# In the Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-811**

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
*Petitioner,*

VS.

ALLAN BAKKE,
*Respondent.*

## Brief of The Black Law Students Association at the University of California, Berkeley School of Law as Amicus Curiae

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### INTEREST OF THE AMICI

The amici are members of the Black Law Students Association at Boalt Hall. This organization consists of approximately eighty students who attend Law School at the University of California at Berkeley. The Black Law Students Association works to provide legal services for the Black community; to actively encourage minority students to broaden and pursue their professional goals; and to assist the entire process of minority matriculation into law school. The organization is also actively involved in direct recruitment of Black students from undergraduate institutions as well as the distribution of information regarding admissions.

The interest of the amici is based on the inevitable impact that this case will have on the lives and careers of all Black students who are considering professional careers. Although many organizations have filed briefs as amicus curiae, a student voice is conspicuously lacking. Amici have neither the desire nor resources to address a number of varied issues already being given adequate concentration in a number of other briefs. This brief, filed with the consent of the parties, will focus on the qualifications of minority applicants in an attempt to protect the professional needs and further the educational interests of those groups likely to be most adversely affected by the termination of special admissions.

This case arises because of Allan Bakke's assertion that he was "more qualified" for the study of medicine than the 16 students admitted under the Special Admissions Program. As students involved in professional education, amici are keenly aware of both the invalidity and racial bias of present standards used to determine qualifications. These fatal shortcomings of the Medical College Admission Test (MCAT), which is a major criterion for admission, were not considered below. It is the purpose of this brief to present evidence in support of the contention that this test (just like the Law School Admission Test used for admissions to law school) is biased against minorities and encourages an unwarranted assumption that minorities are "less qualified" for professional careers.

The California Supreme Court avoided discussion of the possible bias in the MCAT because neither Bakke nor the University raised the issue at trial. It is the acceptance of these preadmission tests as indicators of qualification which allows Bakke to make a claim of being "more qualified" than minority students. Therefore, amici feel that proof that

these tests are biased against minority candidates to professional schools is crucial to a fair determination of the case. Furthermore, evidence will be offered to demonstrate that, notwithstanding MCAT score differentials, minority students do perform as well as majority students once admitted.

Amici fear that the upholding of the California Supreme Court decision will lead to a drastic reduction in the number of Black students attending law schools. Although Blacks comprise approximately 12% of the American population, Black lawyers account for just over 1% of the total number of attorneys. Professional schools face a situation in which an abundance of qualified applicants apply for a limited number of places. Special Admissions Programs have been instituted in such schools in an attempt to assure adequate minority representation. Without these programs, minority groups will continue to be systematically excluded from these professions and minority communities will remain critically underserviced. It is with this concern that amici file this brief in support of the Special Admissions Program of the University of California at Davis Medical School.

## SUMMARY OF ARGUMENT

I. The court below found the Davis admission program unconstitutional because it did not provide the equal protection of the laws to rejected majority candidates who were "better qualified" than accepted minority students. The court was invited to assume, and erroneously so, that minority candidates were "less qualified" and therefore in need of preference. Adequate evidence bearing on applicants' qualifications was not entered into the record to test this assumption. A thorough review of candidates' qualifications would show minority students to be equally quali-

fied to study medicine as majority students. The court below, then, reached a momentous, erroneous, constitutional decision without a sufficient factual basis.

One of the major factors in the Davis admission process was a candidate's four scores on the Medical College Admission Test (MCAT). This test predictably makes minority candidates appear "less qualified" because it is biased in favor of white middle class culture. In contrast to the biased MCAT, majority and minority students would appear equally qualified on the basis of their undergraduate grade point averages (UGPA) and their personal qualities elicited during an unbiased interview. The bias in the MCAT is particularly invidious because the test is not demonstrably related to performance as a medical student or a physician. In contrast the UGPA is more predictive of performance as a medical student, and personal qualities are more relevant to performance as a physician.

II. This Court has required that racial minorities be admitted to professional schools without prejudice due to their race, *Sweatt v. Painter,* 339 U.S. 629 (1950), and has guaranteed racial groups the opportunity to learn and compete in integrated schools beginning in elementary grades, *Brown v. Board of Education,* 347 U.S. 483 (1954). The bias in standardized tests, which law students also face in the Law School Admission Test (LSAT), see Appendix, should not thwart that goal. The full realization of that goal in contemporary America still requires that a race-neutral admission process must be race-conscious. Race-consciousness does not involve a preference for racial groups, but seeks to avoid racial discrimination which could otherwise occur. Since there exist reasons to be race-conscious in evaluating candidates to medical school and since the court below prohibited the consideration of race

during admission committee deliberations without considering those reasons for race-consciousness, this Court should reverse the decision below.

## ARGUMENT

### I. The Proceedings Below Were Fatally Flawed Because of the Unquestioned Assumption That Minority Students Admitted to Davis Medical School Were "Less Qualified" Than Majority Candidates Refused Admission.

The relative qualifications of majority candidates refused admission and minority candidates accepted for medical study is central to the decision reached below. In the words of that court: "the question we must decide is whether the rejection of better qualified applicants on racial grounds is constitutional." 18 Cal.3d 34, 48. The posture of the case requires the comparison of groups, not individuals. Nevertheless, there is no evidence bearing on the relative qualifications of rejected majority candidates and accepted minority candidates. The record discloses the qualifications of only one rejected majority candidate—Allan Bakke. The only other evidence available in the record relates to *accepted* majority and minority candidates. From this evidence, the court concluded that a program harming rejected majority candidates existed and remanded the evaluation of Mr. Bakke's own qualifications to the trial court. This brief will prove that minority students were justifiably admitted to the Davis Medical School on the basis of their competitive qualifications. The proof will depend on published research and corroboration from the evidence available in the record, with the understanding that the force of the corroboration would be stronger if the truly relevant evidence of the qualifications of rejected majority candidates were available.

**A. LITTLE EVIDENCE APPEARS IN THE RECORD ABOUT THE QUALIFICATIONS OF STUDENTS.**

Each candidate interviewed at Davis received a "benchmark score" from several raters. The "benchmark scores" of candidates heavily influenced the admission process. However, there is no conclusive evidence about the average "benchmark scores" of majority[1] and minority students, and no evidence about the validity of the MCAT as a predictor of medical school performance or the practice of medicine. There was no attempt to show the effects of racial background on MCAT scores.

The sparse record on this crucial issue of qualifications resulted because the University did not perfect a proper record. There have been ample indications that members of the judiciary consider evidence of biased testing to be crucial to the just resolution of lawsuits challenging Special Admissions Programs, *DeFunis v. OdeGaard*, 416 U.S. 312, 336 (1974) (Douglas, J., dissenting); in the court below, 18 Cal.3d 34, 81-85 (Tobriner, J., dissenting). Nonetheless, Universities defending Special Admissions Programs have not included evidence of test bias in the record.[2] The court

1. Since only "disadvantaged" minority students were considered in the Special Admissions Program at Davis Medical School, there were 15 minority students in 1973 and 10 in 1974 admitted through the regular admission process (CT 174, 177). However, since the relevant consideration is between accepted minority students evaluated in the Special Admissions program and rejected majority candidates, this brief will speak of the cognate evidence comparing regularly and specially admitted students as indicative of majority and minority qualifications.

2. MR. JUSTICE DOUGLAS: Mr. Attorney General, when I was teaching law many years ago, I discovered to my consternation that these tests, these so-called tests, had built-in racial bias. Is there any finding in this record as to your test?

MR. GORTON: There is no finding in this record, Mr. Justice Douglas, because neither party wished even to bring that subject up. Obviously Mr. DeFunis would not make that claim, and the University of Washington did not attempt in court to prove that it engaged in previous racial discrimination. *DeFunis v. OdeGaard*, oral argument in the United States Supreme Court, February 26, 1974 in *DeFunis versus OdeGaard and the University of Washington*, vol. III at 1339 (A. Ginger, ed. 1974).

below did not consider the possibility of test bias simply because there was no such evidence in the record, 18 Cal.3d 34, 60. With no evidence in the record relating to qualifications it was an error to decide the issue.

### B. THE COURT BELOW SHOULD NOT HAVE CONCLUDED THAT REJECTED MAJORITY CANDIDATES WERE MORE QUALIFIED ON THE BASIS OF "BENCHMARK SCORES."

Candidates granted an interview at the Davis Medical School were assigned a "benchmark score" which, with infrequent exceptions, controlled the ultimate decision to admit students (CT 158-159). These "benchmark scores" were combined numerical ratings from five or six admission committee members, each of whom rated a candidate on a scale of 100 points after reviewing the application form, letters of recommendation, interview summary, MCAT scores, undergraduate grade point averages (UGPA), as well as considering the motivation, character, imagination and the type and locale of practice anticipated of each candidate, 18 Cal.3d 34, 41.

Crucial as these "benchmark scores" were to the admission process and are to the determination of the relative qualifications of accepted minority candidates and rejected majority candidates, the only named individual whose "benchmark score" appears is Allan Bakke.[3] There is no indication of any minority scores given in 1974. The only reference to minority scores given in 1973 is a vague recollection by the Dean of Admissions that they "average probably about ten to 30 points below" the 468 which Mr. Bakke received (CT 181). The range of minority "benchmark scores" is not indicated. At least one majority candidate was

3. In 1973, Mr. Bakke received a "benchmark score" of 468 out of 500 (CT 181). In 1974, he received a score of 549 out of 600 (CT 185).

admitted with a "benchmark score" sixteen points below the 468 of Mr. Bakke (CT 181). Thus, some minority students accepted had higher "benchmark scores" than some accepted majority students.

Furthermore, whatever "benchmark scores" actually were assigned, they should not serve as the basis for a color-blind admission process. A variety of information, much of it completely subjective, formed the basis for these scores. Raters were given no written instructions about combining this information. At least two of the factors have a potential for a racially discriminatory impact and therefore affect the raters' perceptions of the qualifications of minority candidates even if the University sought to avoid a racially discriminatory result.

The first biasing factor is the personal interview of candidates. These interpersonal sessions were unstructured and the interview summaries were unstandardized (CT 155). There is a substantial potential for both the debilitating influence of racial prejudice on the rapport between candidate and interviewer and the injection of personal biases by interviewers into their summaries. In Title VII, 42 U.S.C. 2000e et seq., as amended, where such subjective evaluations have been the basis for a hiring process and resulted in minority applicants appearing less qualified than majority candidates interviewed by majority interviewers, a *prima facie* case of discrimination is established, *U.S. v. Hazelwood School District,* 534 F.2d 805, 812-814 (8th Cir. 1976); *Rowe v. General Motors,* 458 F.2d 348 (5th Cir. 1972).[4] The court below erred in assuming no discrimination

4. See also Executive Order 11246, as amended, which says that "where there exist data suggesting that such unfair discrimination or exclusion of minorities . . . exists, the contractor should analyze his unscored procedures and eliminate them if they are not objectively valid." 41 C.F.R. § 60-2.24 (d) (3).

against minorities occurred when the procedure used at Davis caused minority candidates to seem "less qualified."

The second biasing factor is the MCAT. The test scores of each candidate were available to each rater. Their seeming objectivity heavily influenced raters in assigning unequal ratings to different candidates.[5] However, a critical review of published research indicates that the MCAT is not a valid indicator of performance as a medical student, an intern or resident, or a practicing physician. Compounding this problem, there is an unjustified racially discriminatory impact embodied in these test scores. Thus, heavy reliance on MCAT scores made candidates from different racial backgrounds seem unequally qualified without justification.

### C. THE MEDICAL COLLEGE ADMISSION TEST (MCAT) SCORES DO NOT IDENTIFY MORE QUALIFIED STUDENTS.

There is a significant gap in the average MCAT scores of majority and minority students accepted at Davis Medical School.[6] This gap serves as a barrier to minority admission and made those minority students admitted seem "less qualified" than majority students. First, students not considered "disadvantaged" had to present UGPAs above 2.5 and also provide "very positive" evidence to offset low

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5. A statistical study of the factors ultimately affecting acceptances among the 1972-1973 applicant pool to Davis Medical School concluded, "It is apparent that grades as measured by G.P.A., MCAT scores, (especially science MCAT score) and age of applicant were the most important factors determining whether an applicant was accepted or rejected. J. Baumer, *Summary of the Results of the Study on the Subjective and Objective Characteristics of Applicants to the U.C.D. School of Medicine,* 25-26 (unpublished).

6. In 1973, the average percentile rankings of majority students on the four MCAT subtests were 81 Verbal, 76 Quantitative, 69 General Information, 83 Science; for minority students: 46, 24, 33, and 35. In 1974, the average majority student percentiles were 69, 67, 72, and 82; for minority students: 34, 30, 18, and 37.

MCAT scores before being interviewed (CT 153). Since minority candidates are more likely to have low MCAT scores, "nondisadvantaged" minority students were less likely to be interviewed despite competitive UGPAs. Second, those minority students granted an interview were given a "benchmark score" which largely reflected MCAT scores. Thus, the record makes minority students appear much less qualified because of the seemingly objective MCAT. Yet the MCAT does not "bear a demonstrable relationship to successful performance" in medical school or as a physician, *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The MCAT should justify neither rejecting minority candidates nor disparaging the qualifications of those minority students accepted.

There is a considerable body of literature, not included in the record developed by the University, which searches for evidence that the MCAT predicts medical school or physician performance and fails to find such evidence.[7] Some of the more significant research findings are discussed below.

A total of 49 students were admitted to the University of Rochester School of Medicine between 1949 and 1962 with MCAT scores significantly below the typical students. The gap in MCAT scores was similar to that apparent at Davis Medical School.[8] Nevertheless, 92 percent of the low-MCAT

7. This has already led to one revision in 1962 of the original MCAT developed in 1946, Erdmann, "Editorial, Separating wheat from chaff: revision of the MCAT," 47 J.Med.Ed. 747 (1972), and will result in another revision in the immediate future, 18 Cal. 3d 34, 84-85. (Tobriner, J., dissenting).

8. The gaps in MCAT scores between the typical student and the low-MCAT students (not identified by race) were 142 points on the Verbal subtest, 87 on Quantitative, 110 on Modern Society (now called General Information) and 124 on Science.

students graduated from medical school, compared to 93 percent of the typical students, Bartlett, "Medical school and career performances of medical students with low Medical College Admission Test scores," 42 J.Med.Ed. 231 (1967).

A study of the performance of 400 students from 4 classes of students at the Harvard Medical School compared MCAT verbal and quantitative ability subtests with medical school grades. There were minimally significant statistical correlations in only a few instances and no statistically significant results when a single class of 100 students was compared, Funkenstein, "Current problems in the Verbal and Quantitative Ability subtests of the Medical College Admission Test," 40 J.Med.Ed. 1031 (1965).

A study reported in 1963 found a statistically significant correlation between the MCAT science subtest and academic grades in only 6 of the 11 medical schools studied, Peterson, Lyden, Geiger, and Colton, "Appraisal of medical students' abilities as related to training and careers after graduation," 269 New Eng.J.Med. 1174 (1963).

A study of 1088 students from 14 classes at the University of California School of Medicine in San Francisco, compared MCAT subtest scores and medical school grades. Despite a wide variation in MCAT scores among students, there was virtually no relationship between those scores and medical school grades.[9]

A study in 1961 by the Association of American Medical Colleges, the owners of the MCAT, generally showed higher MCAT scores were associated with higher medical school

9. The range of scores on subtests was considerable, running from approximately 320 to 800 on a scale of 200 to 800. The correlations were: MCAT verbal .04, MCAT quantitative .15, MCAT science .13 (a perfect correlation would be 1.00), Gough, Hall and Harris, "Admissions procedures as forecasters of performance in medical training," 38 J.Med.Ed. 983 (1963).

grades. The study was "exploratory in nature and limited itself to small groups at the extreme ends of the MCAT scale" and the findings were equivocal enough that "a number of students in the low group not only made regular progress through medical school, but also made excellent grades while in school," Association of American Medical Colleges, Division of Basic Research, "Medical school performance of high and low MCAT students," 36 J.Med.Ed. 1733 (1961).

A 1972 study found that higher MCAT scores were associated with lower grades in the basic science courses at the University of Kentucky College of Medicine, Hale and Lerner, "The characteristics and performance of medical students during preclinical training," 47 J.Med.Ed. 446 (1972).

Another study found that higher undergraduate grades, higher MCAT scores and higher clinical performance were related. Nevertheless, the authors concluded with the observation that: "As one would expect, an emphasis on MCAT scores and premedical GPA's seem to systematically *unselect* with reference to such a criterion as Humanism," Korman, Stubblefield and Martin, "Patterns of success in medical school and their correlates," 43 J.Med.Ed. 405 (1968) (emphasis in original).

This observation is borne out by studies which find that students in clinical situations who were highly rated actually had lower MCAT scores than students rated less effective as clinical students. Similar results occur in comparisons between MCAT scores and performance as a physician.

An analysis of the clinical ability of 50 third-year students at the Ohio State University College of Medicine found that high MCAT science scores were related with lower ratings of clinical ability, Turner, Helper and Kriska, "Predictors of clinical performance," 49 J.Med.Ed. 338 (1974).

A study of 174 graduates from the University of Utah College of Medicine between 1955 and 1959 found that higher MCAT scores were associated with lower performance as an intern, Richards, Taylor and Price, "The prediction of medical intern performance," 46 J.Appl.Psychol. 142 (1962).

A review of the performance of 180 physicians in a U.S. Public Health Service Hospital from 1960 to 1964 showed higher MCAT scores related to lower supervisory ratings of physician performance, Howell and Vincent, "The Medical College Admission Test as related to achievement tests in medicine and to supervisory evaluations of clinical performance," 42 J.Med.Ed. 1037 (1967).

Finally, George H. Lowry, Associate Dean, Student Affairs and Chairman of the Admissions Committee at the School of Medicine, University of California, Davis, wrote in a recent newspaper article, "I wholeheartedly agree with the comments made concerning the uselessness of grades and MCAT scores in deciding the applicant's potential performance as a physician." "Dean Lowry on Med Admissions," Advocate-Borborygmi, April 14, 1975.

These studies indicate that the MCAT is, at best, a very poor indication of a candidate's qualifications to study or practice medicine. Indeed, if an admission committee were to follow literally the implications of studies relating MCAT scores to physician performance it should prefer candidates with lower scores. Assertions that candidates with higher MCAT scores are more qualified to pursue a medical career are unsupported by available research. The court did not consider these findings and the court had no other evidence before it to justify its conclusion that minority candidates were less qualified. The comparison of candidates from different racial groups on the basis of MCAT scores is

particularly unjustified because there exists persuasive evidence that these scores also carry with them a disparate racial impact.

Evidence of racial bias in the MCAT is relevant to the factual issue of whether minority students are less qualified than rejected majority candidates. The evidence is not cited to suggest a legal conclusion that the University has discriminated in the past by relying on MCAT scores to admit students. Likewise, the Court is not being asked to actively intervene in the University's admission process to increase the number of minority students admitted. Such judicial activity on the basis of the Fourteenth Amendment to the Constitution would be forthcoming only after a showing that the University was intentionally discriminating against minority candidates by relying on the MCAT scores, *Washington v. Davis,* 96 S.Ct. 2040 (1976). Instead, this evidence is being offered to justify the voluntary actions of the University in evaluating candidates on factors other than MCAT scores.

The racial and cultural bias in the MCAT is evident to most candidates taking the test.[10] Indeed, the history of the development of the MCAT makes it quite probable that the test would reflect white middle class culture. Bias is introduced into a test whenever a test is normed on one group and used to evaluate members of another group, H. Averch, S. Carroll, T. Donaldson, H. Kiesling, & J. Pincus, *How Effective is Schooling?* 22 (1971). This means that "any nationally normed test primarily reflects the characteristics of white-middle-class America, simply because there are so

10. Of those students surveyed after taking the MCAT, 61 percent agreed that the "content is oriented toward white, middle-class culture," Baird, "What Graduate and Professional School Students Think About Admissions Tests," Measurement in Education, Spring 1977 at 3, Table 1.

many of them." *Id.* (sic). The MCAT was normed on students taking the test in 1951, *The Seventh Mental Measurements Yearbook,* 1511 (O. Buros, ed. 1972), at a time when there were virtually no minority candidates for medical school. The bias is likely to be even larger than for a test normed on a representative sample of the population, where minority representation would still be proportionately small.

Research about the performance of minorities on the MCAT and in medical school evidences the bias on the MCAT. A comparison of the average MCAT scores on the four subtests reveals a gap of 105 to 155 points between black and white students admitted in 1970, Johnson, Smith and Tarnoff, "Recruitment and Progress of Minority Medical School Entrants, 1970-1972," 50 J.Med.Ed. 713, 755 Table 11 (1975). Thus, the average minority student appears much less qualified than competing majority students on this invalid predictor of performance. The only statistical study of which we are aware comparing the nationwide performance of minority and majority students in medical school and on the MCAT indicates that the large performance gap between racial groups on the MCAT is not reflected by a similar performance gap in medical school. The study was conducted by the Association of American Medical Colleges and concludes that the MCAT has a modest ability to predict success in the first two years of medical school when candidates from a single racial group are compared. Thus, white medical students who complete the first two years of medical school on schedule have somewhat higher MCAT scores than those who fail. Likewise for black medical students. However, when candidates from different racial groups are compared, the MCAT's predictive powers vanish. The author found:

> for whatever reasons, the "black" group can "succeed" in medical school with lower MCAT scores than the "white" group, where success is narrowly defined as uninterrupted progress through the first two years in medical school—(the *promoted* group). For example the black *promoted* group had lower MCAT averages than the white *dismissed* group. Feitz, "The MCAT and Success in Medical School," paper presented at the Annual Convention of the American Educational Research Association, Chicago, Illinois, 1974. (emphasis in original).

Thus, in concluding that accepted minority students were "less qualified" than rejected majority candidates, the court below not only accepted scores on the MCAT as indicative of relative qualifications when no such inference was warranted, but also relied on a test whose history, evident cultural bias and statistical properties made minority candidates the predictable underdogs in the qualification comparisons. Instead the court should have concluded that the University was avoiding racial discrimination, not inflicting it, when it admitted minority candidates with lower MCAT scores. The reluctance of the University to present evidence for such a conclusion should not excuse the lower court's ignoring such evidence presented by *amici,* 18 Cal.3d 34, 60, and conjuring reverse discrimination instead.

**D. THE CONSIDERATION OF UNDERGRADUATE GRADE POINT AVERAGE, A MORE VALID PREDICTOR OF AN APPLICANT'S PERFORMANCE, DOES NOT SUSTAIN A CONCLUSION THAT MINORITY STUDENTS ARE LESS QUALIFIED.**

It is often assumed that minority candidates for medical school have inferior qualifications on "objective" criteria such as the MCAT and UGPA. However, the record below and published research indicate that comparisons among candidates on the basis of UGPA does not produce signi-

ficant differences, much less differences of constitutional significance, between candidates of different racial backgrounds. Moreover, insofar as UGPA is justifiably relied upon to predict performance as a medical student or physician, the prediction is more valid than prediction based on MCAT scores. Thus, UGPA, a factor which reflects motivation, perseverence and sustained competition among candidates, affords a more predictive, less discriminatory indicator of "qualifications" than the MCAT.

The record indicates that there was a wide range in UGPAs among accepted majority students.[11] UGPA was not an overwhelming determinant of admission. This is a reasonable reliance on UGPA, consonent with available research, see D. Hoyt, "The Relationship between College Grades and Adult Achievement: A Review of the Literature," American College Testing Program, Research Report, no. 7 (1965). The Special Admissions Program gave a similar weight to UGPAs of minority students, since the range of UGPAs is similar to the range among majority students.[12] More importantly, the range of UGPAs within racial groups is considerably larger than the difference in average UGPA between racial groups.[13] Thus, the essential conclusion of the court below—that less qualified minority students were admitted in preference to more qualified majority candidates—cannot be supported by referring to

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11. In 1973, majority students had UGPAs ranging from 2.81 to 3.99. In 1974, the range was 2.79 to 4.00 (CT 210, 223).

12. In 1973, minority students had UGPAs ranging from 2.11 to 3.76. In 1974, the range was 2.21 to 3.45, (CT 210, 223).

13. In 1973, the difference between the highest and lowest UGPA of majority students was 1.18; in 1974 it was 1.21. For minority students, the difference in 1973 was 1.65; in 1974 it was 1.24. In contrast, the average UGPA for majority students in 1973 was only .61 above the average UGPA for minority students; in 1974 it was .67 (CT 210, 223).

the groups' comparative UGPAs. Indeed, in the individual case of Allan Bakke, his UGPA was higher than the average majority student accepted in both 1973 and 1974, (CT 321). To ignore this fact and instead focus on his qualifications vis-a-vis minority students is itself a racist comparison. A careful consideration of the evidence would show that UGPA is a less discriminatory indicator of qualifications than is the MCAT.

The UGPA is also a more valid predictor, although a modest one, of medical school and physician performance than is the MCAT, see Conger and Fitz, "Prediction of success in medical school," 38 J.Med.Ed. 943 (1963); Gough, Hall and Harris, "Admissions procedures as forecasters of performance by medical students," 38 J.Med.Ed. 983 (1963); Richards, Taylor and Price, "The prediction of medical intern performance," 46 J.Appl.Psychol. 142 (1962); but cf. Price, Taylor, Richards and Jacobsen, "Measurement of physician performance; Discussion," 39 J.Med.Ed. 203 (1964). This predictive power also applies to grades from little known colleges, Moffat, Jacobs and Metcalf, "Predictors of academic performance in gross anatomy," 46 J.Med. Ed. 545 (1971).

It was egregious error for the court below to assume that accepted minority students were "less qualified" than rejected majority candidates. The record, which is sparse, may make minority students appear inferior when MCAT scores are heavily weighted, but does not document substantial differences when UGPA is considered. Published research buttresses the conclusion that minority students are equally qualified to pursue medical studies. It was therefore reversible error for the court below to conclude that minority students were admitted to Davis Medical School unconstitutionally.

## II. A Race-Conscious Admissions Policy Is Necessary and Not Stigmatizing.

### A. THERE ARE COMPELLING REASONS TO RETAIN THE OPTION OF A RACE-CONSCIOUS ADMISSIONS POLICY AMONG EQUALLY QUALIFIED MAJORITY AND MINORITY CANDIDATES.

The court below required the University to offer compelling reasons for preferring "less qualified" minority candidates. This brief has already disputed the assumption that minority candidates were "less qualified." The conclusion that minority and majority candidates were equally qualified to enter medical school does not eliminate the need to be race-conscious in selecting medical students. This brief will assume the strict burden of showing a compelling state interest for a race-conscious admission policy among equally qualified candidates of different races. Race-consciousness, as justified in this brief, does not involve a preference for minority candidates but the avoidance of personal or institutional racism in the admission process. The Executive Order program, which requires affirmative action of employers even after they adopt unbiased selection procedures, 41 C.F.R. § 60-3.11, has been found constitutional. Cf. cases cited at 18 Cal.3d 34, 71 n. 6 (Tobriner, J., dissenting). The measures suggested below are as necessary to avoid perpetuation of discrimination in the medical profession as the Executive Order program is to do likewise in the construction industry, *Contractors Ass'n of Eastern Pa. v. Secretary of Labor,* 442 F.2d 159 (3rd Cir. 1971), cert. den. 404 U.S. 854 (1971) so that the largest pool of qualified applicants can be considered for admission, compare *id.* at 171, 177.

1. Racially biased admission tests require different interpretations for members of different racial groups.

Before a school can select the most qualified students, it must adjust the interpretation of MCAT scores to accom-

modate the different backgrounds of candidates. Since the MCAT produces a disparate racial impact, interpretation of those scores must necessarily consider the race of an applicant. No less onerous alternative exists. To ignore the racial bias in the MCAT would itself be racial discrimination. A University can constitutionally avoid that discrimination.

2. Racially diverse populations with unmet health care needs require a racially diverse medical profession.

The vast unmet health needs of racial minorities are well documented in the briefs of other *amici* before this Court. Minority candidates whose academic qualifications are competitive with those of majority candidates are often more qualified to meet the health needs of minority communities. Minority students have a common cultural and ethical background to establish rapport with minority patients. Moreover, minority students are more likely to return to their own minority communities which have been chronically neglected by the medical profession. Not all minority students will have the inclination or sensitivity to serve minority patients, but even their choice of the medical profession serves to integrate segments of our society that previously remained segregated. So too, not only minority students can serve minority communities effectively. But an admissions process which today places heavy reliance on the MCAT, which predicts overall physician performance so poorly, should be able to rely on the predictive ability which race-consciousness provides in identifying candidates likely to ease unmet health needs. Indeed, it is difficult to imagine an admission policy which sought candidates qualified to serve in underserviced communities without considering the race of candidates.

3. The admission process should be conducted by a racially integrated committee.

In order to arrive at a race-neutral result after a complex admission process, there is a need to be race-conscious in the selection of admission committee members. At the very least, the presence of minority officials on the committee serves as a safeguard against invidious discrimination which may be difficult to prove or remedy.[14] In addition, minority officials can sensitize other committee members of the need to carefully evaluate minority candidates' qualifications. Due to the chronic underrepresentation of racial minorities in the medical profession, there are very few minority doctors presently staffing medical faculties.[15] This means that minority faculty members will have to be chosen to serve on the committee because of their race. The integration of faculties has already been upheld by this Court, *United States v. Montgomery County Board of Education,* 395 U.S. 225 (1969); *Swann v. Board of Education,* 402 U.S. 1 (1971), and thus racially integrated committees are also constitutional.

4. Some admission officers may express attitudes which would make it likely that minority candidates would not be fairly considered.

Since avowed racists and individuals unsympathetic to "Special Admission" of minority candidates still populate

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14. The mere presence of a minority official on an admission committee should not substitute for judicial scrutiny of the prejudicial admission policies, since "members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority." *Castaneda v. Partida,* 45 U.S.L.W. 4302, 4308 (U.S. March 23, 1977) (Marshall, J., concurring).

15. At Davis, there are over 1,100 members of the medical school faculty, *16 School of Medicine Bulletin, University of California, Davis 1976-77 (Sept. 1976).* There are only 5 minority faculty members, Association of American Medical Colleges, *Medical School Admission Requirements, USA and Canada 1976-1977,* Table 6-D.

the faculty and staff of medical schools,[16] the University may have to isolate certain officials so that they do not unfairly evaluate the qualifications of minority candidates. This race-conscious action would seek a race-neutral result by assigning other duties to individuals unable to communicate with or fairly evaluate minority applicants.[17]

5. A subjective interview procedure will yield the most information if the race of the candidates is known.

The Davis program selected candidates in two stages. The first phase looks only at paper qualifications. The second looks for personal qualities likely to produce the best doctor. This inherently subjective phase will produce better information if it is race-conscious. If racial prejudices affect the course of the interview or the written summary of the interview prepared at Davis, then the University will fail to find the best candidates for the medical profession. If the University is seeking students likely to serve medically neglected areas, a race-conscious interview procedure is particularly necessary to assess the person's career goals. A race-conscious interview process does not require interviewers to evaluate only members of their own race, but it does require the University, with knowledge of a candidate's race, to assign interviewers.[18] The race-conscious scheduling

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16. For example, correspondence between Allan Bakke and the Assistant to the Dean for Student Affairs/Admissions at Davis Medical School, indicates that at least one member of the admissions committee shared Mr. Bakke's misgivings about the Special Admission program, (CT 259-269).

17. The Executive Order program, 41 C.F.R. § 60-2.24(d)(1), stipulates that "All persons involved in the recruiting, screening, selection, . . . and related processes shall be carefully selected and trained to insure elimination of bias in all personnel actions."

18. Compare J. Campbell, L. Pike and R. Flaugher, *Prediction of Job Performance for Negro and White Medical Technicians* (1969) which found that supervisors rated members of their own race more favorably.

of interviews is analogous, but less onerous, than the assignment of voting district boundaries with conscious regard to the racial composition of the voting population, *United Jewish Organizations of Williamsburgh v. Carey,* 45 U.S. L.W. 4221 (March 1, 1977). Where race-influenced voting occurs, minority interests are protected to the extent that members of these racial groups will actually win some elections. Id. at 4227 (White, J., joined by Rehnquist and Stevens, JJ.) Race-conscious interviewing merely assures each candidate for admission that rejection will not be based on their race.

6. As an administrative convenience, a subcommittee evaluating minority candidates can be given an approximate target for issuing letters of acceptance.

It would be an administrative nightmare to avoid prejudiced evaluations of minority candidates by juggling interview schedules within a single admission committee. Instead, those officials best able to evaluate minority candidates must be identified and assigned the responsibility of doing so. As a separate subcommittee, members can critically compare the special qualifications of candidates likely to be able to serve underserviced areas of the profession. Once such a committee is established, it must be given an approximate target for issuing letters of acceptance. At Davis, interviews were conducted over the course of several months and letters of acceptance were issued during that period in rough proportion to the percentage of projected interviews which had already been conducted, (CT 167). Minority acceptances were apportioned similarly, (CT 66, 165). Whether the target given the subcommittee is based on the application rate among minority candidates, the minority population to be served by medical graduates, or the previous academic performance of minority students in medical school should

be constitutionally irrelevant,[19] so long as the target was not a rigid quota which would be filled even if some students were not qualified to study medicine, cf. *Associated General Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9, 18-19 (1st Cir. 1973), cert. den. 416 U.S. 957 (1974). The Davis program was not such a quota, 18 Cal.3d 34, 89 (Tobriner, J., dissenting).

### B. WHERE A LARGE NUMBER OF EQUALLY QUALIFIED CANDIDATES APPLY FOR A LIMITED NUMBER OF POSITIONS, A RACE-CONSCIOUS ADMISSIONS PROCESS CARRIES NO STIGMA OF INFERIORITY.

A stigma attaches only from an assumption that minority groups cannot qualify on their own merits. In this case there is no dispute as to the fact that all of the students accepted by the Davis Medical School are fully qualified for the study of medicine. 18 Cal.3d 34, 82 (Tobriner, J., dissenting). A race-conscious admissions process identifies the race of applicants in order to integrate the profession and to identify candidates who are most likely to serve the unmet professional needs of specific communities. No stigma need attach when those accepted are undoubtedly qualified to meet the needs of the profession.

The mere existence of a race-conscious admissions procedure for minority candidates does not automatically carry with it the stigma which a "separate but equal" educational system necessarily does, cf. *DeFunis v. Odegaard*,

19. Cf. *United Jewish Organizations of Williamsburgh v. Carey*, 45 U.S.L.W. 4221, 4227 (March 1, 1977) (White, J. joined by Rehnquist and Stevens, JJ.) (drawing district boundaries using race does not violate constitution so long as majority population does not have its voting strength minimized or unfairly cancelled out), accord, 45 U.S.L.W. at 4231 (Stewart, J., joined by Powell, J., concurring). The court below noted that no basis for the 16 places allocated disadvantaged minority students appears in the record, 132 Cal. Rptr. 680, 683 n. 1. However, the court did not indicate which bases would be permissible.

416 U.S. 312, 343 (Douglas, J., dissenting). A segregated school system offers no opportunity for minority students to compete with and be compared against majority students. Therefore, the minority students bear the burden of the social assumption that they are indeed inferior. However, a race-conscious admissions process affords minority candidates the opportunity to compete and participate on equal terms with majority students in the same curriculum and thereby begin to dispel the assumptions of racial inferiority which still infect our society.

The admissions process conducted at Davis Medical School may seem to convey a stigma against minority candidates insofar as a separate cutoff UGPA was used in screening regular and special admissions candidates for the interview process. However, properly understood, this procedure need convey no stigma. Since there were a large number of applications received from majority candidates, but only a limited capacity to interview candidates personally at Davis Medical School, a crude method of narrowing the applicant pool—establishing a UGPA cutoff score—allowed the admission committee to consider a limited number of candidates. A cutoff is used as a matter of administrative convenience and does not indicate that those below the cutoff are not qualified for the study of medicine. In the case of the minority applicant pool, far fewer applications were received and the admissions committee was able to search for the additional relevant factors indicative of actual physician performance from a larger percentage of minority applicants. Thus, candidates with lower UGPA's were given interviews, and some were found to be among the most qualified applicants after their complete qualifications were reviewed.

The likelihood that a stigma will persist is immeasurably heightened when a state University concedes or a court concludes that minority applicants are "less qualified" to

pursue professional education than majority students rejected for such study. Such a conclusion by this court, based on so skimpy a record as the one developed by the University in the proceedings below, would unjustifiably place an official stamp of inferiority upon minority students, cf. *Defunis v. Odegaard,* 416 U.S. 312, 343 (Douglas, J., dissenting).

For this court to affirm the decision below may maintain an insurmountable stigma. 18 Cal.3d 68 n. 2 (Tobriner, J., dissenting). It is the stigma of being excluded from these professions that is most detrimental. Professional schools have begun to realize that the underrepresentation of minority individuals in professional schools is neither justified on the basis of qualification nor desirable in terms of the needs of these professions. Special admissions programs were established to rectify this regrettable situation.

Special admissions merely provides equal opportunity and access to quality education. The stigma that the Court should fear most is the stigma which will arise from the decline of minority professionals and the foreseeable systematic rejection of qualified minority applicants that must inevitably occur if these programs are declared constitutionally prohibited.

## III. Conclusion.

For the above reasons the judgment below should be reversed.

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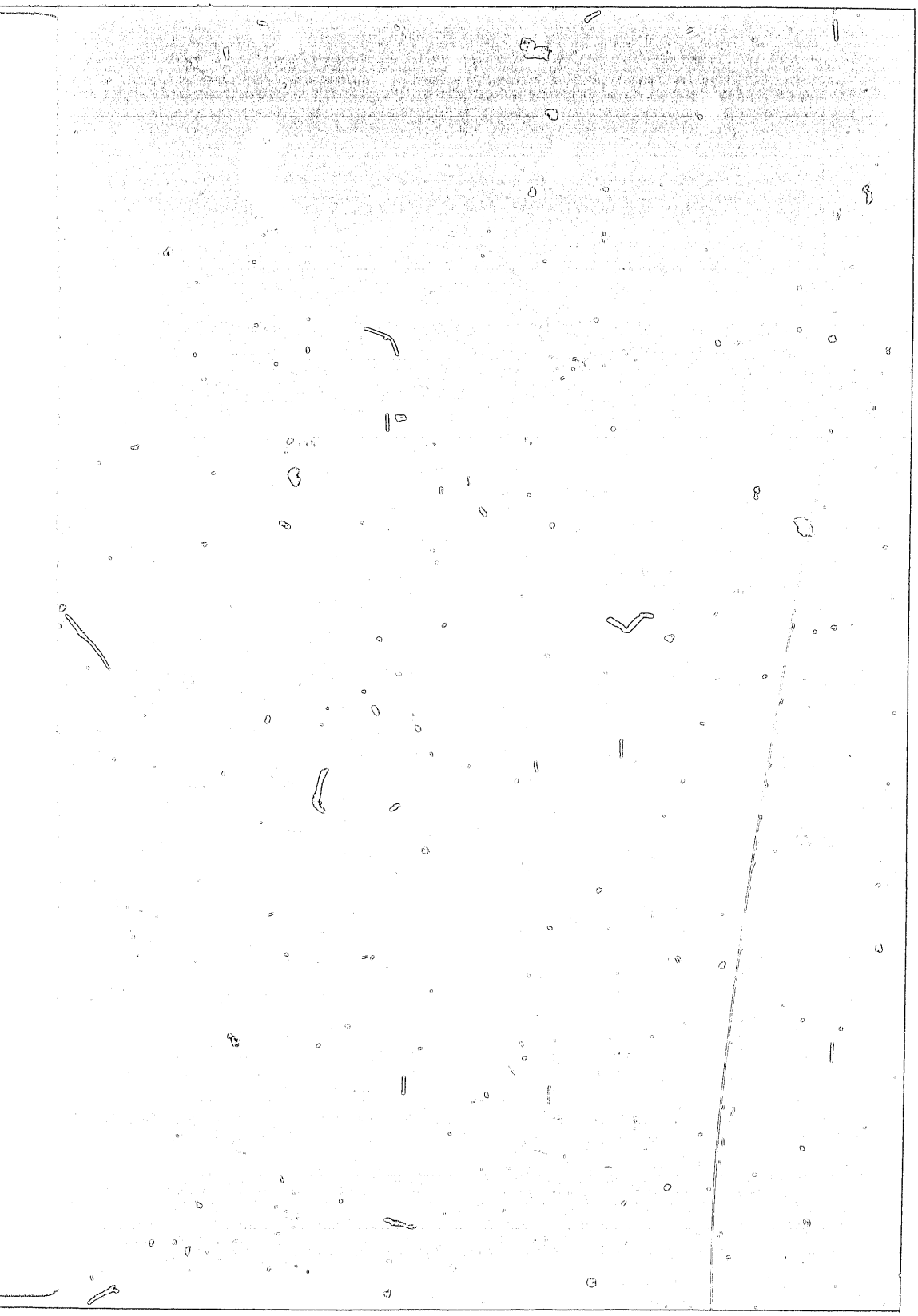

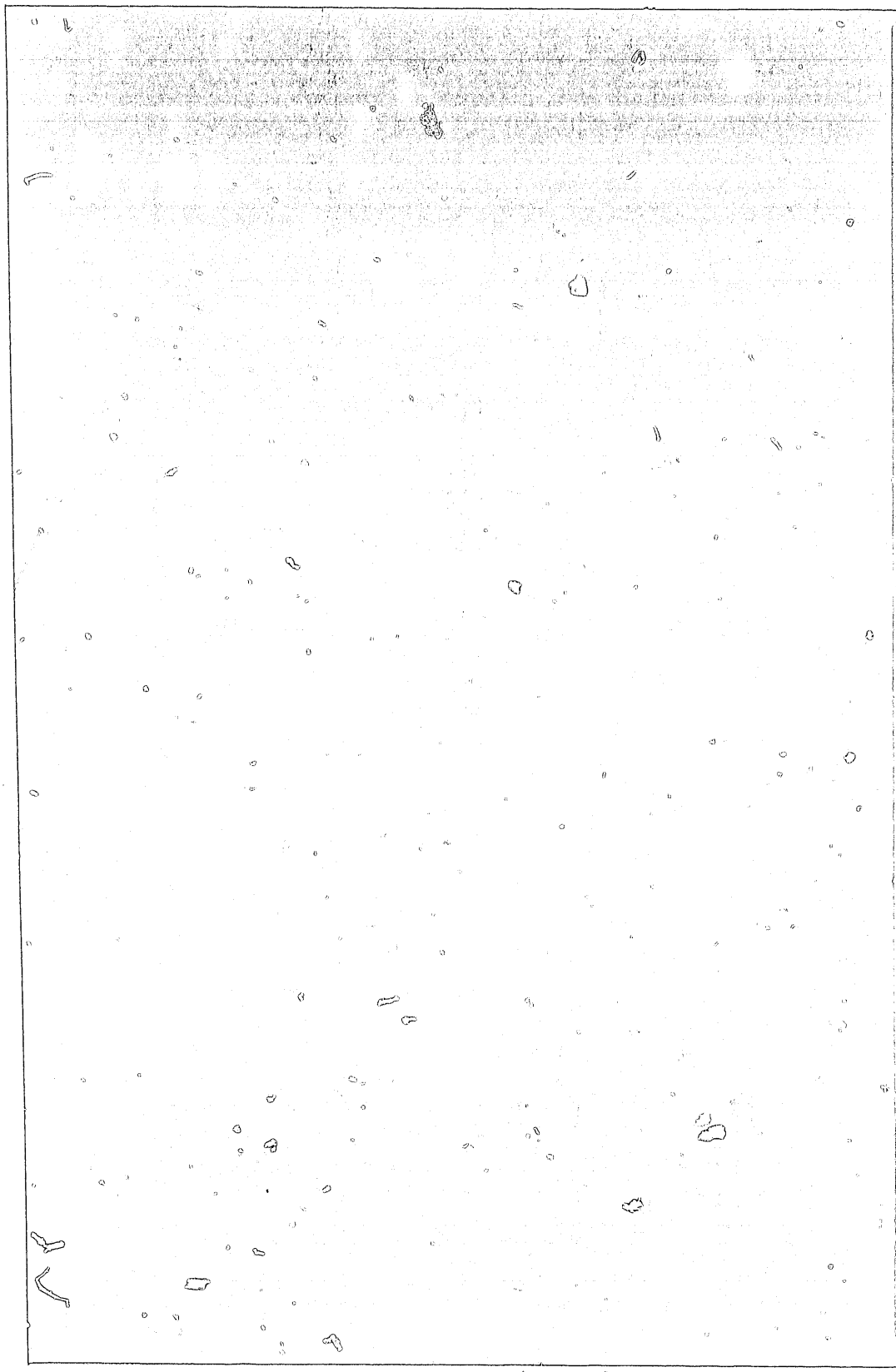

## *Appendix*

### IV. Minority Law Students Appear "Less Qualified" on the Basis of Standardized Tests Than They Would Under Alternative Criteria.

As law students, amici realize that the disposition of this case will significantly affect the admission process at publicly-supported law schools. In addition, minority law students are damaged by a standardized test, the Law School Admission Test (LSAT), in ways similar to the damage imposed upon minority medical students by the MCAT. Thus, the infirmities identified above concerning the MCAT's poor predictive ability and large discriminatory impact are not merely idiosyncrasies of a single test, but rather typical defects of standardized tests used to admit candidates to the professions.

The weight of the evidence concerning the validity of the LSAT, when compared to the validity of UGPA, actually strengthens the argument concerning the poor validity of the MCAT, since the LSAT has a moderate predictive ability compared to the zero or negative correlations with medical performance so common in studies of the MCAT. Despite this moderate predictive ability of the LSAT, a candidate's UGPA "is normally a better indicator of law school performance than is the LSAT and if a school had to choose to use only one predictor it would use the undergraduate grade point average." Testimony of Frederick M. Hart, President of the Law School Admission Council before U.S. House of Representatives Special Subcommittee on Education, September 20, 1974. Besides being a better single predictor of law school performance than the LSAT, the UGPA is also a less discriminatory predictor, Schrader and Pitcher, "Predicting Law School Grades for Black American Law Students," Law School Admission Council Annual Report, 530, 567 Table 10 (1973).

The implication of these facts is that reliance on the relative LSAT scores of majority and minority candidates in making admission decisions would result in an unjustifiable underrepresentation of minority students in law school. This is true even under the conservative definition of fair representation based on the previous performance of minority students in law school. This is because the performance gap between racial groups on the LSAT is not reflected by a similar performance gap in law school, *Id.* Since most law schools typically rely heavily on the Predicted-First-Year-Average (PFYA) of candidates to arrive at admission decisions, it is more appropriate to analyze the effects of the PFYA which combines LSAT and UGPA. Research indicates that reliance on the PFYA would result in a significant underrepresentation of minority students in law school,[1] Breland and Ironson, "*DeFunis* Reconsidered: A Comparative Analysis of Alternative Admission Strategies," 13 J.Ed.Meas. 89 (1976).

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1. Research commonly shows that law school grades of minority students are slightly overpredicted by LSAT scores or PFYAs. However, it is possible to have "overprediction" of grades and underrepresentation of minority students in the same situation, Thorndike, "Concepts of Cultural Fairness," 8 J.Ed.Meas. 63 (1971). Statistical theory would lead one to expect "overprediction" whenever a group scores below another on both a standardized test and in school, Schrader and Pitcher, "Prediction of Law School Grades for Mexican American and Black American Students," Law School Admission Council Annual Report, 527, 528 (1974). Thus, "overprediction" findings persist in situations where minority students earn slightly lower grades in school, but considerably lower scores on standardized tests. Research indicates that significant underrepresentation of minority students occurs in the vast majority of situations where "overprediction" of their grades has been found, Schmidt and Hunter, "Racial and Ethnic Bias in Psychological Tests: Divergent Implications of Two Definitions of Test Bias," 29 American Psychologist 1 (1974). The likelihood of having both "overprediction" of grades and underrepresentation of students increases as the test's predictive validity decreases and the performance gap between majority and minority students on the test widens, Thordike, "Concepts of Culture Fairness," 8 J.Ed.Meas. 63, 68 (1971).

The LSAT is not the only standardized test which aspiring minority candidates to the legal profession must confront. Today, the typical lawyer will have to excel on the Scholastic Aptitude Test (SAT) before entering college, and on the Multistate Bar Examination (MBE) to pass the bar in over forty jurisdictions. Yet research indicates that the performance gap between majority and minority students on the SAT is larger than the gap in grades received on campuses of the University of California, Goldman and Hewitt, "Predicting the Success of Black, Chicano, Oriental and White College Students," 13 J.Ed.Meas. 107, 116 (1976). Likewise, the performance gap between majority and minority candidates for the bar in Colorado is smaller on the essay portion of the bar examination than on the MBE, Colorado Advisory Committee to the U.S. Commission on Civil Rights. *Access to the Legal Profession in Colorado by Minorities and Women,* 49 (1976). This pattern of bias on standardized tests makes even more urgent the confrontation of bias in the MCAT during the resolution of of this lawsuit.