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 WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF THE LEGAL SERVICES CORPORATION, AMICUS CURIAE ON BEHALF OF PETITIONER

ALICE DANIEL
JAMES E. COLEMAN, JR.
733 Fifteenth Street, N.W.
Suite 700
Washington, D.C. 20005
Attorneys for Amicus Curiae.

June 7, 1977

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases, continued: Page

Other Authorities, continued: Page

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INTEREST OF AMICUS CURIAE

The Legal Services Corporation is a private, non-profit Corporation created by the Congress in 1974 to support legal assistance in civil matters for persons unable to afford an attorney. See 42 U.S.C. Sections 2996-2996k. The Congress declared that such a program was essential to provide equal access to the system of justice in our nation for individuals seeking to redress grievances, and

that providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice. *Id.*, Section 2996. The decision of the Supreme Court of California in this case, if permitted to stand, will seriously impair the Legal Services Corporation's ability to achieve those goals. The Corporation has, therefore, obtained the consent of the parties to file this brief on behalf of Petitioner.

We stress at the outset that the Corporation takes no position regarding every particular of the University of California, Davis' special admissions program for medical students. The California Supreme Court held, however, that race-conscious admissions procedures are impermissable under the Equal Protection Clause of the Fourteenth Amendment. That holding necessarily affects all professional schools, including law schools, and would perpetuate the gross underrepresentation of minorities in the legal profession. It is that part of the decision that will affect adversely the operations of the Legal Services Corporation, and with which the Corporation disagrees.

The Legal Services Corporation is governed by a board of eleven directors appointed by the President of the United States with the advice and consent of the Senate. The Corporation receives annual appropriations from the Congress to make grants and provide technical support to local legal services programs meeting the requirements of the Legal Services Corporation Act and regulations promulgated thereunder. The Corporation currently funds 315 such programs located in each of the 50 states, Puerto Rico, the Virgin Islands, and the Trust Territory of the Pacific Islands (Micronesia). Some of the programs are devoted primarily to serving particular groups, such as Native Americans living on reservations or migrant farmworkers. Most are located in poverty areas of large

urban centers. Nearly one-half of all legal services clients are members of minority groups.

Legal services programs funded by the Corporation currently employ nearly 4,000 full-time attorneys. Of that number, approximately 15% are members of minority groups. Although this figure is far greater than the percentage of minority attorneys in the legal profession as a whole, it is substantially less than the proportion of legal services clients who are minorities. The Corporation is firmly of the view that this gap must be narrowed in order for legal services programs to operate more effectively in minority communities.

There are, moreover, nearly 16 million poor people in the United States who are completely without access to counsel when they face a legal problem. The Corporation is undertaking a plan to provide minimum access to legal services for those persons by the end of 1979, and that plan will require doubling the present number of legal services attorneys. The need to increase recruitment of minority attorneys will, therefore, become more acute in the near future.

The Corporation is engaged in a number of efforts to remedy this situation. All legal services programs are required to establish affirmative action plans designed to increase the number of minority employees. The Corporation is developing a national recruiting program to attract attorneys to legal services work, with a special emphasis on minority lawyers. The Corporation funds the Reginald Heber Smith program, which provides one or two year fellowships for highly qualified law graduates to work in legal services. Since 1971, an average of 50% of these Fellows have been members of minority groups.

The success of all these efforts depends on the number of minority law graduates. If minorities continue to be

grossly underrepresented in the legal profession, the national legal services program will be a predominantly white program attempting to serve a largely minority client population. The credibility of the program to that population requires that significant numbers of minority lawyers serve in it. More generally, continuing the pattern of underrepresentation will perpetuate the effects of racial discrimination in this country and the disaffection of minorities—poor and non-poor alike—with our system of justice. Those are the inevitable consequences of the Supreme Court of California's decision in this case, and such consequences would frustrate the goals proclaimed by Congress in the Legal Services Corporation Act.

SUMMARY OF ARGUMENT

The Congress recognized that achieving equal justice is a goal of the highest priority, and created the Legal Services Corporation to make that concept a reality. The Corporation's experience confirms, however, that its statutory mandate cannot be met if the legal profession continues to be a virtually all-white institution. A racial mix of lawyers is essential for legal services programs to be effective in minority communities, and minority lawyers are more likely to serve the poor of their communities. Similarly, minorities must participate in the process of government as judges, legislators, administrators, and advocates in order for Americans who are members of minority races to have confidence in the legal system. These goals can be attained only if the gross underrepresentation of minorities in the legal profession is corrected.

It is only through the implementation of remedial special admissions programs that this problem can be solved. The number of qualified applicants to professional schools, including law schools, far exceeds the

number of positions available. Although many minority students are qualified both for law school and the legal profession, the history of racial discrimination in this country precludes them from competing effectively for law school admission. This Court has recognized that race-conscious procedures are necessary to counteract the effects of that history. The California Supreme Court's decision invalidating such procedures will perpetuate the absence of minorities from the legal profession, and imperils the goals proclaimed by Congress in the Legal Services Corporation Act.

In reaching its conclusion, the California Supreme Court misapplied cases dealing with racial classifications. This Court has never held that all distinctions based upon race are illegal *per se*. Race-conscious special admissions programs reflect none of the evils that characterize invidious racial discrimination: They are not irrational, or based on hostility toward any race; they do not stigmatize any individual or racial group; they are remedial in nature, and do not threaten the future opportunities of any group; and, they do not deprive any individual of a right or benefit. In such circumstances, there is no basis for holding that special admissions programs for minority students offend the Constitution.

Finally, the California Supreme Court was incorrect in concluding that race-conscious remedial procedures are permissible only to correct a judicial finding of past racial discrimination. That view would overburden federal courts and distort their proper role in our federal system. Equally important, it would frustrate the national goal of integrated professions.

ARGUMENT

I.

A RACIALLY INTEGRATED LEGAL PROFESSION SERVES A NATIONAL GOAL OF THE HIGHEST PRIORITY[1]

In the Act creating the Legal Services Corporation, Congress declared that a program of legal assistance to poor people was essential to achieving national goals of the highest priority. The Congress found a need "to provide access to the system of justice in our Nation for individuals who seek redress of grievances . . .", and "to provide high quality legal assistance to those who would otherwise be unable to afford adequate legal counsel . . ." 42 U.S.C. Section 2996(1), (2). The Congress found further that "for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws. . . ." *Id.*, Section 2996(4). The continued availability of such services, it concluded, "will serve best the ends of justice. . . ." *Id.*, Section 2996(3).

The Legal Services Corporation has been operating for nearly two years. During that time it has taken the first essential steps toward achieving its statutory mandate, by expanding the number of legal services programs throughout the country and strengthening those that have the most critical shortage of resources. Simply increasing the number of lawyers available to poor people, however, is

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[1]As indicated above, the specific interest of the Legal Services Corporation derives from the effect the California Supreme Court's decision would have on the legal profession. This brief concentrates on that issue. A second legitimate goal of Petitioner's special admissions program was to increase the quality of education at its medical school through a racially-diverse student body. See 18 Cal.3rd at 52. This goal will be elaborated upon in Petitioner's brief and that of other *amici*; the Legal Services Corporation does not profess expertise on that subject.

not enough. The Corporation's experience has convinced it that a significant number of legal services attorneys—like legal services clients—must be members of minority groups for the programs to operate effectively. Equally important, the number of minorities who participate in the legal system as lawyers, judges, legislators, and administrators must increase substantially for the millions of minority Americans to retain faith in our government of laws.

These essential goals will be frustrated if minorities continue to be grossly underrepresented in law schools and the legal profession.

A. A Racially Integrated Legal Services Program is Essential to Provide Equal Access to Justice for the Poor.

Although federally-funded legal assistance is provided to poor people without regard to race, the impact of the legal services program on minorities is substantial. In 1974, there were estimated to be more than 24 million poor persons in America; about 10 million of these persons were members of minority groups.[2] Thus, while minorities make up only about 12% of the total population, they comprise nearly 40% of the poor. For two out of every five minority persons in America, access to equal justice may depend on the availability of a legal services attorney.

For the most part, Corporation-funded legal services are provided through neighborhood law offices established in the communities where poor people live. The Corporation has learned, however, that it is not enough simply to open such offices and attempt to staff them

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[2]U.S. Bureau of the Census, CHARACTERISTICS OF THE POPULATION BELOW THE POVERTY LEVEL: 1974, at 1 (1974).

with lawyers. The Corporation has concluded that it must increase substantially the number of minority attorneys in its programs, both because such attorneys have exhibited a strong commitment to legal services work, and because a mix of attorneys is necessary to ensure that programs will be sensitive to the needs of and credible in minority communities.

The California Supreme Court's opinion in this case rejected as "parochialism" the argument that physicians who are members of minority groups are more likely to serve minority communities. *Bakke v. Regents of the University of California,* 18 Cal.3d 34, 53 (1977). The experience of the Legal Services Corporation, however, is that minority lawyers do have a greater commitment to serving poor members of their race.

Minorities constitute less than three percent of the legal profession.[3] A 1974 survey conducted by the Corporation's predecessor organization disclosed that the proportion of legal services attorneys who are members of minority groups is more than five times as great.[4] It also appears that the percentage of minority legal services attorneys is even larger in areas where a substantial part of the poor community consists of minorities.[5] Since affirmative action plans have increased demand for minority law graduates among governmental agencies and

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[3]See, U.S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES: 1975, 361 (1975).

[4]The survey, conducted in June 1974 by the Office of Legal Services of the Community Services Administration, disclosed that 9% of legal services attorneys were black and 7% were Hispanic-American.

[5]Although the percentage varies from program-to-program, legal services programs in large metropolitan areas commonly employ one-fifth to one-half minority attorneys.

the private bar, and legal services salaries are commonly far less than lawyers receive elsewhere,[6] the higher proportion of minority lawyers in legal services clearly shows that they have a strong commitment to legal services work.

This showing is corroborated by the experience of a pre-law training program operated by the Council on Legal Education Opportunity (CLEO). CLEO was formed in 1968 as the joint project of several professional legal organizations, including the American Bar Association and the National Bar Association, to assist educationally and economically disadvantaged students whose academic performances and financial resources would probably preclude them from admission to accredited law schools. CLEO offers summer institutes to orient prospective law students to the study of law. The students' performance in the program is evaluated and this evaluation is used to assist them in gaining admission to law school.

The overwhelming majority of CLEO participants have been minorities,[7] and the program's experience demonstrates convincingly that such persons have a strong commitment to public interest work. A survey of CLEO graduates showed that, of the 29 students in the class of 1971 who responded to the questionnaire and indicated they were employed, 22 were working with disadvantaged groups. For the class of 1972, 67% of those

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[6]In 1975 the average beginning salary for a legal services attorney was $10,500. Although that level may have increased in succeeding years, legal services salaries remain substantially below those paid by government and the private sector.

[7]See Hearings on H.R. 13172 Before the Subcomm. on the Departments of Labor and Health, Education and Welfare and Related Agencies of the Senate Comm. on Appropriations, 94th Cong., 2d Sess., at 361 (1976) (hereafter referred to as "CLEO Hearings").

employed were working with the disadvantaged, many with legal services programs. The survey concluded:

> A number of inferences can be drawn from the results of the survey of both the '7.. and '72 classes. First and foremost, is that the graduates are proving out one of the basic tenets upon which the program was founded, i.e., they are focusing their energies and skills upon the problems of the disadvantaged. Their insight into the first hand knowledge of the poverty cycle when combined with the analytical and professional abilities they possess as lawyers, represents a powerful combination indeed. It has long been feared that these graduates once having finished law school would simply forget or reject any association with or sense of obligation to the disadvantaged communities from which they came. Demonstrably, this has not happened. CLEO Hearings, at 533.

The Legal Services Corporation is convinced, therefore, that increasing the number of minority lawyers is essential to recruitment of the most highly motivated persons for legal services work. Such an increase is also necessary for Corporation-funded programs to serve minority communities effectively. The Corporation does not believe that a black client must always have a black lawyer, or that only Native American attorneys should serve members of their race. It is a stubborn fact, however, that cultural and racial factors affect the manner in which a legal services program is perceived in a community and the ability of an attorney to communicate with his or her client.

The cause of this situation is clear. On the most basic level, language and cultural differences may make it difficult, if not impossible, for attorneys to communicate with their clients. The Congress expressly recognized this fact in the Legal Services Corporation Act, requiring, for

example, that: "In areas where significant numbers of eligible clients speak a language other than English as their principal language, the Corporation shall, to the extent feasible, provide that their principal language is used in the provision of legal assistance to such clients . . ." 42 U.S.C. Section 2996e(b)(6). Obviously, the most direct way to comply with this mandate—and to break down cultural barriers generally—is to recruit attorneys from the minority group being served.

More important, lawyers and the legal system have only recently begun to act on behalf of minorities. See *NAACP v. Button,* 371 U.S. 415, 443-44 (1963). The minority community's perception of the virtually all-white legal profession is that it is devoted to promoting interests that are indifferent, if not actively hostile, to theirs. As one commentator has observed:

> Effective access to legal representation not only must exist in fact, it must also be perceived by the minority law consumer as existent so that recourse to law for the redress of grievances and the settlement of disputes becomes a realistic alternative to him. Griswold, *Some Observations on the DeFunis Case,* 75 COLUM. L. REV. 512, 517 (1975).

The experience of the Legal Services Corporation confirms this view. Earlier this year the Corporation surveyed three large programs, each of which serves a largely minority poor population and employs a substantial number of minority attorneys.[8] The survey disclosed

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[8]Sixty-five questionnaires were sent to attorneys employed by the Neighborhood Legal Services Program in Washington, D.C., the Northern Mississippi Rural Legal Services Program in Oxford, Mississippi, and the Legal Aid Society of Alameda County in Oakland, California. These programs serve a combined total population of 1,728,189 poor persons, of whom 729,433 are minorities. Seventy-seven percent of the questionnaires were returned completed. The survey is discussed in more detail at pages 16-19, *infra.*

a significant pattern. The minority attorneys were virtually unanimous in the view that having the same racial background as their clients resulted in better communications. Conversely, many of the non-minority attorneys stated that relating to minority clients was sometimes a problem. The response of one white attorney was typical: "I have often encountered difficulty communicating with or gaining the trust of minority clients, especially blacks, because of language and cultural differences, and their suspicions of white lawyers."

In short, the California Supreme Court's apparent assumption that society requires only qualified professionals, even if they are almost all of one race, is not correct with respect to law. To the contrary, an integrated bar is essential to the goal of providing "equal access to the system of justice in our Nation . . ." for all individuals.

B. A Racially Integrated Legal Profession is Necessary to Affirm Faith in Our System of Justice and Our Government of Laws.

To most Americans, lawyers *are* the legal system. The reason for this perception is obvious: the overwhelming majority of judges are lawyers, as are a substantial number of legislators and administrators. Lawyers in their roles as advocates also have disproportionate influence on governmental institutions. The nature of this influence was acknowledged in *NAACP v. Button,* 371 U.S. 415 (1963), where the Court observed that the efforts of minority lawyers "while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, make possible the distinctive contribution of a minority group to the ideas and beliefs of our society." 371 U.S., at 431.

It is clear, then, that the necessity for correcting the gross underrepresentation of minorities in the legal profession reflects more than a need to provide effective legal assistance. Rather, continuing the bar as a virtually all-white institution will perpetuate the exclusion of minorities from positions of real influence, and further the appearance of majority domination. Such a result can only destroy confidence in our system of law:

> A special reason why it is important to have black lawyers is that many lawyers become legislators and high administrators. Both blacks and whites need to see blacks in positions of community leadership, as well as to have a black perspective brought directly to bear on the resolution of many community problems.
>
> Increasing the number of blacks in high vocational positions and as community leaders will not only raise the aspirations of young blacks and dissipate white racial stereotypes, but may also ameliorate some stereotypes blacks have about whites. No longer will it be easy to distinguish "them" (the white power structure) from "us" (the black oppressed), because "them" will include many blacks. Other blacks will come more easily to see the constraints under which those with power operate and will abandon any oversimplified notion that those in responsible positions are invariably "oppressors." Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions,* 75 COLUM. L. REV. 559, 592 (1975) (footnote omitted).

"[R]eaffirm[ing] faith in our government of laws" is a further, and independent, reason that increasing the number of minority lawyers is a national goal of the highest priority. As the following section demonstrates, that goal cannot be accomplished unless law school officials are free to implement reasonable race-conscious

special admissions programs. Because the Supreme Court of California's decision in this case outlaws all such programs unless designed to remedy a judicial finding of illegal discrimination by a particular law school, it will frustrate the policies proclaimed by Congress in the Legal Services Corporation Act.

II.

SPECIAL ADMISSIONS PROGRAMS ARE A VALID MEANS OF ACHIEVING A RACIALLY INTEGRATED BAR

Eleven percent of the American population is black. Yet, blacks do not constitute more than 3% of most professions.[9] In 1970, blacks made up less than 2.5% of the medical profession;[10] less than 2.0% of the legal profession;[11] and less than 1.5% of the engineering profession.[12] In an attempt to correct these disparities, many professional schools, including Petitioner, have adopted special admissions programs to increase the enrollment of minority students. The intent of these programs is to prevent the rejection of qualified applicants whose academic performance may have been affected by racial discrimination.

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[9]See U.S. Bureau of Census, STATISTICAL ABSTRACT OF THE UNITED STATES: *1975*, at 361 (1975). Because blacks are the largest racial minority in America, they will be the focus of our discussion. Our conclusions, however, will apply to all racial minorities since their status largely parallels the status of blacks.

[10]*Id.*

[11]*Id.*

[12]*Id.*

A. Students Admitted Under Special Admissions Programs Are Qualified to Study and Practice Law.

The uncontroverted evidence in this case is that every minority student admitted to the University of California, Davis' medical school under the special admissions program was qualified to study medicine. (CT 67). Indeed, the college records and standardized test scores of most minority students now admitted under special admissions programs are equal to those of white students admitted by the usual criteria applied fifteen years ago.[13]

In the last fifteen years, however, the number of applications to professional schools has risen dramatically while the number of available places in those schools has remained relatively constant.[14] This imbalance has inflated the standards for admissions so that today the primary function of the admissions process is to select a class from a large pool of qualified applicants. The consequence is that, without special admissions programs,

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[13]See Brief of Law School Admissions Council as Amicus Curiae, *Regents of the University of California v. Bakke*, United States Supreme Court, No. 76-811; Brief of Sanford H. Kadish, Dean of the School of Law, University of California, Berkeley as Amicus Curiae, in Support of Petition for Certiorari at 23, *Regents of the University of California v. Bakke*, No. 76-811 (hereafter referred to as "Deans' Brief").

[14]Between 1964 and 1975, the number of students enrolled in the first year of law school increased from 22,753 to 39,038. During roughly the same period, 1964-1974, the number of persons taking the LSAT grew from 37,598 to 135,397. Exact figures are not available on how many persons actually applied to law school, but the best estimate is that between 1971-1975, 80,000 to 85,000 applications were submitted to law schools annually. American Bar Association, Section on Legal Education and Admissions to the Bar, *Law Schools and Bar Admission Requirements: A Review of Legal Education in the United States—Fall 1975*, at 45 (1975) (hereafter referred to as "ABA Review").

the difference between the college performance and standardized test scores of minorities and non-minorities would exclude minorities from admissions,[15] even though they are otherwise fully qualified.

1. Special admissions lawyers from disadvantaged backgrounds aid in providing legal services to the poor.

One of the fundamental goals of law schools is to produce lawyers who will use their talents and skills to serve those who are disadvantaged, and the Legal Services Corporation believes that special admissions programs are essential to achievement of that goal. We demonstrated in the previous section that minority lawyers are playing an essential role in delivering legal services to the poor. The results of the survey conducted by the Corporation this year[16] show graphically the severity of the conditions that were overcome by most of the special admissions lawyers who are now practicing law on behalf of the disadvantaged. Because of those conditions many of these lawyers would have been denied the opportunity to study law without special admissions programs, and the poor whom they are serving would have been deprived of their assistance.

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[15]See discussion at page 22-23, *infra*. Studies have shown that, in general, the average college GPA of non-white students is substantially lower than that of white students, L. Baird, A PORTRAIT OF BLACKS IN GRADUATE SCHOOLS, FINDINGS, (1974), and that minority students score lower on standardized tests than non-minorities, Evans & Reilly, *A Study of Speediness as a Source of Test Bias*, 9 J. EDUC. MEAS. 123 (1972) (involving the LSAT). See also, brief filed herein by the Law School Admissions Council as Amicus Curiae.

[16]See note 8, *supra*.

Forty-seven percent of the minority attorneys surveyed by the Corporation believed they had been admitted to law school under special admissions programs.[17] All of the special admissions lawyers began law school between 1970 and 1973; their average age was 28. Although the survey included a relatively small number of the minority lawyers in the country, its consistency with published studies supports our belief that valid generalizations may be drawn from our results.

During the 1968-69 school term, for example, of the estimated 1122 minority students enrolled in law school, about 40% were believed to have been special admissions students,[18] and the pool of young minority lawyers in the job market after 1972 included a great many who had been admitted under special admissions programs.[19] Since most minority attorneys employed by legal services programs were hired after 1972, it is reasonable to conclude that many were former special admissions students. More significant, however, the results of the survey indicate that, while in law school, 71% of the special admissions attorneys had decided to use their legal skills to serve the disadvantaged, while only 44% of the regular admissions minority group had intended to do so. In view of this, it is highly probable that, as the survey showed, a significant number of the special admissions law graduates in the country became legal services attorneys.

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[17]The programs surveyed employed a total of 65 attorneys, 34 of whom were minorities. Thirty of the minority attorneys responded to the questionnaire.

[18]O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L. J. 669, 723 (1971).

[19]*Id.* See also ABA Review, at 42.

The survey indicated that the overwhelming majority of special admissions attorneys grew up in racially isolated neighborhoods and came from economically disadvantaged backgrounds. Sixty-four percent of the special admissions lawyers grew up in neighborhoods that were predominantly minority, and 86% grew up in neighborhoods that were more than 25% minority. A majority of all minority attorneys surveyed came from families with annual incomes of $10,000 or less, but 86% of the special admissions lawyers came from families with incomes in this range, and 28% of the special admissions lawyers had family incomes below $5,000. Because of their families' poverty, 78% of the special admissions lawyers worked to support themselves while in college; the same percentage received financial assistance. Only one special admissions lawyer had another lawyer in his immediate family.

Similarly, a majority of the special admissions lawyers attended public schools in which they were racially isolated. Eighty-six percent of the special admissions lawyers went to public elementary and secondary schools. Seventy-six percent of them attended schools that were more than 25% minority, and 54% attended schools that were predominantly minority.

The average LSAT score of the lawyers who were admitted under special admissions programs was 522. The average score of the regular admissions minority lawyers, excluding those who went to predominantly black law schools, was 552;[20] the average score of the non-

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[20]The LSAT scores of black lawyers who graduated from predominantly black law schools were excluded because such scores are not used by those schools for admissions purposes. See Griffin, *Admissions: A Time for Change*, 20 HOW. L. J., 128, 142 (1977).

minority attorneys was 635.[21]

The survey also supports our belief that while minority lawyers in general are essential to providing effective legal services to minority clients, there is a special advantage to legal services in having lawyers who also share the economic and social background of our clients. All of the minority attorneys surveyed worked in communities where they were of the same race as a substantial number of their clients. Where there were not significant economic and social differences between the backgrounds of the lawyers and clients, nearly all minority attorneys thought that having the same racial background as their clients resulted in better communications.

The survey unequivocally shows that by making it possible for minority lawyers to study, special admissions programs have contributed significantly to the Corporation's goal of providing effective legal services to the poor. Without those programs, the number of minority lawyers employed by the three programs surveyed would have been reduced substantially.[22] In all events, it is clear that special admissions lawyers have had to overcome many obstacles on the way to obtaining a legal education. The fact that they are now qualified lawyers serving the poor strongly refutes the view of the California Supreme Court that special admissions programs do not serve the goal of providing much needed professional services to the disadvantaged.

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[21]Because standard grade point averages were not used, we were not able to compute the average GPA for the special admissions lawyers.

[22]Since the survey showed that 56% of the regular admissions minority lawyers graduated from predominantly black law schools, the primary effect of prohibiting the use of race-conscious admissions programs would be to impair our ability to recruit minority lawyers who are graduates of non-minority national law schools.

2. Many lawyering abilities are not measured by quantitative screening devices.

Discussions about the qualifications necessary for the study of law often overlook talents and skills that are necessary for the effective practice of law, but are not measured by quantitative screening devices, nor taught by law schools, except, perhaps, in clinical courses with limited enrollments. These talents and skills, such as interviewing, negotiating, counseling, client relations and advocacy, are absolutely essential to the effective practice of law. In our view, the ability to develop these skills is not related to GPAs, LSAT scores, or performance in regular law school courses. This fact is also recognized by admissions officers.

Erwin Griswold, former dean of the Harvard Law School, said of the law school admissions process:

> All legal educators know that the quantitative measures can predict performance on law school examinations only on a crude level. This is particularly true because the LSAT was developed about twenty-five years ago for the purpose of selecting out at the bottom the applicants who were not qualified to do law school work. With the great increase in applicants in recent years, the problem has become entirely different. The law school admission officers today have to select from a group, all of whose members are qualified. It is not known whether the LSAT has any real statistical ability to select accurately from among many applicants, all of whom have the minimum requisite qualities. Law school admission officers have long felt the need to take other factors into account in selecting from among applicants. Factors such as motivation and diligence on the part of the student, and the quality of instruction afforded by the

> faculty of the undergraduate institution, are probably of equal importance to the quantitative measures. Griswold, *op. cit.*, at 515. [23]

To provide necessary skills that law schools do not teach, and screening devices do not measure, the Legal Services Corporation's training programs teach techniques in interviewing, negotiating, drafting, and advocacy. Every new lawyer in a legal services program is required to participate in these programs.

B. Special Admissions Programs are the Only Means of Achieving a Racially Integrated Legal Profession.

In *North Carolina Board of Education v. Swann,* 402 U.S. 43 (1971), this Court struck down a statute that "flatly [prohibited] assignment of any student on account of race or for the purpose of creating a racial balance . . . in the schools." The Court noted:

> [T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education,* 347 U.S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. 402 U.S. at 45-46.

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[23] A 1965 study that examined the relationship between college grades and adult achievement in various vocational activities, including law and medicine, concluded that there was no demonstrable correlation between the two. "Although this area of research is plagued by many theoretical, experimental, measurement, and statistical difficulties, present evidence strongly suggests that college grades bear little or no relationship to any measures of adult accomplishment." D. Hoyt, THE RELATIONSHIP OF COLLEGE GRADES AND ADULT ACHIEVEMENT, at *i* (1965).

This holding expressly recognizes that race-conscious procedures are necessary to achieve the ultimate goal of a racially-integrated society. A careful analysis of law school admissions procedures confirms the validity of that principle.

1. Without special admissions programs, the legal profession will remain virtually all-white.

The number of black lawyers in the United States increased from 1,123 in 1940[24] to 4,182 in 1970,[25] when blacks represented only 1.3% of the legal profession. The use of special admissions programs has dramatically changed the picture. In the 1972 school year, there were more black students in law school than there were black lawyers in the profession in 1970.[26] But without race conscious special admissions programs the ability of law schools to enroll black and other minority students will virtually cease.

Although many factors combine to influence the final decision to accept or reject an applicant for admission to law school, major consideration is given to a weighted combination of an applicant's grade point average and LSAT scores. Because minorities measure lower than non-minorities with respect to these criteria,[27] they would be virtually excluded from admission if race could not be considered. This point was made in the brief filed by the deans of four California state law schools as Amicus Curiae in support of the Petition for Certiorari.

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[24]Tollett, *Black Lawyers, Their Education, and the Black Community*, 17 HOW. L. J. 326, 336 (1972).

[25]Toles, *Report of Black Lawyers and Judges in the United States, 1960-1970*, 116 CONG. REC. 7996E (1970).

[26]ABA Review, at 42.

[27]See note 16, *supra*.

Statistical analysis of applications at one of the schools demonstrated that if race were not considered, state supported law schools in California would be virtually all-white. The deans stated:

> Although the regular admissions process does take account of non-numerical factors such as disadvantage, extra-curricular activities, letters of recommendation and other factors, the disparity in the predicted level of performance [measured by GPAs and LSAT scores] is such that almost no applicants from racial or cultural minorities are admitted in the regular admissions process. Deans' Brief at 24.

2. Failure to consider race would perpetuate the effects of past and present discrimination.

That minorities score lower on standardized tests and perform less well in college than whites is not surprising. In view of the history of racial discrimination in this country no other result could be expected:

> Indeed, it would be surprising if, in this society, where members of minority groups have been denied opportunities over an accumulation of many years, these groups did not show a lower mean score on the LSAT than members of the majority group. Linn, *Test Bias and the Prediction of Grades in Law School,* 27 J. LEGAL EDUC. 293, 296 (1975).

The legacy of racial discrimination in education in this country is well documented. See, *e.g., Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954); *Griffin v. School Board of Prince Edward County,* 377 U.S. 218 (1964); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). Moreover, the difficult task of implementing *Brown* continues even today. See, *e.g., Morgan v. Hennigan,* 379 F. Supp. 410 (D. Mass. 1974) *aff'd,* 509 F.2d 580 (1st Cir.) *cert. denied sub nom.*

Kerrigan v. Hennigan, 421 U.S. 963 (1975). Meanwhile, another generation of black children continues to be denied constitutionally-protected educational opportunities.

Finally, as this Court is aware, exclusion of minorities from educational opportunities is not the only form of racial discrimination to which they have been subjected. Blacks, for example, have been denied equal treatment in employment, *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976); *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); in housing, *Jones v. Mayer Co.,* 392 U.S. 409 (1968); in public accommodations, *Katzenbach v. McClung,* 379 U.S. 294 (1964); and in the political and judicial process, *Katzenbach v. Morgan,* 384 U.S. 641 (1966), *Akins v. Texas,* 325 U.S. 398 (1945). It is no wonder, then, why,

> . . . a far higher percentage of the minority students come from inadequate secondary schools; a far higher number of deperately poor and will have to work many hours; a far higher proportion will either have heavy and time-consuming family responsibilities or will lack the reinforcement and support that white middle class students typically derive from stable families. O'Neil, *op. cit.* at 735 (footnote omitted).

In view of the formidable obstacles, what is surprising is not that blacks do not perform as well academically as whites, but that they have managed to perform as well as they have. It would be unconscionable, however, for this Court to depart from its previous decisions and hold that the Constitution requires that minorities must bear the full responsibility for overcoming the effects of racial discrimination in our society.

III.

THE REMEDIAL USE OF RACE-CONSCIOUS ADMISSION PROCEDURES TO CORRECT THE GROSS UNDERREPRESENTATION OF MINORITIES IN A PROFESSION DOES NOT OFFEND THE CONSTITUTION.

The almost total absence of minorities from the professions in this country is a problem requiring immediate attention. The California Supreme Court recognized that fact in this case:

> We do not doubt that the amelioration of this societal infirmity is one of the most urgent tasks of the medical schools and the medical profession. *Bakke v. The Regents of the University of California,* 18 Cal.3rd, at 56.

Nevertheless, a majority of that Court held that the use of race-conscious means to attack the problem violates the Fourteenth Amendment. It distinguished cases from this and other federal courts approving the use of race-conscious remedial procedures on the ground that,

> In all these cases the court found that the defendant had practiced racial discrimination in the past and that the preferrential treatment of minorities was necessary to grant them the opportunity for equality that would have been theirs but for the past discriminatory conduct." *Id.,* at 57.

The California Supreme Court's decision is paradoxical: On the one hand, it assumes a compelling need to remedy the underrepresentation of minorities in the medical profession; on the other, it prohibits consideration of the minority status of applicants as a means to accomplish that end. Such an anomalous result is not required by the Constitution, and has no basis in cases dealing with racial classifications.

A. The Remedial Use of Race-Conscious Admissions Procedures by Professional Schools is Not Proscribed by the Fourteenth Amendment.

It is settled that, when governmental entities undertake to make distinctions based upon race, such "classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Washington v. Davis,* 426 U.S. 229, 242 (1976). This Court has not, however, held that racial classifications are illegal *per se.* The central inquiry under the Equal Protection Clause of the Fourteenth Amendment remains whether a particular classification constitutes "invidious racial discrimination . . ." *Id.* See *Loving v. Virginia,* 388 U.S. 1, 10 (1967).

Consistent with this approach, a growing number of cases have approved the remedial use of carefully circumscribed racial classifications in varying circumstances. This Court, for example, has upheld race-conscious procedures used to determine electoral districts, *United Jewish Organizations v. Carey,* 45 U.S.L.W. 4221 (1977); to eliminate the effects of an officially-mandated dual school system, *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); and to remedy unlawful discrimination in employment, *Franks v. Bowman Transportation Company,* 424 U.S. 747 (1976). State and other federal courts have upheld voluntary affirmative action programs designed to correct substantial underrepresentation of minorities in employment and graduate schools, despite the fact that those plans explicitly relied upon race. *E.g., Associated General Contractors of Massachusetts v. Altshuler,* 490 F.2d 9 (1st Cir.) *cert. denied,* 416 U.S. 957 (1974); *Porcelli v. Titus,* 431 F.2d 1254 (3rd Cir. 1970); *Germann v. Kipp,* 14 F.E.P. Cases 1197 (W.D. Mo. 1977); *Alevy v. Downstate Medical Center,* 348 N.E.2d 537, 384

N.Y.S.2d 82 (1976); *DeFunis v. Odegaard,* 82 Wash.2d 11, 507 P.2d 1169 (1973), *vacated as moot* 416 U.S. 312 (1974).

These cases stand for the fundamentally sound principle that, where the traditional reasons for disfavoring racial classifications are absent, distinctions based upon race are not forbidden by the Constitution. That principle controls here. A careful analysis of race-conscious special admissions programs confirms that they implicate none of the concerns raised by invidiously discriminatory racial classifications.

1. Race-conscious special admissions programs are not irrational, or based on racial antagonism.

A hallmark of racial classifications is that they are " 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, . . ." *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964). Such classifications are often based upon unsupportable assumptions regarding the inferiority of a group, or reflect official hostility toward the members of a particular race. As demonstrated earlier in this brief, however, race-conscious special admissions programs are reasonable—indeed, essential—means to accomplish public goals of the highest priority. It cannot seriously be suggested that such programs reflect animosity toward Respondent or any other members of the white race. In short, as the Supreme Court of California recognized in this case, race-conscious special admissions programs unquestionably serve "ends otherwise within the power of government to pursue . . ." *Washington v. Davis, supra,* 426 U.S. at 242. Compare *Loving v. Virginia, supra,* 388 U.S., at 11-12.

2. Race-conscious special admissions programs are not based upon assumptions that are unfair to some individuals, or that stigmatize any individuals or group.

A basic defect of invidious racial classifications is that, with respect either to an entire race or individual members of that race, such classifications are "practically a brand upon them . . ., an assertion of their inferiority." *Strauder v. West Virginia,* 100 U.S. 303, 308 (1880). See *Peters v. Kiff,* 407 U.S. 493, 499-500 (1972); *Brown v. Board of Education of Topeka,* 347 U.S. 483, 494 (1954). Clearly, special admissions programs do not have that effect. The number of qualified applicants to professional schools far exceeds the number of positions available. Creation of a race-conscious special admissions program implies nothing regarding the abilities of those not considered under the program, any more than would rejection of applicants who do not meet geographical distribution criteria. The governmental action in this case reflects "no racial slur or stigma with respect to whites or any other race," *United Jewish Organizations v. Carey, supra,* 45 U.S.L.W. at 4227.

3. Race-conscious special admissions programs are remedial in nature.

This case does not concern governmental action that threatens to exclude any racial group from a sector of civil society, or to substantially restrict its participation. It involves, rather, a remedial program whose limits are clearly defined by the problem it was designed to correct.

This Court has recognized the legitimacy of such efforts. In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), for example, the Court expressly acknowledged the power of a school board to require each school within its jurisdiction to have "a

prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." 402 U.S. at 16. Similarly, in *United Jewish Organizations v. Carey,* 45 U.S.L.W. 4221 (1977), a plurality of the Court approved a redistricting plan designed to maintain minority voting strength where "there was no fencing out of the white population from participation in the political process of the country, and the plan did not minimize or unfairly cancel out white voting strength." 45 U.S.L.W. at 4227. *Cf. Kahn v. Shevin,* 416 U.S. 351 (1974); *Gaffney v. Cummings,* 412 U.S. 735, 754 (1973).

So here, the special admissions program is aimed at correcting a gross underrepresentation of minorities in a professional school and in the profession as a whole, a problem indisputably reflecting the effects of racial discrimination throughout society. The program is reasonable in scope; it admits only qualified applicants and has set modest goals of minority representation. There is no reason to believe that the program will continue beyond the time it is needed; indeed, the elimination of Asian applicants from another special admissions program within the University of California when the number gaining admission under the general procedures increased substantially, suggests the contrary.[28] Under the circumstances, there is no basis for the conclusion that race-conscious special admissions procedures threaten the future opportunity of any race.

4. Race-conscious special admissions programs do not infringe upon the rights of any individuals, or deny them benefits to which they are entitled.

It is plain that no individual has a right to be admitted to a professional school, and equally plain that school

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[28] See Deans' Brief, at 25 n.8.

authorities have wide discretion in formulating and applying criteria for admission to those schools. Even though admissions committees for professional schools may assign numerical scores to applicants to aid them in their deliberations, there is no evidence to support a judicial requirement that applicants be offered admission according to them. The most that any applicant can expect is that his or her application will be considered fairly, and not rejected arbitrarily.

Special admissions programs for minority students are consistent with these principles. In this case, there is no question that Petitioner admitted only persons whom it considered qualified for graduate work and the medical profession. The fact that Respondent and other rejected applicants may also have been qualified is irrelevant. Respondent was not, moreover, excluded from consideration for admission. The record is clear that his application was fully and fairly reviewed by Petitioner's admissions committee. That he did not also qualify for the special admissions program cannot be said to have harmed significantly his opportunity to obtain admission.

In short, Respondent had no legitimate expectation that he would be admitted to Petitioner's medical school. His only claim is that his chance for admission might have improved slightly had Petitioner maintained procedures that effectively excluded almost all minority applicants. Such a claim is not entitled to constitutional protection. See *Franks v. Bowman Transportation Company*, 424 U.S. 747, 774-79 (1976);[29] *NAACP v. Allen*, 493 F.2d 614, 618 (5th Cir. 1974).

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[29]Any harm to Respondent is certainly less than that suffered by the white employees in *Franks*. The job seniority of those employees was reduced by having others placed ahead of them, to their obvious economic detriment. This Court approved that

[footnote continued]

For these reasons, special admissions programs for minority students do not constitute invidious discrimination against any individual or group. The California Supreme Court's contrary conclusion ignores the reasons that racial classifications are disfavored, and is plainly wrong. It bears emphasis, however, that this case does not require the Court to decide whether allegedly benign racial classifications are permissible in all circumstances. Cases that involve elements of stigma or real injury to particular groups or individuals present different problems. All the Court must hold here is that, where none of the evils of invidious racial classifications are present, race-consciousness alone does not offend the Constitution.

B. The Constitutionality of Race-Conscious Special Admissions Programs Does Not Depend on a Judicial Finding of Racial Discrimination.

A majority of the cases upholding race-conscious classifications have involved measures taken to remedy judicial findings of racial discrimination. Such cases offer perhaps the clearest example of situations in which classification by race involves no element of invidious discrimination. It may also be that, absent a finding of illegal racial discrimination, federal courts cannot require government officials to implement race-conscious remedial procedures. The California Supreme Court was incorrect, however, in concluding that an admission or judicial finding of racial discrimination is a condition

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procedure, however, as a proper exercise of equity jurisdiction. 424 U.S. at 774-79. Because the California Supreme Court was incorrect in its conclusion that *Franks* must be confined to instances where a court is attempting to remedy past illegal conduct, see pages 31-36, *infra*, that case *a fortiori* disposes of Respondent's claim of "harm".

precedent to the validity of all classifications based upon race.

This Court and other federal courts have been clear in distinguishing between judicial power to order race-conscious remedial procedures and the far broader prerogative of government officials to implement such procedures voluntarily. For example, in *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971), the Court observed:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of a federal court. 402 U.S. at 16.

Similarly, in *Springfield School Committee v. Barksdale,* 348 F.2d 261 (1st Cir. 1965), the Court of Appeals held that a plan to integrate a number of schools was constitutional even though no determination had been made that an illegal dual system had been maintained:

> It has been suggested that classification by race is unlawful regardless of the worthiness of the objective. We do not agree. The defendants' proposed action does not concern race except insofar as race correlates with proven deprivation of education opportunity. This evil satisfies whatever "heavier burden of justification" there may be. *Cf. McLaughlin v. State of Florida,* 379 U.S. 194, (1964). It would seem no more unconstitutional to take into account plaintiffs' special characteristics and circum-

> stances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological or sociological variances from the norm occasioned by other factors. That these differences happen to be associated with a particular race is no reason for ignoring them. 348 F.2d at 266.

See *Offerman v. Nitkowski,* 378 F.2d 22 (2d Cir. 1967); *Wanner v. County Board of Arlington County,* 357 F.2d 452 (4th Cir. 1966); *Germann v. Kipp,* 14 F.E.P. Cases 1197 (W.D. Mo. 1977).

The Congress, too, has acknowledged the propriety of voluntary efforts by state and local officials to eradicate the effects of racial discrimination. The Civil Rights Act of 1964, for example, was designed to eliminate the results of racial discrimination by the most effective means possible; its legislative history made clear, however, that "primary reliance [was placed] on voluntary and local solutions. Only when these efforts break down would the residual right of enforcement come into play." S. Rep. No. 872, 88th Cong., 2d Sess. at 2 (1964). See also *Lau v. Nichols,* 414 U.S. 563 (1974), in which this Court interpreted Title VI to require a school district to provide bilingual education to non-English speaking children even though the school district had not "affirmatively or intentionally contributed to this inadequacy." 414 U.S. at 569.

The conclusion that race-conscious remedial procedures are not exclusively judicial tools reflects several interrelated considerations. First, attempts to eliminate

the effects of racial discrimination require a balancing of factors and social judgments of the kind that are inherently difficult for courts to make in the context of a lawsuit. The special admissions program in this case involves just such a balancing: the admissions committee at Petitioner's medical school took into account the reality that a history of racial discrimination had resulted in a gross underrepresentation of minorities at the school and in the medical profession; its conviction that this situation was undesirable from an educational and social standpoint; the need to maintain high standards for admission to medical school; and the fact that far more highly qualified persons were applying to medical school than there are places available. Based upon all of these factors, the committee devised the modest, carefully circumscribed special admissions program that is now at issue.

This Court has frequently recognized that this type of policy decision is at best difficult for the judiciary. In *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971), the Court referred to the "flinty, intractable realities of day-to-day implementation" of its desegregation decisions, and pointed out that its orders "cannot embrace all the problems of racial prejudice . . ." 402 U.S. at 6,23. The second *Brown* decision made a similar concession, observing that citizens and governmental agencies must "have the primary responsibility for elucidating, assessing, and solving these problems . . ." *Brown v. Board of Education of Topeka,* 349 U.S. 294, 299 (1955).

A second reason for not reserving to courts the power to invoke race-conscious remedial procedures is that to do so would stand on its head the traditional role of the judiciary in our federal system. Federal courts should be the last, not the first resort for dealing with important

social issues. This Court has emphasized that role by pointing out that its continued involvement with the desegregation of primary and secondary schools has been necessary only because "the failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems." *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 14 (1971).

The Congress has also recognized that using courts as the principal means of combatting the effects of racial discrimination distorts their proper role. The Voting Rights Act, for example, gave the Attorney General primary authority to review changes in voting procedure, with the courts available to hear challenges to his decisions. That strategy was designed in response to the difficulties in "trying to cope with the problem [through] case-by-case litigation against . . . discrimination . . . which required judicial findings of unconstitutional discrimination in specific situations and judicially approved remedies to cure that discrimination." *United Jewish Organization v. Carey,* 45 U.S.L.W. 4221, 4224 (1977). Nothing could be more inconsistent with this design than to insist on judicial findings in order for race-conscious remedies to be implemented.

Finally, and most important, voluntary programs such as the one in this case are essential if the goal of equal opportunity is to be realized. This brief and others have demonstrated that race-conscious special admissions procedures are the only practical means of correcting the gross underrepresentation of minorities in professional schools and in the professions themselves. The history of this Court's school desegregation decisions makes clear the cost of prohibiting such procedures without lengthy litigation in federal courts that are already over-burdened.

It is unrealistic and unwise to require government officials to confess to past illegal conduct in order to institute special admissions programs. The inevitable result of the California Supreme Court's decision in this case is that another generation will pass—and perhaps another after that—before meaningful progress is made toward the pressing national goal of integrated professions.

In sum, the fact that many cases approving the use of race-conscious remedial procedures have involved judicial findings of racial discrimination does not imply that such procedures are invalid in all other contexts. Those cases are properly seen as supporting the broader principle that race-conscious remedies are permissible where they share none of the characteristics of invidious racial classifications. As demonstrated in the previous section, the special admissions programs for minority students clearly survive that test.

CONCLUSION

Minority lawyers who are the product of special admissions programs are playing an important role in providing legal services to the poor. Their presence enhances both the effectiveness and credibility of legal services programs that provide legal services to a significant number of minority clients. The Corporation believes that these minority lawyers are essential in assisting us to achieve the goal set by Congress of providing equal access to our system of justice for those who are unable to redress their grievances because they

cannot afford an attorney. The continued success of our efforts to recruit minority attorneys, however, is seriously threatened by the decision of the Supreme Court of California. For the reasons set out above, therefore, that decision should be reversed.

Respectfully submitted,

ALICE DANIEL
JAMES E. COLEMAN, JR.

Legal Services Corporation
733 15th Street, N.W.
Washington, D.C. 20005
(202) 376-5113
Attorneys for Amicus Curiae.

June 7, 1977