No.

IN THE
SUPREME COURT of the UNITED STATES

KATURIA SMITH, ANGELA ROCK, AND MICHAEL PYLE, *et al.*,

Petitioners,

v.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, WALLACE D. LOH, ROLAND HJORTH, SANDRA MADRID, AND RICHARD KUMMERT,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Michael E. Rosman
Counsel of Record
Hans Bader
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St., NW, Suite 300
Washington, DC 20036
(202) 833-8400

Steven A. Hemmat
Law Office of Steven A. Hemmat, P.S.
119 First Ave. South, Ste. 500
Seattle, WA 98104
(206) 682-6644

QUESTIONS PRESENTED

1. Is "academic freedom" or "diversity" a compelling governmental interest sufficient to meet strict scrutiny and to justify race-based preferences in admissions to a state law school under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does an admissions system that uses such race-based preferences violate Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) or 42 U.S.C. § 1981?

PARTIES TO THE PROCEEDING

Petitioners are Katuria Smith, Angela Rock, and Michael Pyle. They were plaintiffs in the District Court and appellants in the Court of Appeals.

Respondents are The University of Washington Law School, Wallace D. Loh, Roland Hjorth, Sandra Madrid, and Richard Kummert. They were defendants in the District Court and appellees in the Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions, Statutes, Rules:

Other Authorities:

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App. 1a-25a) is reported at 233 F.3d 1188. The decision of the District Court (App. 28a-40a) denying plaintiffs' motion for partial summary judgment was unreported. An earlier decision of the district court, granting plaintiffs' motion for class certification and denying several of defendants' motions for summary judgment, is reported at 2 F. Supp. 2d 1324.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 2000.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

2. Title VI of the Civil Rights Act of 1964 states:

---

[1] On January 11, 2001, the Ninth Circuit (Fernandez, J.) issued an order stating that a judge of the court had made a *sua sponte* call for rehearing *en banc* and asking the parties to submit papers on the propriety of *en banc* rehearing on or before January 31, 2001. The court has not yet ruled on rehearing the case. Under Rule 13.3 of this Court, the time for petitioners to file this petition was not tolled because there has been no "petition for rehearing . . . filed in the lower court by any party." Sup. Ct. R. 13.3.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

3. 42 U.S.C. § 1981(a) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . .

STATEMENT

This case presents the question of whether the admissions system for a state university law school can give race-based preferences to certain applicants in an effort to achieve a "diverse" student body. The Fifth and Ninth Circuits have split on this issue of profound national importance.

A. FACTUAL BACKGROUND

This case involves three white residents of the State of Washington whose applications to the state law school were rejected in the years 1994, 1995, and 1996.

1. *Defendants*. -- Defendant University of Washington Law School (the "Law School") is a state-run law school that receives federal funds. Pretrial Order, Admitted Facts, ¶ 7.

Each of the individual defendants Wallace Loh and Roland Hjorth was dean of the Law School during a relevant period. Richard Kummert was actively involved in the admissions process for the Law School since 1965 and had served as chair of the Law School's Admissions Committee during the years that plaintiffs applied to the Law School. Sandra Madrid was Assistant Dean of the Law School, and had responsibility for the administration of the admissions system. App. 3a n.2; Loh Decl. Filed 1/29/98 ¶ 2; Hjorth Decl. Filed 10/31/97 ¶ 1; Kummert Aff. Filed 10/31/97 ¶ 1; Madrid Decl. Filed 1/29/98 ¶ 1.

2. *The Law School's Admissions System*. -- There were disputed facts concerning the operation of the Law School's admissions system in the years 1994, 1995, and 1996 in the trial court. The following description, however, is taken from stipulated facts and defendants' own testimony.

The written admissions policy adopted by the Law School in late 1989 was in effect during the years that plaintiffs applied. Kummert Decl. Filed 12/23/97, Ex. 1 pp. 7-8. Under that policy, the Law School considers race as a factor in admissions, but not as a means of remedying the present effects of its own past discrimination. It does not limit its consideration of race to applicants who are members of groups that have been the victims of statesanctioned discrimination. App. 36a n.4. Pretrial Order, pp. 2-3 (stipulated facts).

In the two years prior to that 1989 adoption, the Law School's offers to non-whites constituted 16% and 20% of all offers. In the next six years, the percentage of offers to non-whites stayed within fairly close parameters: between 30% and 38% of all offers. Rosman Statement Filed 12/17/98, Ex. D. In 1996, it dropped slightly to 27%. *Id.* ¶ 2.

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

Upon receipt of completed applications, the Law School uses an index, a weighted average of undergraduate grade point average and LSAT scores, to order the applicants. *Smith v. University of Washington Law School*, 2 F. Supp. 2d 1324, 1329 (W.D. Wash. 1998). The highest ranking applicants, referred to as "presumptive admit" candidates, were reviewed by Admissions Coordinator Kathy Swinehart, who would recommend that the candidate be admitted or held for further review. Her decisions were reviewed by defendant Kummert. *Id.* According to the Law School, applicants in this category were held for further review if their "academic potential" appeared to be less than that indicated by their index score or if they lacked a "diversity" factor as described in the Law School's admissions policy. *Id.*; Kummert Decl. Filed 12/23/97, Ex. 1, p. 11.

In 1994, the remaining candidates (those with Index scores below 197) were divided into "Admissions Committee" files and "presumptive denial" files. *Smith*, 2 F. Supp. 2d at 1329; Kummert Aff. Filed 10/31/97 ¶ 6. White candidates at Index levels 195 and 196 were set aside for review by the Admissions Committee; minority candidates at those levels were reviewed by defendant Madrid. Kummert Decl. Filed 12/17/98 ¶ 4; Madrid Decl. Filed 12/17/98 ¶ 7. The "presumptive denial" candidates (those with Index scores below 195) were all reviewed by defendant Madrid, who had the authority to admit such candidates, hold their applications for further review by the Admissions Committee, or deny their applications. *Smith*, 2 F. Supp. 2d at 1329. Her decisions were reviewed by defendant Kummert. *Id.* Those admitted directly by Madrid from the "presumptive denial" category in 1994 were substantially all minorities. Rosman Statement Filed 1/8/99, Ex. 12 (Kummert Depo. Tr. 166, 177). Only whites and Asians were referred for further review. *Id.* (Kummert Depo. Tr. 169).

In 1995 and subsequently, Madrid would read all the files outside of the "presumptive admit" category. She had the same authority to admit, deny, or hold for further review. *Smith*, 2 F. Supp. 2d at 1329.

Throughout the years at issue, when applicants from preferred races submitted applications that did not sufficiently identify their "diversity," defendants would send those applicants a letter seeking additional information about their "family background" and "cultural activities and associations." The letter was sent *only* to nonwhite applicants. Defendants never sent out any other letter seeking additional information about "diversity" to whites. Rosman Statement Filed 1/8/99, Exs. 8, 13 (Madrid Depo. Tr. 71), and 14 (Swinehart Depo. Tr. 59-60).

In the spring of 1994, the Law School adopted a goal of having each admitted class consist of students 70-75% of whom were residents of the State of Washington. *Id.*, Ex. 7. Even prior to that time, residency was considered as a positive factor at various points in the admissions process. *Id.*, Exs. 12 (Kummert Depo. Tr. 171), and 14 (Swinehart Depo. Tr. 53-55).

Both Kummert and Madrid asserted that they used the admissions criteria set forth in the Law School's policy, which, as noted, was adopted in 1989 and considers race as a positive "diversity" factor.

3. *Plaintiffs' Applications*. -- Katuria Smith applied in 1994. Earlier, she had asked for a waiver of the fees to apply to the Law School, and provided documentation of her minimal income. The Law School states that it will grant a "limited number of fee waivers . . . for those who would not otherwise be able to apply." Rosman Statement Filed 1/20/98, Ex. 9, p. 10. It granted Smith's application for a fee waiver. *Id.*, Exs. 21-22.

Smith's application was unusual. Rosman Statement Filed 1/8/99, Ex. 4. After several years in community colleges, she transferred to the undergraduate business program at the University of Washington ("UW"). Although UW was obviously a far more academically rigorous program, Smith did *much* better there than she had at the community colleges. Although her overall GPA was a 3.28, she had a GPA of 3.62 at UW. Her LSAT score was in the 94th percentile, and she had an index score of 192. *Id.* In 1994, all resident African American and Filipino American applicants with an index score above 177 were offered admission. Rosman Statement Filed 12/17/98, Ex. F, ¶¶ 1-2.

Smith's application explained that she had worked full-time during most of the time she was in community colleges, until she switched to part-time work just prior to her transfer. Rosman Statement Filed 1/8/99, Ex. 4. (In her last semester at a community college, working "only" part time, she earned a 3.89 GPA.) She noted that her father was dead, that her mother had three other children, and that she had no means of supporting herself other than working. Accordingly, she continued to work 20-25 hours per week even after transferring to UW. *Id.*

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

Defendant Kummert, the admissions chair, testified that Smith's application did not demonstrate any characteristics that would warrant consideration under the Law School's existing diversity policy. Kummert Aff. Filed 10/31/97, ¶ 10. The Law School rejected Smith's application in March 1994. As a consequence, Smith attended a more expensive private law school and suffered damages as a consequence. Am. Compl. ¶ 4; Answer ¶ 4.

Angela Rock applied in 1995. She had an LSAT score in the 93rd percentile, and a GPA from the University of Washington of 3.65. Rosman Statement Filed 1/8/99, Ex. 5. Her "Index score" of 196 was a "presumptive admit" score for Washington residents in 1995. Kummert Decl. Filed 12/17/98 ¶ 2. All resident African American, Asian American, and Hispanic applicants with index scores above, respectively, 175, 190, and 187 were offered admission in 1995. Rosman Statement Filed 12/17/98, Exs. E, F (Reqs. To Admit Nos. 23, 28, 31).

Rock's application spoke about having been a swimming coach in a depressed, gang-infested ghetto area of Spokane and about how that experience had changed her and her perspective. She also identified the other jobs she held while attending college. Rosman Statement Filed 1/8/99, Ex. 5.

Kummert testified that Rock's application did not demonstrate any information that would warrant consideration under the Law School's existing diversity policy. Kummert Aff. Filed 10/31/97, ¶ 13. The Law School placed Rock on a waiting list in March 1995 and rejected her application in August 1995. Rosman Statement Filed 1/8/99, Ex. 5. As a consequence, Rock attended a more expensive private law school and suffered damages.

Michael Pyle applied in 1996. Rosman Statement Filed 1/8/99, Ex. 6. He had graduated in 1991 from Duke University with a 3.15 GPA in Mechanical Engineering, and had scored in the 97th percentile on the LSAT when he took it in 1995. *Id.* In 1996, the Law School switched from three-digit index scores to two-digit scores, and Pyle's was 89. *Id.* All Filipino and Native American resident applicants with an index score above 83, and all Hispanic resident applicants with an index score above 87 were offered admission in 1996. Rosman Statement Filed 12/17/98, Exs. E, F.

Pyle's application spoke at length about his job for the previous years working as a structural analyst at the Boeing Co. Pyle also wrote about how he had come to terms with his homosexuality and how that experience had sensitized him to the experiences of other groups that have traditionally been the victims of irrational discrimination. Rosman Statement Filed 1/8/99, Ex. 6.

Kummert testified that Pyle's application did not contain any information that would warrant consideration under the Law School's existing diversity policy. Kummert Aff. Filed 10/31/97, ¶ 17. The Law School does not give weight to sexual orientation in its diversity policy. Rosman Statement Filed 1/8/99, Exs. 13 (Kummert Depo. Tr. 229), 14 (Madrid Depo. Tr. 89). The Law School rejected Pyle's application in March 1996. Pyle reapplied to the Law School in 1999 and was admitted. App. 4a. Due to positive developments in his career, however, he chose not to matriculate.

B. PROCEEDINGS BELOW

This action commenced on March 5, 1997 with the filing of the original complaint. The original complaint, like the consolidated and amended complaint filed in July 1997, asserted that defendants operated an admissions system at the Law School that illegally discriminated on the basis of race in violation of 42 U.S.C. §§ 1981, 1983, and 2000d. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

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

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

As passed, I-200 was codified as a statute at Section 49.60.400 RCW. Pursuant to the Washington Constitution, it can now be amended by a simple majority vote of the legislature. Wash. Const. Art. 2, § 41.

On November 19, 1998, defendants moved to dismiss plaintiffs' requests for declaratory and injunctive relief on the ground that I-200 rendered them moot. The District Court granted that motion on February 10, 1999, noting that plaintiffs' claims for damages remained.

Pursuant to the trial court's scheduling order, both sides moved for summary judgment on December 17, 1998. Plaintiffs' motion for partial summary judgment on liability was based upon the undisputed fact that defendants considered race and ethnicity in the Law School's admissions process and purported to do so for the purpose of achieving "educational diversity" pursuant to its academic freedom; plaintiffs argued that "diversity" and "academic freedom" were not compelling governmental interests sufficient to justify the use of race in admissions. Defendants' motion argued that they had complied with the requirements of Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1977), that the individual defendants had qualified immunity, and that the Law School had not engaged in "intentional" discrimination in violation of Title VI.

The District Court denied both sides' motions. The trial court concluded Justice Powell's opinion in *Bakke*, asserting that "academic freedom" and/or "diversity" were compelling governmental interests, stated the rationale for that part of the holding of the Court in that case approving the future consideration of race. In so doing, the trial court applied the Supreme Court's analysis in *Marks v. United States*, 430 U.S. 188 (1977) for interpreting decisions of a fragmented court, and specifically rejected the holdings of a number of circuit courts that *Marks* cannot be applied unless there is a "common denominator" among the various opinions in the Supreme Court decision being analyzed. App. 32a. While conceding that "[t]he application of the *Marks* principle to the *Bakke* decision is particularly vexing because in many ways the opinions of the Justicies are at odds with each other" (*id.*), the court nonetheless held that Justice Powell's opinion was the "narrowest" and, thus, the rationale for the part of the holding in *Bakke* that approved the use of race.

The parties stipulated that this order met the requirements of 28 U.S.C. § 1292(b), *i.e.*, it involved a controlling question of law as to which substantial grounds for disagreement existed and the resolution of which could materially advance the ultimate termination of the litigation. The District Court agreed, and signed an order to that effect on February 22, 1999. App. 26a-27a. That order also stayed the trial pending further order of the court. The Ninth Circuit Court of Appeals accepted plaintiffs' Section 1292(b) appeal and affirmed in a decision dated December 4, 2000. Like the District Court, the panel concluded that Justice Powell's rationale was the rationale for this Court's judgment in *Bakke*. Specifically, the panel gleaned four distinct principles from Justice Powell's opinion: (1) strict scrutiny applies to racial classifications, (2) racial proportionalism (*i.e.*, insuring some proportion of a particular race or races) was not proper, (3) the state can remedy the effects of past identified discrimination where there have been findings of past violations, and (4) using racial preferences to attain a diverse student body is a constitutionally permissible goal for an institution of higher education. App. 15a-17a.

The court contrasted this with the approach taken by Justices Brennan, White, Marshall, and Blackmun (the "Brennan concurrers"). The opinion joined by those four Justices would have relied upon Justice Powell's third principle, but did not agree to Justice Powell's limitation of that principle to instances where institutional discrimination was supported by findings. The panel correctly concluded that those Justices "would have established a principle broader than the [t]hird principle because they would have allowed individual institutions or departments to ameliorate societal discrimination, even without specific judicial, legislative, or administrative findings at the proper level." App. 20a.

But the panel also concluded that the concurrers' expanded third principle was broader than Justice Powell's *fourth* principle (concerning "diversity" or "academic freedom"). The panel conceded that the Brennan concurrers "did not specifically say that `race' could be used to achieve student body diversity in the absence of any societal discrimination." App. 23a. But they "could hardly doubt" that the Brennan concurrers "*would have* embraced that somewhat narrower principle if need be, for [they] thought that it was simply an allotrope of the principle [they were] espousing." *Id.* (emphasis added).

Applying *Marks v. United States*, 430 U.S. 188 (1977), the panel concluded that Justice Powell's rationale was narrower than the rationale employed by the Brennan concurrers and was thus the rationale for the Court's judgment. Accordingly, it affirmed the denial of plaintiffs' motion for partial summary judgment.

REASONS FOR GRANTING THE WRIT

This case involves the use of racial preferences in admissions to higher education. There are few, if any, legal issues more significant. *Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg and Souter, JJ.) ("Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance"). Moreover, as the decision in this case specifically noted, the Fifth and Ninth Circuits have split on the question of whether "academic freedom" or "diversity" is a compelling governmental interest sufficient to justify the use of race preferences in admissions. *See* App. 24a n.9 (noting disagreement with Fifth Circuit).

There are also a host of subsidiary questions that are encompassed by the primary question for review, and some of these subsidiary questions have also produced mixed answers in the lower courts.

A. THE *BAKKE* CASE

In *Bakke*, this Court found that the admissions program of the University of California Medical School at Davis, which set aside 16% of the places for incoming students for educationally or economically disadvantaged minorities, violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Justice Powell concluded that Title VI prohibited only that conduct prohibited by the Constitution, but that the justifications offered by the Regents were insufficient and/or the system employed by the Davis Medical School was not "narrowly tailored" to meet those justifications. Justice Stevens, writing for himself and three others, concluded that the system of racial preferences employed by the Davis Medical School violated the plain language of Title VI. Those Justices did not reach the question of whether the Davis system also violated the Constitution.

Justice Powell also concluded that the injunction imposed by the California Supreme Court, prohibiting all use of race in admissions in the future, should be reversed. In this conclusion, he was joined by the Brennan concurrers (who also would have upheld the system employed by the Davis Medical School).

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

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

The Brennan concurrers concluded that the Davis program met their "strict and searching" scrutiny analysis because remedying the effects of past societal discrimination was a sufficiently important governmental objective, and because the Davis program was, in their view, substantially related to achieving that objective. In reaching the latter conclusion, the Brennan concurrers stated that remedies for past discrimination need not be limited to victims identified by specific proof, but that they should be limited to those "within a general class of persons likely to have been the victims of discrimination." *Id.* at 363. In finding that the Davis program met that requirement, the Brennan concurrers emphasized:

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

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

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

B. THE LOWER COURTS ARE SPLIT

In *Adarand Constructors v. Pena*, 515 U.S. 200, 218 (1995), this Court accurately noted that "*Bakke* did not produce an opinion for the Court." Accordingly, there has been no settled interpretation of its holding, and, not surprisingly, the lower courts have not agreed on the proper way to interpret the 1-4-4 breakdown of Justices in *Bakke* or whether "academic freedom" or "diversity" is a compelling governmental interest. As described above, the Ninth Circuit in this case concluded that Justice Powell's opinion in *Bakke* was the "narrowest" and therefor the rationale for the judgment of the Court.

In contrast, the Fifth Circuit has concluded that Justice Powell's opinion in *Bakke*, and his endorsement of "academic freedom" and "diversity" as compelling governmental interests sufficient to meet strict scrutiny, was not the rationale for the judgment of the Court (or the rationale for that part of Justice Powell's opinion, V-C, that reversed the California Supreme Court's injunction). *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996). That Court held that Justice Powell spoke for no other Justice, and that the Brennan concurrers had implicitly rejected diversity as a compelling governmental interest. *Hopwood*, 78 F.3d at 944 (citing *Bakke*, 438 U.S. at 326 n.1 (Brennan, J., dissenting and concurring)). *See also Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000) (the four Brennan concurrers in *Bakke* "disagreed with [Justice Powell] as to the rationale that is necessary to justify constitutionally the government's use of racial preferences. . . . None of the [concurrers] would go the extra step proposed by Justice Powell and approve student body diversity as a justification for a race-based admission criterion").

Concluding that the question of whether "diversity" was a compelling governmental interest was not determined by this Court's precedents, the Fifth Circuit decided that giving *all* members of a racial minority a "plus" constituted improper racial stereotyping inconsistent with the underlying principles of equal protection. *Hopwood*, 78 F.3d at 945-46. That court also noted that the First Amendment, in which Justice Powell located the principles of academic freedom upon which he relied, is usually considered a shield for individuals against the state, not a sword to be used by state-run institutions to discriminate. *Hopwood*, 78 F.3d at 943 n.25.

Other courts have simply noted that this Court has not resolved the issue of whether "diversity" or "academic freedom" is a compelling governmental interest sufficient to support race preferences in admissions. *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 130 (4th Cir. 1999) ("whether diversity is a compelling governmental interest remains unresolved"); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) ("whether [non-remedial] justifications are possible is unsettled"). Many academics have also concluded that there is no rationale for the judgment 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).

District courts have also split on this question. In *Johnson v. Bd. of Regents of the University System of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), the Court considered the system of undergraduate admissions at the University of Georgia. After a number of students were admitted based solely on grades and SAT scores, the school would recalculate each student's "index" by considering some fifteen factors (including summer employment, extracurricular activities, and whether the student would be a first-generation college student), the most heavily-weighted of which was race. *Id.* at 1365; *Wooden v. Bd. of Regents of the University System of Georgia*, 32 F. Supp. 2d 1370, 1375 & n.5 (S.D. Ga. 1999). The school would then admit students based upon this revised index.

The district court concluded that Justice Powell's view as to the validity of a "Harvard plan" was *dicta* because such a plan was not before this Court; like the Fifth Circuit, it also concluded that the "use of a Harvard Plan admissions scheme for non-remedial purposes gained the support of no other Justice, much less a majority." *Johnson*, 106 F. Supp. 2d at 1369. *Cf. 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"). Considering the question open (*Johnson*, 106 F. Supp. 2d at 1371), the court reviewed subsequent cases of this Court and concluded that they disfavored rationales for racial preferences that had no temporal or other stopping point. Finding that "student diversity" was just such a rationale, was indistinguishable in practice from a goal of racial proportionalism, and stereotyped the views of racial minorities, the court held that UGA's admissions system violated Title VI and the Constitution. *Id.* at 1371-75.

In contrast, in *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), the court upheld a similar system used by an undergraduate school of the University of Michigan. Admissions counselors added twenty points to the files of members of "underrepresented" races -- the decision does not identify those races -- pursuant to a system in which those counselors also added points to files for various other factors, including geography, alumni relations, athletic ability, socioeconomic status, and leadership skills. *Id.* at 827. (An outstanding essay, for example, was worth three points. *Id.* at 829.)[2]

---

[2] While the court upheld the system described in the text, used during the 1999 and 2000 admissions seasons, it declared the systems used from 1995 to 1998 unconstitutional. Those systems created "protected" or "reserved" seats for underrepresented minorities to ensure that the college's rolling admissions system did not undermine its enrollment targets. Curiously, the court distinguished between the two admissions systems despite the fact that the defendants themselves stated that there was no substantive difference between the two. *Id.* at 827 & n.16. *Cf. Bakke*, 438 U.S. at 379 (Brennan, J., concurring and dissenting) (no basis "for preferring a particular preference program simply because in achieving the same goals that [Davis] is pursuing, it proceeds in a manner that is not immediately apparent to the public").

The court in *Gratz* recognized that "diversity in higher education, by its very nature, is a permanent and ongoing interest" and that "the need for diversity lives on perpetually." *Id.* at 823-24. Nonetheless, it reviewed the relevant cases and concluded that no case precluded the finding that diversity is a compelling governmental interest, and that, thus, "if presented with sufficient evidence regarding the educational benefits that flow from a diverse student body, there is nothing barring the Court from determining that such benefits are compelling . . . ." *Id.* at 822. Reviewing the evidence presented on defendants' motion for summary judgment, the court concluded that the evidence was compelling and that it would thus consider diversity to be a compelling governmental interest.

In addition to being an important issue, and one on which the courts have split, the issue of whether diversity is a compelling governmental interest is also key to this case. That is why *all* parties, and *both* courts below, agreed that 28 U.S.C. § 1292(b) was applicable to the order that denied plaintiffs' motion for summary judgment. That statute, of course, applies only to "controlling" issues of law as to which there are substantial grounds for disagreement, and the resolution of which could materially advance the ultimate termination of the litigation. Plainly, the question of whether "academic freedom" or "diversity" is a compelling governmental interest is such a question. Currently, this case will be remanded for a trial on whether those were defendants' actual objectives and whether the admissions system in 1994-96 was narrowly tailored to meet those objectives. That trial will be unnecessary if this Court concludes that the lower courts erred. *See, e.g., Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (hearing an appeal from interlocutory order denying motion to dismiss); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (hearing appeal from order of Fifth Circuit reversing district court order that had been certified for interlocutory appeal); *Ohio Citizens for Responsible Energy v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J.) ("certiorari review of interlocutory orders of federal courts is available, *see* 28 U.S.C. §§ 1254(1) and 1292").

C. THIS COURT CAN RESOLVE OTHER ISSUES RELATED TO THE USE OF RACE IN ADMISSIONS

Even assuming that Justice Powell's opinion in *Bakke* was the rationale for the judgment of this Court in that case, many of its points could be clarified and/or reconciled with other precedents of this Court. Among those are the following.

1. *Academic Freedom Or Diversity?* -- As noted previously, Justice Powell concluded that "academic freedom" was a governmental interest sufficient to justify the use of race preferences because it entailed a university's freedom to select its own student body. Nonetheless, he concluded that universities only had the "academic freedom" to choose "intellectual diversity," in which race could play a role, but that the university could not pursue racial diversity directly or as a goal in itself.

But academic freedom, and the First Amendment generally, protects all *ideas* equally. If racial preferences can be used to *implement* those ideas, then they should be available to implement any idea that academic freedom protects, including the idea that racial proportionalism *itself* fosters a better academic environment. Moreover, if some less-enlightened school concludes that "homogeneity," rather than "diversity," fosters better educational results -- because it lessens racial tensions, for example -- it should be able to implement that idea with racial disadvantages ("minuses") consistent with Justice Powell's vision of "academic freedom" as a justification for race-conscious decision-making. Other than Justice Powell in *Bakke*, no member of this Court has ever suggested that the First Amendment encompasses the right of state institutions to discriminate. *Cf. Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (no First Amendment right for private school that promoted segregationist views to exclude racial minorities).

Justice Powell also emphasized the widely-held nature of the belief concerning "diversity." *Bakke*, 438 U.S. at 312 (an atmosphere of speculation, experiment, and creativity is "*widely believed* to be promoted by a diverse student body" (emphasis added)); *id.* at 313 ("our *tradition and experience* lend support to the view that the contribution of diversity is substantial" (emphasis added)). But the First Amendment protects minority views, as well as majority; widely-held views, and those only believed by a few. The "academic freedom" to imitate Harvard is not the "academic freedom" our First Amendment protects.

2. *Issue of Fact or Issue of Law?* -- Closely related to the "academic freedom" issue is whether defendants must actually demonstrate the value of diversity. It seems fairly clear that Justice Powell did not think so, since there was no actual evidence by which he concluded that diversity would foster a better intellectual environment. Rather, as the quotes in the last paragraph indicate, it was sufficient that college administrators believed in these beneficial effects. *See also, e.g.*, *id.* at 314 ("[a]n otherwise qualified medical student with a particular background . . . *may* bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body" (emphasis added)).

The Ninth Circuit seemed to agree, and treated the question as one of law. As already mentioned, though, the district court in *Gratz* appeared to view the value of diversity as an open question to be determined by the trier of fact.

3. *Diversity, Racial Diversity, and Racial Proportionalism*. -- While Justice Powell's opinion in *Bakke* seemed to reject a diversity based solely on race, not all college administrators or courts have viewed it that way. *See Johnson*, 106 F. Supp. 2d at 1371 ("The record shows that UGA is plying a `diversity = proportionalism' rationale"); *Gratz*, 122 F. Supp. 2d at 819 (relying on Justice Powell's opinion in *Bakke*, University contends that it has "a compelling governmental interest in the educational benefits that flow from a racially and ethnically diverse student body"). *See also* Transcript of Oral Argument in *Gratz v. Bollinger*, 11/16/2000, p. 39 (University attorney: "I don't think there's any question but that what Justice Powell is talking about in *Bakke* is racial and ethnic diversity, not viewpoint diversity"); *id.* at 49 (same).

What "racial diversity" really means, and how it differs from the desire to have a particular proportion of a given race (or races) in the student population -- which Justice Powell roundly condemned as "discrimination for its own sake" (*Bakke*, 458 U.S. at 307) -- is unclear. This case presents this Court with an opportunity to clarify the relationship between various kinds of "diversity."

4. *Level of Scrutiny*. -- Towards the end of his *Bakke* opinion, Justice Powell asserted that, while "[a] facial intent to discriminate . . . is evident" in the program operated by the Davis Medical School, "[n]o such facial infirmity exists in an admissions program where race or ethnic background is simply one element -- to be weighed fairly against other elements -- in the selection process." *Bakke*, 438 U.S. at 318 (Powell, J.). According to Justice Powell, a "court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system" because "good faith would be presumed." *Id.* at 318-319.

Justice Powell further stated that universities

> may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process.

Id. at 319 n.53.

It is unclear why Justice Powell believed that a "plus" system -- perhaps granting "points" to members of some races, but not others, as in Georgia and Michigan -- does not evidence a facial intent to discriminate. *Cf.* App. 4a (referring to defendants' "overt racial policy"). Applicants of certain races receive an advantage, and members of other races do not. Nonetheless, Justice Powell's "presumption of legality" suggests that racial preferences in such a system would not be subject to "strict scrutiny." Indeed, the defendants in this case made precisely this argument. Rosman Statement Filed 2/25/98, Ex. C, Response to Int. No. 4 (Law School's admissions system was "race neutral" and "not subject to strict scrutiny" at all because it was in compliance with the requirements of Justice Powell's opinion).

This Court should take this case to make clear that defendants' argument, although perhaps plausibly based in some of Justice Powell's more cryptic language, is wrong. Strict scrutiny applies to all racial preferences, regardless of the form those preferences take.

5. *"Compelling" Interests*. -- This Court's more recent precedents have rejected justifications, like the "role model" justification, that have no obvious temporal or other limit. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 497-98 (1989) ("because the role model theory had no relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to `justify' race-based decisionmaking essentially limitless in scope and duration" citing *Wygant v. Jackson Bd. Of Education*, 476 U.S. 267, 276 (1986) (plurality opinion)); *Croson*, 488 U.S. at 520 (opinion of Scalia, J.). The "academic freedom" or "diversity" rationale is very much like the role model justification in that regard. It is, as the district court in *Gratz* recognized even while upholding it, "a permanent and ongoing interest." *Gratz*, 122 F. Supp. 2d at 823. *Cf. id.* ("This Court . . . is not convinced that what may be too amorphous and ill-defined in other contexts, *i.e.*, the construction industry context, is also necessarily too amorphous or ill-defined in the context of higher education").

This Court has set a high threshold for characterizing an interest as "compelling." In *Palmore v. Sidoti*, 466 U.S. 429 (1984), for example, the Court considered 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 to 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.

Professional school education is important, but it is just a step in an individual's development, whereas the "best interests of the child" encompasses a much broader view of that development. It is unclear why the "best interests of the students" should be a compelling interest while the "best interests of the child" is not.

Moreover, if diversity truly fosters ideas and learning, it should not be limited to colleges and universities. Government agencies might very well benefit from different perspectives in determining, for example, whether the economic benefits of allowing a power plant to be built in a poorer neighborhood outweigh the potential environmental hazards. If racial preferences are needed to obtain those different perspectives, such agencies would have the same justification as universities to adopt such preferences. To date, this Court has never yet endorsed a rationale that could be so broadly utilized to support racial preferences.

In short, this case would permit this Court to set forth standards for determining whether and when non-remedial interests are sufficiently compelling (if any are) to support race-conscious decision-making by government.

6. *Societal Discrimination*. -- It is now well-established that "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Shaw v. Hunt*, 517 U.S. 899, 910-911 (1996). Indeed, in *Wygant*, the "role model" theory was rejected at least in part because the absence of role model minority high school teachers was a consequence of societal discrimination. *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 274 (1986) (plurality opinion) (noting that the Court of Appeals had upheld a program of race-conscious layoffs to provide minority role models as a means of alleviating the effects of societal discrimination; reversing because "[t]his Court has never held that societal discrimination alone is sufficient to justify a racial classification"); *id*. at 276 (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness").

But, just as with the paucity of minority teachers in high schools, the paucity of certain racial groups from top tier state colleges and universities is no doubt also, at least in part, a product of the continuing effects of past societal discrimination. If rationales connected to societal discrimination are not compelling, then the diversity rationale cannot stand. If the connection to societal discrimination is not fatal, then further clarity is needed on which such connected justifications are compelling and which are not.

7. *The Application of* Marks *to* Bakke. -- Finally, the Ninth and Fifth Circuits have split on how to apply this Court's opinion in *Marks*, concerning the interpretation of splintered opinions of this Court, to *Bakke*. The Ninth Circuit concluded that Justice Powell's opinion was the "narrowest" because the Brennan concurrers "would have" adopted an even broader principle. The Fifth Circuit specifically rejected that analysis. *Hopwood v. Texas*, 236 F.3d at 275 n.66 ("We respectfully disagree . . . with the Ninth Circuit's . . . holding that Justice Powell's diversity rationale is binding Supreme Court precedent . . . With respect, . . . we do not read *Marks* as an invitation from the Supreme Court to read its fragmented opinions like tea leaves, attempting to divine what the Justices `would have' held").

More generally, most courts of appeals have held that *Marks* cannot be applied unless there is a "common denominator" among the various opinions of a splintered court. *See, e.g.*, *Ass'n Of Bituminous Coal Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 (D.C. Cir. 1998) (the "narrowest grounds" approach "does not apply unless the narrowest opinion represents a `common denominator of the Court's reasoning' and `embod[ies] *a position implicitly approved by at least five Justices who support the judgment*'" (emphasis added)); *Rappa v. New Castle County*, 18 F.3d 1043, 1056-58 (3d Cir. 1994); *United States v. Castro-Vega*, 945 F.2d 496, 499 (2d Cir. 1991); *United States v. Eckford*, 910 F.2d 216, 219 n.8 (5th Cir. 1990); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 n.5 (7th Cir. 1983).

If these courts are correct, it seems unlikely that *Marks* can be applied to the academic freedom / diversity rationale in *Bakke* because the Brennan concurrers simply said nothing about that rationale and cannot be deemed to have "implicitly" endorsed it. *Hopwood v. Texas*, 236 F.3d at 275 ("None of the [Brennan concurrers] would go the extra step proposed by Justice Powell and approve student body diversity as a justification for a race-based admission criterion").[3]

---

[3] Indeed, when the Brennan concurrers themselves tried to divine the "central meaning" of the splintered decisions in *Bakke*, they concluded that the common ground was on remedial uses of race. *Bakke*, 438 U.S. at 325 (Brennan, J., dissenting and concurring) ("central meaning" of opinions is that "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area"). That is, when the concurrers themselves stated the principle they gleaned from the splintered decisions in *Bakke*, they relied not upon the academic freedom or diversity principle, but rather their own remedial principle, modified by Justice Powell's additional restrictions.

On the other hand, if these courts are incorrect, then this Court can provide some guidance as to how to determine the "narrowest" opinion in cases like *Bakke*. The Brennan concurrers, after all, emphasized that the David Medical School's program limited its benefits to individuals who were likely the victims of societal discrimination, and excluded other members of racial minority groups. In addition, they at least questioned whether a program that led to racial minorities being represented in greater proportions than their representation in the relevant state would pass muster. *See* discussion, *supra* at -. This Court can clarify how one should take those considerations into account in determining whether the Powell or Brennan rationale was "narrower."[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

---

[4] Of course, unlike the lower courts, this Court has no obligation to consider *Marks* analysis, but can simply revisit the issues addressed in *Bakke*. *Nichols v. United States*, 511 U.S. 738, 745-46 (1994) ("We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it").

Michael E. Rosman
Counsel of Record
Hans Bader
CENTER FOR
INDIVIDUAL RIGHTS
1233 20th St., NW
Suite 300
Washington, DC 20036
(202) 833-8400

Steven A. Hemmat
Law Office of Steven A.
Hemmat, P.S.
119 First Ave. South Suite
500
Seattle, WA 98104
(206) 682-6644