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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

SUPPLEMENTAL MEMORANDUM OF AMICI CURIAE

FOR THE NATIONAL CONFERENCE OF BLACK LAWYERS;
THE NATIONAL LAWYERS GUILD; and
CALIFORNIA RURAL LEGAL ASSISTANCE, INC.

JEANNE MIRER
National Lawyers Guild
853 Broadway
New York, N.Y. 10003
(212) 260-1360

ALFRED P. SLOCUM
818 18th Street, N.W.
Washington, D.C. 20006
(202) 785-4840

RALPH R. SMITH
National Conference of
Black Lawyers
126 W. 119th Street
New York, N.Y. 10026
(212) 866-3501

RALPH SANTIAGO ABASCAL
ALBERT H. MYERHOFF
California Rural Legal
Assistance, Inc.
115 Sansome St., Suite 900
San Francisco, Cal. 94103
(415) 421-3405

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SUPPLEMENTAL MEMORANDUM OF AMICI CURIAE

The National Conference of Black Lawyers, the National Lawyers Guild and California Rural Legal Assistance, Inc., having filed a Brief Amici Curiae in the case with leave of the parties, now file the Supplemental Memorandum to apprise the Court of a development which has a clear and direct bearing on this case and which, in the opinion of *Amici,* should affect this Court's disposition of this case.

I.

SINCE THE CALIFORNIA SUPREME COURT RENDERED ITS JUDGMENT, THE CALIFORNIA CONSTITUTION HAS BEEN AMENDED IN A MANNER WHICH MAY PROVIDE AN ADEQUATE STATE GROUND AS A BASIS FOR DECISION. ACCORDINGLY, THE JUDGMENT BELOW SHOULD BE VACATED AND THE MATTER REMANDED FOR DISPOSITION ON THIS GROUND.

When the California Supreme Court entered its decision in this case, there was no provision of California law which directly and undeniably related to the disposition on the merits. Thus the state court felt obliged to construe and apply the U. S. Constitution. However, on November 2, 1976 subsequent to the California Supreme Court's decision, the Constitution of that state was amended to read in pertinent part, as follows:

> The University shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs, and *no person shall be debarred admission to any department of the University on account of race, religion, ethnic heritage, or sex.* [emphasis added]. California Const., Art. IX, § 9, Subd. F.

The amendment in question inserted the words "race," "religion," and "ethnic heritage" in the provision dealing with the admission policies of the University of California. the Petitioner in the case. As a consequence, there is now available to Respondent the possibility of state relief for the action he brought in the state court. This is the fundamental change of circumstance which to *Amici's* knowledge had not yet

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been brought to the attention of the Court. *As a result of this change in the Constitution of the State of California the judgment below should be vacated and this case remanded for further proceedings.*

The occurrence and timing of this amendment provides added and compelling support for *Amici's* contention that the Court should grant certiorari in this case to summarily vacate the decision of the California Supreme Court and remand this case for further proceedings.

In *Bell* v. *Maryland,* 378 U.S. 226 (1964), this Court refused to reach the federal constitutional question presented. The Court said ". . . a significant change has taken place in the applicable law of Maryland . . . Under this Court's settled practice in such circumstances, the judgment must consequently be vacated and reversed and the case remanded so that the state court may consider the effect of the supervening change in state law . . . ." *Id.,* at 228. This "settled practice" has developed because the Court has historically exercised its power, not only to correct errors in the judgment entered below, but also to make such disposition of the case as justice may now require. *Bell* v. *Maryland, supra; Gulf* v. *Dennis,* 224 U.S. 503, 506 (1911). To determine what justice requires, the Court has considered changes in law and in fact which have supervened since judgment was entered in a lower court. *Bell* v. *Maryland, supra; Case* v. *Nebraska,* 381 U.S. 336 (1964); *Ashcraft* v. *Tennessee,* 322 U.S. 143 (1943); *Patterson* v. *Alabama,* 294 U.S. 600 (1934); *Dorchy* v. *Kansas,* 264 U.S. 286 (1923); *Watts, Watts & Co.* v. *Unione Austriaca di Naviganzione,* 248 U.S. 9, 21 (1918).

When new facts have supervened since judgment or where there has been a change in th law of the state from which a case comes to this Court, the Court may consider the state questions thus arising and, at its option, may either decide such questions or remand the cause for appropriate action by the state courts. *Bell* v. *Maryland, supra; Missouri ex rel. Wabash Railway Co.* v. *Public Service Commission,* 373 U.S. 126, 130 (1927); *Gulf* v. *Dennis, supra.*

The change in the law of the State of California which is being brought to the attention of this Court is a change in the organic constitution of the State which has received the requisite bicameral approval and has been adopted by the voters of that state. It is thus a paradigmatic situation in which the state court should have an opportunity to interpret its own law.

It appears that a majority of the cases wherein this Court has vacated the judgment of a state court and remanded in light of a supervening occurrence have involved circumstances giving rise to an expectation that the state court would reach a result different from that which was vacated. Nevertheless, whether a different result might ensue from remand is not at all controlling and suggests a standard which has been implicitly rejected by the Court. *Reetz* v. *Bozanich,* 397 U.S. 82, 86-87 (1969). Rather than seeking to predict, influence or pre-determine the post-remand action of the state court, this Court has sought to further its twin policies of (1) fostering amiable federal-state relationships, and (2) reaching federal constitutional issues only when necessitated by the circumstances.

> Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of

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> state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. That is especially desirable where the question of state law are enmeshed with federal question . . . In such a case, when the state court's interpretation . . . may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand lest it render a constitutional decision unnecessarily. *Meridian* v. *Southern Bell T & T Co.*, 358 U.S. 639, 640 (1969).

Neither the text of the amendment in question nor the circumstances surrounding its adoption provide a basis for predicting what the California Supreme Court will do upon remand. In light of this Court's rulings, there is no need to.

In order that the state court might be free to consider the question of state law and to make proper disposition of it with a judgment informed by whatever additional insight and arguments the litigants can muster, this Court must now act as it has in the past and set aside the decision below. *Missouri ex rel. Wabash, supra; Gulf* v. *Dennis, supra.*

II.

IN LIGHT OF THE TOTALITY OF CIRCUMSTANCES SURROUNDING THIS CASE, JUSTICE REQUIRES THAT THE JUDGMENT BELOW BE SUMMARILY VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

Amici have demonstrated that the record in the case thus far is deficient in several critical respects. *Amici's* Brief, pp. 23-27. These deficiencies could provide a basis on which this Court would refuse to grant a writ

of certiorari. *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (5th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967). Moreover, even after granting the writ, the Court may review the record and find that the writ was improperly granted. *Needleman* v. *United States*, 362 U.S. 600 (1959).

While *Amici* agree that there is ample support for either course of action, the practical result of each would be to leave standing a disputed decision of the California Supreme Court. *Missouri ex rel. Wabash Railway Co.* v. *Public Service Commission*, 273 U.S. 126 (1927); *Gulf* v. *Dennis, supra.* This result is undesirable for several reasons: (1) as discussed, *supra*, it would preclude reconsideration in light of supervening state law; and, (2) it would deprive the parties of an opportunity to perfect the record and to present to the Court at some time in the near future a case on which it might render a decision on this issue of great national importance.

The consequences are not mandated by the circumstances and are not in accord with the mandate that the Court dispose of cases before it "as may be just under the circumstances." 28 U.S.C. § 2106 (1948).

In the past where the denial of review would yield results inconsistent with its mandate to do justice, the Court has acted to set aside the judgment of the state court and to remand the case for further proceedings. *Bell* v. *Maryland, supra; Case* v. *Nebraska, supra; Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1938); *Missouri ex rel. Wabash, supra.* This is particularly true where there is some reason to believe that further pro-

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ceedings can result in a better record. In such instances the Court has declared that:

> where the record . . . does not adequately show the facts underlying the decision of the state court of the federal question . . . opportunity should be given for their appropriate presentation either through amendment of the record or by further proof as the state court may be advised. *Villa* v. *Van Schaick,* 299 U.S. 152, 155-6 (1936).

The defects in the record in the instant case can be remedied. Moreover, the decision of the state court has been best described as "begging for proof." Such proof is available.

CONCLUSION

Like Justice Brennan, *Amici* realize that the federal constitutional issues raised by this case "will not disappear." *DeFunis* v. *Odegaard*, 416 U.S. 312, 350. However, *Amici* urge the Court to vacate and remand in this instance because this is not a case devoid of technical barriers to review as Petitioners have contended. The circumstances surrounding this case preclude effective review by the Supreme Court and make impossible the definitive ruling which is the holy grail of the quest which has brought the case this far. Moreover, Supreme Court review at this time is especially inappropriate in light of the supervening development now brought to the Court's attention. By affording the state court an opportunity to review its determination and to construe the now existing applicable state law, the Court would act in accordance with long-established, sound principle, would further its concern for federalism, would continue to avoid deciding con-

stitutional issues unless necessary, and would hasten the day when it can decide this matter of profound national importance.

Respectfully submitted,

JEANNE MIRER
National Lawyers Guild
853 Broadway
New York, N.Y. 10003
(212) 260-1360

ALFRED P. SLOCUM
818 18th Street, N.W.
Washington, D.C. 20006
(202) 785-4840

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National Conference of
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New York, N.Y. 10026
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(415) 421-3405

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