Nos. 99-35209, 99-35347, 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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

This case presents the important question whether institutions of higher education may consider the race or national origin of an applicant as one factor in an admissions decision in order to further the compelling educational goal of enrolling a diverse student body. The United States Department of Education has primary responsibility for the administrative enforcement of federal civil rights laws affecting educational institutions, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., which prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. The Department's regulations and policy guidance interpreting Title VI provide that educational institutions may take race into consideration for purposes of remedying past discrimination or enrolling a diverse student

body. See 34 C.F.R. 100.3(b)(6)(i)-(ii); 59 Fed. Reg. 8756, 8759-8762 (1994). In addition, the Department of Justice is responsible for the judicial enforcement of Title VI and for enforcing the Equal Protection Clause under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c et seq. The United States thus has an interest in participating in litigation not only to support the appropriate and lawful use of narrowly tailored affirmative action programs by educational institutions, but also to ensure that the important constitutional issues raised by such programs are reached only when necessary and only after the development of a full factual record.

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the district court correctly held that plaintiffs' claims for prospective relief are moot.

2. Whether this Court should dismiss the discretionary 1292(b) appeal of the denial of plaintiffs' motion for partial summary judgment in light of the changed circumstances since leave to appeal was granted.

3. Whether the district court correctly held that the University of Washington Law School may constitutionally consider the race of applicants as one factor in its admissions process in order to obtain the educational benefits of a diverse student body.

STATEMENT OF THE CASE

1. This case involves a challenge to the admissions policies of the University of Washington Law School (the Law School). Until late 1998, the Law School considered race as one factor among many in its admissions process for the purpose of enrolling a diverse student body (ER106).[1/] Plaintiffs Katuria Smith, Angela Rock, and Michael Pyle, are white applicants who were denied admission to the Law School for the academic years 1994, 1995, and 1996 respectively (ER2-3). Smith and Rock attended and graduated from other law schools (see ER2-3). Pyle initially did not attend law school, but he has been admitted to the Defendant University of Washington Law School (Br. 7).

2. In July 1997, plaintiffs filed suit against the Law School and four of its present and former administrators (ER1). Plaintiffs alleged that, by considering race in the admissions process, defendants discriminated against them in violation of the Equal Protection Clause of the Fourteenth Amendment (ER1).[2/] Plaintiffs brought suit under 42 U.S.C. 1981, 42 U.S.C. 1983, and 42 U.S.C. 2000d et seq. (Title VI) (ER2).

3. On April 22, 1998, the court certified a class under Fed. R. Civ. P. 23(b)(2) consisting of all white applicants who had been denied admission to the Law School since 1994 (ER210).

[1/] "ER__" refers to the Excerpts of Record. "SER__" refers to the Supplemental Excerpts of Record. "Br.__" refers to the brief filed by appellants. "Appellees' Br.__" refers to the brief filed by appellees.

[2/] Plaintiffs did not challenge the Law School's consideration of ethnic origin.

The court held that the class would be "limited to claims for injunctive and declaratory relief" (ER242). The court denied plaintiffs' motion for class certification of the damages claims, reasoning that claims for damages "turn[ed] on the individual circumstances of each applicant" and therefore were not appropriate for class treatment (ER242). The court bifurcated the trial, holding that the claims of the "named plaintiffs" for damages would be addressed, if necessary, after liability was established (ER242-243).

The April 22, 1998 order did not specifically address plaintiffs' alternative request to certify the class pursuant to Rule 23(b)(3). In a subsequent order, dated February 22, 1999, the court stated that it was also denying class certification of the claims for damages under Rule 23(b)(3) (ER858). Plaintiffs have not appealed the orders denying class certification for damage claims.

The April 22, 1998, order also denied the individual defendants' motion for summary judgment on their claim that they were entitled to qualified immunity on plaintiffs' Section 1981 and Section 1983 claims (ER217-224). The court held, and the plaintiffs conceded,[3/] that the individual defendants would be entitled to qualified immunity if they had implemented an

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[3/] Plaintiffs' brief opposing defendants' motion stated: "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." (SER204)

affirmative action plan that was consistent with the "Harvard plan" endorsed by Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 378 (1978) (ER220-224). The court found summary judgment to be inappropriate, however, because plaintiffs were claiming that the Law School's plan in practice was not consistent with Justice Powell's opinion, and plaintiffs were entitled to take discovery on this claim (ER224). For similar reasons, the court also denied the Law School's motion for summary judgment on the Title VI claim (ER224-228).

4. On November 3, 1998, the voters of the State of Washington approved Initiative I-200, which states, in relevant part (ER249, emphasis added):

> 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.

On November 3, 1998, hours after I-200 became law, the President of the University of Washington directed all of the University's schools and colleges, including the Law School, "to suspend the use of race and sex as factors in admissions decisions * * *" (ER253). On December 3, 1998, the Law School adopted a new admissions policy eliminating the use of race and ethnic origin in admissions decisions (ER256-257).

5. On February 10, 1999, the court dismissed plaintiffs' claims for injunctive and declaratory relief as moot in light of

the passage of I-200 and the Law School's new admissions policy (ER791). The court then decertified the class that it had previously certified solely for injunctive and declaratory relief (ER801-803).

On February 12, 1999, the court denied plaintiffs' cross-motions for summary judgment on their Title VI claim against the Law School (ER804). Declining plaintiffs' invitation to follow Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996), the court held that Bakke remained good law and that universities therefore may, consistent with Justice Powell's opinion, consider race as one factor in a narrowly tailored admissions process (ER805-811). At the same time, the court again concluded that material issues of fact concerning whether defendants' former admissions program had been consistent with Justice Powell's opinion precluded entry of summary judgment for defendants (ER812).

6. Plaintiffs appealed the dismissal of their claims for injunctive relief pursuant 28 U.S.C. 1292(a)(1) (ER862). Plaintiffs also petitioned to appeal the class de-certification order under Rule 23(f) and the denial of partial summary judgment pursuant to 28 U.S.C. 1292(b). Defendants did not oppose either petition and this Court granted both. At the parties' request, the district court stayed the trial pending disposition of these interlocutory appeals (ER861).

SUMMARY OF ARGUMENT

The district court properly held that plaintiffs' claims for prospective injunctive and declaratory relief are moot in light of the passage of I-200. In response to I-200, which prohibits racial preferences in public education, the University prohibited its components from taking race into consideration in the admissions process, and the Law School changed its admissions policy accordingly. In light of the fundamental change in state law and the resulting change in the Law School's admissions policy, in order to obtain prospective relief, plaintiffs must show that it is likely, as opposed to merely speculative, that the Law School will disregard state law and University policy and re-institute the consideration of race in admissions. Defendants make no attempt to make such a showing.

The absence of a viable claim for prospective relief and the recent decision of this Court in Hunter v. Regents of the University of California, --- F.3d ---, No. 97-55920, 1999 WL 694865 (9th Cir. Sept. 9, 1999) makes the 1292(b) appeal on the validity of Bakke inappropriate. The validity of Bakke is potentially relevant to only part of plaintiffs' multi-count complaint and, depending on the outcome of the trial, the district court could enter a judgment for plaintiffs on all of their claims without ever reaching the Bakke issue. This Court has made clear that the court of appeals should grant review pursuant to 28 U.S.C. 1292(b) only in extraordinary

circumstances. Where, as here, the sole issue raised by the 1292(b) appeal will not obviate the need for a trial and might not even be necessary to the disposition of the case, such extraordinary circumstances are not present.

Assuming this Court reaches the merits of the 1292(b) appeal, it should hold that Bakke remains binding precedent and that a University may constitutionally consider race as one factor in its admissions process in order to obtain a diverse student body. Bakke clearly held that university may constitutionally consider race in their admissions process even when it was not necessary to remedy past discrimination at the University itself. This Court in Hunter also has rejected plaintiffs' argument that the use of race in public education is never permissible except for remedial purposes. Those holdings foreclose the result plaintiffs seek here. This Court has no authority to ignore Bakke based on speculation about what the Court would do if it were to revisit the issues raised in that case. Only the Supreme Court may overrule its own decisions.

ARGUMENT

I
THE COURT CORRECTLY HELD THAT PLAINTIFFS' CLAIMS FOR PROSPECTIVE INJUNCTIVE AND DECLARATORY RELIEF ARE MOOT

The district court properly held that plaintiffs' claims for prospective relief are moot. Mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must

continue throughout its existence (mootness)." Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997); Cook Inlet Treaty Tribes v. Shalala, 166 F.3d 986, 988 (9th Cir. 1999). In order to obtain prospective injunctive and declaratory relief, the plaintiff must show, at each stage of the litigation, that it is likely, rather than merely speculative, that he or she will be injured in the immediate future if relief is not granted. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992); City of Los Angeles v. Lyons, 461 U.S. 95, 102, 111 (1983); Nava v. City of Dublin, 121 F.3d 453, 455-460 (9th Cir. 1997). A claim for prospective relief becomes moot after the defendant's challenged activity ceases if it is "clear that the alleged violations could not reasonably be expected to recur." See Ruiz v. City of Santa Maria, 160 F.3d 543, 549 (9th Cir. 1998), cert. denied, 119 S. Ct. 2367 (1999).

Applying these principles, the court's decision that plaintiffs' claim for prospective relief is moot is clearly correct. I-200 has changed state law in Washington: racial preferences in public education in Washington are now impermissible and the University has directed the Law School to stop considering race in its admissions process. The Law School has adopted a new admissions policy under which race will no longer be considered. There is no need for relief requiring the University to do what it has already done.

In order to obtain prospective relief notwithstanding the change in Washington law and the Law School's change in its admissions policy, plaintiffs would have to show that one of the following scenarios is "imminent," see Defenders of Wildlife, 504 U.S. at 560: (1) the Law School will disobey the University's directive; (2) the University will rescind its directive and tell its components that they may consider race in the admissions notwithstanding the passage of I-200; or (3) I-200 will be repealed. Plaintiffs do not allege, much less attempt to show, that any of these events is likely to happen in the near future.[4/]

Plaintiffs' reliance (Br. 32) on the doctrine concerning the voluntary cessation of illegal activity is misplaced. The "voluntary cessation" doctrine does not relieve plaintiffs of their burden under Article III to show that there is a "reasonable possibility that the unlawful conduct will recur." See Armster v. United States Dist. Court, 806 F.2d 1347, 1358 & n.16 (9th Cir. 1986); accord Defenders of Wildlife, 504 U.S. at 561. There is no suggestion that defendants changed their policy only temporarily in an effort to avoid an injunction, or that

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[4/] Plaintiffs rely (Br. 34) on a deliberative memorandum written before I-200 was passed, in which the Assistant Attorney Generals (AAGs) of Washington outlined for the Attorney General the "major legal issues" raised by I-200 (ER263). This memorandum has no relevance to the issues in this litigation. The University has interpreted I-200 to ban all consideration of race in public education. Plaintiffs have not demonstrated that there is any likelihood that the University will reverse course and interpret I-200 in a different manner.

they are free to or will reinstate their old policy at any time. Compare City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288 (1982). Defendants did not change their policy voluntarily, but were ordered to do so in response to a fundamental change in Washington law that continues to constrain their conduct. This case is therefore similar to Banas v. Dempsey, 742 F.2d 277, 278-279 (6th Cir. 1984), aff'd sub nom. Green v. Mansour, 474 U.S. 64 (1985), where the court held that plaintiffs' claims for prospective relief were moot because the State had changed the challenged policy in response to a new federal law. Because plaintiffs have not established that there is any reasonable possibility that defendants can or will re-institute the use of race in their admissions process, plaintiffs' claims for prospective relief are moot. See Native Village of Noatak v. Blatchford, 38 F.3d 1505, 1510 (9th Cir. 1994) ("A statutory change * * * is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed."); Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992) (university's adoption of new policy regarding showing of films mooted claims for injunctive relief).

Nor does this case fall within the mootness exception for conduct that is "capable of repetition, yet evading review." That exception is applicable only if "(1) the challenged action [is] in its duration too short to be fully litigated prior to its

cessation or expiration[;] and (2) there [i]s a reasonable expectation that the same complaining party [will] be subjected to the same action." Lewis v. Continental Bank Corp., 494 U.S. 472, 481 (1990) (emphasis added). Plaintiffs have not shown that the Law School is likely continually to reinstate its previous admissions policy and then withdraw it, thereby avoiding review. See Adarand Constructors, Inc. v. Slater, 169 F.3d 1292, 1296 (10th Cir. 1999). Nor have they shown that there is any reasonable expectation that defendants will reinstate a race conscious admissions policy.

II
THIS COURT SHOULD DISMISS PLAINTIFFS' 1292(b) APPEAL OF THE DENIAL OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

This Court should dismiss the appeal that it initially approved pursuant to 28 U.S.C. 1292(b). Section 1292(b) permits an appeal of an interlocutory order that otherwise would not be appealable when: (1) the order involves a controlling question of law as to which there is substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. 1292(b). The court of appeals may decline to hear the appeal for any reason even if the jurisdictional requirements are met. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 473 (1978). This Court has made clear that an appeal under this Section should be allowed "only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and

expensive litigation." In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982); accord Coopers & Lybrand, 437 U.S. at 473. As this Court noted soon after Section 1292(b) was enacted, the provision "was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit." United States v. Woodbury, 263 F.2d 784, 785 (9th Cir. 1959) (emphasis added).

Although this Court initially approved the 1292(b) appeal, the petition was not opposed and the merits of granting the petition were never briefed. A court of appeals may dismiss a 1292(b) appeal that it has previously approved whenever changed circumstances or other facts suggest that permitting the appeal is no longer appropriate. See, e.g., Nickert v. Puget Sound Tug & Barge Co., 480 F.2d 1039, 1040 (9th Cir. 1973); United States v. Bear Marine Servs., Inc., 696 F.2d 1117, 1119 (5th Cir. 1983).

For several reasons, the strong policy against "piecemeal" appeals, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974), now requires dismissal of plaintiffs' 1292(b) appeal. First, there is no longer a controlling legal question for which there is a substantial ground for disagreement in the Ninth Circuit. Plaintiffs' principal claim is that race conscious measures are appropriate only when necessary to remedy discrimination at the institution (see ER860-861). This Court

has recently held to the contrary. See Hunter v. Regents of the Univ. of Cal., --- F.3d ---, No. 97-55920, 1999 WL 694865 (9th Cir. Sept. 9, 1999).

Second, the 1292(b) appeal will at most only resolve one count of a multi-count complaint and it will not make a trial unnecessary. Plaintiffs' appeal raises only the narrow question of whether Bakke remains valid, i.e., whether the interest in enrolling a diverse student body may ever be a compelling interest. That question has no relevance to plaintiffs' Section 1981 and Section 1983 claims against the individual defendants.[5/] Plaintiffs have stipulated that these defendants will be entitled to qualified immunity as long as their actions were consistent with the requirements set forth in Justice Powell's opinion in Bakke. Therefore, plaintiffs' appeal can only affect the resolution of the Title VI claim against the Law School.[6/] Regardless of how plaintiffs' appeal is resolved, it will not obviate the need for a trial on both liability and damages of plaintiffs' claims against the individual defendants. In similar circumstances, i.e., when the appeal will only resolve one claim and/or a trial would still be necessary, courts have held that a

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[5/] Under the Eleventh Amendment, plaintiffs may not maintain an action under Section 1983 or Section 1981 for damages against the Law School. See Quern v. Jordan, 440 U.S. 332, 344 (1979).

[6/] Although the Eleventh Amendment ordinarily bars suit for damages against the State, Congress has abrogated the State's immunity for Title VI claims. See 42 U.S.C. 2000d-7; Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

1292(b) appeal is not appropriate.[7/] See New York Health & Hosp. Corp. v. Blum, 678 F.2d 392, 397 (2d Cir. 1982); Cummins v. EG & G Sealol, Inc., 697 F. Supp. 64, 65 (D.R.I. 1988).

Third, a trial may render moot the question sought to be reviewed, a fact that further counsels against permitting the appeal. See Lerner v. Atlantic Richfield Co., 690 F.2d 203, 210 (Temp. Em. Ct. App. 1982). Plaintiffs may prevail in the district court even if the court's ruling on the validity of Bakke is left undisturbed. The court could find that defendants' admissions policies were not narrowly tailored to serve the compelling interest in diversity and, therefore, discriminated against plaintiffs on the basis of race. See, e.g., Wessmann v. Gittens, 160 F.3d 790, 795-800 (1st Cir. 1998). Plaintiffs could seek relief based on the assumption that they would have been admitted, unless the Law School is able to show that these plaintiffs would have been denied admission under a race-neutral admissions plan. See Regents of the Univ. Of Cal. v. Bakke, 438 U.S. 265, 320 & n.54; Hopwood v. Texas, 78 F.3d 932, 956-957 (5th Cir.), cert. denied, 518 U.S. 1033 (1996). Thus, whether plaintiffs prevail on the narrow grounds that the admissions policy was not consistent with Justice Powell's opinion in Bakke or on the broader grounds that any consideration of race violates

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[7/] Indeed, this appeal is not even likely to speed the ultimate termination of the Title VI claim. Even if plaintiffs are successful, the court will still have to hold a trial on damages and make findings on how defendants' admissions process worked and if, and how, it damaged the plaintiffs.

the Equal Protection Clause of the Fourteenth Amendment, their right to relief will be the same.

Finally, the Law School has raised a good faith defense to its liability under Title VI for damages. Defendant argues that as long as its policies were consistent with Justice Powell's opinion in Bakke, it should not be required to pay damages, even if Bakke is eventually overturned (Appellees' Br. 30-31; ER226-227). If this defense ultimately is sustained by the trial court, the question of whether Bakke has been overruled would be irrelevant to the Title VI claim for damages. Thus, this Court would likely have to resolve the merits of this defense in order to know whether reaching the merits of the 1292(b) appeal can have any effect on this litigation. The fact that this Court would have to consider this additional issue -- an issue that would be moot if plaintiffs prevail in the district court by arguing that the Law School's implementation of its admissions program violated Bakke standards -- is yet another reason why the court should dismiss the 1292(b) appeal.

In sum, 28 U.S.C. 1292(b) should be reserved for situations where it will eliminate, not generate, unnecessary litigation. See Note, Interlocutory Appeals In the Federal Courts Under 28 U.S.C. 1292(b), 88 Harv. L. Rev. 607 (1975). Furthermore, this Court should not reach important constitutional issues, such as the continued validity of Bakke, unless it is necessary to do so.

Oregon Shortline R.R. Co. v. Department of Revenue Oregon, 139 F.3d 1259, 1264 (9th Cir. 1998). Because plaintiffs' appeal will not eliminate unnecessary litigation, it should be dismissed.[8/]

III
A UNIVERSITY MAY CONSIDER RACE AS ONE FACTOR IN ITS ADMISSIONS PROCESS IN ORDER TO ENROLL A DIVERSE STUDENT BODY

If this Court chooses to address the merits of the 1292(b) appeal, this Court should follow Bakke and hold that a university may consider the race of applicants as one factor in its admissions decisions in order to further the compelling educational goal of enrolling a diverse student body. In Bakke, the Supreme Court affirmed a California Supreme Court judgment holding that a state medical school's use of a rigid racial admissions quota was unconstitutional, but reversed that portion of the judgment that completely barred the school from considering race in its admissions process. Five Justices joined in the Court's holding that the medical school constitutionally could consider race under a "properly devised admissions program." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (Opinion of Powell, J.); id. at 328 (Brennan, J., concurring in the judgment in part and dissenting in part). Thus, despite the fact that the medical school had neither asserted nor demonstrated a need to remedy any present effects of

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[8/] Dismissal of the 1292(b) appeal is appropriate regardless of whether or not the class was properly decertified.

discrimination at the school itself, see id. at 296 n.36 (Opinion of Powell, J.), the Court expressly refused to prohibit consideration of race altogether.

Justice Powell's separate opinion has been regarded by lower federal and state courts and by commentators for the past two decades as stating the applicable law.[9/] That opinion identified the medical school's interest in providing the educational benefits of a diverse student body as a constitutionally permissible basis for consideration of race in admissions. See Bakke, 438 U.S. at 311-315. Applying strict scrutiny, id. at 291, Justice Powell found that "[a]n otherwise qualified * * * student with a particular background * * * may bring to a professional school * * * experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates." Id. at 314. Justice Powell emphasized, however, that race is merely one of many aspects of diversity, and that a

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[9/] See, e.g., Eisenberg v. Montgomery County Pub. Schs., 19 F. Supp. 2d 449, 453-454 (D. Md. 1998), appeal pending, No. 98-2503 (4th Cir.); Wessmann v. Boston Sch. Comm., 996 F. Supp. 120 (D. Mass. 1998), rev'd on other grounds, sub nom. Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998); Davis v. Halpern, 768 F. Supp. 968, 975-976 (E.D.N.Y. 1991); DeRonde v. Regents of the Univ. of Cal., 28 Cal. 3d 875, 625 P.2d 220 (Cal.), cert. denied, 454 U.S. 832 (1981); McDonald v. Hogness, 598 P.2d 707, 712-713 & n.7 (Wash. 1979), cert. denied, 445 U.S. 962 (1980); Akhil Amar & Neal Katyal, Bakke's Fate, 43 U.C.L.A. L. Rev. 1745, 1753 (1996); Charles Fried, Foreword: Revolutions?, 109 Harv. L. Rev. 13, 47 (1995) (Justice Powell's opinion "was an exact area of intersection between four Justices who would have been far more permissive of race conscious programs * * * and four others who, on statutory grounds, would have been more restrictive"); Vincent Blasi, Bakke as Precedent: Does Mr. Justice Powell Have a Theory, 67 Cal. L. Rev. 21, 23 (1979).

narrowly tailored admissions program must treat all applicants as individuals. See id. at 318.

The Supreme Court has never disavowed either Bakke's holding that a university cannot be enjoined from the narrowly tailored use of race in its admissions programs or Justice Powell's opinion stating that the educational benefits of diversity constitute a compelling state interest. Indeed, in 1990, the Court reaffirmed that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 568 (1990), overruled in part, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).[10/] Justice O'Connor has also noted that, "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (citing Justice Powell's opinion in Bakke).

[10/] In Adarand, the Supreme Court overruled Metro Broadcasting to the extent that that decision applied a lower level of constitutional scrutiny to a congressionally enacted program. See 515 U.S. at 227. The Court expressly recognized in Adarand that Justice Powell applied "the most exacting judicial examination" in his opinion in Bakke. Id. at 218.

The Department of Education also has relied on Justice Powell's opinion in Bakke in advising educational institutions. The Department of Education has stated that the use of properly narrowly tailored affirmative action to achieve a diverse student body does not violate the Constitution or Title VI. See 59 Fed. Reg. 8756, 8759-8762 (1994); 44 Fed. Reg. 58,509, 58,510-58,511 (1979).

Plaintiffs argue that the district court erred in concluding that Justice Powell's opinion represents the holding of the Bakke Court. In Marks v. United States, 430 U.S. 188, 193 (1977), the Supreme Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds[.]" Some courts have held that an opinion represents the "narrowest grounds" only when it 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." See, e.g., Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1254 (D.C. Cir. 1998); Rappa v. New Castle County, 18 F.3d 1043, 1057 (3d Cir. 1994). Even when no opinion represents a common denominator of the reasoning of the majority of the Court, however, lower courts are still bound by the result of the case and by those

propositions to which a majority of the Court did agree. See id. at 1043, 1060 & n.26.

Regardless of whether or not Justice Powell's entire opinion represents the holding of Bakke, the Bakke Court clearly held that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin," even in circumstances where the university has not asserted or demonstrated a need to remedy any present effects of discrimination at the school itself. Bakke, 438 U.S. at 296 n.36, 320 (Opinion of Powell, J.); id. at 328 (Opinion of Brennan, J.) (joining this part of Justice Powell's opinion). Moreover, the Court reversed the judgment of the lower court insofar as it had granted the same relief -- an injunction prohibiting the university from "any consideration of the race of any applicant", see id. at 320 -- that plaintiffs seek here. Thus, Bakke clearly forecloses the result sought by plaintiffs.

Relying on Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996), plaintiffs ask this Court to declare that Bakke has been overruled by implication and, contrary to Bakke's explicit holding, hold that race can never be considered in admissions decisions for other than strictly remedial purposes. In our view, Hopwood was wrongly decided. In attempting to discern what the Supreme Court would do in the future, rather than following what it had held in the past, the

Hopwood majority ignored the Supreme Court's repeated admonition that lower courts may not conclude that a Supreme Court decision has been overruled by implication. See Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)) ("[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). The court of appeals may not question the "soundness of * * * Supreme Court determinations and their continuing vitality in the light of later Supreme Court pronouncements. * * * [I]t is for the Supreme Court, not [the court of appeals], to proclaim error in its past rulings, or their erosion by its adjudications since."[11/] Holmes v. Burr, 486 F.2d 55, 60 (9th Cir), cert. denied, 414 U.S. 1116 (1973).

[11/] Other courts of appeals have reached the same conclusion. See, e.g., Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1107 n.3 (6th Cir. 1995), cert. denied, 516 U.S. 1158 (1996) ("While we understand that changes in Court personnel may alter the outcomes of Supreme Court cases, we do not sit as fortune tellers, attempting to discern the future by reading the tea leaves of Supreme Court alignments. Each case must be reviewed on its merits in light of precedent, not on speculation about what the Supreme Court might or might not do in the future, as a result of personnel shifts."); Adams v. Department of Juvenile Justice, 143 F.3d 61, 65 (2d Cir. 1998) (court of appeals bound by Supreme Court precedent notwithstanding contention that rule set forth in the precedent would no longer command a majority of the Supreme Court).

The Hopwood court wrongly concluded that the use of race to promote diversity rests on impermissible stereotyping. See 78 F.3d at 946. The Court rejected that same argument in Metro Broadcasting. See 497 U.S. at 579. Narrowly tailored race conscious admissions programs do not assume that all minorities think alike. They simply recognize that, in the aggregate, race and ethnic diversity, when considered in conjunction with other factors, will produce more diversity of viewpoints and perspectives in the student body than if the students were drawn from a racially and ethnically homogenous group. See Bakke, 438 U.S. at 313 (Opinion of Powell, J.); William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College & University Admissions 8 (1998).

The Hopwood majority also ignored several compelling considerations that counsel against its erroneous conclusion that Bakke had been overruled and make clear that Justice Powell's conclusion that achieving diversity can be a compelling governmental interest is a correct statement of the law. Two decades of experience in implementing affirmative action plans modeled on Justice Powell's opinion in Bakke have confirmed his conclusion that diversity, including racial and ethnic diversity, significantly enhances the educational experiences of all students. See, e.g., Bowen & Bok, supra, at 279-280; Note, An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education, 109 Harv. L. Rev. 1357, 1369-1373 (1996)

(citing studies); Daryl G. Smith & Assocs., Diversity Works: The Emerging Picture of How Students Benefit (1997); Gary Orfield & Dean Whitla, Diversity & Legal Education: Student Experiences in Leading Law Schools, (The Civil Rights Project, Harvard Univ. ed., Aug. 1999). Furthermore, research confirms that without some consideration of race and ethnicity in the admission process, the numbers of racial and ethnic minorities in competitive colleges and law schools would likely drop precipitously. See Bowen & Bok, supra, at 31-50; Linda Wightman, The Threat To Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1 (1997).

In other contexts, the Supreme Court has recognized that the principle of stare decisis is critical to maintaining respect for the rule of law and that the Court should be particularly reluctant to overrule precedent where it has "engendered substantial reliance." See Adarand Constructors, Inc., 515 U.S. at 233 (Opinion of O'Connor, J.) (citing Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992)). Such reliance is present here. In the two decades since Bakke was decided, virtually every selective college and professional school in the United States has relied on Bakke in developing and implementing their admissions programs. See Bowen & Bok, supra, at 8. Declaring Bakke dead would upset carefully crafted policies that have been developed in reliance on Bakke over the past twenty years. Thus,

even if there were doubts about Bakke's continued validity, this Court would be required to follow Bakke and leave to the Supreme Court the task of weighing the serious consequences of overruling its decision.

Contrary to plaintiffs' contentions (Br. 66), the Court has never overruled Bakke and Metro Broadcasting's holdings that non-remedial interests may, in appropriate circumstances, provide sufficient constitutional support for the limited and narrowly tailored consideration of race and ethnicity. Both Adarand Constructors, Inc. v. Pena, supra, and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), on which plaintiffs rely, involved the use of affirmative action in public contracting, not higher education. It is hardly surprising that the Supreme Court in those cases did not address or consider the State's interest in the educational benefits of a diverse student body, as that interest has no relevance to public contracting, which involves very different governmental interests, and clearly implicates only remedial aims. Justice O'Connor's suggestion in Croson that racial classifications should be "reserved for remedial settings" in order to avoid promoting notions of racial inferiority, id. at 493 (citing Bakke, 438 U.S. at 298 (Opinion of Powell, J.)), must be read in that context. Moreover, if Justice O'Connor had intended to overrule Bakke in that sentence, she certainly would not have cited to Justice Powell's opinion in Bakke as support. And as Justice Stevens noted in his dissent in Adarand, nothing

in the majority opinion suggested that the interest of fostering diversity could not, in appropriate circumstances, be sufficient to support race conscious measures in government programs.[12/] See Adarand, 515 U.S. at 257 (Stevens, J. dissenting).

In any event, this Court has recently held that a non-remedial purpose in the context of public education may satisfy strict scrutiny. In Hunter v. Regents of the University of California, --- F.3d ---, No. 97-55920, 1999 WL 694865, at *2 & n.3 (9th Cir. Sept. 9, 1999), this Court held that California had a compelling state interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools, even though the parties agreed that the school's admissions process was not part of a remedial program. Other courts of appeal have also held that non-remedial interests may satisfy strict scrutiny. See Buchwald v. University of New Mexico Sch. of Med., 159 F.3d 487, 498 (10th Cir. 1998) (identifying compelling interest in public health); Wittmer v. Peters, 87 F.3d 916, 918-919 (7th Cir. 1996), cert. denied, 519 U.S. 1111 (1997) (identifying compelling interest in integrity of correctional facility's boot camp program).

[12/] Plaintiffs' reliance (Br. 66) on Wygant v. Jackson Board of Education, 476 U.S. 267, 276 (1986), is also misplaced. Although the Court rejected the Board's purported interest in providing role models for minority students, Justice O'Connor emphasized that interest "should not be confused with the very different goal of promoting racial diversity among the faculty." Id. at 288.

Plaintiffs' attempt (Br. 64-65) to equate efforts to achieve educational diversity with the practice of wholesale exclusion of racial minorities simply ignores the nature of constitutional interests involved. Justice Powell never suggested that an educational institution could invoke "academic freedom" to support racially discriminatory measures to reduce the level of diverse viewpoints and vigorous intellectual debate at a university. The constitutional difference between efforts to enhance the robust exchange of ideas and efforts to eliminate undesirable viewpoints is neither subtle nor irrelevant.

In the absence of any Supreme Court authority overruling Bakke, this Court should not frustrate the efforts of university administrators to continue to provide the crucial educational benefits of diversity. We do not argue that the mere assertion of an interest in diversity always establishes a compelling interest supporting consideration of race or national origin in admissions. Plaintiffs are wrong, however, in contending that the state interest in the educational benefits of diversity can never, as a matter of law, constitute such a compelling interest. Educational institutions should have the opportunity to demonstrate as a factual matter that the benefits of a diverse student body are sufficiently compelling to justify an appropriate and narrowly tailored admissions program that considers race as one factor among many.

CONCLUSION

The judgment dismissing plaintiff's claims for prospective relief should be affirmed. Plaintiffs' interlocutory appeal of the order denying their motion for partial summary judgment should be dismissed. In the alternative, the order should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES URGING AFFIRMANCE complies with Federal Rule of Appellate Procedure 32(a)(7)(B). It contains 6,684 words.

TIMOTHY J. MORAN
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 1999, I served the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES AND URGING AFFIRMANCE, by mailing two copies, by first class mail, postage pre-paid, to counsel at the following addresses:

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