IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

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KATURIA E. SMITH, ANGELA ROCK,

and MICHAEL PYLE,

for themselves and all others

similarly situated,

Plaintiffs,

v.

THE UNIVERSITY OF WASHINGTON

LAW SCHOOL, et al.,

Defendants.

Civil Action # C-97-335

MEMORANDUM OF

LAW IN OPPOSITION

TO DEFENDANTS' PARTIAL

SUMMARY JUDGMENT

MOTION (QUAL. IMM.)

NOTE ON MOTION CALENDAR:

Friday, Jan. 23, 1998

_____)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON QUALIFIED IMMUNITY

Plaintiffs submit this Memorandum of Law in opposition to the individual defendants' motion for partial summary judgment on qualified immunity grounds.

Factual Background

The individual defendants move for partial summary judgment, at the outset of discovery and before any depositions have been taken, because "the undisputed facts show that the Law School's admissions process treats race as one of many factors that contribute positively to the diversity of the student body." Dfs' Mot. 2. (The individual defendants apparently do not dispute that each of them has been significantly involved with the admissions program. See Rosman St. ¶ 3 & Ex. 1, Resp. To Int. No. 5.) As shown below, however, the "facts" concerning defendants' admissions process are hardly "undisputed." With even the minimal documents and discovery taken to date, genuine issues of material fact exist concerning both the motivation behind defendants' consideration of race and whether race was one of many diversity factors permitting individual comparison.

A.The Pre-1989 Stated Policy

Prior to 1968, the Law School did not discriminate on the basis of race in its admissions policy. Rosman St. Ex. 2, 1973 Policy Statement, p. 14. In 1968, the Law School commenced a special program to consider applicants who were racial or ethnic minorities. The Law School referred to those admitted under this program as "special admissions." These individuals were admitted with academic credentials that would have led to the rejection of those who were not members of a preferred race or ethnicity. Id., pp. 16-17. The stated rationale was that

> certain ethnic groups in our society have historically been limited in their access to the legal profession and . . . the resulting underrepresentation can affect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities . . .

Id., p. 14. See also Rosman St. Ex. 2, 1977-78 Policy Statement, p. 5; 1979-83 Policy Statement, ¶ 3. Although the stated rationale for the program changed over time, in 1988 the Law School still referred to its program as a "special admissions for minority program" and boasted that the Law School had "the largest [such] program in the United States among comparable institutions." Rosman St. Ex. 3, 1/7/88 Faculty Minutes, p. 1. In 1989, twenty-four (24) individuals were admitted with an index score on that year's scale at or below 75; all twenty-four (24) were ethnic minorities. Rosman St. Ex. 4, p. 2.

The goals of the overall admissions system, including its concern for "diversity," are set forth in Section 1 of the Law School's current Admissions Policy (the "Admissions Policy"), repeated on page 4 of Defendants' Motion. That section has remained more or less unchanged since 1979. Rosman St. Ex. 2. As set forth in defendants' motion, the Law School seeks those individuals who "will contribute to the diversity of the student body and of the legally trained segment of the population" (emphasis added).

B.Stated Policy -- 1989 to Present

Prior to changes made in 1989, Section 3 of the Admissions Policy stated that the Law School "gives special consideration to applicants who are members of racial and ethnic minority groups that have been subject to long-continued, pervasive discrimination sanctioned by the legal system and that would not otherwise be meaningfully represented in the entering class." It identified examples of such groups as follows: "Asian Americans, Black Americans, Chicanos, Filipino Americans, Native Americans/Indians, and Puerto Rican Americans." The policy stated that membership in those groups would be considered a positive factor so as to enhance the "diversity" of the student body.

In 1989, some twelve years after Bakke, the Law School reviewed its policy and concluded that much of it could not withstand scrutiny under Bakke. In a memo to the faculty dated September 18, 1989 (see Rosman St. ¶ 8 & Ex. 8), the Admissions Committee explained that it had been "concerned with our approach to giving special consideration to the minority status of applicants," and thus had decided to draft "a new policy statement for the admissions process in order to avoid constitutional difficulties." Section 3, the Committee wrote, suggested that the Law School was trying to remedy past societal discrimination, i.e., "to assure that certain groups are represented in the legal profession in proportion to their presence in the population at large" -- an improper goal without a showing that the University of Washington Law School had engaged in past discrimination. Id. Moreover, if Justice Powell's "diversity" rationale were deemed to be the rationale for the policy, "we may faulted [sic] for making race and ethnicity the only diversity

factors used in admissions decisions." Id., p. 2. The Admissions Committee recommended that the faculty adopt a new Section 3. After some minor revision, a new version was proposed identical to the one that is quoted on page five of Defendants' Motion. See Rosman St. ¶ 8 & Ex. 8, 10/26/89 memo.

In both their September 18, 1989 and October 26, 1989 memos, the Admissions Committee also recommended that Section 1 of the Admissions Policy be amended as well by striking the words "and of the legally trained segment of the population." The memos stated that "[t]his is a problematic goal under Bakke. As a state institution, we are not permitted to try to give a racial group a specified portion of the entering class, even if this is intended to overcome deficits of that group in the professional population." Rosman St. Ex. 8. As already noted, the "problematic goal" has nonetheless remained a part of the Admissions Policy as set forth in the Law School's Admissions Bulletins. E.g., Dfs' Mot. 4.

Moreover, the September 1989 memo does not indicate that Powell-type "educational diversity" was the sole goal of the admissions process before that time. To the contrary, it strongly suggests other goals and rationales. E.g., Rosman St. Ex. 8, 9/18/89 memo, p. 2 (diversity "has long been a justification for our own affirmative action program" (emphasis added)). Significantly, nowhere in the 1989 memos does the Admissions Committee recommend an actual change in the goals of the system. Rather, the tone strongly suggests that stated policies needed to be reworded to avoid legal liability.

The Law School also follows the guidelines of the University of Washington in its admissions policies. Rosman St. ¶¶ 6, 7 & Ex. 6; id., ¶ 12 & Ex. 15. These policies further emphasize the significant non-diversity objectives that the consideration of race in the admissions policies tries to further. For example, University policy explicitly states that "[a]ffirmative action will be taken to increase substantially the number of minority group members, . . . in educational programs where they have been traditionally underrepresented." Rosman St. Ex. 6 (Ex. XII-2.1) (emphasis added). Admissions policies, it goes on to state, must be mindful not only of the need for "diversity" in the student body but, in addition, "of society's need for highly trained individuals from all of the sub-cultures of the population." Id. The policy further requires:

> Special attention shall be paid in the admission process to members of those constituencies traditionally underrepresented in all or particular segments of the educational programs of higher education, including those groups of minority and women applicants who have been the objects of past societal discrimination.

See also Rosman St. Ex. 6 (Ex. XII-10.6) (the "process of admission is mindful of society's need for highly trained individuals from all sectors of society"). Thus, considering only defendants' stated policies, defendants had motivations other than the "educational diversity" described in Justice Powell's Bakke opinion. But other evidence exists as well.

C.Other Evidence Of Non-Diversity Objectives

The Law School is a member of the Association of American Law Schools ("AALS"), and, as the Kummert affidavits reflect, he and others at the Law School probably spend significant time preparing papers for the accreditation process by the AALS. Defendant Loh served on the Executive Committee of the AALS from 1992 through 1994. Rosman St. ¶ 9 & Ex. 10. In order to be accredited, a Law School must fulfill the obligations of membership reflected in the by-laws. By-Laws § 2-2. Among those obligations is Section 6-4(c) of the By-Laws, which states that "[a] member school shall seek to have a faculty, staff and student body which are diverse with respect to race, color and sex" (emphasis added). (In contrast, the by-law further states that a member school may seek other affirmative action objectives.) Racial diversity, to the exclusion of other forms of diversity, is a primary focus of the AALS. See Huffman Statement. Law school deans generally view its rules as tantamount to a requirement that they employ different standards (i.e., different cut-off scores) for preferred races. Rosman St. ¶ 10 & Ex. 12.

This focus on racial and gender diversity to the exclusion of all else explains a similar emphasis in documents prepared by the Law School for accreditation by the AALS and American Bar Association. Thus, in a document entitled "Programs For Promoting Opportunities For Racial And Ethnic Minorities," the Law School asserted that it "maintains one of the most progressive and outstanding minority admissions programs in the nation" (emphasis added), and extolled the "increase of over 100% in the amount [sic] of minority students admitted and enrolling at the Law School" since the last accreditation process. Rosman St. ¶ 11 & Ex. 13, p. 1. Additionally, the accrediting agencies sought, and

the Law School provided, the number of racial or ethnic minorities who had been offered admission in the previous year. Id., p. 8. See also Rosman St. Ex. 14.

Finally, plaintiffs have produced evidence that defendant Loh had a specific goal of increasing the number of racial and ethnic minorities prior to his becoming Dean, and that he has, in the past, expressed a strong animus against whites. See Scully Declaration.

D.Procedures

Plaintiffs have been precluded from reviewing student applications, and have been given no breakdown of applicants by race and index score to assess Kummert's statistical recitation. Rosman St. ¶ 20. Despite this gross disadvantage, we do know that the "Law School identifies any minority applicants with high grade point averages and LSAT scores and tries to make admissions decision on these students very quickly." Rosman St. Ex. 13, p. 4. While that memo omits whether the standards for a "high" grade point average is different for different races, or whether this "quick offer" procedure applies to students with other types of "diversity," another internal memorandum provides additional illumination. See Rosman St. ¶ 12 & Ex. 16. Defendant Madrid "read all of the files in the presumptive denial category." See also Kummert Decl. (Dec. 1997) ¶ 3. Then,

> [s]he admitted approximately 125 persons on grounds of contribution to ethnic diversity, and identified another 250 files that contained diverse experiences, background, education, etc. She denied the remaining files. Dick Kummert reviewed the 250 diversity files, and another 150 intermediate files and recommended ordinal (1 to 15) ranks for the files. . . [Madrid and Kummert] then decided on the number of files to admit (from the top ranked groups), the number of files on the waiting list, and the number of files to be denied.

Id., Rosman St. Ex. 16, p. 2 (emphasis added). Thus, "ethnic diversity" and other kinds of diversity were not treated even remotely alike by the Law School -- one provided immediate entry to the Law School, the other simply avoided immediate denial for the applicant.

E.Results, Statistics, And Credibility

As noted, defendants have not provided plaintiffs with any breakdown of applicants offered admission or rejected by index score and ethnicity, and have not described the source defendant Kummert used to glean the statistics that he sets forth in his affidavits. But even assuming his statistics to be accurate -- but see Rosman St. ¶ 14 -- those statistics raise as many questions as they answer. For example, according to Kummert, nearly 79% of those admitted with index scores below 193 in 1994 were racial minorities. Kummert Decl. (Dec. 1997) ¶ 10. On its face, this is a rather high number for a system in which race is just one of many "diversity" factors considered by the Law School. And, of course, Kummert is presenting his statistics, from a source undisclosed to plaintiffs, in the light most favorable to the Law School. (Aside from Kummert being able to choose the cut-off index scores for his statistics, he also has lumped all racial minorities together in his analysis.)

Additional evidence shows that the Law School's preferences for certain minorities are significant, to the point of being dispositive in many cases. The Law School has provided a breakdown of those admitted from certain LSAT and undergraduate GPA ranges by race. Rosman St. Exs. 17-20. From 1994-97, about 15% of white applicants with undergraduate GPAs in excess of 3.24 and LSAT scores between 150 and 164 (inclusive) were admitted. In contrast, 64% of those applicants identified as Chicano/Mexican American -- over four times the percentage for whites -- and over 91% of African Americans -- over six times the likelihood for whites -- were admitted. By year, this broke down as follows:

YearWhitesAfric.-Ams.Chicano/Mex. Ams.

19949%90%50%

199514%100%56%

199621%89%80%

199719%83%80%

Other statistics emerge from defendants' documents, not all of which can be described here given space limitations. In 1994, among applicants with GPAs between 2.5 and 3.24 and LSAT scores in the 155-59 range, 100% of African-American applicants were admitted. There were 131 candidates identified as "white" or "other ethnicity" in the same range. Exactly zero were admitted. Rosman St. Ex. 17. That is, in 1994, and defendants' claims that race was just one of many diversity factors considered notwithstanding, every African American applicant had more "diversity" than any of 131 white or "other ethnicity" applicants. Similar statistics could be identified in each of the other years in question.

Finally, defendant Kummert's credibility must be questioned. In an apparent effort to make plaintiff Pyle's index score of 89 seem as if it were near the bottom of all acceptable scores, Kummert asserts that no one was admitted in 1996 with an index score below 87. Kummert Decl. (Dec. 1997) ¶ 12. But as shown in the accompanying Rosman statement, this just is not correct. Indeed, it seems clear that there were many candidates (both white and non-white) with index scores well below that. See Rosman St. ¶ 14. Given that defendants' motion for qualified immunity (for, among others, Kummert) is based entirely upon Kummert's affidavits, and that plaintiffs have not been afforded access to the data or documents that he apparently relied upon, questions concerning his credibility are sufficient of themselves to create a genuine issue of fact.

F.Plaintiffs' Applications

Katuria Smith applied in 1994. Earlier, in the summer of 1993, 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." Rosman St. Ex. 9, p. 10. Both the LSDAS (which prepares a report of a candidate's LSAT score and undergraduate GPA) and the Law School granted Smith's application for a fee waiver. Rosman St. ¶ 15 & Exs. 21-22.

Smith's application was unusual. After several years in community colleges, she transferred to the undergraduate business program at the University of Washington. Although it was obviously a far more academically rigorous program, Smith did much better at the University of Washington than she had at the community colleges. (Although her overall GPA was a 3.28, she had a GPA of 3.62 at the University of Washington in its competitive undergraduate business program.) 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. (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, and that she was raised by a single mother and had no means of supporting herself other than working. Accordingly, she continued to work 20-25 hours per week even after transferring to the University of Washington. She submitted a glowing recommendation from her employer (an attorney). Rosman St. ¶ 16 & Exs. 23-24.

The Law School rejected Smith's application in March 1994. Despite economic circumstances that were sufficient for the Law School to grant her a fee waiver, and although the Law School lists "growing up in a disadvantaged or unusual environment" as a so-called diversity factor, defendant Kummert concluded that Smith's application did not merit special consideration for any "diversity" factors. Kummert Decl. (Oct. 1997) ¶ 10.

Angela Rock applied in 1995. Her application spoke about having been a swimming coach in a depressed, gang-infested ghetto area of Seattle and about how that experience had changed her and her perspective. She also identified the other jobs she held while attending college. Rosman St. ¶ 17 & Exs. 25-26. The Law School placed Rock on a waiting list in March 1995, and eventually rejected her application. Although "activities and accomplishments" are listed in Section 3 of the Admissions Policy as potential diversity factors, Kummert concluded that Rock's application did not merit special consideration for any "diversity" factors. Kummert Decl. (Oct. 1997) ¶ 13.

Michael Pyle applied in 1996. His application spoke at length about his work for the previous 4+ years as a structural analyst at the Boeing Co. 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. Rosman St. ¶ 18 & Ex. 27. The Law School rejected Pyle's application in March 1996. Kummert concluded that Pyle's application did not merit special consideration for any "diversity" factors. Kummert Decl. (Oct. 1997) ¶ 17.

This Action

Plaintiff Smith commenced this action pro se on March 5, 1997. Plaintiffs filed the consolidated amended complaint (the "Complaint") on July 10, 1997, and defendants timely filed an answer on August 8, 1997. Rosman St. ¶ 19.

Shortly after the filing of the Complaint, plaintiffs served their first set of discovery requests. Defendants, citing other commitments and the time associated with responding, sought extensions of time for various of the matters that had been sought. Responses were received in early and mid-October 1997. These responses referred to the application files of applicants, but defendants have refused to produce these applicant files until an order is in place protecting the confidentiality of these files. Plaintiffs drafted a proposed order to meet defendants' concerns in early November 1997. Claiming personal and professional commitments, defendants' attorneys have not yet responded to plaintiffs' proposal, and plaintiffs have not had access to the student files. Depositions have not yet been scheduled by either side. Rosman St. ¶ 20 & Exs. 28-31.

Argument

I.

GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT FOR

THE INDIVIDUAL DEFENDANTS ON QUALIFIED IMMUNITY GROUNDS

Under the applicable standards, defendants' motion should be denied. Genuine issues of material fact exist concerning defendants' motivation for commencing and continuing the consideration of race in the Law School's admissions process as well as whether the Law School actually considered race as only one of many "diversity" factors.

A.Standards On This Motion

1.Summary Judgment Standards. -- On a summary judgment motion, any disputes of fact must be resolved in favor of the non-moving party, and any inferences that can be made from undisputed facts that favor the non-moving party should also be made. These basic principles are as applicable to summary judgment motions asserting a qualified immunity defense as they are for any other summary judgment motion. E.g., Liston v. County of Riverside, 120 F.3d 965, 977 (9th Cir. 1997); Knox v. Southwest Airlines, 124 F.3d 1103, 1108 (9th Cir. 1997).

2.Qualified Immunity. -- Qualified immunity is unavailable to governmental officials who have violated a clear constitutional right by conduct which a reasonable official should have known violated the Constitution. Hallstrom v. City of Garden City, 991 F.2d 1473, 1482 (9th Cir.), cert. denied, 510 U.S. 991 (1993). In determining whether the constitutional right was clear, and the conduct of the governmental officials unreasonable, this Court should examine the binding precedents of the Ninth Circuit and the Supreme Court. See Hallstrom, 991 F.2d at 1483 (rejecting officials' reliance on district court decisions within the Ninth Circuit, Court rejects claim of qualified immunity because "an official is charged with knowledge of controlling Supreme Court and Ninth Circuit precedent").

Although qualified immunity normally requires that a defendant's conduct be analyzed "objectively" to determine if the conduct was "reasonable," an exception exists for where the underlying Constitutional tort relies upon subjective motion. E.g., Branch v. Tunnell, 937 F.2d 1382, 1385 (9th Cir. 1991) (noting tension between "objective reasonableness" test and "cases in which the `clearly established law' at issue contains a subjective element, such as motive or intent"); Tompkins v. Vickers, 26 F.3d 603, 607 (5th Cir. 1994) ("Every circuit that has considered the question has concluded that the public official's motive must be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation" citing, inter alia, Branch v. Tunnell). Here, as shown below, the "reasonableness" of defendants' consideration of race in the Law School's admissions program depends very much on the underlying motivation for its implementation; a program designed to implement the Law School's desire for an educationally diverse student body has more Constitutional support than one arising out of racial animus (see Scully Declaration) or designed to rectify past societal discrimination, increase the proportion of minorities at the Law School, or increase the "diversity" of the legal profession.

B.The Equal Protection Clause

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, 116 S. Ct. 1894, 1902 (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.

Defendants assert that the consideration of race by the Law School in its admissions process satisfied strict scrutiny because it was supported by the opinions of Justices Powell and Brennan in Regents Of University Of California v. Bakke, 438 U.S. 265 (1978). E.g., Rosman St. Ex. 1, Resp. To Amended Int. No. 4. For purposes of this motion -- and only such purpose -- plaintiffs will assume that Justice Powell's lone opinion can be construed as the "rationale" for the "holding" of the entire Court in Bakke, and that state actors may consider race for the non-remedial reason set forth in that opinion.

In Bakke, the Court found that the 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. In so holding, Justice Powell applied strict scrutiny and went through various compelling interests offered by the medical school. Particularly relevant here, he held that assuring a particular percentage of minorities within its student body was a "facially invalid" justification; indeed, it was "discrimination for its own sake." Bakke, 438 U.S. at 307. So, too, attempting to remedy societal discrimination was not a compelling interest for Fourteenth Amendment purposes. Bakke, 438 U.S. at 310. See also City of Richmond v. J.A. Croson, 488 U.S. 469, 496-97 (1989) (opinion of O'Connor, J.); id. at 520 (opinion of Scalia, J.); Coral Construction Co. v. King County, 941 F.2d 910, 917 (9th Cir. 1991) ("Data sharing presents the risk that data of `societal discrimination' will become the factual basis for a [race-conscious] program. This is impermissible."), cert. denied, 502 U.S. 1033 (1992). Rather, the only legitimate compelling interest was the attainment of a "diverse" student body related to the medical school's First Amendment and academic freedom interest in selecting its own students. Bakke, 438 U.S. at 312; id. at 313 ("in arguing that its universities must be accorded the right to select those students who will contribute the most to the `robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment").

Justice Powell held that a state interest that would justify the consideration of race was not the ethnic diversity promoted by UC Davis, but one 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. In a constitutional admissions program, the use of race "may be deemed a `plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." Id. at 317 (emphasis added). Thus, even the broadest interpretations of Bakke recognize that a system which would apply, for example, a "presumptive deny" line to some candidates, and not apply that same line to ethnic minorities, violates Bakke because it insulates some candidates from direct competition with others. Hopwood v. Texas, 861 F. Supp. 551, 576 (W.D. Tex. 1994) ("the setting of different presumptive denial lines for minorities and nonminorities creates a similar problem [viz., lack of individual comparison]: some nonminority applicants who fell below the nonminority presumptive denial line, though having a higher score than minority applicants placed in the discretionary zone, were rejected early in the process with no comparison to the individual minority applicants"), vacated and remanded on other grounds, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

C.Genuine Issues Of Material Fact Exist Concerning

Defendants' Entitlement To Qualified Immunity

The evidence set forth by plaintiffs on this motion creates genuine issues of fact on two material issues: first, whether defendants' compelling interest was really the "educational diversity" envisioned by Justice Powell in Bakke; and second, whether defendants' system truly permits comparisons between minority applicants and nonminority applicants, as Justice Powell required, or whether, for all practical purposes it insulates racial and ethnic minorities from such comparisons.

1.The Purpose Of The Program. -- In order to survive scrutiny under the Fourteenth Amendment, race-conscious decision-making had to have been implemented to achieve a recognized compelling interest. Shaw v. Hunt, 116 S. Ct. 1894, 1902 n.4, 1903 (1996) ("To be a compelling interest, the State must show that the alleged objective was the legislature's `actual purpose' for the discriminatory classification"; rejecting remedial purpose for discrimination

because it "did not actually precipitate the use of race in the redistricting plan"); Mississippi University for Women v. Hogan, 458 U.S. 718, 730 n.16 (1982) (rejecting gender-based discrimination allegedly designed to remedy past discrimination against women because "the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination"); Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 91 F.3d 586, 597 (3rd Cir. 1996), cert. denied, 117 S. Ct. 953 (1997) (in action challenging city ordinance creating subcontracting set asides, Court holds that "[t]he party challenging the race-based preferences can succeed by showing . . . that the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role"); Podberesky v. Kirwan, 956 F.2d 52, 56 n.4 (4th Cir. 1992) (race-based scholarship could not be justified on diversity grounds where "it does not appear that [University] established the [scholarship] with this goal in mind"); Davis v. Halpern, 768 F. Supp. 968, 980 (E.D.N.Y. 1991) (in challenge by rejected white applicant to law school's consideration of race in admissions process, Court denies summary judgment to defendants where law school's affirmative action policy states that one of its goals was a more "diversified" and "representative" bar).

Here, plaintiffs have set forth evidence from which a reasonable trier of fact could conclude that defendants' consideration of race was not designed to meet the goal of a diverse student body as described by Justice Powell, but rather "ethnic diversity" (what Justice Powell called "discrimination for its own sake") or "diversity" in the legal profession. Indeed, the evidence consists of defendants' own statements. Defendants, after all, described their program to the AALS as a "minority admissions program" -- one of the most progressive in the country. Defendant Loh stated that his goal was to increase the numbers of certain ethnic groups. Scully Decl. These admissions are supported by the evidence of the significant weight given to race in the admissions process, that is the fact that being a member of certain races is apparently the only diversity factor that can overcome significant deficiencies in an applicant's LSAT and GPA scores; that the only "diversity" factors considered before 1989 were race and the ethnicities of candidates who were members of groups that the Law School considered to be victim of societal discrimination; that changes were made in 1989 simply to avoid legal challenge; and that the Law School's own internal documents focus heavily on the "diversity" of its student body only in terms of race and ethnicity.

So, too, it is easy to conclude that defendants are motivated by the desire to "diversify" the legal profession as a whole because that is what they say each year in Section 1 of their Admissions Policy. But achieving "diversity" in the legal profession, even broadly defined "diversity," is not part of the compelling interest identified by Justice Powell. Davis, 768 F. Supp. at 980 (summary judgment for defendants denied where admissions policy "seems to confuse or merge the goal of diversity . . . with that of the remedial consideration of race and ethnicity, which in this case seems directed at addressing the inadequate minority representation in the legal profession"). A university's freedom to consider race in choosing its own students "is constitutional only so far as it seeks to procure for the university the educational benefits which flow from having a diverse student body." Id., at 981.

2.True Comparison Of Candidates. -- Even if there were no disputes of fact concerning defendants' motive for the program, summary judgment should still be denied because a genuine dispute of material fact exists concerning whether defendants' system permits comparison between non-preferred candidates and preferred candidates. By defendants' own description, "high-scoring" minorities are offered admission immediately; among others, "ethnic diversity" and other kinds of "diversity" are separately considered; and immediate offers are made to those who contribute to the former, while the latter are further reviewed and compared (and, in some instances, denied admission). Again, the evidence supports the conclusion that race and ethnicity are near-dispositive considerations, that they practically assure admission for those preferred groups with certain academic credentials, and that they far outweigh any other "diversity" category.

D.Defendants' Cases Are Inapposite

Each of the three pre-Croson Ninth Circuit cases cited by defendants -- Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984), Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987), an Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982) -- involved the use of race as a remedy for the effects of specific past discrimination (in Larry P. and Williams specific past discrimination that had been found in the very case before the court). The Law School makes no effort to justify its use of race in this fashion.

The various state court cases cited by defendants are irrelevant under Hallstrom, under which Supreme Court and/or

Ninth Circuit authority sets forth the proper standards. In any event, in McDonald v. Hogness, 598 P.2d 707 (1979), the Court dismissed plaintiff's case after its presentation at trial, and the Court made findings of fact that diversity was the motive for the program (id. at 713 n.8). In DeRonde v. Regents, 625 P.2d 220, 223 (Cal. 1981), the Court made factual findings after a trial in which statistics concerning the relevant index score and admission were presented before the Court. And while University System v. Farmer, 930 P.2d 730 (Nev. 1997) discussed Bakke and other precedents in an employment context, it was a Title VII case decided under the different standards of that statute. E.g., Cunico v. Pueblo School Dist. No. 60, 917 F.2d 431, 437 (10th Cir. 1990) ("The level of proof necessary to justify the consideration of race . . . differs depending on whether the challenge invokes the equal protection clause or Title VII").

II.

DEFENDANTS' MOTION SHOULD BE DENIED PURSUANT TO RULE 56(f)

Rule 56(f) of the Federal Rules of Civil Procedure provides that a court may deny a motion for summary judgment if "it appear[s] from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." In the Ninth Circuit, Rule 56(f) applies to summary judgment motions made on the ground of qualified immunity. Klingele v. Eikenberry, 849 F.2d 409, 412 (9th Cir. 1988).

Plaintiffs believe that the evidence presented here, at a very early stage of discovery, creates genuine issues of material fact. But plaintiffs plainly have not had access to the same evidence as defendants. The discovery that plaintiffs have been provided to date, and that which they intend to take, is set forth in the accompanying statement of Michael E. Rosman, one of plaintiffs' attorneys.

Conclusion

For the foregoing reasons, it is respectfully requested that the Court deny the individual defendants' motion for partial summary judgment.

Dated: January 20, 1998

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Certificate Of Service

I hereby certify that I caused the foregoing Plaintiffs' Memorandum in Opposition To Defendants' Motion for Summary Judgment to be served by hand on January 20, 1998, to the individuals, and at the addresses, identified below:

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