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

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATURIA E. SMITH, *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

On Appeal from the
United States District Court
for the Western District of Washington
The Hon. Thomas S. Zilly

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Introduction

Defendants' opposing brief ("Dfs' Br.") reflects some changes in their position. In the lower court, defendants **stipulated** that the question of "whether educational diversity is a compelling governmental interest" was a "controlling question of law" **in this case**, the resolution of which would "materially advance the ultimate termination of the litigation." ER860-61. Now, they insist that "this Court need not even address the Bakke issue" (Dfs' Br. 28) and argue that the only claims on which that issue was even relevant at the time they stipulated was the already-dismissed request for systemic injunctive relief and Pyle's request for individual equitable relief. Dfs' Br. 31. (Pyle had already applied to the Law School at the time defendants stipulated.) So, too, defendants **stipulated** that the "compelling interest" question was one on which "there is substantial ground for difference of opinion." ER860. They now express shock at "just how radical

[plaintiffs'] argument is" (Dfs' Br. 31) on that question, based (or so they say) on "astounding premise[s]" (id., 38). Either defendants were disingenuous with the court below, or they are being disingenuous with this Court.

Defendants' brief also misrepresents the record, outright misquotes plaintiffs' brief, and attributes various arguments to plaintiffs that they never made. There are simply too many of these to enumerate; those instances noted in this brief should be sufficient to warn the Court not to take defendants' representations of the "undisputed" evidence or plaintiffs' positions at face value.

Additional Facts

Subsequent to the filing of plaintiffs' principal brief, Pyle decided not to attend the Law School this fall due to some significant degree to a recent improvement in the financial compensation in his current job. As both sides have now agreed, Pyle's personal requests for injunctive relief became moot when the Law School offered him admission (and, thus, could not become either more or less "moot" by reason of his decision not to attend the Law School). Defendants do not dispute his continuing interest in the certification of the class (Pls' Br. 26-28).

Argument

I.

DEFENDANTS' MOOTNESS ARGUMENTS IGNORE THE THRUST OF PLAINTIFFS' CLAIM AND THE RELEVANT BINDING CASE LAW

Plaintiffs' principal brief ("Pls' Br.") demonstrates that the court below misconstrued this case as one addressed only to defendants' written policy, and not to the actual admissions practices that defendants had employed. Pls' Br. 28-33. Defendants barely address this argument, and identify no evidence in the record suggesting that their actual admissions practices have changed. Rather, defendants insist, contrary to law, that it is plaintiffs' burden to show not only what defendants have done in the past, but what they will do in the future. Dfs' Br. 14-17.

A. Defendants Do Not Identify Any Evidence Concerning The Cessation Of The Challenged Admissions Practices

Plaintiffs' principal brief identified the evidence that supports their case that defendants' admissions system illegally discriminated. It noted, inter alia, that defendants have (1) used different processes for white and non-white candidates at certain index scores, (2) sought additional "diversity" information about family background, languages spoken, and cultural activities not contained in the applications **only** from non-white candidates (compare ER400 ¶ 8 (plaintiffs' "diversity factors" were not "apparent to us from their applications")), and (3) used different standards for candidates of different races. E.g., Pls' Br. 19. Defendants brush off this evidence by claiming that it is "germane primarily" to their denied (and unappealed) motions for summary judgment. Dfs' Br. 6.

But defendants' past conduct -- especially when a court has concluded that it might have violated clearly-established law -- is also relevant to the question of whether they can be enjoined. This is particularly so when defendants have submitted no evidence whatsoever that **the practices being challenged** have ceased. Defendants respond to this gaping hole in the record by (1) referring broadly to the "representations of the University's president and the Law School's dean" and (2) asserting that this Court should simply assume that defendants will comply with the law in the future. Dfs' Br. 14. But the "representations" (Hjorth's statement) said nothing about the admissions **practices**. ER254-55.

While an assumption of "good faith" might be appropriate in some circumstances, it cannot be proper in a case where defendants' past conduct raises serious questions. Otherwise, officials could moot claims for injunctive relief at will. See, e.g., Gluth v. Kangas, 951 F.2d 1504, 1507 (9th Cir. 1991) (where Arizona Corrections Department changed its policy regarding access to a law library to allow "reasonable" access to such facilities, and then claimed that a lawsuit based upon the denial of such access was moot, Court holds case is not moot because "[e]ven assuming that the policy meets constitutional standards on its face, given the Department's history of allegedly denying access arbitrarily and the vagueness of the new policy, it cannot be said `with assurance' that there is no `reasonable expectation' that the alleged violations will recur").

Here, the case against mootness is even stronger because defendants have sworn under oath that their old policies were "race neutral" and not subject to strict scrutiny at all. Pls' Br. 33; ER195-97. Race-neutral practices are perfectly consistent with I-200, which renders defendants' failure to identify any change at all in their admissions practices all the more conspicuous.

B. Defendants Misstate The Law

Ultimately, defendants cannot really dispute that if any burden falls upon them -- beyond simply showing that they have changed some words in a policy -- they have failed to carry it. Rather, their argument is that they need not meet any burden, and that the general standard set forth by the Supreme Court in County of Los Angeles v. Davis, 440 U.S. 625 (1979) is inapplicable.

Defendants repeatedly suggest that if plaintiffs wanted the injunction claims to remain alive, it was **plaintiffs'** burden to seek a continuance so that they could demonstrate what defendants will do in the future. See, e.g., Dfs' Br. 5, 9 (plaintiffs "insisted on trial on liability issues in February 1999"), and 15. Defendants also rely on the fact that the parties stipulated, late in 1998, that there was no record concerning the actual admissions practices that would be employed in 1999. Dfs' Memo. 15. (Defendants ignore the fact that plaintiffs believed the future admissions program was irrelevant to their claims for injunctive relief. Defendants' Supplemental Excerpts of Record ("SER") 600.)

Were this sufficient under the law, injunction claims would forever be subject to manipulation by defendants who could change their policy just before trial, claim there was no "record" to judge their new policy, and force plaintiffs to choose between abandoning their injunction claims and further delay. Thankfully, this is not the law.

Under Davis and Ninth Circuit authorities like Gluth, it is defendants who must show that it is **clear** that there is no reasonable chance for recurrence. Unable to meet that burden, defendants argue: (a) the Davis burden is applicable only if defendants claim mootness by reason of "voluntary cessation" and (b) "voluntary" cessation only occurs if cessation was induced by litigation. Dfs' Br. 13. Each of these contentions is contradicted by numerous Supreme Court and Ninth Circuit cases.

1. The Burden Of Demonstrating Mootness Is Not Limited To Cases Of "Voluntary Cessation," And It Would Not Help These Defendants In Any Event. -- The burden of proving "mootness" is upon the party claiming it regardless of the reason. Michigan v. Long, 463 U.S. 1032, 1042 n.8 (1983). Courts have applied the Davis burden in many cases in which mootness was claimed because of some event other than "voluntary cessation." See, e.g., Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 570 (1984) (Court cites Davis on burden question where mootness is claimed because race-conscious layoffs had been remedied by subsequent rehirings); Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 815 (9th Cir. 1999); Pintlar Corp. v. Fidelity And Casualty Co. Of New York, 124 F.3d 1310, 1312 (9th Cir. 1997); Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988); Wood v. Walker-Pinkston Cos. (In re Brickyard), 735 F.2d 1154, 1159 (9th Cir. 1984).

The first set of cases cited by defendants (Dfs' Br. 13) do not suggest any limitation of the Davis burden to "voluntary cessation." Doe v. Madison School Dist. No. 321, 177 F.3d 789 (9th Cir. 1999) involved a complaint against prayer at a high school graduation ceremony that was moot because the student had graduated. This Court noted that "voluntary cessation" was inapplicable because defendants had not stopped permitting prayer at graduation. Id. at 799. Norman-Bloodsaw v. Lawrence Berkeley Lab, 135 F.3d 1260, 1274 (9th Cir. 1998) applied the Davis burden to a case of "voluntary cessation." It never held that it was inapplicable elsewhere.

Even if (contrary to much case law) the Davis burden should only be applied where mootness is claimed to result from a "voluntary cessation," defendants fail to show why it would not be applicable here. Defendants state that the court below concluded that the Law School's abandonment was "compelled by the passage of

I-200," but they slyly take "no position with respect to this conclusion." Dfs' Br. 11 & n.2. (If defendants do not know whether **they** were compelled, who should?) Rather, they claim that they made a "reasoned judgment" (Dfs' Br. 11 n.2) to change their policy. But if defendants were **not** compelled, their conduct in changing the words of the Law School's policy was voluntary.

Defendants' consideration of extrinsic circumstances before changing the words of their policy does not suggest otherwise. Defendants who have just been sued often change their conduct after a review of extrinsic circumstances (like relevant case law), and no one seriously contends that their conduct is not voluntary. Indeed, in Armster v. U.S. District Court for Central District of California, 806 F.2d 1347, 1358 (9th Cir. 1986), the cessation of illegal conduct was the resumption of civil jury trials **mandated** by the Seventh Amendment, and this

Court nonetheless found that resumption voluntary. Defendants' wording change was no less voluntary.

2. Defendants Err In Arguing That Only Cessations In Response To Litigation Are "Voluntary". -- This argument for limiting Davis is contradicted by innumerable cases -- including Davis itself. Davis, 440 U.S. at 629 (plan to use results from invalidated written test abandoned before litigation commenced). See also, e.g., Norman-Bloodsaw, 135 F.3d at 1265, 1274 (Dfs' Br. 13) (tests discontinued in mid-1990's, prior to the litigation, because of their limited usefulness; Court applies Davis burden and holds that claims were not moot); Barnes v. Healy, 980 F.2d 572, 580 (9th Cir. 1992) (head of Department of Social Services voluntarily changes notice provisions regarding collection of child support payments by the Department to non-welfare families, despite the fact that the lower court had not required him to do so; burden applied); Coral Construction Co. v. King County, 941 F.2d 910, 915 (9th Cir. 1991) (municipality changed its minority set-aside program despite victory in District Court; burden applied).

There is no reason to limit the Davis doctrine to changes in policy for just one of many possible reasons. Unless there is no reasonable possibility of recurrence, courts should retain jurisdiction.

Defendants' two additional cases -- Sze v. I.N.S., 153 F.3d 1005 (9th Cir. 1998) and Public Utilities Comm'n of California v. Federal Energy Regulatory Comm'n, 100 F.3d 1451 (9th Cir. 1996) ("FERC") (Dfs' Br. 13) -- do not cite Davis or state that the Davis burden is inapplicable outside of litigation-induced cessation. Moreover, the discussion of "voluntary cessation" in both cases is pure dicta because the cases themselves had nothing to do with cessations by defendants. Sze, 153 F.3d at 1008; FERC, 100 F.3d at 1457. Cf. F.T.C. v. Affordable Media, 179 F.3d 1228, 1237 (9th Cir. 1999) (victim's own conduct can moot a case much more easily than claim by wrongdoer that it is no longer engaging in relevant conduct). Accordingly, the dicta in Sze and FERC should not be expanded to encompass a general rejection of the Davis burden in such cases.

Defendants cannot meet their burden. Accordingly, the claims for injunctive relief should not have been dismissed.

C. The Court Below Erred In Decertifying The Rule 23(B)(2) Class

Because the class members' claims for injunctive relief were not moot, the court below erred in decertifying the class for that reason.

Plaintiffs' principal brief also noted that the court below offered no reason for its rejection of plaintiffs' request to have future applicants included in the class. Pls' Br. 15 n.1. Defendants offer no explanation either. This Court should remand with instructions to include future applicants in a 23(b)(2) class.

Plaintiffs' principal brief demonstrated that their motions for class certification and bifurcation made clear that all class members would be able to prove entitlement to equitable relief in the second part of the bifurcated trial -- and that the court below granted the motion. Pls' Br. 12, 43-44. Unable to refute this showing, defendants contrive to cast doubt upon it. E.g., Dfs' Br. 3 (plaintiffs "stated that the court should reserve retrospective relief for non-class treatment"), 19. These veiled assertions do not contradict the thrust of plaintiffs' motions in the lower court: "class issues" would be dealt with in the first trial, and questions of individual relief for particular class members in the second trial. This Court should remand with instructions that the court below permit class members to assert claims for individual relief in the second trial.

Indeed, even if the claims for systemic injunctive relief were (contrary to controlling authority) moot, it would be proper to maintain a 23(b)(2) class for purposes of providing a declaration that would be the basis for prospective equitable remedies for particular class members. Doe v. Lawrence Livermore Nat'l Laboratory, 131 F.3d 836, 841 (9th Cir. 1997) (request for reinstatement constituted request for prospective injunctive relief). Use of a 23(b)(2) class for such purposes is common. Sagers v. Yellow Freight Sys., 529 F.2d 721, 733-34 (5th Cir. 1976); Waldrip v. Motorola, Inc., 85 F.R.D. 349, 354 (N.D. Ga. 1980) (class maintained even though request for systemic relief was moot).

II.

DEFENDANTS' JURISDICTIONAL, PROCEDURAL AND SUBSTANTIVE ARGUMENTS WITH RESPECT TO RULE 23(B)(3) CERTIFICATION ARE MERITLESS

Plaintiffs' principal brief demonstrates that, alternatively, the court below should have recertified the class pursuant to Rule 23(b)(3). Pls' Br. 37-47. Defendants, hoping to defer resolution of this question for a few more years, until after final judgment, first suggest that this Court lacks jurisdiction over the 23(b)(3) issue and/or that plaintiffs waived their argument. Dfs' Br. 20-23. Their substantive discussion (Dfs' Br. 23-28) barely addresses the main point of plaintiffs' brief: that **liability** for the claims of discrimination does not depend upon individual questions.

A. Defendants' Jurisdictional And Waiver Arguments Are Meritless

Plaintiffs' initial Rule 23(f) petition (p. 5) and their Docketing Statement (Ex. C) specifically noted that plaintiffs sought an order recertifying the class pursuant to Rule 23(b)(2) **and/or Rule 23(b)(3)**. Defendants never suggested any jurisdictional defect.

Now, though, defendants claim that this Court "lacks jurisdiction over plaintiffs' **claim** that the district court should have certified a damages class under Rule 23(b)(3)." Dfs' Br. 21 (emphasis added). But Rule 23(f), like Section 1292(b), gives this Court jurisdiction over "orders," not "claims." E.g., Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1300 (9th Cir. 1997) (jurisdiction pursuant to Section 1292(b) not limited to certified question, but rather entire order); Hudson United Bank v. Chase Manhattan Bank of Connecticut, N.A., 43 F.3d 843, 850 (3d Cir. 1994) (on interlocutory appeal, court will consider issue not raised in district court because the court can consider all grounds which might require reversal). The lower court decertified a class in the February 10 Order (ER791-803). This Court has the **jurisdiction** to reverse for any appropriate reason. E.g., Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 783

(9th Cir. 1991) (on appeal pursuant to Section 1292(b), court can consider federal common law choice of law rules, although they were not raised in lower court).

And although it is not necessary to show for jurisdictional purposes, the February 10 Order was, in fact, based in part upon Rule 23(b)(3). See ER858-59 (February 22 Order). Defendants now assert that the February 22 Order only clarified the earlier April 1998 Order (ER209-43) granting certification, Dfs' Br. 21-22, but a reasonable reading of the February 22 Order shows otherwise. ER859 ("Having already ruled that a damages class was inappropriate, the Court decertified the class [in the February 10 Order]").

Finally, this Court may also take jurisdiction over the April 1998 Order to the extent it denied certification pursuant to Rule 23(b)(3) because that order is inextricably tied with the February 10 decertification order. E.g., Bernard v. Air Line Pilots Ass'n, Int'l, AFL-CIO, 873 F.2d 213, 215 (9th Cir. 1989); Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1365 (11th Cir. 1997); In re School Asbestos Litigation, 789 F.2d 996, 1002 (3d Cir. 1986) ("so many of the factors relevant to the [Rule 23](b)(1)(B) class are also crucial to the (b)(2) and (b)(3) certifications, resolving some of the questions now while reserving the others until after final judgment would be neither practicable nor desirable").

Defendants further argue that plaintiffs "waived" their argument for recertification pursuant to Rule 23(b)(3) because plaintiffs failed to make it in the court below in response to defendants' "motion to decertify." E.g., Dfs' Br. 5, 22. But defendants never moved for decertification of the class in the lower court. Plaintiffs' Further Excerpts of Record ("FER") 13-14. Even if a motion to decertify would have been defendants' next step **after** dismissal of some of the injunctive relief claims, plaintiffs had no obligation to predict, and then counter, such a hypothetical motion. Rather, if defendants sought to decertify the class, they should have made a motion that clearly said so. See Rule 7(b)(1), Fed. R. Civ. P. (a motion "shall state with particularity the grounds therefor, and shall set forth the relief or order sought"). In fact, the court below took it upon itself -- and without asking plaintiffs for any additional briefs on the question -- to decertify the class.

The "waiver" argument is even more bizarre given defendants' position that the court below already had rejected plaintiffs' arguments for Rule 23(b)(3) certification in the April 1998 Order. Dfs' Br. 9 (referring to district court's "**prior decision** not to certify a damages class under the more stringent requirements of Rule 23(b)(3)" (emphasis added)). Thus, the argument that defendants now claim was "waived" was not only gratuitous, because no motion to decertify had been made, but (under their view) would have been **futile** even if a motion had been made.

B. Defendants' Substantive Arguments Are No Better

Plaintiffs' principal brief demonstrates that certification pursuant to Rule 23(b)(3) was appropriate here because the question of defendants' liability to each class member is determined by the same factual and legal questions. Pls' Br. 37-47. In response, defendants avoid this issue and instead claim that "plaintiffs would **force** class members who did not opt out into extensive individual proceedings . . . " (Dfs' Br. 24 (emphasis added)) and that "plaintiffs . . . suggest that members of a b(3) class would automatically be entitled to damages for emotional distress" (id., 25). Defendants do not say how plaintiffs could "force" anyone to prove their own damages if that person did not want to. Nor do they identify any part of plaintiffs' principal brief that made any argument about "automatic" damages.

Defendants' cases (Dfs' Br. 26-27) involve situations where the very existence of a cause of action depended upon unique individual circumstances. In re Hotel Telephone Charges, 500 F.2d 86, 89 (9th Cir. 1974) (certification of antitrust lawsuit against 600 different hotels pursuant to Rule 23(b)(3) reversed because "each hotel's knowing participation would be a requisite element of proof" for that hotel's **liability**); Montgomery v. Rumsfeld, 572 F.2d 250, 251-52 (9th Cir. 1978) (common issues do not predominate where Army enlisted personnel claimed that false representations had been made to them during the recruiting process).

The non-Ninth Circuit cases cited by defendants are equally distinguishable. In Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) (Dfs' Br. 26), the court denied certification because the individual instances of discrimination at different hotels in the Motel 6 chain were not part of any general policy of the chain. See Israel v. Avis Rent-A-Car, 185 F.R.D. 372, 384-85 & n.10 (S.D. Fla. 1999) (distinguishing Jackson on that ground). The 2-1 decision in Allison v. Citgo Petroleum, 151 F.3d 402 (5th Cir. 1998) relied on the fact that the plaintiffs alleging discrimination were "spread across two separate facilities," worked "in seven different departments," and were challenging "various policies and practices over a period of nearly twenty years." Id. at 417. It also concluded that the substantial value of most of the plaintiffs' claims militated against class certification. Id. at 420.

Here, there is just one law school, whose admissions system was substantively the same in its consideration of race throughout the period from 1994 to 1998. Individual questions all relate to remedy, not liability. Thus, this case is controlled by this Court's decision in cases like Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975) and Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996). Defendants' footnote effort (Dfs' Br. 27 n.8) to distinguish these cases is superficial. They cite this Court's reference to the "mechanical task" of ascertaining damages in Blackie, but the Court's language demonstrates that that factor was not a necessary prerequisite to class certification, but rather a reason in addition to the general impropriety of rejecting class certification because of individual variation in damages. This is demonstrated by Hilao. Each of the torture victims of the Marcos regime that were part of the class in Hilao obviously did not suffer the same

injury or require the identical compensation in damages. Rather, their claims for liability were similar.

Lastly, defendants offer three "other" reasons why the court below did not abuse its discretion (Dfs' Br. 27) -- none of which were ever mentioned, much less relied upon, by the trial court.

III.

THE EFFORTS BY DEFENDANTS AND THEIR AMICUS TO AVOID PARTIAL SUMMARY JUDGMENT ARE UNAVAILING

In their effort to rebut plaintiffs' showing that "academic freedom" and "diversity" are not compelling governmental interests, defendants first ask that this Court not decide the issue at all. Perhaps too embarrassed by their previous stipulation that the question is a controlling question of law in this case (see ER860-61), they leave the primary task of making this argument to their amicus, the United States. (The United States falsely asserts that the "merits of granting the petition were never briefed." U.S. Br. 13.) Second, defendants try to show that Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) was controlling and/or that "academic freedom" or "diversity" is a compelling state interest.

A. Defendants And Their Amicus Err In Asserting That This Court Should Not Review The Order Appealed From

Defendants claim that this Court need not address "the Bakke issue." Dfs' Br. 30-31. Their amicus claims that this Court should reverse its April 1, 1999 order, in which it granted plaintiffs' petition for leave to appeal the February 12 Order pursuant to 28 U.S.C. § 1292(b). U.S. Br. 12-17. Both arguments seem to rely heavily on the fact that the partial summary judgment motion was not addressed to plaintiffs' claims for damages under Section 1981 and 1983 against the individual defendants. Dfs' Br. 30; U.S. Br. 14. But if defendants have no compelling governmental interest, then plaintiffs will be entitled to a finding of liability on their Title VI claim for damages, the requests for systemic injunctive relief, and class members' requests for individual equitable relief.

Defendants argue that the court below correctly dismissed the latter two sets of claims. For the reasons discussed previously, plaintiffs disagree. But even if defendants were correct, partial summary judgment on Title VI liability would still obviate the need for any trial relating to other liability and would thus "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). To avoid this obvious conclusion, defendants now suggest that the question they stipulated to be controlling would not determine Title VI liability. They make quick footnote assertions that the Law School has qualified immunity of a kind under Title VI because a federal agency agrees with them about Justice Powell's opinion, and that, perhaps, the Law School does not even receive federal funds (Dfs' Br. 30 n.9). But see ER815 (¶ 7) (stipulated fact that the Law School receives federal funds). The United States calls this defendants' "good faith defense" under Title VI, without stating whether it thinks such a defense has any merit. U.S. Br. 16.

It does not. Title VI permits an award of compensatory damages for all forms of intentional discrimination. Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 74-75 (1992) (damages are available for intentional discrimination because no "notice problem . . . arise[s] in a case . . . in which intentional discrimination is alleged"). Title VI only covers intentional discrimination. New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); Gomez v. Illinois State Bd. Of Educ., 811 F.2d 1030, 1044 (7th Cir. 1987). Whatever else Bakke decided, five Justices concluded that the Davis Medical School violated Title VI. Bakke, 438 U.S. at 289 n.27 (opinion of Powell, J.) (Davis Medical School engaged in purposeful discrimination). As Bakke itself suggests, "good faith" is not a defense to intentional discrimination. See also, e.g., Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers Of America v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (policy of excluding women capable of

becoming pregnant from jobs involving exposure to lead violated Title VII despite "the absence of a malevolent motive"; "Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates . . . "); Jeldness v. Pearce, 30 F.3d 1220, 1231 (9th Cir. 1994) (paying male prisoners, but not female prisoners, for vocational training constituted intentional discrimination under Title IX regulations even in the absence of a discriminatory motive); Hopwood v. Texas, 78 F.3d 932, 957, 959 (5th Cir. 1996) (the University of Texas Law School engaged in intentional discrimination and was liable under Title VI for compensatory damages for its race-conscious admissions program even though "the law school had always acted in good faith" and "[t]his is a difficult area of the law, in which the law school erred with the best of intentions").

The United States offers a potpourri of other reasons for this Court to reverse its April 1 Order. It asserts at the outset that "changed circumstances" warrant reconsideration (U.S. Br. 2), but one searches in vain throughout its brief for an explanation. (It briefly suggests at one point that the changed circumstance may be this Court's decision in Hunter v. Regents of the University of California, 190 F.3d 1061 (9th Cir. 1999) (U.S. Br. 13-14), but, as shown below, Hunter has nothing to do with whether "academic freedom" is a compelling governmental interest.)

The United States also asserts that a trial may render the question of whether "academic freedom" or "diversity" is a compelling state interest moot if the court below concludes that the admissions system was not narrowly tailored. U.S. Br. 15. But even if true, that would not preclude this Court from exercising its discretion to hear an interlocutory appeal. In Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777 (9th Cir. 1991), the choice of law question at issue (between California law and Mexican law) affected only damages, not liability. Id. at 782. A trial in which the defendant had been found not liable under either law would certainly have rendered that question moot. This Court nonetheless granted leave to appeal a denial of a motion for partial summary judgment based on the choice of law question.

"[A]ll that must be shown in order for a question to be `controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir. 1981). Unless defendants are prepared to concede that their admissions system was not narrowly tailored to meet the goals of "academic freedom" and "diversity," determining whether those goals are compelling state interests could determine liability and, thus, "could materially affect the outcome."

Further, this Court should not exercise its discretion to dismiss only part of this appeal. The Court has jurisdiction over the other parts, and the issues related to the relevant compelling governmental interests have been briefed. Cf. 16 Wright, Miller, & Cooper, Federal Practice And Procedure: Jurisdiction 2d, § 3929 (2d ed. 1996) ("It does not make sense, however, to vacate a grant of permission to appeal if the appeal has been argued and the only purpose is to instruct litigants and district courts that a particular use should not be made of permissive appeals").

B. Defendants' Efforts To Demonstrate That Justice Powell's Opinion Was The "Controlling" Opinion In *Bakke* Are Misleading And Erroneous

Plaintiffs' principal brief demonstrates that Justice Powell's opinion in Bakke garnered only his vote, was not the rationale of the Court, and is not binding precedent. Pls' Br. 47-63. Defendants' response mischaracterizes or ignores plaintiffs' arguments.

1. Defendants' *Bakke* Analysis. -- Defendants begin by insisting that the Brennan group **and** the Stevens' opinion did not reject "diversity" as a compelling governmental interest. Dfs' Br. 32, 38. For the reasons set forth in plaintiffs' principal brief, at pp. 54-55, this is incorrect, but defendants set the bar too high in any event. Plaintiffs' primary argument has been that "the Brennan group did not **adopt** Powell's rationale" (Pls' Br. 54 (emphasis added)), and defendants do not really dispute that. Defendants' argument that the Brennan group's rationale "complement[ed]" Powell's "academic freedom" rationale and their pedantic reinterpretation of footnote 1 of the Brennan group's opinion (Dfs' Br. 32-33 n.10) are unsupported. (On the latter point, defendants emphasize that the Brennan group used "at least" instead of "only" after the comma in footnote 1. The more important question, though, is why are there any words at all after the comma.) Defendants also quote the Brennan group to the effect that "there was a clear

benefit to `bringing the races together.'" Dfs' Br. 33 n.10. What the Brennan group actually said was that the purpose of Davis's program was "to overcome **the effects of segregation** by bringing the races together." Bakke, 438 U.S. at 374 (Brennan, J. concurring (emphasis added)).

Defendants correctly assert that five Justices joined Part V-C of Justice Powell's opinion. Dfs' Br. 32. But Part V-C contains no rationale at all as to why race can be considered. The holding in Part V-C can be justified by innumerable rationales, including the societal discrimination rationale of the Brennan group, the "role model" theory of Wygant v. Jackson Bd. Of Education, 476 U.S. 267 (1986), the possibility that a competent body would make specific findings of past discrimination for Davis, or perhaps even some variation of the "passive participant" theory of Croson. Compare City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 492 (1989) with Bakke, 438 U.S. at 372 & n.53 (Brennan, J.) (arguing that Davis Medical School could use race because of widespread discrimination in public education in California which had harmed those minority applicants who had applied in the years in question). Part V-C, then, does defendants no good. Their

system is based upon a compelling interest in "academic freedom" and "diversity," and Part V-C says nothing about that.

Defendants then quickly abandon any analysis of Bakke itself, and move on to other Supreme Court cases, lower court cases, and academic writings.

Defendants are wrong in asserting that **anyone** held "educational diversity [to be a] **compelling** state interest" (Dfs' Br. 31 (emphasis added)) in Metro Broadcasting v. F.C.C., 497 U.S. 547 (1990), overruled, Adarand Constructors v. Pena, 515 U.S. 200 (1995); the Court did not apply strict scrutiny in that case. Cf. Dfs' Br. 48-49. In any event, one cannot interpret the Stevens and Brennan opinions in Bakke by looking at what Justices may have written more than a decade later in a different case before a differently-composed Court. And if defendants really can do no better than Minnick v. California Dep't Of Corrections, 452 U.S. 105 (1981) (Dfs' Br. 33-34) -- which did no more than describe a procedural history in which lower courts had referred to Bakke, and then dismissed the writ of certiorari -- they are in serious trouble.

Defendants' long footnotes of non-binding authority on pages 34 through 36 are misleading because many of the cited authorities did nothing more than **assume without deciding** that "academic freedom" and/or "diversity" is a compelling governmental interest (e.g., Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998)); or because they had nothing at all to do with any question of race discrimination, much less whether "academic freedom" and/or "diversity" is a compelling governmental interest sufficient to support race-based decisions (e.g., Buchwald v. University of N.M. School Of Medicine, 159 F.3d 487 (10th Cir. 1998), United States v. Brown University, 5 F.3d 658 (3d Cir. 1993), and Ross v. Creighton University, 957 F.2d 410 (7th Cir. 1992)); or because they were called into question by later authority that defendants fail to identify (e.g., Talbert v. Richmond, 648 F.2d 925 (4th Cir. 1981), limited by Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d

207, 213 n.5 (4th Cir. 1993)).[1] Even defendants' citation of academics is misleading. John Hart Ely wrote only that Part V-C was the opinion of the Court in Bakke. Compare Dfs' Br. 37.

[1] Another of defendants' authorities has recently been reversed. Eisenberg v. Montgomery County Public Schools, 19 F. Supp. 2d 449 (D. Md. 1998) (Dfs' Br. 35 n.14), rev'd, 1999 WL 795652 (4th Cir. Oct. 6, 1999)

Moreover, and contrary to defendants' suggestion that the interpretation of Bakke has been uniform with the exception of Hopwood, other courts have concluded that Justice Powell's opinion was not the controlling opinion. E.g., Capacchione v. Charlotte-Mecklenburg Schools, 57 F. Supp. 2d 228, 289 (W.D.N.C. 1999); Peters v. Moses, 613 F. Supp. 1328, 1335 (W.D. Va. 1985) ("I do not believe that Justice Powell's concurring opinion represents the court's opinion in Bakke with regard to this matter"). Others have recognized that the question is open. Eisenberg v. Montgomery County Public Schools, 1999 WL 795652, *5 (4th Cir. Oct. 6, 1999) ("whether diversity is a compelling governmental interest remains unresolved"); McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir.) ("whether [non-remedial] justifications are possible remains unresolved"), cert. denied, 119 S. Ct. 444 (1998). And, not surprisingly, one can find many academics on any side of this issue, including those who do not believe that there

was a rationale in Bakke. Gabriel Chin, *Bakke* To The Wall: The Crisis of *Bakkean* Diversity, 4 Wm. & Mary Bill of Rights J. 881, 925-26 n.192 (1996) (listing such academics).

Defendants' Ninth Circuit authorities do not help them. Dfs' Br. 36. Higgins v. Vallejo, 823 F.2d 351 (9th Cir. 1987) was discussed in plaintiffs' principal brief (p. 62), and the other authorities suffer from the same defect. Each involved remedying past discrimination, and did not cite Justice Powell's Bakke opinion on the issue of whether "academic freedom" or "diversity" is a distinct compelling governmental interest.

2. Defendants' *Marks* Analysis. -- Plaintiffs' principal brief demonstrates that United States v. Rutledge, 517 U.S. 292 (1996) precludes the adoption of the rationale of a single Justice that no other Justice adopts as the holding of the Court. Pls' Br. 55-56. Although Rutledge is a Supreme Court precedent directly on point, defendants do not bother to cite it, much less distinguish it.

Plaintiffs' principal brief also demonstrates that the analysis suggested by Marks v. United States, 430 U.S. 188 (1977) can work only if there is something in common between the opinions being compared. Defendants distort that argument, insisting that plaintiffs argue that Marks requires a common rationale. Dfs' Br. 39. There is a difference between a "common rationale" and rationales that have **something** in common (i.e., a "common denominator"). The **remedial** analyses of Justice Powell and the Brennan group in Bakke (see Pls' Br. 54-55) had a common **denominator** even though the **rationales** were quite different; Powell's **"academic freedom" / "diversity"** rationale had no common denominator with the Brennan group's opinion. Defendants' primary argument, then, only defeats a straw man. In the cases defendants cite (Dfs' Br. 39-41 & n.18), there **was** a common denominator, and they thus do not undermine or refute the need for one.

Wisely, defendants abandon any defense of the rationale of the court below, which was that Marks can determine "the precedential value of **any** case" in which there are fewer than five votes for any opinion. ER808 n.2 (emphasis added). Defendants concede that some cases defy Marks analysis, but claim that they are only those cases in which lower courts are "baffled and divided" about the meaning of a precedent. Dfs' Br. 40. (Defendants conclude that Bakke is not such a case by referring to their previous misleading citations, none of which applied Marks in any event. This does not prevent defendants from repeatedly attacking the Hopwood decision for failing to apply Marks. Dfs' Br. 34 n.12, 39.) Defendants do not say how their "bafflement and division" standard would apply in practice. (How, for example, would the first few courts to consider a Supreme Court precedent determine whether Marks is applicable?) Nor can they cite any lower court case which has applied this standard. Given this, defendants' quick rejection

of the analyses of numerous other circuit courts interpreting Marks (Dfs' Br. 41 n.18) -- claiming that **they** "make[] no sense" (id., 39) -- seems disingenuous at best. See also United States v. Alcan Aluminum Corp., 49 F. Supp. 2d 96, 100-01 (N.D.N.Y. 1999).

In arguing that Justice Powell's opinion was the "narrowest" opinion in Bakke, defendants break no new ground, but only demonstrate how quixotic the effort is.[2] Defendants claim that "narrower" could mean "less permissive" (Dfs' Br. 42), and that Justice Powell's opinion was "less permissive" because societal discrimination can include discrimination by other actors whereas educational diversity "can be claimed only by educational institutions in the narrow context of admissions policies." Id. However, and in direct contradiction, defendants also argue that Powell's rationale has been extended to "workplace diversity" (Dfs' Br. 36) and cite cases like University & Community College Sys. of Nevada v. Farmer, 113 Nev. 90 (1997) (Dfs' Br. 36 n.15) (Title VII case concluding that "diversity" was an important rationale to support race-conscious **employment** policies).

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[2] Defendants insist that plaintiffs' principal brief argued that the difference between strict and intermediate scrutiny is "meaningless." See Dfs' Br. 42 (quoting Pls' Br. 60). Like so much else attributed to plaintiffs in defendants' brief, the quote is, to put it charitably, mistaken.

Defendants assert that societal discrimination rationales "treat people as members of racial groups, not as individuals, and automatically benefit all members of historically victimized groups" (Dfs' Br. 43-44); this is a "crucial point" that "[p]laintiffs miss" (Dfs' Br. 44 n.22). In contrast, defendants say, "diversity" treats people as individuals because race is only one of many factors considered. Dfs' Br. 44. But this argument ignores Bakke. Perhaps some "societal discrimination" justifications for race-conscious decision-making treat people as members of groups, but the Brennan group's justification did not. Pls' Br. 51-52. (Defendants deceptively quote from plaintiffs' brief concerning various limits used with the societal discrimination justification, attacking plaintiffs because the limits are "utterly irrelevant" to a "program designed to remedy past societal discrimination" (Dfs. Br. 44 n.22) -- but fail to disclose that the limits are the Brennan group's, not plaintiffs'.) Thus, it is simply untrue that a "societal discrimination" program **consistent with**

the Brennan group's opinion could be implemented more broadly than race-conscious programs like the Law School's, because such programs would have fewer minorities who could qualify for an advantage. See Stephen Magnini, Minority Drop Stirs Up Regents, Sacramento Bee, June 19, 1998 at A1, available in 1998 WL 8827896 (of 150 socioeconomically deprived applicants to Boalt Law School in 1998, none were African-American; law school dean states that African American applicants were from professional families with good incomes). Compare Dfs' Br. 45 n.23.

Moreover, Powell's "diversity" rationale permits colleges to treat individuals as members of groups by granting an advantage to all favored races. Hopwood, 78 F.3d at 946. The purported consideration of other "diversity" factors hardly mitigates this problem, any more than a law school's consideration of LSAT scores and grades does. Under Powell's opinion, "racial diversity" advantages are given to all members of a race. The fact that a racial "plus" might not be enough to guarantee admission is hardly proof that the applicants are not being treated as members of a group. Compare Bakke, 438 U.S. at 275-76 nn.5-6 (431 of 456 preferred minorities who applied to the special admissions program were rejected).

Contrary to defendants' misrepresentations (Dfs' Br. 31, 41 n.19), none of this is to argue that the Brennan group's opinion was "narrower" and/or controlling. Rather, it is simply impossible to apply any "narrowness" analysis to this aspect of Bakke.[3]

C. Defendants' Analysis Of Other Supreme Court Precedent Is Unavailing

[3] Defendants make one other footnote argument, which requires only a brief rebuttal. To refute plaintiffs' argument that there really is not much of a difference between a **plus system** and a quota, defendants cite authority for the proposition that there is a "subtle" difference between **a goal** and a quota, and further claim that "[a] plus-factor approach is not even a goal." Dfs' Br. 43 n.21. A "goal," of course, will not **necessarily** require race-conscious decision-making at all; a "plus-factor" system always does.

Defendants claim that if precedent has not established that "academic freedom" or "diversity" is a compelling governmental interest, plaintiffs' motion for partial summary judgment was still properly denied because "[i]t was [plaintiffs'] burden to show that defendants violated the Constitution." Dfs' Br. 54. They have it backwards. Once it is established that racial classifications are used, it is defendants' burden to meet strict scrutiny. Ho v. San Francisco Unified School District, 147 F.3d 854, 865 (9th Cir. 1998); Monterey Mechanical v. Wilson, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government"). As shown below, defendants' arguments fail to meet their burden.

1. The Equal Protection Cases. -- One set of authorities defendants rely upon are equal protection cases involving race discrimination. Dfs' Br. 48-51. Specifically, defendants invoke dicta from the overruled Metro Broadcasting -- a case which did not deal with "educational diversity" at all and which set a standard of intermediate scrutiny for the "programming diversity" it did consider -- and a series of concurrences and dissents from other cases. Obviously, none of this is either binding or persuasive.[4]

[4] It does deserve mention that defendants' quote from Justice O'Connor's Metro Broadcasting dissent (Dfs' Br. 50) is typically misleading. Defendants note that Justice O'Connor cited Justice Powell's Bakke opinion, but they omit the sentence that cite was used to support: "**Even if** distinct views could be associated with particular ethnic and racial groups, . . . " (Metro Broadcasting, 497 U.S. at 621 (O'Connor, J., dissenting (emphasis added)). The previous three pages of her opinion were devoted to undermining that assumption.

2. The "Academic Freedom" Cases. -- Defendants' "academic freedom" discussion is a wholesale revision of Justice Powell's rationale. Defendants cite a series of cases to the effect that "academic freedom" is "an important First Amendment right." Dfs' Br. 46. No doubt it is. But defendants' cases simply do not address whether it is a sufficiently compelling interest to permit schools to weigh race in the admission of students.

Indeed, defendants never respond at all to cases like Runyon v. McCrary, 427 U.S. 160 (1976), which demonstrate that it is **not** sufficiently compelling, and more or less concede that it cannot be. According to defendants, it is only when "the First Amendment right to select students **supports the goal of a diverse student body**" that it becomes compelling, because that is a goal "consistent with equal protection." Dfs' Br. 48. See also id., at 61-62 (suggesting that educators who believe that racial homogeneity is beneficial would not be entitled to effect such beliefs in an admissions system because those beliefs are not "nonpretextual, common, valid, or applicable"). The United States joins in this chorus. U.S. Br. 27.

In other words, both defendants and the United States now argue that "academic freedom" is compelling only if a college or university thinks like the majority of established institutions -- if the view is "common" and "valid" and supports "a diverse student body." (It is not clear who determines "validity." Nor does anyone explain why "diversity" should be elevated over actual improvements in education if a specific institution believes they are in conflict.) It is hard to discern anything like that in Justice Powell's opinion in Bakke, but if it is there, it is hard to think of any better reason to conclude that it is inconsistent with Supreme Court precedent. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("[Academic] freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom"). Cf. New York Times v. Sullivan, 376 U.S. 254, 271 (1964) (First Amendment "protection does not turn upon `the truth, popularity, or social utility of the ideas

and beliefs which are offered'"). Apparently, a "pall of orthodoxy" **among** universities is acceptable to the defendants and the United States, but it is not the "academic freedom" of the Supreme Court. A "compelling" interest in "academic freedom" for those colleges that agree with Harvard is not "academic freedom" at all.[5]

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[5] The First Amendment protects the right to exclude diverse viewpoints as much as the right to include them. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (parade organizers had First Amendment right to exclude those who supported gay rights). If "academic freedom" is an important First Amendment right, then, it should encompass the freedom to choose something other than "diverse viewpoints" as an institutional goal.

Nor do defendants explain why a diverse student body -- and here they can only be speaking of a racially diverse student body -- is "consistent with equal protection." Dfs' Br. 48. See Taxman v. Bd. Of Educ. Of Township of Piscataway, 91 F.3d 1547, 1557-58 (3d Cir. 1996) (en banc) (considering race to promote racial diversity for education's sake was inconsistent with Title VII's twin goals of ending discrimination and remedying the underrepresentation of minorities in the workforce), cert. granted, 521 U.S. 1117, cert. dismissed, 118 S. Ct. 595 (1997). "Equal protection" is not outcome oriented, but rather process oriented. It simply requires that the government treat individuals without regard to their race. Sometimes that principle promotes racial diversity. Sometimes it does not. Cf. United States v. Starrett City Assoc., 840 F.2d 1096 (2d Cir. 1988) (employing separate tenant waiting lists by race to ensure a good racial mix and prevent white flight violated the Fair Housing Act).

In explaining why "diversity" improves education, Dfs' Br. 56-61, defendants' "evidence" are the affidavits of people who believe (like Harvard) that it does. (No study examining objective, measurable results, like scores on a bar exam, are identified.) They also apparently believe that "racial diversity" is an essential component of "intellectual diversity," although the degree to which the former improves the latter is apparently unquantifiable. But nothing in Justice Powell's opinion requires "evidence" to support a school's invocation of "academic freedom."[6] Moreover, if the kind of evidence supplied by defendants were sufficient to create a "compelling" governmental interest, schools in the South could have delayed desegregation by simply supplying the affidavits of their leading

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[6] Indeed, defendants also assert that the benefits of "diversity" are "questions of constitutional fact, which are not open to relitigation in every case." Dfs' Br. 55. If so, why are they presenting their "evidence"? Moreover, defendants again just plain misrepresent in asserting that such "evidence was not presented in Hopwood." Dfs' Br. 60. See Hopwood v. Texas, 861 F. Supp. 551, 571 (W.D. Tex. 1994), vacated and remanded, 78 F.3d 932 (5th Cir. 1996).

experts, many of whom believed that segregation was the most effective means of educating everyone.

3. "Educational Diversity" Is Not A Compelling Interest Sufficient To Support The Use Of Racial Preferences. -- Although it is defendants' burden to demonstrate that an interest meets "strict scrutiny," plaintiffs' principal brief nonetheless demonstrates that binding Supreme Court authority strongly suggests that rationales without temporal or other limits cannot meet strict scrutiny. Pls' Br. 65-67. Defendants concede that the Court has "looked" at these considerations, but assert that they are not "acid tests." Dfs' Br. 53. Plaintiffs submit that they are. Defendants cannot (and do not) dispute that "academic freedom" and/or "diversity" are compelling interests that have no temporal limit. (Indeed, defendants have argued that there is no clear limit to the size of the preference either. See FER 7-8.) Although defendants claim that their justification is limited to admissions decisions by educational institutions (Dfs' Br. 42), they cite cases in which it is applied elsewhere. (And it is hardly clear why the Iowa Department of Natural Resources

or the Federal Bureau of Investigation would not benefit from a "diversity of viewpoints" in effecting their important missions.)

The recent case of Hunter v. Regents Of The University Of California, 190 F.3d 1061 (9th Cir. 1999) is consistent with Supreme Court authority in this regard. Hunter upheld the use of race in the admissions process for a laboratory elementary school designed to research effective educational strategies. While Hunter made clear that non-remedial interests can be compelling (id. at 1064 n.6), this Court emphasized that the research school in question was "an exceptional school" and that the "educational research" justification in that case **would not** "lead to racial classification in every stratum of a state's public education system." Id. at 1065. "Academic freedom" and "diversity," though, do not depend on the type of school or any special mission. Every school uses them, and they **would** lead to racial classifications in every stratum of a public education system.

Education matters, as Hunter recognized. But not **every** marginal improvement in the educational process is so "compelling" that it would permit the use of race in classifying people, particularly if the price is a never-ending system of racial classifications throughout public education. The people in two states of this Circuit that have voted against the use of race to achieve goals like "diversity" are not "against" education or even "against" intellectual diversity. The Court, too, has recognized the insufficiency of equally important goals. In Palmore v. Sidoti, 466 U.S. 429 (1984), for example, the Court reviewed a Florida court's determination that a child's best interest would not be served by placing her with her white mother, who had remarried an African American, because of the social stigma associated with a mixed marriage. The Court recognized that granting custody based on the best interests of the child was a "substantial government interest," and that there were, as the state court had recognized, certain risks associated with a child living

with a stepparent of a different race. Id. at 433. But those additional risks were **not** sufficiently compelling to justify the consideration of race in the custody decision. Id. See also Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996) (governmental interest in avoiding expense and unpleasantness of litigation is not a compelling governmental interest justifying racial gerrymander of election district); Memorial Hospital v. Maricopa County , 415 U.S. 250, 263 (1974) (County's interest in insuring the fiscal integrity of its free medical care program did not justify the burden on the right to travel imposed by its residency requirement).

4. Defendants' "Reliance" Argument Is Meritless. -- Finally, defendants argue that "they were entitled to rely on the centrality of the Powell opinion in seeking in good faith to comply with the law." Dfs' Br. 51. Cf. U.S. Br. 24-25. Stare decisis can be invoked only with respect to unambiguous judgments of a majority of the Court. If courts began to uphold people's subjective perceptions of the law as binding, they would be abdicating their responsibility.

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Michael E. Rosman

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Pursuant to Fed. R. App. P. 32(a)(7)(C), Ninth Circuit Rule 32-1, and the order of this Court dated November 4, 1999, the attached reply brief is proportionately spaced, has a typeface of 14 points or more and contains 8393 words.

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