In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

VS.

ALLAN BAKKE,
Respondent.

RESPONDENT'S REPLY TO BRIEF OF UNITED STATES AS AMICUS CURIAE

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Respondent Allan Bakke hereby replies to the brief filed herein by the United States as Amicus Curiae.[1] As explained below, the government's brief transparently ignores the basic issue presented for decision, distorts the instant record and, incredibly, asserts that the Court ought not to decide this case. The late filing of the government's brief and the short period of time available for reply prevent us from discussing the other, more tangential, aspects of the government's position.

[1]In the interest of brevity, we refer to Amicus as "the government" and to the brief as "Brief of United States". "R." references are to the record filed in this Court.

I.

THE GOVERNMENT'S BRIEF IGNORES THE BASIC ISSUE OF ALLAN BAKKE'S EXCLUSION FROM A STATE OPERATED MEDICAL SCHOOL AS THE RESULT OF A RACIAL QUOTA ADMISSION POLICY.

The government's brief centers on the false premise that the University of California and Allan Bakke together have sought to expand this case beyond the instant record.

> "The parties have portrayed this case as an appropriate vehicle for definitive resolution of numerous constitutional questions that may arise with respect to minority-sensitive programs. . . .
>
> The record does not afford an adequate basis for the exploration of other questions. . . . At all events the present record is plainly insufficient to permit the formulation of detailed principles that would determine the constitutionality of . . . many other federal and state programs. . . ." Brief of United States at 23.

The plain fact is that there are not "numerous constitutional questions", "other questions", or "many other federal and state programs" before this Court. There is but one question, involving one program, one plaintiff, and one defendant. That question is whether the University of California may lawfully impose a racial quota to govern admission to the Davis Medical School and thereby exclude Allan Bakke from the school solely because of his race.

Bakke has not asked the Court to consider more than this single question. *See, e.g.,* Response to Application for Stay at 2, 7[2]; Brief for Respondent at 26.

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[2]The Response to Application for Stay was filed herein on November 10, 1976.

The University has taken a similar approach. *Cf.* Brief for Petitioner at 86. A decision confined to the instant record is an altogether proper resolution of this dispute for there is only one set of facts before the Court.

The trial court and the California Supreme Court both found the University's "special admission program" to be in fact a racial quota. The trial court findings read in part:

> "In each of the two years in which [Bakke] applied for admission the [University] set a predetermined quota of 16 to be admitted through the special admissions program. This special admissions program discriminates in favor of members of minority races and against members of the white race, [Bakke], and other applicants under the general admissions program. . . ." R. 388.[3]

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[3]The trial court also found that:

> "Applicants in the special admissions program are rated for admission purposes only against other applicants in this program and not against applicants under the general admissions program and are processed in part by a separate admissions committee. In each of the years in which [Bakke] applied for admission, applicants in the special admissions program were admitted whose grade-point average and test scores and over-all ratings were substantially lower than [Bakke's] and other applicants under the general admissions program who were not admitted. Under the general admissions program an applicant will not even be considered for an interview who has a grade-point average below 2.5 (on a scale of 4.0), yet in the entering class of 1973 applicants were admitted in the special admissions program with a grade-point average as low as 2.11 and in the class of 1974 with grade-point averages as low as 2.21. [Bakke's] overall grade-point average was 3.51. Some applicants were admitted under the special admissions program in 1973 and 1974 whose overall ratings were as much as 20-30 points below that of [Bakke]. . . ." R. 388.

The University did not challenge these factual findings on appeal. The highest court of California, after reviewing the record and the constitutionality of the program, commented:

> "While a program can be damned by semantics, it is difficult to avoid considering the University scheme as a form of an education quota system, benevolent in concept perhaps, but a revival of quotas nevertheless. No college admission policy in history has been so thoroughly discredited in contemporary times as the use of racial percentages. Originated as a means of exclusion of racial and religious minorities from higher education, a quota becomes no less offensive when it serves to exclude a racial majority. 'No form of discrimination should be opposed more vigorously than the quota system.' . . ." 18 Cal.3d 34, 62 (citation and footnote omitted).

The findings of fact in this case and the observations of the Supreme Court of California are not hypothetical abstractions. They rise directly from the evidence. The government, however, has decided to ignore the evidence and has proceeded to question whether there was a preferential racial quota at Davis and, furthermore, whether the quota caused Allan Bakke to be excluded from the medical school on racial grounds. Brief of United States at 71-74. The record is crystal clear on both points.

A. The Quota.

The record reveals that the medical school faculty passed a resolution in 1969 setting aside 16% of the places in each first year class for members of certain

"minority" groups. R. 159-160, 164. Initially, when the class consisted of 50 students, the "special admission committee" was charged with filling 8 of the openings. When the class expanded in 1970 to 100 places, the quota grew in direct proportion—16 of the openings were set aside. R. 164, 215-218.

The admission procedure at Davis prevented any realistic comparison between regular and special admission candidates. In fact, the special admission committee operated separately and apart from the regular admission committee. It employed a separate screening process, a separate interview process and a separate "benchmark" rating process. R. 64-66, 161-166. Once the special committee decided that a particular minority candidate would be offered a place in the first year class, it recommended to the regular committee that the person be admitted. R. 165. The regular committee routinely approved the special committee's choices. This procedure continued until the quota was filled. R. 168.[4]

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[4]Dr. Lowrey testified that the special committee "admitted" the special applicants to the medical school. R. 165. Although he noted that the special committee's selections were reviewed by the regular committee (of which he was chairman), he could not recall any specific instance in which the special committee's decisions were rejected. R. 166-167, 171. He did recall, however, only two of the special candidates who "were sent back to the [special] committee. . . ." R. 171. According to Dr. Lowrey, in one of the cases the person "had not actually taken all the required courses for admission," and in another case, "it was because he had received a less than satisfactory grade in a course which was required for admission." *Id.* These persons may have received further consideration by the special committee. R. 167-168. No evidence in the record indicates whether they were ultimately denied admission to the school.

The persons admitted under the quota were judged according to different standards—lower standards—than were applied to persons considered by the regular admission committee. Justice Douglas' observation in *DeFunis* applies with equal force to this case:

> "[T]he school appears to have conceded that by its own assessment—taking all factors into account—it admitted minority students who would have been rejected had they been white." *DeFunis v. Odegaard,* 416 U.S. 312, 331 (1974) (Douglas, J., dissenting).

The University clearly abandoned the use of its own academic criteria in administering the special admission program. The extent to which the school went in filling the quota is set forth in our earlier brief. Brief for Respondent at 9-15, 29 & n.22.[5]

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[5]As we have noted previously, the special committee departed from the school's one firm admission standard: it did not adhere to the rule that no student would be interviewed if he or she had an overall grade point average (OGPA) of less than 2.5. In 1973 and again in 1974, the special committee interviewed *and admitted* minority students to the medical school whose OGPA's were as low as 2.11 (1973) and 2.21 (1974). R. 210, 223; *see* Brief for Respondent at 11-13.

As to the Medical College Admissions Test (MCAT), upon which the school chose to rely in part in making admission decisions, Dr. Lowrey testified that the school would be hard pressed to admit an applicant who scored below the 50th percentile in science or verbal ability. R. 153-154. Nevertheless, in 1973 the minority students who entered the school pursuant to the quota *averaged* in the 35th percentile (science) and in the 46th percentile (verbal ability). In 1974 the average scores of persons admitted under the quota dropped even lower; in that year the special admittees averaged in the 37th percentile (science) and in the 34th percentile (verbal ability). R. 210, 223.

Allan Bakke, who was barred because of his race from competing with the quota applicants, had an OGPA of 3.51 and MCAT scores in the 97th percentile (science) and in the 96th percentile (verbal ability). R. 239.

Despite this overwhelming record, the government curiously asserts that "it is not clear what the [trial court] mean by 'quota.'" Brief of United States at 69. The statement cannot be taken seriously in light of the foregoing evidence. The suggestion that the setting aside of these 16 places is a "benign goal" simply deprives language of its plain meaning.

B. Bakke's Exclusion on Racial Grounds.

The government feigns an inability to comprehend that Allan Bakke was excluded from the Davis Medical School solely because of his race. That fact, however, stands out on the face of the record.

Throughout the history of the Davis Medical School, not a single non-minority person has been admitted to the school through the special admission program, although 245 "white economically disadvantaged" persons so applied during the two years in question. R. 217-218. Indeed, in 1974, the second year in which Allan Bakke applied, the question on the school's application form which triggered preferential treatment under the quota asked: "Do you wish to be considered as a minority group applicant?" R. 236. The trial court found as a matter of fact that non-minority persons such as Bakke were barred from participation in the special program. R. 387-388. The University did not challenge that finding on appeal. 18 Cal.3d at 44.

Allan Bakke has contended throughout this litigation that he would have been admitted to the Davis Medical School had there been no quota. In its Petition for Rehearing filed with the California Su-

preme Court, the University conceded that it could not bear the burden of proving otherwise. R. 487-488. On that basis, the California Supreme Court modified its original opinion and directed that Bakke be admitted to the medical school. 18 Cal.3d at 64.[6]

C. The Government's Brief Concedes That Racial Quotas Are Unlawful.

The government's pretense that the decision below should be reversed is truly amazing, particularly given the government's statement that the Equal Protection Clause "protects all persons without regard to race. . . ." Brief of United States at 51-52.

> "The United States has undertaken to foster the principle that race itself is unrelated to merit or qualification, and to discourage the belief that race is generally a legitimate basis for distributing opportunities. To do otherwise would risk encouraging divisiveness and political organization along racial lines, emphasizing the importance of race and perpetrating thinking in racial terms. Moreover, it would risk reverting to the very thinking that has in the past resulted in invidious discrimination—the consideration of racial stereotypes to the exclusion of individual characteristics." Brief of United States at 51.

Could the government have had any better case in mind?

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[6]The modification initially appeared in the official advance sheets at 18 Cal.3d 252b. It appeared separately from the California Supreme Court's full opinion and was so cited in our previous brief on the merits. *See* Brief for Respondent at 1. The modification has since been incorporated into the opinion of the court below and presently appears in the bound volume of California Reports. *See* 18 Cal.3d at 64.

In its discussion of "affirmative action", the government suggests that the civil rights statutes empower a state university to adopt and administer some form of special admission program. Brief of United States at 33-37. The discussion, however, is flawed by the noticeable failure to quote the express language of Title VI of the 1964 Civil Rights Act. That provision spells out a flat prohibition against racial discrimination:

> "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." 42 U.S.C. § 2000d.[7]

The affirmative action regulations contained in the appendices to the government's brief further support the rule that racial quotas are illegal. Appendix D, for example, states in part:

> "Any system which requires that considerations of relative abilities and qualifications be subordinated to considerations of race, religion, sex or

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[7]Bakke pleaded Title VI as an alternate ground for relief in his complaint. R. 1-5. The University, likewise, relied upon this provision in its cross-complaint for declaratory relief. R. 24-32. The trial court expressly ruled that:

> "The [University] by use of the special admissions program, [has] discriminated against [Bakke] by reason of his race, and in the use of a quota in favor of certain minority racial or ethnic groups, thus violating [Bakke's] rights under the Fourteenth Amendment to the United States Constitution, Article 1, Section 21 of the California Constitution *and the Federal Civil Rights Act* (42 U.S.C. §2000(d)). . . ." R. 390 (emphasis added).

The California Supreme Court affirmed, relying exclusively on federal constitutional grounds. 18 Cal.3d at 48, 62-63.

> national origin in determining who is to be hired, promoted, etc., in order to achieve a certain numerical position has the attributes of a quota system which is deemed to be impermissible under the standards set forth herein." Brief of United States at 11A.

The logic of the government's legal position in this case seems to be that all persons are entitled to the same degree of equal protection and that preferential racial quotas such as the one at Davis are unlawful. Why, then, is the government unwilling to state such a position openly and on the record?

Finally, and with great disappointment, we note that the United States does not see fit to discuss Allan Bakke's individual rights or his exclusion from the Davis Medical School. Apparently the government is not interested in these crucial aspects of the case. This is ironic indeed, for the complaint Bakke filed with the Yolo County Superior Court—the pleading which commenced this action—alleged that he *personally* had been invidiously discriminated against because of his race. R. 1-5. It is that act of discrimination, rather than some academic essay, which remains at the heart of this lawsuit.

II.

THE GOVERNMENT'S BRIEF DISTORTS THE RECORD IN ASSERTING THAT THIS CASE SHOULD BE REMANDED.

We have already discussed in some detail the central question presented for decision and the govern-

ment's assiduous attempt to evade it. Unfortunately, the government also has distorted the factual record of the case. Relying upon several irrelevant matters, the government suggests that the opinion below be vacated and the case remanded for "further proceedings". Brief of United States at 60-74.

The government specifically questions (1) the evidence regarding interaction between the regular and special committees, (2) why Asian-Americans were included within the preferential quota, and (3) how race was used by the University, and why. Brief of United States at 68-71.

All of these matters are inconsequential to the resolution of the legal question presented by this case. The issue is Allan Bakke's exclusion from the medical school. The degree of interaction between the regular committee and the special committee, fully explored above, does not alter the ultimate fact—which stands uncontested on the record—that Allan Bakke was barred from competing for the 16 quota places solely because of his race and, as a result, was barred from admission to the school itself. 18 Cal.3d at 44, 64.

The government also argues that some possible uncertainty as to the reason for the inclusion of Asian-Americans in the quota is an appropriate ground for remand. We are at a loss to understand how this becomes a dispositive fact. Would Bakke have been less discriminated against if the places awarded to Asian-Americans under the quota had been awarded to Blacks, Chicanos or American Indians? Would not the result as to Bakke be precisely the same?

The government further questions how race was used, and why. The answer is simple. Race was used to enable members of certain groups to qualify for quota admission and, whatever the school's motivation, the result of that procedure was to keep Bakke out of the competition for the quota places.

The issues raised in the government's brief are not matters of substance. They are only desperate attempts to find some trap doors in the record. It does not matter that these secret escape hatches are only a fiction. It is sufficient that they seem to fulfill the government's daydream: the fantasy that they will magically open, and through them the government's political problems will miraculously disappear.

Thus the government's brief is a make-believe effort to avoid the direct question at hand. Perhaps the University, in contrast, best stated the realistic situation in its Petition for Writ of Certiorari:

> "Both the majority and the dissenters in *De Funis* recognized that the Court would soon have to resolve the fundamental issue presented in that case when confronted with a case devoid of technical barriers to review. This is precisely that 'next case', for it raises unavoidably the same fundamental and urgent issues of constitutional law. . . ." Petition for Certiorari at 13.

CONCLUSION

The government pursues the delusion that it can persuade the Court not to decide this case. To that end, the government has fancifully seized upon a

number of minute and irrelevant factual details. In so doing, the government, turning away from reality, has ignored the legal issue that surrounds the University's quota system and its exclusionary impact upon Allan Bakke.

As the foregoing discussion makes clear, there is no foundation whatever to the government's position. What is to be gained by such reverie, other than the hope of sidestepping the controversy and uncertainty that pervade this issue?

As the University itself has pointed out:

> "The fundamental issues raised demand national resolution, and demand it now, by the only Court that is empowered to give a uniformly applicable and authoritative answer." Petition for Certiorari at 14.

Respectfully submitted,

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October 5, 1977.