Personnel Association, Amicus Curiae

37. The College Board, Amicus Curiae

38. Council for Advancement and Support of Education, Amicus Curiae

39. Council of Graduate Schools, Amicus Curiae

40. Council of Independent Colleges, Amicus Curiae

41. Mark H. Cohen, Counsel for Defendant/Appellant

42. I. Kenneth Dious, Counsel for Defendant-Intervenors/Appellants

43. Alexander E. Dreier, Counsel for American Council on Education, et al., Amici Curiae

44. Laramie Duncan, Defendant-Intervenor/Appellant

45. Dennis R. Dunn, Counsel for Defendant/Appellant

46. Educational Testing Service, Amicus Curiae

47. Ben Emanuel, Defendant-Intervenor/Appellant

48. Honorable B. Avant Edenfield, Trial Judge

49. Mark L. Gross, Counsel for the United States, Amicus Curiae

50. Annie Hester, Defendant-Intervenor/Appellant

51. Antoine Hester, Defendant-Intervenor/Appellant

52. Sidney Hester, Defendant-Intervenor/Appellant

53. Hispanic Association of Colleges and Universities, Amicus Curiae

54. Jennifer L. Johnson, Plaintiff/Appellee

55. Elaine R. Jones, Counsel for Defendant-Intervenors/Appellants

56. Michael D. Kaufman, Counsel for Defendant/Appellant

57. Teresa Kwong, Counsel for the United States, Amicus Curiae

58. Bill Lann Lee, Counsel for the United States, Amicus Curiae

59. Martin Michaelson, Counsel for American Council on Education, et al., Amici Curiae

60. NAACP Legal Defense & Educational Fund, Inc., Counsel for Defendant-Intervenors/Appellants

61. National Association of Independent Colleges and Universities, Amicus Curiae

62. National Association of State Universities and Land-Grant Colleges, Amicus Curiae

63. National Association of Student Financial Aid Administrators, Amicus Curiae

64. National Association of Student Personnel Administrators, Amicus Curiae

65. NAWE: Advancing Women in Higher Education, Amicus Curiae

66. National Council of University Research Administrators, Amicus Curiae

67. Dennis D. Parker, Counsel for Defendant-Intervenors/Appellants

68. A. Lee Parks, Counsel for Plaintiffs/Appellees

69. Stephen R. Portch, Chancellor, University System of Ga., former Defendant

70. Parks, Chesin, Walbert & Miller, P.C., Counsel for Plaintiffs/Appellees

71. Theodore M. Shaw, Counsel for Defendant-Intervenors/Appellants

72. State Law Department (Ga.), Counsel for Defendant/Appellant

73. Sheldon E. Steinbach, Counsel for American Council on Education, et al., Amici Curiae

74. Rodney K. Strong, Counsel for Defendant/Appellant

75. John Tatum, Counsel for Plaintiffs/Appellees

76. Troutman Sanders LLP, Counsel for Defendant/Appellant

77. United Negro College Fund, Amicus Curiae

78. United States of America, Amicus Curiae

79. United States Department of Justice, Counsel for the United States, Amicus Curiae

80. Tamar Washington, Defendant-Intervenor/Appellant

81. Trevor Washington, Defendant-Intervenor/Appellant

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BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE BOARD OF REGENTS AND DEFENDANT-INTERVENORS

INTEREST OF THE UNITED STATES

This case presents the critical issue of whether institutions of higher education may consider the race of applicants as one factor in their admissions

decisions to further the compelling goal of promoting the educational benefits that flow from a diverse student body.

The Department of Justice has significant responsibilities for the enforcement of the Equal Protection Clause of the Fourteenth Amendment in the context of admission to public colleges and universities, see 42 U.S.C. 2000c-6, and for the judicial enforcement of Title VI of the Civil Rights Act, 42 U.S.C. 2000d, which prohibits recipients of federal funds — including institutions of higher education — from discriminating on the basis of race, color, or national origin. The Department of Education has parallel responsibility for the administrative enforcement of Title VI, and has issued Title VI regulations and policy guidance that provide that educational institutions may take race into consideration for purposes of remedying past discrimination or enrolling a diverse student body. See 34 C.F.R. 100.3(b)(6)(i); 59 Fed. Reg. 8756, 8758-8762 (1994).

Because of its interest in the orderly development of the law regarding the use of race in university admissions, particularly to obtain the educational benefits of diversity, the United States has participated in a number of cases addressing the use of race to achieve diversity in education. See, *e.g.*, *Smith* v. *Univ. of Wash. Law Sch.*, Nos. 99-35209, 99-35347, 99-35348 (9th Cir. 1999); *Hopwood* v. *Texas*,

No. 98-50506 (5th Cir. 1999); *Gratz* v. *Bollinger*, No. 97-CV-75231 (E.D. Mich. 1999). The United States files this brief pursuant to Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUE

Whether the court properly granted plaintiffs summary judgment, holding that the Board of Regents and defendant-intervenors had not put on evidence to support finding diversity as a compelling educational interest.

STATEMENT OF THE CASE

This is an action by three white women (plaintiffs) who were initially denied admission to the University of Georgia (University). Because none of the plaintiffs received points for "plus" factors, including race, under the University's admissions process (R10-140, Ex. 2 at 7-8), they sued the Board of Regents of the University System of Georgia (Board of Regents), alleging, *inter alia*, that the admissions policy unlawfully discriminated against them based on race. Thereafter, several black and several white University of Georgia students and black high school students (collectively, defendant-intervenors) intervened to support the University's admissions policy (R3-44).[1]

All three parties — plaintiffs, the Board of Regents, and defendant-

[1] We hereby adopt the Statement of Facts in the opening briefs filed by appellants Board of Regents and defendant-intervenors.

intervenors — moved separately for summary judgment. In support of its motion, the Board of Regents submitted, among other things, an affidavit by former University of Georgia President Charles Knapp and the deposition testimony of the current president, Michael Adams, both stating that the purpose of designating race as a "plus" factor was to achieve student body diversity and that such diversity, in turn, enhances the quality of the education provided to all students (Doc. 140 (Adams Dep. at 35-37, 47-49, 107-108); R8-124 (Knapp Aff. ¶¶ 19-20)). For example, Adams testified that "there is [an] educational advantage to having a broadly diverse classroom" and that such diverse classrooms are "the best learning environments" because they generate better discussions involving a broader range of opinions (Doc. 140 (Adams Dep. at 35, 47-49)). Plaintiffs, by contrast, did not submit any contrary evidence with their opposition to the Board of Regents' summary judgment motion, or with their own motion for summary judgment.

Despite the *uncontroverted* evidence showing the educational benefits of the University's use of race in admissions, the district court nonetheless granted in part plaintiffs' summary judgment motion; denied in part plaintiffs' motion with respect to the calculation of damages, but entered a damage award; and denied both defendants' motions. See *Johnson* v. *Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1375-1376, 1380-1381 (S.D. Ga. 2000).

First, the court concluded that Justice Powell's opinion regarding the non-remedial use of diversity to justify using race as one factor in university admissions was not binding precedent, but merely carried persuasive weight. *Id.* at 1369. The court then rejected the University's asserted bases for using race as support for a finding that achieving a diverse student body is a compelling interest here. Specifically, the court equated statements by Adams regarding wanting the University to be representative of the State as a desire for racial balancing. *Id*. at 1372-1373. Furthermore, the court found the Board of Regents' evidence regarding the benefits of a diverse student body to be unhelpful because Knapp's statements consisted of "speculation" and were not verifiable. *Id*. at 1372. The court also faulted the Board of Regents for not identifying "when or how" the "goal [of diversity] will ever be met." *Ibid*. Based on this, the court "determined that the 'diversity' interest was so inherently formless and malleable that no plan can be narrowly tailored to fit it." *Id*. at 1374. Each party appealed.

SUMMARY OF ARGUMENT

If this Court reads the district court decision as holding that diversity in higher education can never be a compelling government interest as a matter of law, this conclusion cannot stand in light of Justice Powell's decision in *Regents of the University of California* v. *Bakke* that the use of race as one factor in a university's

admissions process to achieve a diverse student body may be a compelling interest that survives strict scrutiny, as well as decisions of other courts that remediation is not the only compelling interest that justifies race-conscious measures. Indeed, the University of Georgia's use of race as one of many factors in its admissions policy resembles the Harvard plan, which also did not involve a remediation purpose, that was cited approvingly in *Bakke*. Vast published literature and empirical evidence, moreover, underscores Justice Powell's statements in *Bakke* that diversity in higher education considerably improves the education provided to all students. In sum, *Bakke* remains binding precedent and forecloses the result that plaintiffs seek here.

At a minimum, the district court erred in holding that the Board of Regents and defendant-intervenors failed to present sufficient evidence of the educational benefits of achieving a diverse student body to defeat plaintiffs' summary judgment motion. The Board of Regents presented evidence by the University of Georgia's past and present presidents, stating that, based on their experience as educators, the University's use of race as one of many factors considered in its admissions decisions to achieve a diverse student body was needed to enhance the education of all its students in the form of, *inter alia*, better classroom discussions involving a greater range of viewpoints.

Because plaintiffs did not dispute this evidence, there were sufficient facts in support of the University's diversity rationale to survive plaintiffs' summary judgment motion. Accordingly, the district court's disregard of this evidence, when it concluded that the Board of Regents failed to present "specific and verifiable" evidence to justify the University's use of race, was error.

Under either approach, the Court should vacate the grant of summary judgment and remand this action to the district court for further proceedings with respect to the issue whether the University of Georgia's use of race to achieve a diverse student body constitutes a compelling government interest. Moreover, because the district court did not consider whether the University's admissions policy is narrowly tailored, it should be directed to do so on remand.

ARGUMENT

I. ACHIEVING THE EDUCATIONAL BENEFITS THAT FLOW FROM A DIVERSE STUDENT BODY CONSTITUTES A COMPELLING STATE INTEREST

Appellants Board of Regents and defendant-intervenors assert that the University's interest in obtaining the educational benefits of a diverse student body supports the University's decision to consider race as one of many admissions factors (see Brief of Appellant Board of Regents (Board of Regents Br.) 48-50; Brief on Appeal of Intervenors (Intervenors Br.) 24-36). We agree. While a state-

sponsored program that considers race must be subjected to strict scrutiny to ensure that it is narrowly tailored to serve a compelling interest, see *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995); *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493-496 (1989), it has also long been recognized that, in the context of higher education, obtaining the educational benefits of diversity constitutes such a compelling interest.

A. The University May Consider Race As A Factor In An Appropriately Structured Admissions Program

If the Court reads the district court's order as holding that diversity in higher education is not a compelling government interest as a matter of law, the judgment for plaintiffs must still be reversed, pursuant to *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

In *Regents of the University of California* v. *Bakke*, five members of the Supreme Court held that it did not violate the Equal Protection Clause for the University of California, Davis Medical School to take race into account in its admissions process even in the absence of any proof of its own discrimination that would support a remedial interest. In doing so, the Court affirmed the California Supreme Court's judgment holding unconstitutional the medical school's use of a rigid race-based admissions quota. The Supreme Court, however, vacated the

lower court's injunction and reversed that portion of the judgment holding that the school could not constitutionally consider race in any non-remedial manner in its admissions process. *Bakke*, 438 U.S. at 320 (Powell, J.); *id*. at 379 (Brennan, White, Marshall, Blackmun, JJ.) Even though the Court determined that the particular admissions program that denied Bakke admission was unconstitutional, it also determined that the medical school would not be subject to an injunction precluding it from using race in the future. *Id.* at 320.

Five Justices also joined in the Court's holding that the medical school, where appropriate, could constitutionally consider race under a "properly devised admissions program" involving the "competitive consideration of race and ethnic origin." *Ibid.* (Powell, J.); *id.* at 328 (Brennan, White, Marshall, Blackmun, JJ.).[2] Despite the fact that the medical school had not asserted a need to remedy any present effects of discrimination at the school itself, see 438 U.S. at 296 n.36 (Powell, J.), the majority of the Court expressly refused to prohibit consideration of race altogether.

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[2] The remaining four Justices declined to address the constitutionality of the admissions program, but rather would have held that Bakke's exclusion violated Title VI. *Bakke*, 438 U.S. at 408-409 (Stevens, J., concurring in the judgment in part and dissenting in part).

Justice Powell, who announced the judgment of the Court, stated that a university may have a compelling interest in considering the race of applicants in its admissions process in order to increase diversity in its student body. In our view, Justice Powell's opinion is a correct statement of law under the Constitution and Title VI, and has long been generally regarded by lower federal and state courts as stating the applicable law (see Part I.C, *infra*).

Specifically, Justice Powell identified the medical school's interest in providing the educational benefits of a diverse student body as a constitutionally permissible basis for consideration of race in admissions. 438 U.S. at 311-315. Applying strict scrutiny, *id.* at 290, he found that "[a]n otherwise qualified * * * student with a particular background — whether it be ethnic, geographic, culturally advantaged or disadvantaged — may bring to a professional school * * * experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates." *Id.* at 314. In making this finding, Justice Powell relied upon the statements of several university officials concerning the way students benefit from discussions with other students of different races because the students "stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." *Id*. at 312 n.48; see also *id*. at 321

n.55 (references to Appendix to the Brief filed by *amici* Columbia, Harvard, Stanford, and the University of Pennsylvania).

In addition to producing leaders trained through "wide exposure" to a "robust exchange of ideas," *id.* at 312 (Powell, J.), a diverse student body promotes the "atmosphere of 'speculation, experiment and creation'" that is "so essential to the quality of higher education." *Id.* (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). Indeed, the Supreme Court has long recognized "[t]he freedom of a university to make its own judgments as to education," including "the selection of its student body" as "a special concern of the First Amendment." *Bakke*, 438 U.S. at 312 (Powell, J.); *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (noting that one of the "essential freedoms" of a university is to determine on academic grounds "who may be admitted to study"). In exercising that freedom, a university, limited only by constitutional standards, may consider whether and how to admit a diverse class.

Justice Powell emphasized, however, that race is merely one of many aspects of diversity, and that a narrowly tailored admissions program should treat all applicants as individuals. 438 U.S. at 315-318. He approvingly cited to Harvard University's undergraduate admissions process, which considers race as a "plus" in an applicant's file without "insulat[ing] the individual from comparison

with all other candidates for the available seats." *Id.* at 317. Such a plan, he concluded, met constitutional standards because it weighed "all pertinent elements of diversity" in light of the particular qualifications of each applicant "fairly and competitively." *Id.* at 317-318; see also *id.* at 327, 363-364 (Brennan, White, Marshall, Blackmun, JJ.). Competitive consideration does "not necessarily" require "according [each element] the same weight," however. *Id.* at 317 (Powell, J.). When reviewing a large pool of "admissible" applicants, an applicant's race "may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases." *Id.* at 323 (Powell, J.).

Because Justice Powell's opinion is the last Supreme Court statement commanding a majority of the Supreme Court on the question presented here — whether a university may consider race in admissions, even absent a history of discrimination by the university — this Court must follow that holding. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("[W]hen a fragmented Court decides a case and no single rationale explaining the result 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[.]"). Thus understood, *Bakke*'s holding authorizes the "competitive consideration of race" in admissions programs that are not devised solely for the purpose of remedying prior

discrimination by defendant educational institutions. *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 568 (1990), overruled in part on other grounds, *Adarand,* 515 U.S. at 227-235.[3]

B. *Bakke* Has Not Been Overruled

Plaintiffs urged the district court and may urge this Court to ignore Supreme Court precedent and nearly 25 years of judicial reliance on the *Bakke* opinion and to hold that remedying identifiable discrimination is the only interest sufficient to permit the University of Georgia to consider race in admissions. For this Court to dismiss *Bakke* would be a sweeping conclusion not justified by principles of legal reasoning or *stare decisis*.

The Supreme Court has never disavowed *Bakke*, and indeed has uniformly assumed its continuing validity. In 1990, the Court cited *Bakke* for the proposition that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." *Metro Broadcasting,* 497 U.S. at 568 (quoting

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[3] Although the Court's decision in *Adarand* overruled *Metro Broadcasting* on the separate issue of whether a lower level of constitutional scrutiny applies to racial preferences enacted by Congress, see 515 U.S. at 227-235, *Adarand* did not involve (and the Court did not reject) the question whether institutions of higher education have a compelling interest in obtaining the educational benefits of a diverse student body. See *id.* at 257-258 (Stevens, J., dissenting).

Bakke, 438 U.S. at 311-313 (Powell, J.)). The same Court also reaffirmed Justice O'Connor's earlier acknowledgment that, "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Metro Broadcasting*, 497 U.S. at 568 n.15 (quoting *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring)). And most recently in *Adarand*, the Court expressly recognized that Justice Powell applied "the most exacting judicial examination" in reaching his conclusion in *Bakke* that diversity constitutes a compelling interest in the higher education context. *Adarand*, 515 U.S. at 218 (quoting *Bakke*, 438 U.S. at 291 (Powell, J.)).

1. *Only One Appellate Court Has Held That Bakke Is Not Controlling Precedent, And That Decision Was Wrong As A Matter Of Law*

To be sure, one appellate court has ruled, in a divided opinion in the context of law school admissions, that diversity cannot be a compelling interest as a matter of law. See *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996). The *Hopwood* panel majority held that Justice Powell's opinion in *Bakke* no longer represents the law with respect to use of affirmative action by educational institutions, and pointed to more recent Supreme Court opinions

(including *Adarand* and *Croson*), which it interpreted as holding that remedying past discrimination is the only state interest that can support race-based classifications. 78 F.3d at 944-948.

We believe that *Hopwood* was wrongly decided as a matter of law. In declaring *Bakke*'s demise, the panel majority ignored the Supreme Court's repeated admonition that lower courts may not conclude that a Supreme Court decision has been overruled by implication. *Agostini* v. *Felton*, 521 U.S. 202, 237 (1997) (reaffirming that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"); *State Oil Co.* v. *Kahn*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."). Lower courts, including this Court, have consistently held that they remain bound by Supreme Court precedent, regardless of whether that precedent arguably may be in tension with later Supreme Court holdings. See, *e.g.*, *Eng'g Contractor's Ass'n* v. *Metro. Dade County*, 122 F.3d 895, 908 (11th Cir. 1997) (court of appeals is "not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court"); see also

Adams v. *Dep't of Juvenile Justice*, 143 F.3d 61, 65 (2d Cir. 1998); *Montgomery* v. *Carr*, 101 F.3d 1117, 1129 (6th Cir. 1996).

The *Hopwood* court also erred by ignoring the holding in *Bakke* that a university may consider race as a factor in an appropriately structured admissions program even if it has not itself discriminated. Indeed, in *Hopwood* itself, the panel's decision was met by a strong dissent when the full court took up the question of rehearing *en banc*. See *Hopwood* v. *Texas*, 84 F.3d 720, 722 (5th Cir. 1995) (lower courts are not free to disregard directly controlling Supreme Court precedent) (opinion of C.J. Politz, dissenting from denial of rehearing en banc); see also *Wessmann* v. *Gittens*, 160 F.3d 790, 795-796 (1st Cir. 1998) (noting that the sharply divided *Hopwood* court is the only appellate court to reject diversity as a compelling interest).

2. *Subsequent Court Decisions Reaffirm, Rather Than Undermine, Bakke's Holding That Race May Be Used For Non-Remedial Purposes*

Supreme Court decisions in other contexts, such as public employment and contracting, do not undermine *Bakke*. The Court's reasoning in cases such as *Adarand* and *Croson*, for example, has little, if any, bearing on whether universities have a compelling interest in selecting a diverse student body. Although dictum in *Croson* — a case involving contracting — suggests that racial

classifications should be "strictly reserved for remedial settings," 488 U.S. at 493, the Court did not reject *Bakke*, and *Croson* (which predated the Court's apparently approving reference to *Bakke* in *Metro Broadcasting*) did not involve either the educational context or an affirmative action program based on the achievement of diversity. Indeed, as Justice Stevens pointed out, the reasons for educational diversity are not relevant to the awarding of construction contracts. See *Croson*, 488 U.S. at 513 (stating that, in the educational context, concluding that an integrated faculty could better teach students about the "melting pot" in the United States than an all-white or nearly all-white faculty was reasonable) (Stevens, J., concurring). Accordingly, the rationales underlying educational diversity were not considered by the Court in *Croson* or *Adarand*.

This distinction is amply demonstrated by the unique function the Court traditionally has accorded schools. As the Court stated in *Brown* v. *Board of Education*, education is "the very foundation of good citizenship" and "a principal instrument in awakening the [student] to cultural values," preparing her for participation as a political equal in a pluralist democracy. 347 U.S. 483, 493 (1954); see also *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986) (linking "public education" to America's "democratic political system" and adding that such education should promote "tolerance of divergent political and religious

views"); *Ambach* v. *Norwick*, 441 U.S. 68, 77 (1979) (opinion of the Court, per Powell, J.) (quoting *Brown* and then describing "public schools as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground * * * inculcating fundamental values necessary to the maintenance of a democratic political system").

Moreover, neither *Adarand* nor *Croson* held that only a remedial purpose could constitute a compelling interest. See *Hunter* v. *Regents of Univ. of Cal.*, 190 F.3d 1061, 1064 n.6 (9th Cir. 1999) ("The Supreme Court has never held that only a state's interest in remedial action can meet strict scrutiny."), cert. denied, 69 U.S.L.W. 3110 (U.S. Oct. 2, 2000); *Wittmer* v. *Peters*, 87 F.3d 916, 919 (7th Cir. 1996) (same), cert. denied, 519 U.S. 1111 (1997). Indeed, the question whether a non-remedial purpose may also satisfy strict scrutiny was not presented in either case. See *Wessmann*, 160 F.3d at 796; see also *Adarand*, 515 U.S. at 227; *id.* at 258 (Stevens, J., dissenting) (stating that "[t]he proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today — indeed, the question is not remotely presented in this case") (emphasis added).

Several courts have since reiterated that a non-remedial purpose may indeed satisfy strict scrutiny. See *Hunter*, 190 F.3d at 1064 (identifying compelling

interest in educational research); *Buchwald* v. *Univ. of New Mexico Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998) (identifying compelling interest in public health); *Wittmer*, 87 F.3d at 918 (7th Cir. 1996) (identifying compelling interest in maintaining order in correctional facility); see also *Brewer* v. *West Irondequoit Cent. Sch.*, 212 F.3d 738, 752 (2d Cir. 2000) (reducing racial isolation in public schools can be a compelling interest). In rejecting the argument that dicta in *Croson* conclusively limited consideration of race to remedial settings, the Seventh Circuit wrote "there is a reason that dicta are dicta and not holdings, that is, are not authoritative. A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him." *Wittmer*, 87 F.3d at 919; see *Wygant*, 476 U.S. at 286 (1986); *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671 (6th Cir. 1979) (citing national studies and testimony of law enforcement officials in holding that operational needs of police department could justify racial preference in promotion of police officers), cert. denied, 452 U.S. 938 (1981).

As Justice Powell acknowledged, the consideration of race as a factor in university admissions can make a vital contribution to a school's educational mission by permitting the school to assure that it enrolls a truly diverse student

body (see Part I.D, *infra*). Such diversity fosters a robust exchange of ideas, affirmatively promotes integration and understanding, and ultimately enriches both the students themselves and the broader community. Justice Powell's opinion properly recognized the unique characteristics and concerns of the educational environment as well as the fundamental state interest in providing all students with the best possible education, including the irreplaceable educational benefits afforded by a diverse student body.

Bakke also is entirely consistent with cases in which the Supreme Court has emphasized the unique role that race may play in education and the special competence of educators to determine what factors best foster an optimal learning environment. For example, in the public elementary and secondary school context, the Court has recognized that school officials' decision to pursue racial integration "as an educational policy" should be accorded deference. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971). Such considerations take on renewed importance at the college and graduate level as students prepare themselves for civic and professional responsibilities in a racially diverse society. See *Bakke*, 438 U.S. at 313-314 (Powell, J.); see also Neil L. Rudenstine, Harvard Univ., *The President's Report 1993-1995: Diversity and Learning* 43 (1995) (diversity is

important at graduate level "because education at that level so strongly affects a student's conception of professional vocation, as well as the capacity to work with a variety of fellow professionals").

C. Justice Powell's Opinion Has Been Consistently Relied Upon By Lower Courts, Federal Agencies, And Institutions Of Higher Education

During the two decades since *Bakke*, Justice Powell's landmark opinion has guided the admissions policies of public and private educational institutions throughout the United States. On the authority of Justice Powell's opinion, most selective colleges and professional schools have continued to consider race in admitting students. See, *e.g.*, William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 8, 252-253 (1998) (citing Association of American Universities' unanimous statement affirming the educational value of diversity) (hereinafter, Bowen & Bok). The Department of Education has also relied on Justice Powell's opinion in concluding that race-conscious decision-making for purposes of achieving diversity in higher education does not violate Title VI, so long as the admissions plan meets applicable narrow tailoring standards. See, *e.g.*, 44 Fed. Reg. 58509, 58510-58511 (1979); 59 Fed. Reg. 8756, 8760-8762 (1994).

In addition, Justice Powell's opinion has been consistently relied on by

lower federal and state courts. See *Brewer*, 212 F.3d at 747; *Tuttle* v. *Arlington County Sch. Bd.*, 195 F.3d 698, 705 (4th Cir. 1999), cert. denied, 120 S. Ct. 1552 (2000); *Wessmann* v. *Boston Sch. Comm.*, 996 F. Supp. 120, 127-130 (D. Mass.), rev'd on other grounds *sub nom. Wessmann* v. *Gittens*, 160 F.3d 790 (1st Cir. 1998); *Davis* v. *Halpern*, 768 F. Supp. 968, 975-976 (E.D.N.Y. 1991); *DeRonde* v. *Regents of the Univ. of Cal.*, 625 P.2d 220, 226 (Cal.), cert. denied, 454 U.S. 832 (1981); *McDonald* v. *Hogness*, 598 P.2d 707, 712-713 & n.7 (Wash. 1979), cert. denied, 445 U.S. 962 (1980). See also *Smith* v. *Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1333-1334 (W.D. Wash. 1998); *Univ. & Cmty. Coll. Sys.* v. *Farmer*, 930 P.2d 730, 734-735 (Nev. 1997) (accepting diversity rationale for purposes of faculty hiring), cert. denied, 523 U.S. 1004 (1998).

For example, in *Smith*, although the court denied the university's motion for summary judgment in a law school admissions challenge, it accepted as binding authority for the anticipated trial Justice Powell's opinion in *Bakke* that "[t]he attainment of a diverse student body * * * is a compelling interest and constitutionally permissible goal for a university or graduate program." 2 F. Supp. 2d at 1334 (citing *Bakke*, 438 U.S. at 311-312).[4] In *Wessmann*, the First Circuit

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[4] The question whether obtaining the educational benefits of diversity may constitute a compelling interest under the Fourteenth Amendment was certified to

(continued...)

understood that Justice Powell's opinion in *Bakke* remained good law and that "iterations of 'diversity' might be sufficiently compelling, in specific circumstances, to justify race-conscious actions." 160 F.3d at 796. In *McDonald*, the Washington State Supreme Court held that the use of race as a "positive factor" in admission to a state medical school, in part to attain a diverse student body, served a compelling state interest. 598 P.2d at 713. Similarly, in *DeRonde*, the California State Supreme Court held that the use of race as "one of several competing factors" in admission to a state law school satisfied a compelling state interest to "assur[e] an academically beneficial diversity among the student body[.]" 625 P.2d at 225-226.

D. Social Science Research Confirms The Educational Benefits Of A Diverse Student Body

Since *Bakke*, educators operating in a variety of institutional settings as well as academics, scientists, and sociologists studying the educational process consistently have affirmed the important role diversity plays in accomplishing academic institutions' goals of developing students' cognitive and leadership skills. A large body of empirical evidence demonstrating the value of diversity in higher education has been published. Although the district court here did not consider this

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[4](...continued)
the Ninth Circuit. See *Smith* v. *Univ. of Wash. Law Sch.*, No. 99-35209 (9th Cir.).

evidence, it is essential for the Court to take in account the results of these studies when considering whether the University should have the opportunity to demonstrate the benefits of diversity at trial.

Significantly, two decades of experience in implementing affirmative action plans modeled on Justice Powell's opinion in *Bakke* have confirmed his conclusion that diversity, including racial diversity, significantly enhances the educational experiences of all students by, *inter alia*, fostering more complex thinking. See, *e.g.*, American Council on Education and American Association of University Professors, *Does Diversity Make A Difference?: Three Research Studies on Diversity in College Classrooms* 15-16, 48-49, 66-72 (2000) (hereinafter, AAUP Report); Jeffrey F. Milem & Kenji Hakuta, *The Benefits of Racial and Ethnic Diversity in Higher Education* 43-49 (Minorities in Higher Education 1999-2000, 17th Annual Status Report, American Council on Education); Gary Orfield & Dean Whitla, *Diversity & Legal Education: Student Experiences in Leading Law Schools* (The Civil Rights Project, Harvard Univ. ed., Aug. 1999); Bowen & Bok, *supra*, at 279-280; Daryl G. Smith & Assocs., *Diversity Works: The Emerging Picture of How Students Benefit* (1997); Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 Harv. L. Rev. 1357, 1369-1373 (1996); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*,

47 Stan. L. Rev. 855, 856 (1995); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 Wis. L. Rev. 105, 138-139 (1993).

Most selective college and university presidents today agree that when an institution admits a diverse student body, all students enjoy a richer educational experience and develop greater tolerance and racial understanding. See, *e.g.*, AAUP Report, *supra*, at 71; Bowen & Bok, *supra*, at 8, 252-253. That is, when students interact with others who have backgrounds and characteristics different from their own, they are more likely to think critically and engage in the "robust exchange of ideas" that Justice Powell deemed an essential component of higher education. *Bakke*, 438 U.S. at 312 (Powell, J.). See Maurianne Adams & Yu-hui Zhou-McGovern, *The Sociomoral Development of Undergraduates in a "Social Diversity" Course* (1994) (ERIC Report No. 380345) (tests administered to majority and minority students before and after participation in interracial social diversity course measured statistically significant, positive effects on students' cognitive development); Octavio Villalpando, *Comparing the Effects of Multiculturalism and Diversity on Minority and White Students' Satisfaction with College* (1994) (ERIC Report No. 375721) (finding that socializing with other-race students and discussing racial/ethnic issues positively affects students' academic

and personal development); Alexander W. Astin, *What Matters in College* 431 (1993) ("[T]he weight of empirical evidence shows that the actual effects on student development of emphasizing diversity and of student participation in diversity activities are overwhelmingly positive.").

Indeed, racial diversity in the classroom promotes substantive teaching and learning by exposing majority and minority students to other-race students who can challenge long-held perspectives and encourage intellectual exploration. See generally Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 Harv. L. Rev. at 1369-1373 (discussing evidence demonstrating that campus diversity positively affects educational outcomes). See also Maurianne Adams & Linda S. Marchesani, *Curricular Innovations: Social Diversity as Course Content*, New Directions for Teaching 85, 87-91 (Winter 1992) (anecdotal evidence); Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How are Students Affected?*, Change 44, 45 (March/April 1993) (hereinafter, Astin).

Contrary to the district court's opinion, see *Johnson*, 106 F. Supp. 2d at 1373-1374, what diversity fosters is not an exchange of stereotypical or group perspectives, but rather a multitude of individual perspectives. See AAUP Report, *supra*, at 70; Jonathan R. Alger, *The Educational Value of Diversity*, 83 Academe

20 (Jan./Feb. 1997). The pursuit of a racially diverse student body, in other words, does not assume that individuals of the same race will also share common viewpoints that must be represented in the educational setting. Rather, each individual member of such a group will have unique perspectives and the range of these unique perspectives will be broader — and the educational experience of all students correspondingly richer — if individuals with diverse backgrounds are included in the student body.

Support for this proposition is found in the research by Alexander Astin, Director of the Higher Education Research Institute at the University of California, Los Angeles, and one of the foremost experts in researching the impact of diversity on cognitive development. Analyzing data from 217 institutions and 25,000 students who participated in the Cooperative Institutional Research Program's (CIRP) annual survey of college students, Astin identified three factors "associated with [students'] greater self-reported gains in cognitive and affective development": (1) "institutional diversity emphasis," including a commitment to increasing the number of minority faculty and students; (2) "multiculturalism" in the general education curriculum; and (3) "direct student experience with diversity," including taking ethnic studies courses, attending cultural awareness

workshops, socializing with other-race students and discussing racial issues with a diverse group of peers. Astin, *supra*, at 44-45, 48.

Other social scientists analyzing the CIRP college student survey data have reached similar conclusions. See Mitchell J. Chang, *Racial Diversity in Higher Education: Does a Racially Mixed Student Population Affect Educational Outcomes?* (1996) (unpublished Ph.D. dissertation, University of California, Los Angeles), cited in D. Smith & Assocs., *Diversity Works: The Emerging Picture of How Students Benefit* 28, 78 (abstracting social science research). Using the 1985 and 1989 CIRP data, Chang studied 11,000 students on 300 campuses quantified by degree of racial diversity or opportunity for cross-racial interaction. Chang found that, in general, socializing with other-race students and discussing racial/ethnic issues on a diverse campus positively affected, among other things, students' overall graduation rates and undergraduate grade point average. *Id.* at 78; see also Jeffrey F. Milem, *College, Students, and Racial Understanding*, 29 Thought & Action 51-59 (1994) (concluding that, based on CIRP data, white students' commitment to promoting racial understanding was increased by discussing racial/ethnic issues in a diverse setting).

Studies involving small groups have also found that exposure to racial diversity measurably improves cognitive ability, and that members of

heterogeneous groups typically devise more creative solutions to problems than members of homogeneous groups. See Poppy L. McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 Small Group Research 248, 253 (1996); Taylor Cox, Jr., *Cultural Diversity in Organizations: Theory, Research, and Practice* (1993).

In sum, as shown by overwhelming empirical evidence, a diverse student body enables colleges and universities to provide a richer education to *all* students by challenging students to think more critically and broadly in both classroom discussion and informal student interaction. See *Linmark Assoc.* v. *Willingboro*, 431 U.S. 85, 94-95 (1977) (recognizing "that substantial benefits flow to both whites and blacks from interracial association").[5] Diversity, therefore, may be deemed to achieve a compelling interest as a matter of law.

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[5] In addition to promoting learning among majority and minority students, diversity-based admissions programs produce extremely positive educational outcomes for minority students. See Bowen & Bok, *supra*, at 275-290. In their landmark study, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, William Bowen, former President of Princeton University, and Derek Bok, former President of Harvard University, evaluated the academic records of 60,000 students who entered 28 selective colleges and universities in 1951, 1976, and 1989. See *id*. at xxv-xxxii. They found that black students who attended selective colleges and universities had significantly higher graduation rates, were more likely to earn professional degrees, and earned substantially higher salaries than graduates from all black institutions. See *id.* at 256-258.

II. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT

In this case, it is clear that the district court erred in granting summary judgment for plaintiffs. This Court reviews a district court's grant of summary judgment *de novo*, "with all facts and reasonable inferences therefrom reviewed in the light most favorable to the nonmoving party." *EPL, Inc.* v. *USA Fed. Credit Union*, 173 F.3d 1356, 1360 (11th Cir. 1999). Summary judgment is appropriate only if the moving party is entitled to judgment as a matter of law and there is no genuine issue as to a material fact. *Id.* "If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." *Id.*

Under this standard, the district court's grant of summary judgment for plaintiffs was improper because the Board of Regents had submitted evidence of the educational benefits of a diverse student body to support finding a compelling government interest, while plaintiffs failed to provide *any* evidence to the contrary. For example, former University president, Charles Knapp, testified that the goal of considering race as one of many factors in the admissions process was to improve the education provided to *all* University students. He stated that, based on his college teaching experience, a diverse classroom "elevate[s]" the "quality of discussion and the level of critical thinking," which enhances the educational benefits for all students (R8-124 (Knapp Aff. ¶¶ 13, 19-20)). Knapp further stated

that a diverse campus would teach the students to work together "cooperatively and effectively" across racial lines and that this education will help the students succeed in Georgia's "information-focused economy," which requires individuals to work in teams (R8-124 (Knapp Aff. ¶ 12)).

The University's current president, Michael Adams, also testified that the University's use of race improves the education provided to all students (Doc. 140 (Adams Dep. at 35-37, 47-49, 107-108)). Similar to Knapp, Adams based his testimony on his years of experience as a college professor (Doc. 140 (Adams Dep. at 35)). He testified that diverse classrooms are "the best learning environments" because they generate better discussions involving a broader range of opinions (Doc. 140 (Adams Dep. at 35, 47-49, 107)). According to Adams, in a diverse classroom where "you have a full mosaic of opinion," "you ultimately end up with a better [educational] product, a better decision, and a better end result" (Doc. 140 (Adams Dep. at 107-108)).

Despite this *undisputed* evidence about the educational benefits of a diverse student body, the court concluded that the Board of Regents' diversity rationale was too "amorphous" and "stereotyped-driven" to be sufficiently compelling to warrant the University's use of race in making admissions decisions. *Johnson*, 106 F. Supp. 2d at 1374. This was error. The court improperly discounted Knapp and

Adams' testimonies merely because they were based on their experience as educators. See *id*. at 1372. Even if "reasonable minds might differ on the inferences arising from [the] undisputed facts," the district court was obligated to deny summary judgment. *St. Charles Foods, Inc.* v. *America's Favorite Chicken Co.*, 198 F.3d 815, 819, 822 (11th Cir. 1999) (reversing grant of summary judgment where ambiguity in contract should have been decided by a jury).

At a minimum, in light of plaintiffs' failure to dispute this evidence, the Board of Regents' evidence raised factual issues sufficient to defeat plaintiffs' summary judgment motion, especially where all reasonable doubts regarding the facts must be resolved in favor of the Board of Regents and defendant-intervenors. See *Leigh* v. *Warner Bros., Inc.*, 212 F.3d 1210, 1216 (11th Cir. 2000) (similarity in photographs required allowing jury to decide copyright claim and summary judgment was improper); *EPL*, 173 F.3d at 1362-1363 (reversing grant of summary judgment where there were factual issues concerning defendant's conduct under a contract). Plaintiffs, therefore, were not entitled to summary judgment and this matter should be remanded.[6]

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[6] At trial, the Board of Regents and defendant-intervenors will be able to present a more developed record to support the University's race-conscious admissions program than the one that exists now. Moreover, based on further development of the record, whether a remedial purpose supports the University's

(continued...)

CONCLUSION

For the forgoing reasons, the Court should reverse the district court's summary judgment for plaintiffs and remand this action for further proceedings.

Respectfully submitted,

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[6](...continued)
use of race may also be an issue at trial (Intervenors Br. 39-42).

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 29(d) and Eleventh Circuit Rule 29-2, the attached *amicus* brief was prepared using WordPerfect 9 and contains 6,979 words of proportionally spaced type.

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2000, two copies of the foregoing Brief Of The United States As Amicus Curiae In Support Of Board of Regents And Defendant-Intervenors were served by first-class mail, postage prepaid, on:

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