Nos. 99-35209, 99-35347, and 99-35348

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATURIA E. SMITH, *et al.*,

Plaintiffs-Appellants,

v.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, *et al.*,

Defendants-Appellees,

On Appeal from the

United States District Court

for the Western District of Washington

The Hon. Thomas S. Zilly

PLAINTIFFS-APPELLANTS' BRIEF

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Statement Of Jurisdiction

As set forth below, the Amended and Consolidated Complaint (the "Complaint") in this action asserts claims pursuant to 42 U.S.C. §§ 1981, 1983, and 2000d, et al.. Accordingly, the District Court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

This brief addresses the issues raised in three different appeals, consolidated pursuant to this Court's order, filed May 6, 1999. The three appeals arise from the same district court case with the same parties: Smith *et al.* v. University of Washington Law School, *et al.*, W.D. Wash. C97-335(C)Z, but they have arrived in this Court in different ways. In an order dated April 1, 1999 this Court granted plaintiffs' separate petitions (a) for permission to appeal, pursuant to Federal Rule of Civil Procedure 23(f), an order decertifying the plaintiff class (Petition No. 99-80036), and (b) for permission to appeal, pursuant to 28 U.S.C. § 1292(b), an order denying plaintiffs' motion for partial summary judgment (Petition No. 99-80037). Each of the two petitions were timely: the petition pursuant to Rule 23(f) sought permission to appeal orders dated February 10, 1999 and February 22, 1999, and was filed on February 24, 1999, within the ten business days contemplated by Rules 6(a) and 23(f), Fed. R. Civ. P.; and the petition pursuant to 28 U.S.C. § 1292(b) sought permission to appeal an order, dated February 12, 1999, which the court below subsequently certified pursuant to that statute (on February 22, 1999), and which petition was filed on February 27, 1999, well within the time contemplated by Section 1292(b) and FRAP Rule 5(a)(3). (These two petitions subsequently were assigned appeal numbers 99-35347 and 99-35348.) See generally ER791-812, 858-61. ("ER" references are to plaintiffs' Excerpts of Record.)

Appeal No. 99-35209 is an appeal as of right from the dismissal by the District Court of plaintiffs' requests for injunctive relief on February 10, 1999. E.g., Spangler v. U.S., 415 F.2d 1242 (9th Cir. 1969); Hancock Oil Co. v. Universal Oil Products, 115 F.2d 45 (9th Cir. 1940) (dismissal of a claim seeking injunctive relief is appealable pursuant to 28 U.S.C. § 1291(a)(1)). See generally 11A Wright & Miller, Federal Practice and Procedure, § 2962 (1998). The notice of appeal was filed on February 23, 1999. ER862-63.

Statement Regarding Attorneys' Fees

Plaintiffs-appellants intend to seek attorneys' fees for this appeal pursuant to 42 U.S.C. § 1988.

Statement Of The Issues

1. Did the trial court err in (1) decertifying a class that it had previously certified pursuant to Rule 23(b)(2) and (2) failing to certify a class pursuant to Rule 23(b)(3)?

2. Where the individual defendants have operated an admissions system at the defendant University of

Washington Law School (the "Law School") for years, and the trial court concludes that a reasonable trier of fact could conclude that those individual defendants violated clear and well-established Constitutional norms and rules against race discrimination in operating that admissions system, did the trial court err in concluding that there was no possibility of the defendants violating the law in the future because of the passage of a state statute that creates an additional legal impediment to such violations?

3. Did the trial court err in denying plaintiffs' motion for partial summary judgment, a motion based upon the undisputed fact that the defendants' "compelling interest" for the use of race in the admissions process was their interest in "academic freedom" and "diversity"?

Statement Of The Case

This action commenced on March 5, 1997 with the filing of the original complaint. ER874, Docket No. 1. The original complaint, like the consolidated and amended complaint filed in July 1997 (ER1-12), asserted that defendants operated an admissions system at the University of Washington Law School (the "Law School") that illegally discriminated on the basis of race in violation of 42 U.S.C. §§ 1981, 1983, and 2000d. The case is currently stayed pending these appeals, which are described in the Statement of Jurisdiction.

Statement Of Facts

A. Plaintiffs

At all relevant times, plaintiffs Katuria Smith, Angela Rock, and Michael Pyle were white residents of Washington who applied for admission to, and were rejected by, the Law School in 1994, 1995, and 1996 respectively. ER2-3, 8, 14, 16.

Katuria Smith applied in 1994. Earlier, she had asked for a waiver of the fees to apply to the Law School, and provided documentation of her minimal income. The Law School states that it will grant a "limited number of fee waivers . . . for those who would not otherwise be able to apply." ER122. The Law School granted Smith's application for a fee waiver. ER149-56.

Smith's application was unusual. ER552-76. After several years in community colleges, she transferred to the undergraduate business program at the University of Washington ("UW"). Although UW was obviously a far more academically rigorous program, Smith did much better there than she had at the community colleges. (Although her overall GPA was a 3.28, she had a GPA of 3.62 at the UW in its competitive undergraduate business program. Her LSAT score was in the 94th percentile. ER553.) Her application explained that she had worked full-time during most of the time she was in community colleges, until she switched to part-time work just prior to her transfer. ER561. (In her last semester at a community college, working "only" part time, she earned a 3.89 GPA.) She noted that her father was dead, that her mother had three other children, and that she had no means of supporting herself other than working. Accordingly, she continued to work 20-25 hours per week even after transferring to UW. Id.

Smith submitted a glowing recommendation from her employer (an attorney). ER570. Her other recommender (a professor at UW) thought it sufficiently important to write that she "has worked very hard under very difficult circumstances to get to this point"; that she was "truly a much better student than her cumulative GPA suggests"; and that she "had always had to work many hours outside of school to support herself." ER567. He also extolled her initiative and determination. Id.

The Law School rejected Smith's application in March 1994. As a consequence, she was forced to attend the University of Seattle Law School, and suffered damages as a consequence. ER2, 9, 14.

Angela Rock applied in 1995. ER577-602. She had an LSAT score in the 93rd percentile, and a GPA from the University of Washington of 3.65. ER599. Her "Index score" of 196 (see Part C, infra) was a "presumptive admit" score for Washington residents in 1995. ER367-68. Rock's application spoke about having been a swimming coach in a depressed, gang-infested ghetto area of Spokane and about how that experience had changed her and her perspective. ER589-90. She also identified the other jobs she held while attending college. ER588. The Law School placed Rock on a waiting list in March 1995 (ER584), and eventually rejected her application in August 1995. ER577-78. As a consequence, Rock attended the Georgetown Law School, and suffered damages as a consequence. ER2-3, 9-10.

Michael Pyle applied in 1996. ER603-24. He had graduated in 1991 from Duke University with a 3.15 GPA in Mechanical Engineering, and had scored in the 97th percentile on the LSAT when he took it in 1995. ER619. His application spoke at length about his work for the previous years working as a structural analyst at the Boeing Co. ER609-10. Pyle also wrote about how he had come to terms with his homosexuality and how that experience had sensitized him to the experiences of other groups that have traditionally been the victims of irrational discrimination. ER610-11.

The Law School rejected Pyle's application in March 1996. As a consequence, Pyle did not attend any Law School, and suffered damages as a consequence of his inability to become a lawyer. ER3, 10. (Although not in the record below, Pyle reapplied to the Law School in 1999 and was admitted subsequent to the filing of these appeals. He plans to attend the Law School beginning in Fall 1999.)

B. Defendants

Defendant University of Washington Law School is a state-run law school that receives federal funds. ER815.

Defendant Wallace Loh served as Dean of the Law School from 1990 to 1995. ER168. Defendant Roland Hjorth succeeded Loh as Dean and has served in that capacity since August 1995. ER49. Hjorth has been responsible for the admissions program since assuming the office of Dean. Id.

Richard Kummert was actively involved in the admissions process for the Law School since 1965 and had served as chair of the Law School's Admissions Committee since 1993. ER32. Sandra Madrid was Assistant Dean of the Law School, and had responsibility for the administration of the admissions system. ER171. See also ER94, 99 (Int. No. 5), 169.

C. The Admissions Process

Upon receipt of completed applications, the Law School uses an index, a weighted average of undergraduate grade point average and LSAT scores, to order the applicants. The highest ranking applicants, referred to as "presumptive admit" candidates, were reviewed by Admissions Coordinator Kathy Swinehart, who would recommend that the candidate be admitted or held for further review. Her decisions were reviewed by defendant Kummert. ER33, 51, 211. According to the Law School, applicants in this category were held for further review if their "academic potential" appeared to be less than that indicated by their index score or if they lacked a "diversity" factor as described in the Law School's admissions policy. ER44, 64-65, 211.

In 1994, the remaining candidates (those with Index scores below 197) were divided into "Admissions Committee" files and "presumptive denial" files. ER33. White candidates at Index levels 195 and 196 were set aside for review by the Admissions Committee; minority candidates at those levels were reviewed by defendant Madrid. ER368, 400, 672 (Transcript 167). The "presumptive denial" candidates (those with Index scores below 195) were all reviewed by defendants Madrid, who had the authority to admit such candidates, hold their applications for further review by the Admissions Committee, or deny their applications. ER34, 51, 722 (Transcript 33). Her decisions were reviewed by defendant Kummert. ER34, 51, 212. Those admitted directly by Madrid from the "presumptive denial" category in 1994 were substantially all minorities. ER672 (Transcript 166), 674 (Transcript 177). Only whites and Asians were referred for further review. ER672 (Transcript 169).

In 1995 and subsequently, Madrid would read all the files outside of the "presumptive admit" category. She had the same authority to admit, deny, or hold for further review. ER212.

In the spring of 1994, the Law School adopted a goal of having each admitted class consist of students 70-75% of whom were residents of the State of Washington. ER626.

Both Kummert and Madrid asserted that they used the admissions criteria set forth in the Law School's Admissions Policy, which (in Section 3 thereof) identifies various "diversity" factors including "racial or ethnic origin" as positive attributes in an applicant's file. ER106, 211.

The Admissions Committee would review the files referred to it by Swinehart and Madrid (and, in 1994, files of white candidates at Index levels 195 and 196). Based upon rankings of individual members of the Admissions Committee, additional offers of admission would be made. ER51-52, 212.

The Law School considers race as a factor in admissions, but not as a means of remedying the present effects of its own past discrimination. It does not limit its consideration of race to applicants who are members of groups that have been the victims of state-sanctioned discrimination. ER815.

D. Admissions Results

The Law School adopted its current written policy in late 1989. ER61-62, 162. In the two years prior to that adoption, the Law School's offers to non-whites constituted 16% and 20% of all offers. Throughout the period from 1990 through 1995, the proportion of minorities offered admission to the Law School each year stayed within fairly close parameters: between 30% and 38%. ER441-43. Cf. ER140. In 1996, it dropped slightly to 27%. ER441.

The 1990 census indicates that the minority population of the State of Washington was 13.5%. ER479, 483-84 (Reqs. To Admit Nos. 1-4). Estimates for 1994 by the Census Bureau indicate that the minority population had increased to 15.2%. ER480, 485 (Reqs. To Admit Nos. 12-15). Thus, throughout the 1990's the proportion of minorities among those offered admission to the Law School has been far greater than their proportion of the population of the State of Washington.

E. The Initial Class Action And Bifurcation Motions

On September 11, 1997, plaintiffs moved for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs' motion papers argued that the class could be certified pursuant to both Rule 23(b)(2), on the ground that general injunctive and declaratory relief with respect to the class as a whole would be appropriate, and Rule 23(b)(3) and 23(c)(4), on the issue of whether defendants engaged in

unlawful discrimination.

At the same time, plaintiffs moved to bifurcate the case into a "liability" and "remedy" phase. Plaintiffs proposed that the first trial consider whether defendants were liable for having violated various race discrimination norms and that the second trial consider "any damages and other individual relief for the named plaintiffs and any other class members." ER20. Plaintiffs submitted one proposed order for both the class action and bifurcation motions, which asked that "the class issues relating to liability and propriety of injunctive and declaratory relief for the class as a whole be tried first, and any claim related to the individual damages and relief, including those of the named plaintiffs, will be tried in a subsequent proceeding." ER25.

Defendants opposed plaintiffs' motions for class certification and bifurcation, and submitted the affidavit of defendant Kummert. Kummert swore that none of the plaintiffs had **any** characteristics which would warrant consideration under the Law School's diversity policy. ER34-35 (¶¶ 10, 13, 17). Defendants concede that they did not give any diversity credit for characteristics involving sexual orientation. ER687 (Transcript 229), 736 (Transcript 89).

F. Defendants' First Two Motions

For Partial Summary Judgment

On December 23, 1997, the individual defendants moved for partial summary judgment on the damage claims against them pursuant to 42 U.S.C. §§ 1981 and 1983. They based their motion on the qualified immunity defense, and argued that the admissions system that they employed at the Law School complied with the requirements of Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

A few weeks later, on January 16, 1998, the Law School moved for partial summary judgment on the Title VI (42 U.S.C. § 2000d) damages claim asserted against it. It argued that any violation of Title VI was an "unintentional" violation, and, that, accordingly, plaintiffs could not recover damages under Title VI.

In response to defendants' motions for partial summary judgment, plaintiffs submitted evidence suggesting that race was more than a "plus" factor. For example, printouts produced by defendants during discovery demonstrated that, in 1994, every African American with a GPA between 2.5 and 3.24 and LSAT scores in the 155-59 range was admitted to the Law School; of the 131 white or "other" candidates in that range, none were admitted. ER213, 224.

G. The April 1998 Decision And Order

A hearing was held on the various outstanding motions before the Court on March 13, 1998. See Hearing Transcript (Docket No. 104). On April 22, 1998, the trial court granted the motion for class certification and denied defendants' motions for partial summary judgment. With respect to the latter, it concluded that the record was insufficient to grant defendants' motions for partial summary judgment, and ruled that plaintiffs were entitled to additional discovery. ER224, 227-28.

With respect to the motions for class certification and bifurcation, the court below concluded that (1) plaintiffs had standing to assert their claims despite defendants' arguments to the contrary (ER228-32), (2) a class represented by plaintiff Pyle met each of the four requirements (numerosity, commonality,

typicality, and adequacy of representation) in Rule 23(a), but that Rock and Smith were not "adequate representatives" for requests for injunctive relief because they had attended other law schools (ER233-40), and (3) the class met the requirements of Rule 23(b)(2) because the defendants had acted in a manner generally applicable to the class as a whole making final injunctive relief or corresponding declaratory relief appropriate for the class as a whole (ER240-41). The Court certified a class consisting of all Caucasian candidates who applied from 1994 through 1998. ER236.(1) The trial court also granted plaintiffs' motion for bifurcation, ruling that the question of liability would be tried first, and that "[i]f defendants' admissions practices are found to be unconstitutional, the Court will then proceed on the matter of damages." ER243.

The trial court's treatment of plaintiffs' motion pursuant to Rule 23(b)(3) was somewhat less clear. The court never explicitly analyzed plaintiffs' motion pursuant to Rule 23(b)(3), and the predominance and superiority requirements thereof. It noted that there were a number of "[i]mportant factors" in determining damages, including whether the rejected applicant would have been admitted but for the alleged discriminatory conduct. ER242. It concluded that the "damage question" turned on individual circumstances and was not appropriate for class treatment, and thus denied plaintiff's motion for class certification "to the extent it seeks certification of any class claim for damages." Id. This part of the court's decision was ambiguous because plaintiffs had not sought class treatment for any "class claim for damages," but rather only had asked that class treatment be applied (pursuant to Rule 23(c)(4)) to the question of whether defendants had engaged in illegal discrimination -- a procedure the court below adopted. Conspicuously, the trial court did not state that individual members of the plaintiff class were precluded from seeking damages in the second phase of the bifurcated trial relating to individual relief. To the contrary, it granted plaintiffs' motion for bifurcation, which, as noted, had sought such relief.

H. The Mootness Motion

In November 1998, the people of the State of Washington passed Initiative I-200. In relevant part, that initiative stated:

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

ER249. As passed, I-200 was codified as a statute at Section 49.60.400 RCW. (Unlike similar initiatives in other states, like Proposition 209 in California, I-200 did not become a constitutional provision. ER266. Pursuant to the Washington Constitution, it can be amended by a 2/3 vote of the legislature at any time, and by a simple majority vote of the legislature after two years from the date of its enactment. Wash. Const. Art. 2, § 41.)

On November 19, 1998, defendants moved to dismiss plaintiffs' requests for declaratory and injunctive relief on the ground that I-200 rendered them moot. In support of that claim, defendants submitted one affidavit: that of defendant Hjorth, who asserted that the president of the University had issued a directive to suspend the use of race as a criterion in admissions decisions; that he (Hjorth) had directed the Admissions Committee of the Law School to develop a new policy "that would attempt to preserve the benefits of all kinds of diversity, while conforming to the requirements of I-200"; and that "the operational details of how the new policy will be administered will not be determined at th[e] time [of its adoption]." ER254-55.

In a supplemental brief, defendants submitted an unauthenticated version of a new admissions policy. ER256-57. That document continued to stress the importance of "diversity" and stated that "[f]actors that indicate this diversity include, **but are not limited to**, [various listed factors]" (ER256-57 (emphasis added)), and that its list of "diversity" factors was "not exhaustive." Id. It added several "new" diversity factors, like having "spoken a language other than English at home." ER257.

I. The Summary Judgment Motions

Pursuant to the trial court's revised scheduling order (Docket No. 185), both sides moved for summary judgment on December 17, 1998. Plaintiffs' motion for partial summary judgment on liability was based upon the undisputed fact that defendants consider race and ethnicity in the Law School's admissions process for the purported purpose of achieving "educational diversity" pursuant to its academic freedom; plaintiffs argued that "diversity" and "academic freedom" were not compelling governmental interests. Defendants' motion argued that they had complied with the requirements of Justice Powell's opinion in Bakke. They also repeated their contentions that the individual defendants had qualified immunity and that the Law School had not engaged in "intentional" discrimination in violation of Title VI.

In opposition to defendants' motion, plaintiffs submitted evidence that

* When applicants from preferred races submitted applications that did not sufficiently identify their "diversity," defendants would send those applicants a letter seeking additional information about their "family background" and "cultural activities and associations." The letter was sent **only** to preferred, non-white applicants. Defendants had never sent out any other letter seeking additional information about "diversity." ER627, 731, 765.

* As defendants conceded, the system in 1994 provided for differential treatment for whites and racial minorities at various index levels. See discussion, supra, p. 9.

* From the files of white candidates she read each year that she did not outright deny, defendant Madrid referred applicants to the Admissions Committee in far greater numbers than she admitted directly (her two other options). In contrast, from the files of similarly-situated candidates of preferred races, she admitted candidates directly in far greater numbers than she referred to the Admissions Committee. ER528-31.

* Defendants Kummert and Madrid used entirely different standards in assessing the applications of white candidates and preferred race candidates. ER784-90.

* The use of the index was critically important **within a given race** in assessing the chances of all candidates for admission; candidates with index scores below certain levels were almost guaranteed

denial, while those with index scores above certain levels were almost guaranteed acceptance. But these "cut" scores were **substantially different** for different races. ER316-30, 510-12.

* Defendant Hjorth had admitted that plaintiff Katuria Smith would have been admitted had she been an African American. ER503-04.

J. The February 1999 Orders

With the trial in the action scheduled for February 22, 1999 (ER247), the trial court disposed of the outstanding motions in a series of orders in February 1999.

In a decision and order dated February 10, 1999, the Court granted the motion to dismiss the requests for injunctive and declaratory relief. The Court concluded that I-200 precluded public colleges from granting preferential treatment to any individual on the basis of race (ER792); that there was no "mootness" exception for conduct "capable of repetition yet evading review" because "the new law forbids granting preferences on the basis of race and ethnicity, [and thus] there can be no `reasonable expectation' that the plaintiffs will be subject to the same injury again" (ER794); and that the rule precluding mootness where the "defendant voluntarily ceases the allegedly improper behavior in response to a suit, but is free to return to it any time" was inapplicable because the defendants "did not change their admissions policy voluntarily" (id.). The Court concluded that "the mere possibility that the law school may attempt to circumvent the restrictions imposed by I-200 is insufficient to overcome mootness" (ER795).

The trial court also concluded that declaratory relief was unavailable, either as a basis for a damage award or as a basis for a claim for an injunction ordering admission on behalf of plaintiff Pyle. In so doing, the court specifically disagreed with the Seventh Circuit's opinion in Penny Saver Publications, Inc. v. Village of Hazel Crest, 905 F.2d 150 (7th Cir. 1990), and relied upon this Court's "strong denouncement of issuing declaratory judgments on the constitutionality of laws that have been repealed." ER799.

The trial court then decertified the class that it had previously certified pursuant to Rule 23(b)(2) because the requests for declaratory and injunctive relief were moot, and only damages claims remained. ER802. In a subsequent order dated February 22, 1999 (ER858), the trial court clarified this and its previous class certification order:

Because the Court certified a class pursuant to Rule 23(b)(2) [in the April 1998 Order], it did not expressly address plaintiffs' alternative motion to certify a class under Rule 23(b)(3). However, the Court did deny plaintiffs' motion for class certification to the extent it sought certification of any class claim for damages . . . The Court now clarifies its previous Order to hold that for the reasons stated in that Order certification of the plaintiffs' claims for damages would not be appropriate under Rule 23(b)(3).

On February 12, 1999, two days after the decision and order dismissing plaintiffs' injunctive relief requests, the Court denied both sides' summary judgment motions. The trial court denied plaintiffs' motion for partial summary judgment on the ground that Justice Powell's opinion in Bakke, asserting that "academic freedom" and/or "diversity" were compelling governmental interests, stated the holding of the Court in that case. In so doing, the trial court applied the Supreme Court's analysis in Marks v. United States, 430 U.S. 188 (1977) for interpreting decisions of a fragmented court, and specifically rejected the

holdings of a number of circuit courts that Marks cannot be applied unless there is a "common denominator" among the various opinions in the Supreme Court decision being analyzed. ER807. While conceding that "[t]he application of the Marks principle to the Bakke decision is particularly vexing because in many ways the opinions of the Justicies are at odds with each other" (ER807), the court nonetheless held that Justice Powell's opinion was the "narrowest" and thus the holding in Bakke.

The trial court also denied defendants' motion for partial summary judgment. It concluded that "questions of fact exist concerning whether defendants followed a Harvard-type plan in making their admissions decisions." ER812. For that same reason, the trial court could not determine "whether the individual defendants are entitled to qualified immunity." Id.

The court agreed with the parties that its pre-trial decisions would have a substantial effect on the upcoming trial if reversed, and accordingly, it (1) certified the February 12 Order for appeal pursuant to 28 U.S.C. § 1292(b) and (2) stayed the trial pending further order of the court. ER860-61.

Summary Of Argument

The lower court's decision to decertify the 23(b)(2) class resulted from its erroneous belief that the request for injunctive relief had become moot. The court below concluded that this request was moot because it fundamentally misunderstood the nature of this case. Specifically, the court below apparently presumed that plaintiffs and the plaintiff class were challenging only the official "written policy" of the Law School, as adopted by the faculty. Nothing could be further from the truth. Plaintiffs and the plaintiff class were and are also challenging the admissions **practices** of the individual defendants and the Law School. Those individual defendants engaged in conduct not only violative of the norm of I-200 (i.e., a rule against consideration of race in admissions), but in conduct that the court below found a reasonable trier of fact could conclude violated the clear requirements of Justice Powell's opinion in Bakke.

As described above, they sent out letters seeking more "diversity" information **only** to candidates of preferred races; they set out different procedures whereby lower scoring whites were rarely admitted without review by an Admissions Committee, whereas lower-scoring candidates of a preferred race were routinely admitted without such additional review; they applied vastly different standards to candidates of different races; and they used different "cut" scores for admission and rejection depending upon race. The fact that the voters of the State of Washington passed **yet another** law that such conduct would violate (**aside** from the Constitution, Title VI, and Section 1981) hardly means that defendants' "promise" not to engage in such conduct in the future moots anything.

The court below also erred in failing to certify, or recertify, the class pursuant to Rule 23(b)(3). The very reason the court below gave -- that damage questions will vary for each member of the plaintiff class -- is a reason that this Court has rejected. The trial court simply failed to analyze the "predominance" and "superiority" requirements of Rule 23(b)(3).

Finally, the court below erred in concluding that Justice Powell's opinion in Bakke stated the holding of the Court in that case. One can reach that conclusion only by applying an artificial version of the Court's decision in Marks that every circuit court considering the matter has rejected. Cases both before and after Bakke demonstrate that the Court never has accepted the "academic freedom" to discriminate in admissions policies.

Argument

I.

THE COURT BELOW ERRED IN DECERTIFYING THE 23(B)(2) CLASS AND IN FAILING TO RECERTIFY THE CLASS PURSUANT TO RULE 23(B)(3)

The court below decertified the class it had previously certified pursuant to Rule 23(b)(2) on the ground that the injunctive relief requests were moot. It erred. Those requests are not moot because defendants Hjorth, Kummert, and Madrid, and the defendant Law School, failed to meet their burden of showing that there is no reasonable likelihood of a future violation. Even if they had met their burden, the court below should have retained the Rule 23(b)(2) class for the purpose of issuing declaratory relief for the class as a whole. Moreover, a class should have been recertified pursuant to Rule 23(b)(3).

A determination of the propriety of class certification is reviewed for abuse of discretion. Knight v. Kenai Peninsula Borough School Dist., 131 F.3d 807, 816-17 (9th Cir. 1997), cert. denied, 118 S. Ct. 2060 (1998). A district court abuses its discretion if its decision is based upon an inaccurate view of the law or if it makes clearly erroneous findings. Id.; Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1464 (9th Cir. 1995). Mootness is an issue of law reviewed de novo. Knight, 131 F.3d at 811; Wade v. Kirkland, 118 F.3d 667, 669 (9th Cir. 1997); United Parcel Service, Inc. v. California Public Utilities Commission, 77 F.3d 1178, 1181 (9th Cir. 1996).

A. Pyle's Admission To The Law School Does Not Render His Appeal Of The Order Decertifying The Class Moot

Before addressing the decision of the court below to decertify the class, plaintiffs note that Pyle's admission to the Law School subsequent to the February 10, 1999 order decertifying the class does not moot this appeal of that order. Mootness doctrine has two aspects: a requirement that the controversy be a "live" controversy and a requirement that the parties have a legally cognizable interest in the outcome. U.S. Parole Commission v. Geraghty, 445 U.S. 388, 396 (1980). The passage of I-200 purportedly raises questions with respect to the first issue, and those questions are addressed below. But Pyle's admission to the Law School raises questions only with respect to the second aspect, and those questions are easily answered by binding precedent.

As the court below noted, Pyle still has standing to seek injunctive relief under this Court's decision in Nava v. City of Dublin, 121 F.3d 453 (9th Cir. 1997) because his claim for damages and his equitable claims are predicated on the same operative facts and legal theories. ER232. More importantly, though, Pyle still has an separate cognizable interest in class certification. Geraghty, 445 U.S. at 403-04 ("The question whether class certification is appropriate remains as a concrete, sharply presented issue" despite the fact that the named plaintiff's substantive challenge to parole guidelines is moot because he has been released from prison); Wade v. Kirkland, 118 F.3d at 669 ("if [plaintiff's] claims had become moot after a true denial of the class certification motion, [named plaintiff] would have had standing to appeal the denial of certification"). Thus, Pyle still has standing to seek a reversal of the order decertifying the class. Because that order was predicated upon the absence of a "live controversy" due to the passage of I-200,

Pyle has standing to show that the controversy between defendants and the plaintiff class he represented remains alive.

A reversal of the decertification order would "relate back" to the time of that order or, perhaps, the time of the original certification in April 1998. Geraghty, 445 U.S. at 416 n.11. Either way, the class would be deemed "certified" prior to Pyle's admission to the Law School, and his admission does not preclude the existence of a "live controversy" between other members of the plaintiff class and the Law School. Sosna v. Iowa, 419 U.S. 393 (1975) (although named plaintiff's challenge to residency requirements imposed for petitioners in a divorce action was moot, action itself was not moot because class had been certified and "the controversy . . . remains very much alive for the class of persons [named plaintiff] has been certified to represent").

B. The Trial Court Erred In Decertifying The 23(b)(2)

Class Because The Passage Of I-200 Did Not Moot

The Request For Injunctive Relief

The lower court decertified the Rule 23(b)(2) class when it concluded that the request for injunctive relief in the Complaint was moot because of the passage of I-200. But the lower court's analysis failed to grasp the nature of this case. Accordingly, it erred in dismissing plaintiffs' demand for injunctive and declaratory relief, and in decertifying the class.

1. Defendants Did Not Meet Their Heavy Burden. -- A party claiming mootness bears the "heavy burden" of proving that claims are moot. Coral Construction Co. v. King County, 941 F.2d 910, 927-28 (9th Cir. 1991) (case not mooted by repeal of law). In meeting its heavy burden, a party alleging mootness must demonstrate that (1) subsequent events have made it clear that the allegedly wrongful behavior cannot reasonably be expected to recur, and (2) interim relief or events have irrevocably eradicated the effects of the alleged violation. Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1274 (9th Cir. 1998); Hunt v. National Broadcasting Co., 872 F.2d 289, 292 (9th Cir. 1989) (citing County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)). It is the first of these requirements that relates to injunctive relief demands.

In this case, defendants attempted to meet their "heavy burden" by simply pointing to the passage of I-200 and submitting the lone affidavit of the Law School's dean, defendant Hjorth, asserting that he had instructed the faculty to adopt a written policy consistent with I-200, but that would nonetheless "preserve the benefits of all kinds of diversity," with the "operational details" of that new policy to be determined at a later time. Neither Kummert nor Madrid -- the other individuals responsible for the "operational details" in the past -- submitted **any statement at all**.

Plainly, this does not meet defendants' heavy evidentiary burden. Defendants Kummert, Madrid, and Hjorth had been operating a system whose "operational details," as plaintiffs evidence demonstrated, included (1) soliciting additional information on "family background" and "cultural activities and associations" from preferred race candidates, but no others, (2) applying different standards to candidates of different races, and (3) using "cut scores" for admission and denial (where candidates above or below certain scores were virtually guaranteed to be admitted or rejected) that differed depending upon the race of the candidate. See generally, discussion, supra, at pp. 18-19. The court below concluded that such evidence was sufficient for a reasonable trier of fact to conclude that Hjorth, Madrid, and Kummert had

violated **clear and well-established** Constitutional norms. That is, the court below implicitly found triable issues of fact over whether, in its **actual admissions practices**, defendants strayed so far from Constitutional norms that they were either "plainly incompetent" or "knowingly violate[d] the law." Hunter v. Bryant, 502 U.S. 224, 229 (1991). A single affidavit by one defendant asserting that he had instructed the Law School faculty to adopt a new **written** policy, whose "operational details" would have to await another day, hardly makes it clear that defendants' wrongful conduct will not recur.

Thus, this case is distinguishable from Native Village Of Noatak v. Blatchford, 38 F.3d 1505 (9th Cir. 1994), relied upon by the court below, where a "native village government" had sued an Alaskan official for his implementation of a revenue-sharing statute. (The official concluded that the Alaska Constitution required a broader class of beneficiaries than the statute had provided for.) After the Alaskan legislature repealed the revenue-sharing statute (and replaced it with another that essentially codified the official's expanded program), this Court concluded that the challenge to the interpretation of the old statute was moot.

Village of Noatak does not set forth a new standard for mootness or lessen defendants' burden. Where a challenge is to the interpretation of a statute, the repeal of the statute itself renders that interpretation irrelevant and a defendant can meet its burden simply by showing that it is unlikely to interpret a repealed statute. Village of Noatak, 38 F.3d at 1510 ("if a **challenged law** is repealed or expires, the case becomes moot" (emphasis added)). Nothing like that is taking place here because plaintiffs are not challenging a law repealed by the legislature, but rather the actual, admissions **practices** of the Law School. In the court below, defendants simply claimed that they would change their **written** policy; they produced nothing to suggest that its day-to-day implementation would change at all. To the contrary, they were remarkably vague about the "operational details."(2)

Finally, the court below missed the point when it distinguished the "voluntary cessation" doctrine (precluding a finding of mootness where a defendant voluntarily ceases the conduct complained of) because defendants' cessation allegedly was not "voluntary." ER794. There was simply no evidence before the court from which it could conclude that the conduct -- the admissions practices -- had ceased at all, voluntarily or otherwise. The "heavy burden" and two-part test identified by the Supreme Court in County of Los Angeles v. Davis, requiring defendants to assure that there is no reasonable expectation of future recurrence, is not limited to cases of "voluntary cessation" (see, e.g., Hunt, 872 F.2d at 292), and the court's apparent belief that external factors purported to influence the defendants is irrelevant. (In any event, it is unclear why cessation pursuant to a new statute would be any less "voluntary" than cessation pursuant to a litigation-induced new understanding of an old statute, the latter of which is always considered "voluntary.")

2. Other Evidence. -- It was defendants' "heavy burden" to show that the complained-of conduct is unlikely to recur. As shown above, they did not meet it. But plaintiffs also submitted evidence further demonstrating that there was more than a reasonable likelihood of recurrence.

First, defendants have never conceded that their admissions practices in 1994 through 1998 violated any law. To the contrary, they have insisted (and continue to insist) that they were perfectly consistent with Title VI, 42 U.S.C. § 1981, and the Equal Protection clause -- and, in fact, **race neutral** and "not subject to strict scrutiny" at all. ER195. It is well-established that a defendant's failure to recognize the illegality of its "old" practice is a sufficient basis to assume a reasonable possibility of repetition. United States v. Laerdal Mfg. Corp., 73 F.3d 852, 856 (9th Cir. 1996) ("[Defendant's] repeated self-justification is

sufficient to show a likelihood of future violations"); Armster v. U.S. District Court for the Central District of California, 806 F.2d 1347, 1359 (9th Cir. 1986). If the individual defendants believe their various practices are "race neutral" and not subject to strict scrutiny, why would they believe them to violate a state statute that certainly requires nothing more than "race neutral" conduct?

Second, defendants' papers in the court below asserted that I-200 is ambiguous and they conspicuously refused to state that they would not revert to their old policy at some time in the future. E.g., Docket No. 220 (Dfs' Mootness Reply Memo.), pp. 4-5. The Attorney General made a similar claim of ambiguity. ER269-71.

Finally, Section 49.60.400 is only a statute and it can be repealed at any time. Thus, even if this lawsuit were about some statute affected by I-200, it would not be moot. Cf. Coral Construction, 941 F.2d at 928 ("**even if the government is unlikely to reenact the provision**, a case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the provision" (emphasis added)).

C. The Trial Court Erred In Decertifying The 23(b)(2)

Class Because Declaratory Relief With Respect To

The Class As A Whole Is Still Appropriate

The standards for injunctive and declaratory relief are not identical. Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 966 F.2d 1292, 1299-1300 (9th Cir. 1992) ("factors indicating that equitable relief may be inappropriate . . . [do not] militate[] against an award of declaratory relief"); Olagues v. Russoniello, 770 F.2d 791, 803 (9th Cir. 1985) ("[d]eclaratory relief may be appropriate even when injunctive relief is not"). See also, e.g., Greater Los Angeles Council On Deafness v. Zolin, 812 F.2d 1103, 1112 (9th Cir. 1987) (in suit challenging decision not to provide the sign-language interpreters that would allow deaf individuals to be jurors, Court affirms denial of injunctive relief, but reverses denial of declaratory relief; "Declaratory relief should be denied when it will neither aid in clarifying and settling legal relations in issue nor . . . afford the parties relief from the uncertainty and controversy they faced . . . [D]eclarations can serve an important educational function for the public at large as well as for the parties to the lawsuit" (emphasis added) citing Bilbrey v. Brown, 738 F.2d 1462, 1471 (9th Cir. 1984)).

Class declaratory relief in this case would serve an important educational function, and would clarify the law concerning the legal relations between the plaintiff class and defendants. Section 49.60.400 could be repealed at any time. Even if its interpretation were unambiguous, and its faithful implementation by defendants without doubt, it still would be appropriate to clarify those legal relations.

Declaratory relief could form the basis for an injunction requiring the Law School to grant offers of admission to certain members of the plaintiff class during the second, remedial phase of this litigation. See discussion, infra, pp. 43-44. Cf. Doe v. Lawrence Livermore Nat'l Laboratory, 131 F.3d 836, 841 (9th Cir. 1997) (request for reinstatement constituted request for prospective injunctive relief). This, of course, is a typical use for a declaration of liability in a bifurcated proceeding. E.g., Sagers v. Yellow Freight Sys., 529 F.2d 721, 733-34 (5th Cir. 1976) (describing how such procedure is frequently used in Title VII litigation: "[d]uring the first state [sic], general liability for discrimination against the class may be adjudicated; if such liability is found, a second proceeding is held during which the specific relief due individual class members is determined and awarded.").

The court below focussed on distinguishing a Seventh Circuit authority, and barely addressed the standards for declaratory relief set forth in the Ninth Circuit cases identified above. When it did, it simply noted this Court's "denouncement of issuing declaratory judgments on the constitutionality of **laws** that have been repealed" ER799 (emphasis added) -- again, ignoring that plaintiffs have not challenged a "law" at all. Consequently, the court below erred.

D. The Trial Court Erred In Failing To Recertify

The Class Pursuant To Rule 23(b)(3)

Rule 23(b)(3) permits a class to be certified if a court finds that

questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The trial court already had found a question of law and fact in common among members of the class: "whether the Law School's consideration of race in its admissions process violated the equal protection clause of the Fourteenth Amendment." ER237, 241. Although its initial April 1998 decision and order granting class certification did not specifically address the requirements of Rule 23(b)(3) (as the subsequent order dated February 22, 1999 conceded), the court did note that individual claims for damages would require an individualized assessment. Id. at 1344. In its subsequent February 22, 1999 order the court "clarifie[d] its previous Order" and denied certification pursuant to Rule 23(b)(3).

The court below erred. As shown below, members of the class defined by the court below have standing to pursue damages and other forms of individual relief (including equitable relief requiring the Law School to offer admission to some members), although, in many instances, individual damages will be small or nominal. The fact that damages will vary from individual to individual does not affect the viability of certification pursuant to Rule 23(b)(3).

1. Standing. -- The Supreme Court repeatedly has made clear that the harm in discrimination is not just the denial of a specific benefit, but the unequal treatment itself. See Adarand Constructors v. Pena, 515 U.S. 200, 211 (1995) (in challenge to law that created a rebuttable presumption that members of certain racial groups were "disadvantaged," Court rejects suggestion that plaintiff had to show that it has been or will be the low bidder on any contract to have standing); Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 658, 666 (1993) (contractors' association had standing to challenge "preferential treatment to certain minority-owned businesses in the award of city contracts" regardless of whether "one of its members would have received a contract absent the ordinance"; "[t]he `injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit"); Heckler v. Mathews, 465 U.S. 728, 739 (1984) ("like the right to procedural due process . . . the right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against").

The Supreme Court has likened discriminatory acts to "dignitary torts," where the injury is often the emotional and mental distress resulting from the defendant's conduct. Curtis v. Loether, 415 U.S. 189, 195 n.10 (1974) ("[a]n action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress . . . `under the logic of the common law

development of a law of insult and indignity, racial discrimination may be treated as a dignitary tort'" quoting G. Gregory & H. Kalven, Cases and Materials on Torts 961 (2d ed. 1969)).

Further, the Court specifically has held that damages for emotional distress suffered as a consequence of a civil rights violation are recoverable **even if the same punishment (or denial of benefit) would have occurred** without the violation. See Carey v. Piphus, 435 U.S. 247, 260, 263 (1978) (where students claimed that they were suspended without due process, schools should be allowed on remand to present evidence showing that the students would have been suspended even if due process had been followed; but students should be allowed to "produc[e] evidence that mental and emotional distress actually was caused by the denial of procedural due process itself," as opposed to their suspensions). See also, e.g., Merritt v. Mackey, 932 F.2d 1317, 1323 (9th Cir. 1991) ($35,000 damages awarded for procedural due process violation in firing, even though plaintiff would have been fired anyway); Laje v. Thomason General Hosp., 665 F.2d 724, 728-29 (5th Cir. 1982) ($20,000 damages awarded for emotional distress for due process violation, even though plaintiff's discharge was substantively justified).

The same rule applies when race discrimination, and the concomitant insult to dignity, is at stake. See Heckler v. Mathews, 465 U.S. at 739 ("**like the right to procedural due process**, see Carey v. Piphus, . . . the right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied . . . " (emphasis added)); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (race discrimination violates "due process"); Lesage v. Texas, 158 F.3d 213, 222 (5th Cir. 1998) (in suit by applicant to doctoral program in counseling psychology, plaintiff had raised liability issue by evidence that admissions procedures considered race; "[t]he possibility that . . . [plaintiff] would not have been offered admission is relevant only to the quantum of damages available -- not to the pure question of the state's liability"); Price v. City of Charlotte, 93 F.3d 1241, 1244, 1248 (4th Cir. 1996) (seven white police officers had standing to sue for compensatory damages based upon City of Charlotte's race-based promotions practice even though "[a] substantial number of white officers who were not promoted had rankings superior to those of any of the [plaintiffs]" and the plaintiffs "would not have been selected for promotion" even in the absence of the racially-tainted process; "Carey and its progeny demonstrate that the injury [plaintiffs] suffered is the ignominy and illegality of the City's erecting a racial bar to promotions, and more importantly, that this injury can be compensable by damages, not merely declaratory or injunctive relief"), cert. denied, 520 U.S. 1116 (1997).[(3)]

Thus, the members of the class certified by the court below have standing to seek damages. If liability is established, defendants will have the burden of demonstrating that the violation was largely harmless by proof that certain class members would not have been admitted. Domingo v. New England Fish Co., 727 F.2d 1429, 1445 (9th Cir.) ("Because class-wide discrimination has already been shown, the employer has the burden of proving that the applicant was unqualified or showing some other valid reason why the claimant was not, or would not have been, acceptable"), modified, 742 F.2d 520 (1984); Jordan v. Dellway Villa of Tenn., 661 F.2d 588, 595 (6th Cir. 1981) (black housing applicants, discriminated against by housing complex, would not be entitled to individual recovery if "defendant would have treated the claimant the same way had the claimant been white"). Perhaps defendants will be able to defeat significant damage claims by many members of the class by demonstrating that they were otherwise unacceptable candidates. But that hardly militates against certification pursuant to Rule 23(b)(3). Domingo, 727 F.2d at 1444 ("One [of the most important policies underlying Rule 23] is the `vindication of the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost'" quoting Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980)); Israel v. Avis Rent-A-Car, 185 F.R.D. 372,

387 (S.D. Fla. 1999) (where complaint alleges existence of a policy that discriminated against Jews in providing corporate accounts for rental cars, court notes that "class actions are particularly appropriate where multiple lawsuits would not be justified because of the small amount of money sought by the individual plaintiffs").(4)

Finally, the individual members of the class could seek equitable relief, i.e., an injunction requiring the Law School to offer them admission. The trial court suggested in a footnote that plaintiffs did not ask for this relief in their complaint (ER802), but this would hardly be a basis for denying such relief to the members of the class. First, there is no requirement that a complaint in a class action lawsuit -- which is filed, after all, before a class is certified -- identify all relief being sought by the then non-existent class. Even if there were, the Complaint's request for "any other relief that is appropriate and just" (ER12) would be sufficient. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 65-66 (1978) (where complaint in class action alleged that a city exercised jurisdiction over plaintiffs unconstitutionally, and sought a declaration that statutes authorizing such jurisdiction were unconstitutional, court would not have been precluded from extending the right of franchise to plaintiffs as alternative remedy); Z Channel Ltd. Partnership v. Home Box Office, Inc., 931 F.2d 1338, 1341 (9th Cir. 1992) (plaintiff "did not foreclose relief in damages by failing to ask for them in its Count One prayer"); Fed. R. Civ. P. 54(c).

The purpose of a complaint is to notify the defendants of the claims against it, and defendants here can hardly claim surprise. As already noted (see p. 12, supra), plaintiffs' motion papers on their motions for class certification and bifurcation made plain that they sought all forms of individual relief on behalf of the class members, to be tried in the second phase. Defendants **repeated and quoted those very passages** at the very outset of their memorandum in opposition to the motion to bifurcate. ER27-28. While defendants opposed the motion to bifurcate, they did **not** object that the relief being sought was not set forth in the Complaint. The lower court granted the motion to bifurcate, and never limited the scope of who could seek individual injunctive relief in the second trial. It **addressed** the propriety of a "class claim for damages" despite the fact that no such request is in the Complaint. In short, any suggestion that remedies in the second phase could somehow be limited by a claimed pleading defect elevates form over substance in a manner that modern procedural rules simply do not permit.

2. Predominance And Superiority. -- The one element common to the claims of each and every member of the class is a showing that defendants engaged in illegal race discrimination. Moreover, that issue "predominates" in precisely the same way that the falsity of a prospectus or registration statement "predominates" in a class certified in a securities fraud case. It is the one essential element of every claim **and** it is sufficient to demonstrate liability. For the same reason, class treatment is superior to allowing each of thousands of individual claims to be asserted separately. To be sure, the amount of individual claims for damages will depend upon individual circumstances. But that is not sufficient to defeat class certification. Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975) ("[T]he amount of damages is invariably an individual question and does not defeat class action treatment"). See also, e.g., Hilao v. Estate of Marcos, 103 F.3d 767, 774 (9th Cir. 1996) (claims brought on behalf of a class of Philippine citizens tortured, summarily executed, or that had disappeared while in custody of military groups properly certified; class consisted of about 10,000, and 9,539 were awarded damages); Israel v. Avis Rent-A-Car, 185 F.R.D. at 385-86 (class certified pursuant to 23(b)(3) where complaint alleges existence of a policy that discriminated against Jews in providing corporate accounts for rental cars; common issue of discrimination predominated, a class action was superior to many individual actions because "most if not all of plaintiffs' claims will stand or fall on the question whether Avis has adopted and applied . . . a

centralized policy and practice of ethnic and religious discrimination, and not on the resolution of the highly case-specific factual issues alluded to by Avis," and "numerous cases have held that the existence of separate issues concerning damages sustained by individual members will not prevent a common issue of liability from being adjudicated on a class-wide basis"); Markham v. White, 171 F.R.D. 217, 224 (N.D. Ill. 1997) (claim that training seminars for female police officers were conducted in a sexually harassing manner certified under (b)(3) despite the likelihood "that some variances will emerge among the class members' claims, most probably as to their respective damages . . . But that prospect does not upset the present predominance determination"). See generally 7A Wright, Miller & Kane, Federal Practice and Procedure, § 1778 (2d ed. 1986) ("[I]ssues that have been viewed as having overriding significance and therefore have been held to predominate [include] the existence of illegal discrimination").[(5)]

Curiously, the court below cited Blackie for this very proposition (that individual variation in damages does not preclude class certification). ER237 (quoting Blackie). But it never engaged in the analysis required by Rule 23(b)(3), and never explained why Blackie was not dispositive in determining whether certification thereunder was proper.

Merely stating that "the damage question turns on the individual circumstances of each applicant" (ER242) is not enough; individual issues related to damages almost always will exist. Rather, individual issues must be sufficiently important that the common issue does not predominate, and that class treatment would not be superior. The lower court here simply never made such findings, and, accordingly, its conclusion was clearly erroneous. Kayes v. Pacific Lumber Co., 51 F.3d at 1464-65 (issue of adequacy of representation remanded where district court relied too heavily on irrelevant factor and it was impossible to tell what weight it gave to other factors); Executive Software North America v. U.S. District Court, 24 F.3d 1545, 1561 (9th Cir. 1994) ("failure to provide written reasons renders it impossible to determine whether the district court relied on permissible factors").

II.

THE COURT BELOW ERRED IN FAILING TO GRANT PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

It is undisputed that defendants consider race in the admissions process, and that they purport to do so for the purpose of achieving an ostensible compelling governmental interest in "diversity" and/or "academic freedom." Since, as shown below, those are not compelling governmental interests sufficient to warrant the use of racially discriminatory preferences, the court below erred in failing to grant plaintiffs' motion for partial summary judgment.

Racial classifications are antithetical to the Fourteenth Amendment, the central purpose of which was to eliminate racial discrimination by the States and State officials. Shaw v. Hunt, 517 U.S. 899, 907 (1996). As a general rule, the Fourteenth Amendment subjects any consideration of race by a state actor to "strict scrutiny." Id. "Strict scrutiny" requires both a compelling governmental interest and narrowly tailored means to achieve that compelling interest. Id. at 908. The Supreme Court has held that Title VI prohibits the same intentional conduct as the Equal Protection Clause. United States v. Fordice, 505 U.S. 717, 732 n.7 (1991); Jeldness v. Pearce, 30 F.3d 1220, 1227 (9th Cir. 1994) (noting "decisions finding Title VI to be coextensive with the Equal Protection Clause").

Defendants relied upon the sole opinion of Justice Powell in Bakke to support their assertion that "diversity" and "academic freedom" are compelling interests. As already shown, plaintiffs cited much evidence in opposition to defendants' motion for summary judgment showing that the Law School's race-conscious decision-making could not pass muster under the strictures of Justice Powell's opinion. But on their summary judgment motion, plaintiffs argued that Justice Powell's opinion did not state the holding of the Court in Bakke.

The existence of a "compelling interest" is a question of law. E.g., Young v. Crystal Evangelical Free Church, 82 F.3d 1407, 1419 (8th Cir. 1996), vacated on other grounds, Christians v. Crystal Evangelical Free Church, 521 U.S. 1114 (1997), reinstated, 141 F.3d 854 (8th Cir. 1998).

A. A Review Of *Bakke*

In Bakke, the Court found that the admissions program of the University of California Medical School at Davis, which set aside 16% of the places for incoming students for educationally or economically disadvantaged minorities, was unconstitutional. Five justices, however, concluded that race could be considered in Davis's admissions process under some circumstances. No one theory, though, explained why that was so.

Justice Powell, in an opinion only for himself, applied strict scrutiny to the Davis program. He concluded that "academic freedom," although not a specifically enumerated Constitutional right, was a "special concern" of the First Amendment and thus a sufficiently compelling interest to meet strict scrutiny. Bakke, 438 U.S. at 312 (Powell, J.). "Academic freedom" included the freedom to determine who would be allowed to study at a state university. Id. The Regents specifically wanted their institutions to select a group of students who would contribute to a robust exchange of ideas, and argued that "ethnic diversity" was a means of achieving that goal. Id. at 313-15. While rejecting the argument that Davis's specific program of reserving spaces for disadvantaged minorities was necessary to achieve the robust exchange of ideas that the Regents allegedly wanted, Justice Powell did state that race and ethnicity could be considered as "plus" factors by universities seeking to achieve that goal. Justice Powell opined that a state interest in a robust exchange of ideas would not justify the consideration of race to achieve the ethnic diversity promoted by UC Davis, but could justify its consideration to achieve a diversity which "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Id. at 315.

Although Justices Brennan, Marshall, White, and Blackmun (the "Brennan group") seemingly rejected "strict scrutiny" (Bakke, 438 U.S. at 357 (Brennan, J. concurring in part, dissenting in part)), they borrowed a scrutiny level from gender-discrimination cases that they characterized as "strict and searching." Id. at 362. Specifically, they required the use of race to serve important governmental objectives and to be substantially related to achieving those objectives. Id. at 359. They asserted that such scrutiny was appropriate because it is difficult to distinguish between uses of race that seek to remedy the effects of past discrimination and those that seek to stigmatize, and because race-based classifications were inconsistent with the traditional belief that people should be judged on the basis of individual merit. Id. at 360-61.

The Brennan group concluded that the Davis program met their "strict and searching" scrutiny analysis because remedying the effects of past societal discrimination was a sufficiently important governmental objective, and because the Davis program was, in their view, substantially related to achieving that objective. In reaching the latter conclusion, the Brennan group stated that remedies for past

discrimination need not be limited to victims identified by specific proof, but that they should be limited to those "within a general class of persons likely to have been the victims of discrimination." Id. at 363. In finding that the Davis program met that requirement, the Brennan group emphasized:

[T]he Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program . . . [S]pecific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great.

Id. at 377-78. Cf. Bakke, 438 U.S. at 275 n.4 (Powell, J.) (the admissions chairman would confirm "disadvantage" of individual applicants).

The Brennan group also found that the constitutionality of the Davis program "is buttressed by its restriction to only 16% of the positions in the Medical School, a percentage less than that of the minority population in California." Id. at 374 n.58. While the opinion stated that that benchmark was not necessarily a constitutional one, it also made clear that the Bakke case did not raise the question of a program which admitted racial minorities "in numbers significantly in excess of their proportional representation in the relevant population." Id. Such programs, the Brennan group noted, "might well be inadequately justified by the legitimate remedial objectives." Id.

The Brennan group rejected Justice Powell's argument that the Davis program was not "narrowly tailored," and found it substantially related to meeting the goal of remedying past discrimination. Specifically, they rejected any constitutional difference between a set-aside program and one which gave minorities a "plus." Id. at 378-79. In their view, the "Harvard" program espoused by Justice Powell "openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to **disadvantaged** minority students." Id. at 379 (emphasis added). (Thus, among other disagreements, Justice Powell and the Brennan group apparently could not even agree on what a "Harvard plan" was.) There was no basis, they concluded, "for preferring a particular preference program simply because in achieving the same goals that [Davis] is pursuing, it proceeds in a manner that is not immediately apparent to the public." Id.(6)

B. Justice Powell's "Academic Freedom" Rationale

Was Not The "Holding" Of The Court In *Bakke*

For several reasons, Justice Powell's lone opinion, and the "academic freedom" or "diversity" rationale contained therein, was not the "holding" of the Court in Bakke. First, the Brennan group did not adopt Powell's rationale. See Bakke, 438 U.S. at 326 n.1 (Brennan, J., concurring and dissenting) (a "Harvard" plan "is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination"). See also Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (the Brennan opinion "implicitly rejected Justice Powell's position"). Indeed, it is significant that the Brennan group, while recognizing that no one opinion spoke for the Court, stated:

[T]his should not and must not mask the central meaning of today's opinions: Government may take race

into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Id. at 325 (emphasis added). Although the Brennan group received a rebuke from four other Justices for this claim (Bakke, 438 U.S. at 408 n.1 (Stevens, J., concurring and dissenting)), it is a plausible combination of the opinions of Justice Powell and the Brennan group. (Justice Powell had asserted that the State had a "legitimate and substantial interest in ameliorating . . . the disabling effects of identified discrimination," but held that racial classifications required "judicial, legislative, or administrative findings of constitutional or statutory violations." Bakke, 438 U.S. at 307 (Powell, J.). He concluded that the Davis Medical School not only had not, but could not, make such findings. Id. at 307-10.)

Conspicuously, the Brennan group did not state that the "central meaning" of the opinions in Bakke was that race could be considered to achieve "intellectual diversity" or any other purported goal of a college pursuant to its interest in academic freedom -- again, as in their first footnote, demonstrating that they rejected that analysis.

The court below concluded that Justice Powell's opinion was "narrower" than Justice Brennan's, and that, accordingly, it should be deemed the "holding" of the Court in Bakke under Supreme Court precedent for interpreting the opinions of a divided Court. ER807-09 (citing Marks). But "narrowness" analysis should not apply to a specific proposition or mode of analysis when a majority of the Court has rejected that analysis. E.g., United States v. Rutledge, 517 U.S. 292, 298-99 (1996) (where argument that "in concert" element of crime required less of a showing than a "conspiracy" was "rejected to varying degrees, by [eight Justices]," it had not been considered precedential by lower courts); id. at 304 (where, at best, previous case had split 4-4 on issue of whether Congress intended to permit multiple punishments for the same crime, the judgment "[a]s to this issue, then . . . is not entitled to precedential weight no matter what reasoning may have supported it."). See also Homeward Bound v. Hissom Memorial Center, 963 F.2d 1352, 1359 (10th Cir. 1992) (quoting King v. Palmer, 950 F.2d 771, 782 (D.C. Cir. 1992)):

When . . . one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, Marks is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, Marks will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.

See also Dague v. City of Burlington, 935 F.2d 1343, 1360 (2d Cir. 1991) (recognizing "the anomaly of the views of one justice, with whom no one concurs, being the law of the land, where the Court is so divided on an issue and where there is no majority opinion at all" and concluding that issues concerning enhancement of attorneys' fee lodestar addressed by a splintered Supreme Court decision "are open issues"), rev'd on other grounds, 505 U.S. 557 (1992).

The circuit courts have eschewed any "narrowness" analysis when the differing opinions of the Supreme Court have no "common denominator." See Ass'n Of Bituminous Coal Contractors, Inc. v. Apfel, 156 F.3d 1246, 1254 (D.C. Cir. 1998) (the "narrowest grounds" approach "does not apply unless the

narrowest opinion represents a `common denominator of the Court's reasoning' and `embod[ies] **a position implicitly approved by at least five Justices who support the judgment**'" (emphasis added)); Rappa v. New Castle County, 18 F.3d 1043, 1056-58 (3d Cir. 1994); United States v. Castro-Vega, 945 F.2d 496, 499 (2d Cir. 1991) ("no common denominator applicable to this case"); United States v. Eckford, 910 F.2d 216, 219 n.8 (5th Cir. 1990) ("The Marks `narrowest grounds' interpretation of plurality decisions comprehends a least common denominator upon which all of the justices of the majority can agree"); Schindler v. Clerk of Circuit Court, 715 F.2d 341, 345 n.5 (7th Cir. 1983) ("`The rationale underlying this "narrowest grounds" interpretation of plurality decisions is that it constitutes a least common denominator'" quoting State v. Novak, 107 Wis. 2d 31, 38, 318 N.W.2d 364, 367-68 (1982)). Cf. Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1456 n.7 (8th Cir. 1995).

In Baldasar v. Illinois, 446 U.S. 222 (1980), overruled in, Nichols v. United States, 511 U.S. 738 (1994), a plurality held that a misdemeanor conviction of an unrepresented defendant resulting in no jail time, although valid under the Sixth Amendment, could not be used to convert a subsequent misdemeanor into a felony without violating that amendment. Justice Blackmun provided the crucial fifth vote, but concluded that the earlier conviction was invalid (and could not be used for any purpose) because the defendant was subject to more than six months jail time for the first conviction. Lower courts -- including **this** Court -- concluded that no rule of law at all emerged from that case. United States v. Robles-Sandoval, 637 F.2d 692, 693 n.1 (9th Cir. 1981) ("The Court in Baldasar divided in such a way that no rule can be said to have resulted"); Castro-Vega, 945 F.2d at 499-500 ("we find that there is no common denominator applicable to this case upon which all of the Justices in the Baldasar majority agreed" citing, inter alia, Robles-Sandoval).

The court below rejected the "common denominator" analysis that had been adopted by these different circuits, concluding that it would render Marks "unworkable." But this simply cannot be correct. To be sure, when Marks is limited as each of the circuit courts considering the question have limited it, there will be fewer split decisions of the Supreme Court in which a holding emerges. But that hardly makes it "unworkable"; it simply means that the lower courts may have to discern the law without the assistance of such "precedents" (i.e., "precedents" derived from the views of fewer than five Justices). Since lower courts often address questions of first impression, it is hard to understand how any rule limiting Marks can be termed "unworkable," and the court below simply erred in believing that it was.

The court below also concluded that the Supreme Court's decision in United States v. Nichols, 511 U.S. 738 (1994), overruling Baldasar, undermined the "common denominator" interpretation of Marks. ER807-08 n.2. But, in Nichols, the Court simply noted that the circuit courts had split over the application of Marks to Baldasar, and -- without identifying whether one set of cases or another was correct -- concluded that it was not useful for the Court "to pursue the Marks inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." Nichols, 511 U.S. at 745-46. The court below concluded that this passage "suggests that the Supreme Court expects that the precedential value of any case can be determined by applying the Marks rule." ER808 n.2. With due respect, this is not a reasonable interpretation of the quoted passage. The D.C. Circuit, for one, has continued to apply the "common denominator" rule after Nichols. Apfel, 156 F.3d at 1254. See also, e.g., Schultz v. City of Cumberland, 26 F. Supp. 2d 1128, 1139 (W.D. Wisc. 1998).

The only "common denominator" in Bakke among those Justices concluding that race could be a consideration was the remedial analysis. Thus, the lower court here understood that it had to **reject** the "common denominator" rule to conclude that Justice Powell's "diversity" or "academic freedom"

rationale constituted the holding of Bakke. But it makes little sense to say that one governmental interest ("diversity") is "narrower" than another ("remedying societal discrimination"). They are just different.

The reasons given by the court below to justify its "narrowness" conclusion are unconvincing. It first relied upon the fact that Justice Powell claimed that his interest met "strict scrutiny" whereas the Brennan group only claimed that its interest could meet "strict and searching" scrutiny -- but what precisely does this mean if neither opinion conceded that the interest pressed by the other met its own level of scrutiny? Wygant v. Jackson Bd. Of Education, 476 U.S. 267, 286 (1986) (O'Connor, J. concurring) ("the distinction between a `compelling' interest and an `important' governmental purpose may be a negligible one").

The court below also seemed to believe that "societal discrimination" was a broader compelling interest than "diversity" because it "would result in a broader range of race-conscious admissions programs being upheld as constitutional." ER809. It cited nothing at all to support this proposition, and it is hardly intuitive. The very program in this case, after all, would not survive under Justice Brennan's analysis because it gives race-based advantages to non-white candidates who are not members of groups that were the victims of state-sanctioned discrimination, as well as candidates regardless of whether they are "likely to have been isolated from the mainstream of American life." Bakke, 438 U.S. at 377 (Brennan, J.). Plaintiffs submit that the vast majority of modern race-conscious admissions programs would find Justice Brennan's requirements far more restrictive than Justice Powell's. See William G. Bowen & Derek Bok, The Shape Of The River: Long-Term Consequences of Considering Race In College And University Admissions 47-49 (1998) (small percentage of admitted minority applicants to selective schools were of low socioeconomic status).

Justice Powell's analysis could be considered "narrower" in one other respect, viz., his rejection of the separate program that Davis used to achieve its goal. But that analysis relates only to "narrow tailoring," and has nothing to do with whether "remedying societal discrimination" or "academic freedom" is a "narrower" governmental interest. Thus, the reference by the court below (ER809) to this Court's decision in Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987), which cited Justice Powell's opinion, is unhelpful. Higgins involved a challenge to a race-conscious employment plan that was designed to remedy the continuing effects of past discrimination, of which there was "abundant evidence." Id. at 358. The Court cited Justice Powell's opinion in Bakke solely for the proposition that the plan was narrowly tailored because "all candidates compete on equal footing." Id. at 359. See also n.6, supra.

Lastly, the court below also stated that "members of the Supreme Court have continued to refer to Justice Powell's Bakke opinion in subsequent affirmative action cases" and that "at least one Justice has suggested that the issue of educational diversity as a compelling interest **remains open**." ER809 (emphasis added). But if the issue "remains open," it can only be because Justice Powell's "diversity" rationale is **not** binding precedent. E.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218 (1995) ("Bakke did not produce an opinion for the Court").

In short, as the foregoing analysis demonstrates, Justice Powell's "academic freedom / diversity" rationale was rejected by the other four Justices who believed that race could be considered, and, in any event, had nothing in common with the others who would permit the use of race in admissions processes. The "remedial" analysis was the only analysis permitting the consideration of race that commanded a majority of the Court.

C. Cases Both Before And After *Bakke* Cast

Doubt On Justice Powell's Analysis

Given the absence of any holding in Bakke, this Court must look to other Supreme Court authority to determine if defendants (and Justice Powell's) proposed governmental interests should be deemed compelling. Cases both before and after Bakke demonstrate that they are not.

First, Justice Powell's assertion of principles of "academic freedom" notwithstanding, the Court has never accepted any "right" to consider race or sex based in the First Amendment. In Runyon v. McCrary, 427 U.S. 160 (1976), the Court concluded that a private school that wanted to promote segregation could not exclude racial minorities, despite the obvious difficulty an integrated student body would present in promoting segregationist beliefs. Id. at 176 (although "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, . . . it does not follow that the **practice** of excluding racial minorities from such institutions is also protected by the same principle" (emphasis in original)). Cf. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (private club's right to associate for expressive purposes must yield to the State of Minnesota's interest in eradicating discrimination). A fortiori, a state's interest in First Amendment freedoms -- a far more problematic idea, since the First Amendment is usually thought of as a source of rights for the people against the state, and not the other way around(7) -- should have even less weight when compared to principles of non-discrimination.

Although the Court has frequently invoked "academic freedom," it has never held that colleges or universities, even private ones, have First Amendment rights beyond those given to other organizations. Moreover, if taken seriously, an institution's interest in "academic freedom" should be compelling regardless of whether it believes that a robust exchange of ideas is beneficial to educating students or that racial homogeneity (because it reduces racial tensions) is the best pedagogical environment. Schools with the latter view could subtract a "minus" from the applications of racial minorities in the interest of "academic freedom." Not surprisingly, no Court has ever extended the First Amendment so far.

Second, subsequent to Bakke, the Court has made clear that any form of race discrimination must be justified by a compelling governmental interest and be narrowly-tailored to meet that interest. Of particular concern to the Court has been the possibility that a justification could permit the use of race in an unlimited way, i.e., without numerical or temporal constraints. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 505 (1989) ("The `evidence' relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration").

The Court has never found any "compelling" interest other than a "remedial" one; it has specifically rejected non-remedial interests like an interest in providing "role models" on the ground that they would permit undefined racial preferences endless into the future. Croson, 488 U.S. at 497-98 (opinion of O'Connor, J.) ("because the role model theory had no relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to `justify' race-based decisionmaking essentially limitless in scope and duration" citing Wygant v. Jackson Bd. Of Education, 476 U.S. 267, 276 (1986) (plurality opinion)); Croson at 520 (opinion of Scalia, J.). Indeed, the Court has said that any non-remedial "interest" would suffer from similar defects. Croson, 488 U.S. at 493 ("Classifications based on race carry a danger of stigmatic harm. **Unless they are strictly reserved for remedial settings**,

they may in fact promote notions of racial inferiority and lead to a politics of racial hostility" (emphasis added)) (opinion of O'Connor, J.); id. at 520 (opinion of Scalia, J.).

The court below concluded that this last statement did not eliminate all other compelling interests other than remedial ones, but "was merely one part of [Justice O'Connor's] lengthy explanation of why the Court needs to apply strict scrutiny review to all racial classifications." ER811. To be sure, Croson did not involve higher education, and thus its rationale cannot be construed as a **holding** that "academic freedom" or "diversity" is not a compelling governmental interest. But "diversity" is a rationale which apparently can justify preferences "of any size and duration," and a lower court should not simply ignore analogous Supreme Court reasoning. (The trial court also seemed to take some solace from the fact that Justice Scalia disagreed with parts of Justice O'Connor's opinion in Croson, and would have banned all use of race to remedy past discrimination. ER811. Since Justice Scalia plainly would also have banned the use of race to achieve "diversity," it is unclear why the court below would consider his opinion even remotely helpful.)

Without a "holding" in Bakke, this Court must turn to other Supreme Court precedents to assess defendants' purported compelling interests. As shown above, Justice Powell's lone opinion in Bakke, and its non-remedial analysis, has remained just that: alone. Its "academic freedom" rationale was inconsistent with binding precedent and it did not command the allegiance of anyone else on the Court. It never has. Hopwood, 78 F.3d at 944 ("Justice Powell's view in Bakke is not binding precedent on this issue").

Conclusion

For the foregoing reasons, this Court should reverse the orders of the court below that decertified the class, dismissed the requests for injunctive relief, and denied plaintiffs' motion for partial summary judgment on liability.

Respectfully submitted,

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Certificate of Compliance

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 13,679 words.

Michael E. Rosman

Attorney for Plaintiffs-Appellants

Statement Of Related Cases

To the knowledge of plaintiffs-appellants, the only related case pending in this Court is Appeal No. 98-35732, which is a "related case" pursuant to Cir. Rule 28-2.6(a) because it arises out of the same case in the district court.

Certificate Of Service And Filing

I hereby certify that I served a copy of the foregoing Plaintiffs-Appellants' Brief by placing two copies in separate containers, and delivering them to a commercial carrier for delivery within calendar three days on July 19, 1999 addressed as follows:

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1. As the trial court correctly noted, plaintiffs had sought to include future applicants in their class. ER234 & n.11. For reasons not clear, the court below did not include such applicants in the class certified under 23(b)(2).

2. The effort of the court below, in a cursory footnote (ER795 n.4), to distinguish cases like Norman-Bloodsaw fails for the same reason. The court found Norman-Bloodsaw distinguishable because it "did not involve a statutory change in the law." But, as shown above, neither does this case because plaintiffs are not challenging a statute.

3. In addition, nominal and punitive damages are available for civil rights violations regardless of injuries. Woods v. Graphic Communications, 925 F.2d 1195, 1204 (9th Cir. 1991); Sockwell v. Phelps, 20 F.3d 187, 192 (5th Cir. 1994) (prisoners awarded nominal and punitive damages for illegal policy of separating two-man cells by race).

4. According to defendants' expert, the elimination of race as a factor would mean that 15% of the whites outside the "presumptive admit" range would have been admitted in 1994-1998 rather than the 10% that were actually admitted. ER393. According to that same expert, there were about 6400 such white applicants between 1994 and 1998 (ER383); five percent of that is 320.

5. E.g., Rossini v. Ogilvy & Mather, 798 F.2d 590, 598-99 (2d Cir. 1986); Wagner v. Nutra Sweet Co., 170 F.R.D. 448, 451 (N.D. Ill. 1996); Welch v. Bd. of Dir. of Wildwood Golf Club, 146 F.R.D. 131 (W.D. Pa. 1993); Bennett v. Gravelle, 323 F. Supp. 203, 218-19 (D. Md. 1971); Gerstle v. Continental Airlines, 50 F.R.D. 213, 219 (D. Colo. 1970).

6. Most lower courts seem to agree with the Brennan group on this point, and have concluded that there really is no difference between a "plus" system and a set-aside. Middleton v. City of Flint, 92 F.3d 396, 412-13 (6th Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997) ("[W]e note that quotas and preferences are easily transformed from one into the other" citing Bakke, 438 U.S. at 378 (Brennan, J., concurring and dissenting)); Hopwood v. Texas, 78 F.3d 932, 948 n.36 (5th Cir. 1996) ("even if a `plus' system were permissible, it likely would be impossible to maintain such a system without degeneration into nothing more than a `quota' program" citing Bakke, 438 U.S. at 378 (Brennan, J, concurring and dissenting)); Valentine v. Smith, 654 F.2d 503, 510 n.15 (8th Cir. 1981) ("Any distinction between goals, quotas, and targets is primarily semantic" citing Bakke 438 U.S. at 378 (Brennan, J., concurring and dissenting)).

7. E.g., N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1565 (11th Cir. 1990) ("the First Amendment protects citizens' speech only from government regulation; government speech itself is not protected by the First Amendment"); Student Government Association v. Board of Trustees of University of Massachusetts, 868 F.2d 473, 481 (1st Cir. 1989) (administrative unit of state university "has no First Amendment rights" even though analogous private entities did); Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1041 (5th Cir. 1982) (en banc) (television station operated by University of Houston, which in turn is operated by the State of Texas, is a "state instrumentalit[y]" and is thus "without the protection of the First Amendment"). See generally Hopwood, 78 F.3d at 943 n.25.