IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

ALLAN BAKKE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF AMICI CURIAE

FOR THE COMMITTEE ON ACADEMIC NON-DISCRIMINATION AND INTEGRITY AND THE MID-AMERICA LEGAL FOUNDATION

JOHN W. FINLEY, JR.
Attorney for the Amici Curiae

BRASHICH AND FINLEY
501 Madison Avenue
New York, New York 10022
(212) 755-1500

Of Counsel:

MICHAEL BLINICK
JOHN CANNON
LEONARD J. THEBERGE

TABLE OF CONTENTS

AUTHORITIES

TABLE OF CASES

TABLE OF STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

ALLAN BAKKE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF AMICI CURIAE

FOR THE COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY AND THE MID-AMERICA LEGAL FOUNDATION

INTEREST OF THE AMICI CURIAE

The Committee on Academic Nondiscrimination and Integrity (CANI) is a nationwide group formed in early 1972 by faculty members from American colleges and universities, both

state and private. They were alarmed by the development of certain administrative and other practices related to university admissions and employment which they felt were in direct opposition to federal and state legislation relating to civil rights and to fair educational practices, and to the equal protection provisions of the United States Constitution. CANI is an offshoot from University Centers for Rational Alternatives, an organization of concerned scholars and teachers which from its inception in 1968 worked through its members and chapters toward the re-establishment of tranquility on American campuses, the strengthening of rational discourse as the best method of education, and in support of academic freedom which was then under attack by partisans of intolerant political orthodoxy.

During its comparatively brief existence, the Committee on Academic Nondiscrimination and Integrity has succeeded in uniting a representative cross-section of faculty members from colleges and universities all across the country.

It has brought together professionals from every discipline, women and men, blacks and whites, Christians, Jews and myriad denominations, renowned academics with many years of tenure and young graduates entering academic life. This fundamental diversity is well reflected in the composition of CANI's Steering Sub-Committee, including:

Bruno Bettelheim
Joseph Bishop, Jr.
Daniel Boorstin
Paula Sutter Fichtner
Nathan Glazer
Oscar Handlin
Gertrude Himmelfarb
Sidney Hook
Norma L. Newmark
Eugene Rostow
Paul Seabury
Thomas Sowell
Miro Todorovich
L. Pearce Williams
Cyril Zebot

Through its extended academic network of members and friends, CANI first gathered information on cases involving so-

called reverse discrimination against qualified applicants for academic positions in university admissions and employment. Many of these cases then served as the basis for complaints by other allied civic and civil rights organizations. This material was then used subsequently for the analysis of trends and the formulation of positions which CANI advanced during its presentations to the Secretary of Labor, the officials of the Labor Department's Office of Federal Contract Compliance Programs, the Secretary of Health, Education, and Welfare, the Office for Civil Rights of the Department of Health, Education, and Welfare and the officials of the Executive Office of the President. Representatives of CANI have testified at congressional hearings and at those held by such agencies as the Equal Employment Opportunity Commission and the United States Commission on Civil Rights. Representations have also been made to various regional units of HEW's Office for Civil Rights, and to local university administrations. Factual materials have also been put at the disposal of interested individual members of Congress. Furthermore, the Committee seeks to help members of the academic community who are seeking redress against discrimination.

During its inquiries and studies, the Committee on Academic Nondiscrimination and Integrity has repeatedly encountered the rapidly spreading practice of administrative imposition of overt or covert quotas for members of selected racial or ethnic groups, or women, in both admissions and the hiring and promotion of instructors at institutions of higher education. In case upon case, despite the claim of benign intent and allegiance to principles of nondiscrimination, persons whose achievements have led them to believe that they would be given the opportunity to acquire further skill or knowledge, or to use their scholarly abilities, found themselves discriminated against for no other reason than their race, ethnicity or sex.

The question of the constitutionality of the establishment of racial or sex quotas, or of discriminatory preferences for

members of selected groups without the establishment of a quota, is clearly of vital importance to members of the Committee.

The Mid-America Legal Foundation (MALF) is organized to engage in nonpartisan legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions and to provide legal representation and to assist other organizations in providing legal representation on matters of public interest at all levels of the judicial process.

These Amici believe that it is in the public interest to present the views herein expressed.

RECAPITULATION OF POSITIONS OF THE PARTIES AND THE AMICI IN OPPOSITION

Petitioner and Respondent agree that the question to be answered involves the Equal Protection Clause's pertinency to state medical school admission practices calculated in terms of race and ethnicity. Petitioner urges that the writ should be granted, in line with its argument that the California Supreme Court failed to apprehend that the Regents' admission standards satisfied both the "rational basis" and the "compelling state interest" tests.

Respondent maintains that to grant the writ would be improvident, contending that the California Supreme Court decision deprived no one of constitutional rights; that there is no divergence among state high court decisions on the substantive point; that the decision below is correct in result and in application of precedent.

The Amici in opposition allege a nonjusticiable controversy rooted in an assumption that BAKKE would not have been admitted even under the special admissions program. They also urge that Article III jurisdiction is wanting, and the existence of an insufficient record for the purposes of this Court.

QUESTION PRESENTED

CANI and MALF as Amici in support believe that the arguments against granting the writ may be satisfactorily refuted and that the writ may be granted in order to deal with the substantive issue. The sole substantive issue may be couched in terms of "the question presented":

Does the Equal Protection Clause, held to protect blacks from discrimination in state university admissions, also protect whites?

STATEMENT OF THE CASE

CANI and MALF adopt the counterstatement of the case set forth in Respondent's brief at pp. 2-20.

POINT ONE: THE WRIT SHOULD BE GRANTED

These Amici in support respectfully urge the Court to grant the writ, *although the Amici believe that the decision below should be modified* pursuant to paragraph 3, *infra,* and, as so modified, affirmed.

The writ is justified for the following reasons:

1. CANI and MALF firmly agree with Petitioner on the absolute urgency for the Court to rule now on this crucial question. The American people, as Petitioner points out, do indeed deserve an answer to this problem, and the instant case is indeed an "ideal vehicle" for settling the issue. Petition, at 12-13.

"Reverse discrimination" in student admissions is rampant throughout the United States, in undergraduate, graduate and professional schools. While a decision by the Court in this case might not be dispositive as to the legality of such discrimination by private institutions, it would certainly be persuasive authority for future rulings on that issue, in addition to settling the question of legality as to such discrimination by state-run institutions.

Many thousands of talented students who have worked hard to develop their talents are being cruelly denied their rights to self-fulfillment and to meaningful careers by admissions decisions that favor far less qualified members of arbitrarily selected minority groups, and society is being denied the benefits of all the potential contributions by these highly qualified individuals. Ironically, many of the victims of racial "reverse discrimination" are themselves members of minority groups. Opinion below, Petition Appendix A, n.16 at 19a. This widespread violation of Constitutional rights calls out for redress. The suffering of these wrongfully rejected applicants to higher educational institutions will continue until this Court makes it crystal clear that the Equal Protection Clause does not mean that some Americans are to be "more equal than" others.

And in addition, this situation—along with "reverse discrimination" in employment—has (a) caused a great deal of racial polarization, and (b) threatens to undermine the valuable concept of affirmative action, with which "reverse discrimination" is constantly confused both by the proponents and opponents of the latter.

2. While Petitioner alleges that two states' highest courts have disagreed with that of California (Petition, at 13-14), Respondent attempts to show that the New York and Washington tribunals would have nonetheless also struck down the specific quota system instituted at Davis. Brief for Respondent in Opposition, at 23-26.

However it would seem quite clear that preferential admissions in essence are favored by the other two states' high courts and in most situations would be upheld by those courts. Thus, Petitioner's description of the conflict between the state court decisions on this issue is, in essence, correct.

3. Petitioner's position is that its conduct satisfies the "rational basis" test, which it believes is applicable. But Petitioner would also maintain that even under the "compelling state interest" test, its preferential admissions scheme would

pass Constitutional muster. And that leads these Amici in support to question—in one respect—the reasoning underlying the decision below.

Petitioner alleges that the Court below misconstrued the nature of equal protection doctrine. Petition, at 14-17. CANI and MALF fundamentally reject that notion, and believe that the California Supreme Court was entirely correct in its invalidation of the discriminatory conduct of the Davis medical school. However, there are certain aspects of that Court's reasoning which disturb these Amici, because the Court's rationale leaves open the door for an institution to prove that no other means but racially preferential admissions would suffice to achieve one or more allegedly "compelling state interests"—and thus to convince a court of the constitutional validity of that school's discriminatory policies. Opinion below, Petition Appendix A, at 21a.

We can imagine no analogous ruling which would leave open the possibility of a state's ever being able to justify a program of deliberate, invidious and obviously harmful discrimination against racial minorities, and therefore we believe that no such ruling should obtain with respect to non-minorities either. Thus, these Amici respectfully urge that the rationale advanced by the California court does not go far enough to crush entirely the spectre of continued "reverse discrimination" by state-run higher educational institutions. Review by this Court is imperative in order that the juridical test set forth below can be modified, making it clear that any kind of deliberate racial discrimination by a state in this kind of selective process offends the Equal Protection Clause and cannot possibly be explained away by any conveniently self-serving arguments whatsoever, or even by a sincere (though misguided) attempt to help certain citizens (albeit at the expense, and to the great detriment of, other *completely innocent* citizens). This, of course, is an additional reason to grant the Writ.

4. Although the Equal Protection Clause of the Fourteenth Amendment is the only provision of law involved in the decision below, it would seem that the racial discrimination by Petitioner violates two Federal statutes: *First,* Title VI of the Civil Rights Act of 1964 [42 USC § 2000d *et seq.*], which prohibits racial discrimination by recipients of Federal financial assistance. Petitioner, like other American medical schools, presumably receives substantial amounts of such assistance and is thus covered by Title VI. The existence of such coverage is asserted in the Brief Amicus of National Urban League, *et al.*, at 25.

Second, 42 USC § 1981, which, since it prohibits racial discrimination in admissions to private educational institutions, *Runyon* v. *McCrary,* 427 U.S. 160, (1976), should certainly do so with respect to state-run schools. The statute was held to protect whites as well as blacks in *McDonald* v. *Santa Fe Trail Transp'n Co.,* 427 U.S. 273 (1976):

> "Our examination of the language and history of § 1981 convinces us that § 1981 is applicable to racial discrimination in private employment against white persons." 427 U.S. at ____, 49 L.Ed. 2d at 504.

Although these statutes were not brought before this Court in the Petition for Certiorari here, they are representative of congressional intent as to the norms which should be observed in situations such as the case at bar.

POINT TWO: RESPONDENT'S ARGUMENTS AGAINST THE WRIT DO NOT MEET THE ISSUE PRESENTED

These Amici in support of the writ respectfully are of the opinion that the arguments of the Respondent are affected by a very personal stake in the outcome and only to a lesser degree evince a concern for the broader issue which is the real mischief afoot.

1. Respondent maintains that review should not be granted since no one "has been deprived of constitutional rights as a result of the decision below." Brief for Respondent in Opposition at 20. But this is not true, for the reasoning of the decision below sets up a double standard by which reverse discrimination *could* be legalized eventually. *No legal rule now exists that would make it possible for discrimination against blacks or browns to become lawful if it were shown that such discrimination would have some incidental consequence allegedly favorable to society.* So the California Supreme Court's reasoning deprives whites of their constitutional right to equal protection of the laws. (The rationale underlying these assertions is set forth in Point One at Paragraph 3.) Thus it is clear that the decision below, even though it rightfully strikes down the preferential admissions scheme in question, has created an unconstitutionally discriminatory barrier to a victim of reverse discrimination challenging such practices in the future. That situation clearly satisfies the jurisdictional requirement for U.S. Supreme Court review.

2. Respondent urges that there is no real divergence in the state high court decisions on this question. These Amici in support agree with Petitioner that there is indeed a "split" in the high state tribunals that have considered this question. Despite Respondent's ingenious attempts to show otherwise, it is inescapable that preferential admissions are favored by the New York Court of Appeals, in *Alevy* v. *Downstate Medical Center,* 39 N.Y. 2d 326 (1976), and by the Washington State Supreme Court, in *DeFunis* v. *Odegaard,* 82 Wash. 2d 11 (1973). Therefore, there is indeed a conflict among the three state courts' decisions, which can only be resolved by this Court.

3. Finally, Respondent insists that the decision below is correct and in full accord with prior decisions of the U.S. Supreme Court. These Amici in support agree that the decision below was right on the merits in terms of this particular case, but maintain that the serious error in the California court's reasoning could lead in future cases to the opposite result: the

legalization of reverse discrimination wherever and whenever factual proof of the alleged need for it to achieve a supposed "compelling state interest" is shown. Thus, even in the instant situation, the Petitioner here could come back into the California courts at a later date and try to justify preferential admissions on the basis of the specific facts and societal needs allegedly obtaining at that time. In addition to the arguments set forth in Point One at Paragraph 3, we call attention to a succinct statement contained in Petitioner's Reply to Brief of Amici Curiae in Opposition to Certiorari, at 7-8:

> "The University's position throughout this litigation has been and is that it is a constitutionally valid objective for the medical school to seek to increase racial and ethnic diversity in the school and in the medical profession. The California Supreme Court accepted arguendo the validity of these objectives but held, in an unprecedented decision, that the school could not pursue them by race conscious means so long as the court could conceive of any other methods by which they might possibly be advanced."

Petitioner's summary is all too accurate, and it is precisely this blithe disregard of what should be the paramount right—the individual right to be free from racial discrimination—that constitutes reversible error by the California Supreme Court. No matter how desirable it may be, and indeed is, to "increase racial and ethnic diversity in the school and in the medical profession," these are goals which under no circumstances can be sought by official acts of racial discrimination, because the legal right to be free from discrimination—possessed in an equal degree by every American, regardless of race—has a clear and absolute priority over those goals. (Furthermore, the praiseworthy ends sought by the University can indeed be attained in ways that are not discriminatory.)

These Amici in support believe that the Fourteenth Amendment's ban on racial discrimination must remain an

immovable object which will withstand any alleged irresistible force stemming from anyone's opinion, however well-meant, about what our society's needs are. All the needs of American society, these Amici believe, will best be met under conditions of racial equality and nondiscrimination. It is the preservation of such equality, and the enforcing of such nondiscrimination, that are the ends which these Amici seek to serve by filing this brief, and urging, respectfully, that the Writ be granted.

POINT THREE: THE ARGUMENTS SEEKING DENIAL OF THE WRIT URGED BY THE AMICI IN OPPOSITION ARE SPECIOUS

Amici in opposition put forward three main arguments, all of which are based on distortion of the facts and erroneous legal analysis.

First, they allege that the requirements of the Constitution, Article III, with respect to standing to sue are not met, in that there is no justiciable harm to BAKKE because he would not have been admitted to the law school even without the special admissions program. Brief of Amici in opposition, 8-9.

But it is not at all clear that such is the case. It would seem highly possible that BAKKE would have been admitted without the racial quota system. See Brief for Respondent in Opposition, 4-13.

Even were this not so, however, it is incontrovertible that

> "Bakke came so close to admission that it cannot be demonstrated one way or another whether he would have been admitted absent the special program." Petitioner's Reply at 3.

Thus, the question of whether BAKKE would have been admitted under a non-quota regime at the medical school is too hypothetical to be allowed to have a bearing on the disposition of the case, at this point.

In addition it should be noted that the evidence from the lower court to which Amici in opposition point was gathered under an erroneously allocated burden of proof, for that tribunal required that BAKKE shoulder this load, rather than the University having to prove that he would *not* have been admitted without the racial quota.

Once the burden was, rightfully, placed on the University by the California Supreme Court, Petition Appendix 37a-38a, it obviously became one that the University simply could not meet.

And this brings us to the second major allegation put forth by Amici in opposition: that the University falsely stipulated to an inability to meet the re-allocated burden of proof in order to facilitate review by this Court. Brief of Amici in opposition, 13-19.

Actually, though, the University merely agreed that it cannot prove what the facts indubitably show it cannot prove: the notion that BAKKE would have been rejected absent the quota. It is often hard to prove a negative, and especially so where the negative in question is a rather unlikely one to begin with. Thus, the case, contrary to the assertions of the Amici, was definitely not "air tight" in favor of the University.

Also, it must be added that this whole line of argument from Amici in opposition, which attempts to insinuate a non-existent burden of proof issue into the case at this stage, is just one further instance of the double standard which those Amici seek to apply to the victims of reverse discrimination who would challenge this evil. It is difficult to imagine any of those Amici ever asserting that a black, Hispanic, Asian or female victim of discrimination in some selective process could not prevail despite a clear showing that the discrimination occurred, unless he or she could also prove that without the discriminatory acts he or she would still have been selected.

Amici in opposition urge that the University, imbued with the desire to obtain a definitive decision by this Court, engaged

in various tactics to obtain certiorari, despite an alleged lack of standing that would satisfy the mandates of Article III of the Constitution. This argument ignores the simple facts: BAKKE was rejected because of his race and sued the University in order to gain admission. He sought admission in good faith, and the University, which admitted far less qualified minority students, refused to admit BAKKE because he was white—for a *minority* student with the same qualifications would have gotten in easily.

Furthermore, the University has a legitimate interest in ending the possibility of repeated litigation by various rejected applicants to this school and its other constituent institutions. Indeed, Amici in opposition, themselves, assert (at 22) that "many similar cases are now on their way to this Court." Surely, the University's expressed desire to know where it stands on this controversial issue does not make it guilty of trying to obtain an advisory opinion from the United States Supreme Court.

The third main allegation of Amici in opposition is that "[A] fully developed record is essential to a reasoned and principled judgment in this case," Brief of Amici at 19, and that the record in the instant case is inadequate.

However, the development of the record in the manner sought by the Amici in opposition is completely irrelevant. The alleged need for it is based in the erroneous notion, evidently shared by both the Amici in opposition and the court below, that one can justify the kind of official racial discrimination at issue here by evidence showing some social benefits allegedly stemming from it. This aspect of the California Supreme Court's reasoning, we submit, should be explicitly repudiated by this Court.

With respect to the allegedly necessary evidence, we can state that the types of proof cited by Amici in opposition are either irrelevant to the question of justifying racial discrimination or reflect legitimate, even desirable, social goals

which can be met without resort to reverse discrimination and which, indeed, might well be frustrated rather than achieved by the results of such discrimination.

CONCLUSION
THE WRIT SHOULD BE GRANTED

Granting the Writ will permit this Court to cure error, which if not corrected at this propitious occasion, will ultimately result in further applications to this Court to cure a most invidious notion: that our Constitution's Equal Protection Clause is to be applied in a manner calculated to frustrate the very notion of true equality by substituting therefor, among our citizenry, gradations of right to the benefit of that notion according to the accidents of skin color, race or ethnicity.

What is at stake ultimately should resolve whether this Court will accord to the notion of equality, implicit in the Equal Protection Clause, its otherwise historically incontestible character of universality and immutability. These Amici in support of the Writ subscribe to the notion that the mere transitory conveniences of a self-motivated few are insufficient justification for the abridgement of the basic and bedrock Constitutionally defined rights of others.

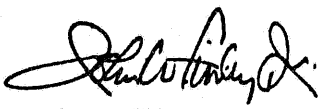
The Writ will permit this Court to examine the propriety of the decision of the California Supreme Court and apply to it the type of Constitutional evaluation process succinctly stated by Roberts, J. in *United States* v. *Butler,* 297 U.S. 1 (1936) at 62, to be:

> ". . . to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former."

While a *statute* per se is not involved, but a state university's admission scheme deriving from an apparent penitent com-

pulsion to ". . .counteract effects of generations of pervasive discrimination against discrete and insular minorities. . .", Petition at 2, that scheme is an engine of destruction with the capacity to deprive Constitutionally secured rights as efficiently as any unconstitutional ordinance.

While we welcome the specific decision of the Court below, we believe it imperative that the faulty reasoning and incorrect application of equal protection doctrine indulged in by the California Supreme Court be corrected by this Court. Otherwise the malignancy of reverse discrimination will remain with us and continue to fester.



JOHN W. FINLEY, JR.
Attorney for the Amici Curiae

BRASHICH AND FINLEY
501 Madison Avenue
New York, New York 10022
(212) 755-1500

Of Counsel:

MICHAEL BLINICK
JOHN CANNON
LEONARD J. THEBERGE
February 16, 1977.

AFFIDAVIT OF SERVICE

STATE OF VIRGINIA }
COUNTY OF } ss.:

, being duly sworn, deposes and says:

1. I am employed by
in the capacity of
, and at the request of JOHN W. FINLEY, JR., Esquire, attorney of record for the Amici Curiae, the Committee on Academic Nondiscrimination and Integrity and the Mid-America Legal Foundation, have on the day of February, 1977 served three copies of the brief of the Amici Curiae, the Committee on Academic Nondiscrimination and Integrity and the Mid-America Legal Foundation, by mailing, airmail first class prepaid and correctly addressed as follows, to counsel for the respective parties hereto at their addresses set forth below, said copies:

a. Donald L. Reidhaar, Esquire
Attorney for the Regents of the University of California, Petitioner,
590 University Hall
Berkeley, California 94720; and

b. Reynold H. Colvin, Esquire
Attorney for Allan Bakke, Respondent
c/o Jacobs, Blanekenburg, May & Colvin
111 Sutter Street, Suite 1800
San Francisco, California 94104.

Sworn to and subscribed
before me this day
of February, 1977.

NOTARY PUBLIC