

**UNITED STATES DISTRICT COURT**

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

KATURIA E. SMITH, et al.,

Plaintiffs,

V.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, et al.,

Defendants.

NO. C97-335Z

**ORDER**

This matter comes before the Court on the defendants' motion to dismiss injunctive and declaratory claims as moot, and for other relief (docket no. 182). The Court, having considered the motion and all papers filed in support of and in opposition to the motion, including the parties' supplemental briefs on the issue of whether the class claims are moot, hereby GRANTS the motion and DISMISSES both the individual and class claims for injunctive and declaratory relief, with the exception of Mr. Pyle's individual claim for an injunction ordering him to be admitted to the University of Washington School of Law. The court further ORDERS that the Rule 23(b)(2) class be decertified. The claims of the three individual plaintiffs for damages remain.

**ORDER -1-**

**Background**

This is a civil rights action under 42 U.S.C. secs. 1981 and 1983, and 2000d et seq. (Title VI). Plaintiffs allege that the University of Washington School of Law and the individual defendants discriminated against Caucasian applicants by applying different standards and criteria for admission to Caucasians than to other racial and ethnic groups. By order entered April 22, 1998, the Court granted the plaintiffs motion for class certification and certified a Rule 23(b)(2) class for injunctive and declaratory relief. Although the plaintiffs also seek damages, no class was certified as to damages claims.

Defendants move to dismiss plaintiffs' individual and class claims for declaratory and injunctive relief under 42 U.S.C. secs. 1981, 1983, and 2000d et seq., on grounds that they are moot as a result of the passage by the voters of the State of Washington of Initiative 200 on November 3, 1998. [Fn 1] Initiative 200 provides in pertinent part:

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.

The Initiative includes public colleges and universities in the definition of "state." Thus, state law now prohibits public colleges and universities from granting preferential treatment to any individual or group

of individuals on the basis of race or ethnicity The plaintiffs oppose the motion, arguing that their claims for injunctive and declaratory relief are not moot because the allegedly wrongful conduct may reasonably be expected to recur. Plaintiffs contend that the defendants have made statements indicating that they will continue to engage in race discrimination under the new policy, and an injunction is necessary to preclude the defendants from engaging in discriminatory conduct in the future.

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FN 1 The defendants' original motion did not specifically address the mootness of the class claims- At a telephone status conference on November 25, 1998, the Court ordered the parties to file supplemental briefs on the issue of whether the enactment 1-200 mooted the class claims for declaratory and injunctive relief

ORDER -2-

### Discussion

Defendants seek to dismiss' the plaintiffs' claims for declaratory and injunctive relief as moot based on the passage and subsequent enactment into law of I-200. The defendants are not moving to dismiss plaintiffs' claims for damages- Defendants concede that plaintiffs still have a claim for damages based on alleged past discriminatory conduct.

#### A. Mootness

The jurisdiction of federal courts is limited to cases and controversies. U.S. Const. art. III, sec. 2, cl. 1. Hence litigants are required to demonstrate a "personal stake" or "legally cognizable interest in the outcome" of their case. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388,395, 100 S.Ct. 1202,1208, 63 L.Ed. 2d 479 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969)). While the standing doctrine evaluates this personal stake as of the outset of a case, "the mootness doctrine ensures that the litigant's interest in the outcome continues throughout the life of the lawsuit." *Cook v. Colgate University*, 992 F.2d 17,19 (2nd Cir. 1993). Accordingly, a case that is "live" at the outset may become moot "when it becomes impossible for the courts,through the exercise of their remedial powers, to do anything to redress the injury." *Alexander v. Yale University* 631 F.2d 178, 183 (2nd Cir. 1980).

The mootness doctrine has some exceptions. One of these exceptions is where the defendant's conduct constitutes a wrong "capable of repetition yet evading review." *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir. 1994). In order to fit within this exception to the mootness doctrine, two criteria must be met. First, there must be a "reasonable expectation" that the same complaining party will be subject to the same injury

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FN 2 Plaintiffs criticize the defendants' failure to identify the Federal Rule of Civil Procedure under which the defendants' motion is brought. Plaintiffs state that they assume it is Fed. R. Civ. P. 12(b)(1) and, if so, they are entitled to conduct discovery in connection with the motion. The Court concludes that even assuming defendants' motion is brought under Fed. R. Civ. P. 12(b)(1), no discovery is necessary to resolve the questions of mootness raised in the defendants' motion.

ORDER -3-

again. Id. (citing *Weinstein v. Bradford*, 423 U.S. 147, 149, 9 S.Ct. 347,348, 46 L.Ed.2d 350 (1975)). Second, the injury suffered must be of a type inherently limited in duration such that it is always likely to become moot before federal court litigation is completed. Id.(citing *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463, 1469 (9th Cir. 1992)). Neither of these criteria is satisfied here. Because the new law forbids granting preferences on the basis of race and ethnicity, there can be no "reasonable expectation" that the plaintiffs will be subject to the same injury again, In addition, the injury here is not so limited induration that it is always likely to be mooted prior to litigation.

Another exception to the mootness doctrine is where the defendant voluntarily ceases an alleged illegal practice. Generally, a case will not be considered moot if the defendant voluntarily ceases the allegedly improper behavior in response to a suit, but is free to return to it at any time. Only if there is no reasonable expectation that the illegal action will recur is such a case deemed moot. Id. at 1510. Here, the defendants did not change their admissions policy voluntarily. Rather, the change in admissions policy was legally compelled by the enactment of a new law [FN3] prohibiting racial preferences in university admissions. Thus, the standards of mootness applicable to voluntary cessation of allegedly illegal conduct do not apply here.

A statutory change, unlike a voluntary change in practice, is usually sufficient to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed. Id. As a general rule, if a challenged law is repealed or expires, the case becomes moot. The exceptions to this general rule are "rare and typically involve situations where it is virtually certain that the repealed law will be reenacted." *Native Village*, 38 F.3d at 1510 (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 445 U.S. 283,289, 102S.Ct. 1070, 1074, 71 L.Ed.2d 152 (1982)). The possibility that the new statute may

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FN 3 Neither party disputes that under Washington law Initiative 200 became a new statute effective 30 days after the election.

ORDER -4-

be repealed or that a challenged discriminatory policy would manifest itself under the new statute is insufficient to except the case from the mootness doctrine. Id.

#### B. Claims for Injunctive Relief

Plaintiffs argue that regardless of I-200's prohibitions the defendants are likely to find ways to continue their alleged discrimination on the basis of race and, therefore, the Court must enter injunctive relief prohibiting the Court from granting preferences on the basis of race and ethnicity. Under well established authority, however, the mere possibility that the law school may attempt to circumvent the restrictions imposed by I-200 is insufficient to overcome mootness. See *Native Villa*" of Noatak 38 F.3d at 1510-11. The plaintiffs have challenged the old policy on grounds that the law school discriminated against Caucasian applicants by granting preferential treatment to certain other racial and ethnic groups. The new law specifically prohibits the law school from granting preferential treatment to any applicant on the basis of race or ethnicity. Because the new law specifically prohibits the practice that plaintiffs have challenged, plaintiffs' claims for prospective relief based on the old policy are moot.[FN4] The only exception is plaintiff Pyle's claim for injunctive relief ordering his admission to the law school. Defendants concede that the Court may still order such relief and, therefore, that particular claim for injunctive relief is not moot.

## C. Declaratory Relief

Where both declaratory and injunctive relief are sought, courts have a duty to decide "the appropriateness and the merits of the declaratory request irrespective of... the propriety of the issuance of the injunction." *Zwickler v. Koot*, 389 U.S. 241, 254, 88 S.Ct. 391, 399, 19 L.Ed.2d 444 (1967). See also *Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1254 (9th Cir. 1984)

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FN 4 The plaintiffs cite *Norman-Bloodsaw v. Lawrence Berkeley Laboratory* 135 F.3d 1260, 1274 (9th Cir. 1998), and *Ruiz v. City, of Santa Maria* 160 F.3d 543, 549-550 (9th Cir.1998), in support of their argument that a claim for injunctive relief is not moot unless subsequent events have made it "absolutely clear" that the alleged wrongful behavior cannot reasonably be expected to recur. Those cases are distinguishable because they did not involve a statutory change in the law. *Norman-Bloodsaw* involved a voluntary change in allegedly illegal conduct, and *Ruiz* involved a change in circumstances.

ORDER -5-

(although claim for injunctive relief was moot, it was court's duty to consider separately the appropriateness of declaratory relief).

Plaintiffs argue that even if the claims for injunctive relief are moot, the Court may still enter declaratory relief because their claims for damages remain.[FN5] Defendants respond that "a declaratory judgment may not be used to secure judicial determination of moot questions," and therefore plaintiffs' claim for declaratory relief must be dismissed as moot. *Id.* at 1514.

Because the Court certified a Rule 23(b)(2) class only with respect to claims for declaratory and injunctive relief, the plaintiffs' argument that declaratory relief is proper as a predicate to an award of damages necessarily applies only to the three named plaintiffs bringing claims for damages. Two of the plaintiffs, Angela Rock and Katuria Smith, seek only retrospective relief in the form of damages. Plaintiff Pyle seeks damages, but also an injunction ordering the Law School to admit him. Thus, plaintiffs Rock and Smith seek declaratory relief solely as a basis for their damages claim, while plaintiff Pyle seeks declaratory relief in connection with both his claim for damages and his claim for prospective injunctive relief. The Court will therefore address first whether plaintiffs Smith, Rock, and Pyle may obtain declaratory relief solely because their damages claims remain, and then consider whether Pyle's claim for prospective injunctive relief permits the court to enter corresponding declaratory relief on the constitutionality of the defunct policy.

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FN 5 It is undisputed that the plaintiffs' claims for damages are not moot.

FN 6 Plaintiffs bring damage claims against the individual defendants in their personal capacity under secs. 1981 and 1983, and against the Law School under Title VI. Plaintiff cannot bring damages claim under secs. 1981 and 1983 against the individual defendants in their official capacity because such claims are barred by the Eleventh Amendment. The Eleventh amendment does not bar, however, claims against the individual defendants in their official capacity for prospective injunctive and declaratory relief. Because the Court may award only prospective relief against the individual defendants in their official capacity, "[d]eclaratory relief against a state official may not be premised on a wholly past violation of

federal law." *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). Thus, any declaratory relief issued in connection with the plaintiffs' secs. 1981 and 1983 claims would have to be entered against the individual defendants in their personal capacity.

ORDER -6-

### 1. Declaratory Relief as a Basis for Awarding Damages

Some courts have held that a court may enter declaratory relief in conjunction with a claim for damages, even if a claim for injunctive relief is mooted by the repeal or amendment of the challenged law. In *Penny Saver Publications, Inc. v. Village of Hazel Crest* 90 F.2d 150, 153 (7th Cir. 1990), for example, publishers of a newspaper challenged an ordinance prohibiting any person from soliciting any owner or occupant of a dwelling for sale or rental of that dwelling. The newspaper had included in its publication a flyer from a real estate broker, which advertised the broker's services. The broker was subsequently prosecuted under the ordinance. In its complaint the publisher sought injunctive relief against the enforcement of the ordinance, declaratory relief that the ordinance was unconstitutional, and damages pursuant to 42 U.S.C. sec. 1983. The Village of Hazel Crest subsequently amended its ordinance to state that it would not apply to print or electronic media of general circulation such as a newspaper. The defendants then argued that the case was moot. The Seventh Circuit affirmed the trial court's holding that the plaintiff's claim for injunctive relief was moot, but held that the plaintiff's claims for declaratory relief and damages were viable. The court held that the amendment of the ordinance did not render the controversy moot because there still remained a live controversy between the parties as to whether the ordinance was unlawful thus entitling the plaintiff to damages. *Accord South-Suburban Housing Ctr. v. Greater South Suburban Board of Realtors*, 935 F.2d 868, 881 (7th Cir. 1991) (claim for damages and declaratory relief not moot even though claim for injunctive relief was), cert. denied, 502 U.S. 1074, 112 S.Ct. 971, 117 L.Ed.2d 136 (1992).

In finding that the claim for declaratory relief was not mooted by amendment of the ordinance, the Seventh Circuit relied in part on *Powell v. McCormack*, 395 U.S. 486, 499, 89 S.Ct. 1944, 1952, 23 L.Ed.2d 491 (1969). In that case, elected Congressman Adam Clayton-Powell challenged a House Resolution that excluded him from membership in the 90th Congress and declared his seat vacant. The Congressman brought suit for declaratory and

ORDER -7-

injunctive relief and for back pay. While the lawsuit was pending, the 90th Congress officially terminated, and Powell was seated as a member of the 91st Congress. The defendants argued that because the gravamen of the plaintiff's complaint was the failure of the 90th Congress to seat him, and because Powell was now seated and the 90th Congress terminated, his claims were moot. The Supreme Court held that Powell's claims for back salary and declaratory relief remained viable:

[E]ven if respondents are correct that petitioner's averments as to injunctive relief are not sufficiently definite, it does not follow that this litigation must be dismissed as moot. Petitioner Powell has not been paid his salary by virtue of an allegedly unconstitutional House Resolution. That claim is still unresolved and hotly contested by clearly adverse parties. Declaratory relief has been requested .... A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus- A declaratory judgment can then be used as a predicate to further relief, including an injunction.... There is no suggestion that petitioner's averments as to declaratory relief

are insufficient and Powell's allegedly unconstitutional deprivation of salary remains unresolved.

Id. at 498-99.

Despite the Seventh Circuit's reading of Powell, the Court concludes that plaintiffs' claims for declaratory relief do not survive merely because they have a claim for damages. First, although Powell can be read as suggesting that declaratory judgment claims survive whenever there is a viable claim for damages, a better view of Powell is that it merely stands for the proposition that where one of several issues presented in a case becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy and prevent the entire controversy from being mooted. See *University of Texas v. Camenisch*, 451 U.S. 390, 394, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981); *Southern Pacific Transp. Co. v. Public Utility Comm'n of State of Or.*, 9 F.3d 807, 809 (9th Cir. 1993). In addition, Powell instructs that a court may enter declaratory relief even though it chooses not to issue an injunction. See *Craye v. Tracy*, 955 F.Supp. 1047, 1058 (E.D. Wis. 1996). Nothing in Powell requires courts to consider claims for declaratory relief whenever there is a live claim for damages. Rather, each individual claim must be evaluated for mootness.

ORDER -8-

The Ninth Circuit has held that in determining whether a request for declaratory relief has become moot, "basically, 'the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Kasza v. Browner*, 133 F.3d 1159, 1172 (9th Cir.) (quoting *Public Utilities Comm'n v. FERC*, 100 F.3d 1451, 1458 (9th Cir. 1996)), cert. denied, 119 S.Ct. 414 (1998). Thus, declaratory relief is appropriate "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceedings." *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1470 (9th Cir. 1984). See also *Eureka Federal Saving and Loan Ass'n v. American Cas. Co. of Reading*, 873 F.2d 229, 231 (9th Cir. 1989). Because the policy giving rise to plaintiffs' claims for damages -is defunct, there is no substantial controversy of sufficient "immediacy and reality" to warrant issuance of a declaratory judgment on the constitutionality of the Law School's former policy.

In so holding, the Court is mindful of the Ninth Circuit's strong denouncement of issuing declaratory judgments on the constitutionality of laws that have been repealed. The Ninth Circuit has held that when laws have been repealed, the issuance of declaratory relief on the constitutionality of such laws serves no purpose other than as an advisory opinion, which is strictly prohibited under Article III of the Constitution. See *Native Village of Noatak*, 38 F.3d at 1514 (flatly stating that "a declaratory judgment may not be used to secure judicial determination of a moot question."). [FN7] See also *Kasza*, 133 F.3d at 1172-73

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FN 7 *Accord National Advertising Co. v. City and County of Denver* 912 F.2d 405, 412 (10th Cir. 1990) ("A declaratory judgment on the validity of a repealed [law] is a textbook example of 'advising what the law would be upon a hypothetical state of facts.'" (quoting *Blinder, Robinson & Co. v. United States Sec. & Exch. Comm'n*, 748 F.2d 1415, 1418 (10th Cir. 1984), cert. denied, 471 U.S. 1125 (1985)). See also *Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist.* 739 F.2d 1472, 1479 n.2 (10th Cir. 1984) (court rejected plaintiffs' argument that its claim for money

damages "obligated" the court to adjudicate the plaintiff's claim for declaratory relief as to the constitutionality of water district formation laws that had been superseded, reasoning that a continuing claim for damages cannot

ORDER -9-

(claim for declaratory relief that EPA failed in the past to comply with RCRA was mooted by EPA's current compliance; "[n]othing remain[ed] of sufficient 'immediacy' or 'reality' to warrant declaratory relief."); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1335 (9th Cir. 1990) (it would be "pointless" to render a declaratory judgment concerning the validity of a plan that was no longer in effect), cert.denied, 499 U.S. 943, 111 S.Ct. 1404, 113 L.Ed.2d 459 (1991); *Enrico's*, 730 F.2d at 1255 (claim for declaratory relief moot where defendants no longer enforcing challenged policy). Thus, the Ninth Circuit has consistently held that claims for declaratory relief are moot where the challenged law or policy is no longer in effect.

That plaintiffs still have a claim for damages does not change the mootness analysis with respect to their claims for declaratory relief See *Coral Construction Co. v. King County* 941 F.2d 910, 927 n. 16 (9th Cir. 1991) (that plaintiffs had a live claim for damages did not alter court's analysis of mootness of claims for declaratory and injunctive relief), cert. denied, 502 U.S. 1033, 112 S.Ct. 975, 116 L.Ed.2d 780 (1992); *Tahoe-Sierra Preservation Council* 911 F.2d at 1335 (claims for injunctive and declaratory relief on validity of defunct plan were moot but claims for reimbursement and damages were not). Because the admissions policy that is the subject of the declaratory judgment claim is defunct, plaintiffs' claim for declaratory relief as to the constitutionality of that policy is moot.[FN8]

## 2. Pyle's Claim for Prospective Injunctive Relief

The parties agree that I-200 does not render moot plaintiff Pyle's claim for an injunction ordering that he be admitted to the Law School. The issue for the Court is

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resurrect moot claims for equitable relief).

FN 8 That does not mean, of course, that the Court need not reach the issue of the constitutionality of the policy -in determining whether plaintiffs are entitled to damages for past constitutional violations. The Court may need to do so in order to determine plaintiff's claims for damages, but it need not issue declaratory relief in order to award plaintiffs damages.

ORDER -10-

whether it may enter retrospective declaratory relief in conjunction with Pyle's claim for prospective injunctive relief.

The Court concludes that any declaratory judgment on the constitutionality of the defunct policy would be at odds with existing Ninth Circuit authority on the mootness of such claims. The Ninth Circuit has strongly cautioned that issuing declaratory judgments on the constitutionality of repealed laws is unnecessary and improper. See *Native Village of Noatak* 38 F.3d at 1514. That plaintiff Pyle may obtain prospective injunctive relief if the Court determines his constitutional rights were violated does not alter that conclusion. The Court need not issue retrospective declaratory relief on the constitutionality of a defunct policy in order to grant prospective injunctive relief to plaintiff Pyle, and the Court declines to do

so. [FN9]

#### D. Class Claims for Injunctive and Declaratory Relief

This Court previously certified class claims for injunctive and declaratory relief under Fed. R. Civ. P. 23(b)(2). The certification was limited to the issue of whether the defendants discriminated against Caucasian applicants on the basis of race in violation of the Fourteenth Amendment. The Court denied the motion for class certification to the extent plaintiffs sought to maintain a class for any damage claims, reasoning that damages vary with the individual applicant and are not suitable for class treatment.

Class actions under Rule (b)(2) are proper if "final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." Rules Advisory Committee Notes on (b)(2). Plaintiffs maintaining a (b)(2) class action are not precluded from seeking money damages, but their

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FN 9 Even assuming the Court had discretion to enter declaratory relief on the constitutionality of the former policy, the Court would exercise its discretion not to enter such relief in this case. The law now forbids the University from engaging in the allegedly unconstitutional conduct challenged by the plaintiffs. Any declaration by the Court that the former policy was unconstitutional changes nothing, and serves no useful purpose in clarifying or settling the legal obligations of the defendants under the new law.

ORDER -11-

claim for money damages must be incidental to their primary claim for injunctive relief *Probe v. State Teachers Retirement System*, 780 F.2d 776, 780 (9th Cir.), cert. denied, 476 U.S. 1170, 10 S.Ct. 2891, 90 L.Ed.2d 978 (1986). Because the plaintiffs' claims for declaratory and injunctive relief with respect to the constitutionality of the former policy are moot and only damages claims remain, there is no longer a basis for sustaining a Rule(b)(2) class.[FN10]

Even if the Court were to agree with plaintiffs that their claims for declaratory relief are not moot, a Rule 23(b)(2) class would still not be appropriate because the declaratory relief would no longer be the predominant form of relief sought. The Advisory Committee Notes to Rule 23(b)(2) provide that:

This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.

Now that the policy in question has been terminated as a result of new state law, the final relief 'in this case relates predominantly, if not exclusively, to money damages. Any declaratory relief would not "afford[] injunctive relief or serve[] as a basis for later injunctive

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FN 10 That plaintiff Pyle still has a claim for an injunction ordering that he be admitted to the Law School does not affect the viability of the class claims for injunctive and declaratory relief. The plaintiffs' complaint makes clear that plaintiff Pyle's claim for injunctive relief is personal to him and is not a class claim. Thus, the class claims were limited to claims for a declaration that the Law School's admissions policy was unconstitutional and an injunction enjoining the law school from using that policy to discriminate on the basis of race and ethnicity.

ORDER -12-

relief." Rather, it would serve only as a basis for awarding damages based on a past violation of law. Under these circumstances, Rule 23(b)(2) certification is inappropriate and the class must be decertified.

IT IS SO ORDERED.

DATED this 10th day of February, 1999.

THOMAS S. ZILLY

UNITED STATES DISTRICT JUDGE

ORDER -13-