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 NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*

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Interest of the Amicus

The National Association for the Advancement of Colored People (NAACP) is a nonprofit membership association representing the interests of approximately 500,000 members in 1800 branches throughout the United States. Since 1909, the NAACP has sought through the courts to establish and protect the civil rights of minority citizens. In this respect, the NAACP has often appeared before this Court as an amicus in cases involving employment, voting rights, jury selection, capital punishment and other cases involving civil rights. More frequently, however, the NAACP has appeared here as counsel to parties in school desegregation suits.

The present case is of particular interest to the NAACP as it involves the review of a decision which, if affirmed, will in all likelihood put an end to the recent efforts of some institutions of higher learning to voluntarily and effectively desegregate their facilities. At the very least, affirmance would serve to discourage such efforts and will deprive this nation of yet another generation of highly educated, highly qualified minority professionals. The NAACP has repeatedly appeared before Congress, successfully pleading the interests of its members for obtaining sweeping legislation requiring the integration of all publicly financed education facilities. Court-ordered elimination of the affirmative action device chosen by the Davis medical school on grounds that it violates the 14th Amendment would render the efforts of the amicus and the legislation obtained largely meaningless.

The true import of this case is that affirmance by the Court will cast a direct burden upon the amicus and upon other civil rights organizations who have chosen litigation as our primary means of ending racial discrimination. Frequently characterized as "private attorneys general," we have almost singlehandedly enforced the nation's commitment to equal educational opportunities. An adverse decision in this case will redouble our burden of litigation, requiring us to seek in the courts what a growing number of educational institutions have recently been willing to accomplish voluntarily.

Consent of the Parties

With the consent of both parties pursuant to Rule 42 of the Supreme Court Rules, Amicus respectfully submits this brief in support of the Petitioner, the Regents of the University of California.

Introduction and Summary of the Argument

The most fundamental fact in this case is that if the Davis medical school had adhered strictly to its regular admissions program for the filling of all available positions, there would have been few, if any, black or Chicano medical students admitted. Although there would have been no dearth of perfectly qualified minority applicants, they would have virtually all been screened out by the regular admissions criteria. These criteria, admitting two thirds of the students based upon a ranking of "benchmark" scores and one third of the students based upon such otherwise extraneous factors as marital status, location of intended medical practice, and "balance",[1] have only a limited basis for predicting medical school performance for most students,[2] and no basis for predicting performance of minority students.[3]

Having the prescience to anticipate the absence of minority students, the Regents approved a special admissions program for admitting qualified students who were both disadvantaged and of minority background. Sixteen per-

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[1] Only two out of three of the applicants offered admission through the regular admission ranking process chose to attend the Davis Medical School. The remaining students were selected from the "alternate list" by the Dean of Admissions, which list was not ranked according to numerical "qualifications." Declaration of George H. Lowery, p. 4.

[2] Dr. Lowery stated that only one of the four scores obtained on the Medical College Admissions Test was useful in predicting academic performance during the first two years of medical school, and that "there is not very much correlation beyond that." Deposition of George H. Lowery, CT-152.

[3] Dr. Lowery stated that "quantifiable data, such as the test scores and grades of applicants do not necessarily reflect the capabilities of disadvantaged persons." Declaration of George H. Lowery, p. 8.

cent of the available positions were reserved for these applicants.

The California Supreme Court determined that the special admissions program, based in part on racial classifications, was invidious discrimination under the Fourteenth Amendment. Without reaching the question of whether the program fulfilled compelling state interests, the court below reasoned that there were less intrusive alternatives available. The court suggested that the school could expand its student capacity and that the admissions process could become more subjective, embracing covert decision making calculated to increase the proportion of minority students regularly admitted.

The Amicus argues that it was not necessary to consider whether there were less intrusive alternatives or whether there was a compelling state interest, because the special admissions device is a constitutionally permitted and statutorily authorized device for ameliorating the racial exclusion that would otherwise exist. Numerous decisions of this Court interpreting the Fourteenth Amendment and of the court below interpreting state law warrant the use of race conscious remedies to desegregate a public educational institution. Through Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq., Congress has required the desegregation of any institution receiving federal financial assistance. The Department of Health, Education and Welfare, exercising its statutory authority to issue regulations under Title VI, has specified that race conscious devices must be utilized to overcome the effects of past racial exclusion, whether or not that past exclusion was purposeful.[4] Thus, the court below erred in its con-

[4] In the trial court, both the Respondent in his complaint and the Petitioner in its cross-complaint alleged Title VI as a jurisdictional basis. The trial court determined that the special ad-

sideration of the parameters of the Fourteenth Amendment, and the decision of the Supreme Court of California must be reversed.[5]

ARGUMENT

I.

The Special Admissions Program Should Be Upheld as a Permissible, Voluntary Effort of the Davis Medical School to Desegregate Its Institution.

A. The Federal Standard

Since its landmark decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) this Court has consistently upheld the notion that:

> . . . in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. *Id.* at 495.

While *Brown* and its companion cases[6] dealt with specific statutes which required or permitted the segregation by

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missions program violated Title VI, but the issue was not discussed by the Supreme Court of California. Although the record is technically silent with respect to whether the Davis Medical School receives federal financial assistance and is therefore subject to Title VI, the Court may take notice of the fact, may establish the fact through questioning at oral argument, or may remand the case for the limited purpose of making such a determination.

[5] The Respondent, Allan Bakke, has not challenged the special admissions program on the ground that a reservation of sixteen percent or any other number is arbitrary or unreasonable, only that it is *per se* unconstitutional. Although the Amicus fully concedes that the use of race, while permissible, is only a "starting point" and cannot be arbitrarily or unreasonably used, the Court need not reach the issue of whether it was so used in this case.

[6] *Briggs* v. *Elliott; Davis* v. *County School Board of Prince Edward County, Va.;* and *Gebhart* v. *Belton*, 347 U.S. 483 (1954).

race of public school students, this Court has construed the concept of *de jure* segregation to include situations in which the actions and/or inactions of local and state officials have had the foreseeable effect of creating, maintaining or perpetuating racial segregation within the schools.[7] Moreover, where school officials, through policies and practices such as assignment patterns, site selections, and the like incorporate within the schools the segregative results of public and private residential discrimination, such school officials become liable for the racial segregation within the schools.[8]

As this Court noted in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971), before the equity powers of the federal courts may be invoked to provide relief to students attending segregated schools, there must first be a showing of a constitutional violation:

> . . . judicial powers may be exercised only on the basis of a constitutional violation . . . Judicial authority enters only when local authority defaults.

B. Under Established Federal Law, The California Regents Were Permitted to Initiate Voluntary Methods of Desegregation to Eliminate Present Effects of Past Discrimination

In *Swann, supra,* this Court found the powers of school officials to be plenary and held it to be within the broad discretionary powers of school officials to conclude, as an educational policy, that:

> . . . to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro

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[7] *Keyes* v. *School District No. 1, Denver,* 413 U.S. 189 (1973).

[8] *Keyes, supra; Milliken* v. *Bradley,* 418 U.S. 717 (1974).

> to white students reflecting the proportion for the district as a whole.[9]

In *North Carolina Board of Education* v. *Swann,* 402 U.S. 43, 45 (1971), decided on the same day as *Swann* v. *Charlotte-Mecklenburg, supra,* this Court affirmed its findings with regard to the powers of school authorities and further stated that such officials may conclude:

> . . . that some kind of racial balance in the schools is desirable quite apart from any constitutional requirement.

Thus, although there must first be a constitutional violation before a federal court may be called upon to order the desegregation of schools and other public institutions, school and other public officials may, within their plenary powers, take it upon themselves to voluntarily desegregate their institutions.

While this Court has never had occasion to determine whether such voluntary desegregation plans as have been adopted by school officials have been valid, both this Court and lower federal courts have consistently held that the recission of such voluntary desegregation plans by subsequently elected or appointed school officials is, in and of itself, a constitutional violation which warrants the intervention of the federal courts.[10]

In the action now before this Court, the Regents at Davis acknowledged that the student enrollment at the

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[9] *Id.* at 16.

[10] *Brinkman* v. *Gilligan,* 539 F.2d 1084 (6th Cir. 1976), *cert. denied* 423 U.S. 1000 (1976); *Bradley* v. *Milliken,* 484 F.2d 215 (6th Cir. 1973) (*en banc*), *aff'd in part and rev'd in part,* 418 U.S. 717 (1974); *Oliver* v. *Kalamazoo,* 508 F.2d 178 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

school was almost exclusively white, and further, that this segregated condition was likely to continue, absent their intervention. In California, as in most other states, school authorities have plenary powers over the operation of the schools, including admissions and assignment powers.[11] Before initiating the special admission program, the Regents identified several factors which were contributing to the segregated condition of the school's enrollment. Included among these factors was the use of quantitative data in admissions determinations, which data the Regents admitted did not truly measure the capabilities of minorities and other persons from disadvantaged backgrounds.

In initiating the special admission program, the Regents were seeking to overcome the discriminatory results inherent in the regular admissions program and to provide minorities and other disadvantaged students with the opportunity to compete on an equal basis with students in the regular admissions program. A further stated purpose of the special admissions program was to promote diversity within the student body and medical profession.[12]

It is thus clear that under the language of *Swann* v. *Charlotte-Mecklenburg, supra,* and *North Carolina Board of Education* v. *Swann, supra,* that while there has been no judicial determination as to whether the Regents were constitutionally liable for the segregation at Davis prior to the initiation of the special admission program, the Regents were, in any event, permitted to voluntarily desegregate their institution.

In determining methods by which public officials may desegregate their facilities, this Court has said:

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[11] See *Crawford* v. *Board of Education of the City of Los Angeles,* 17 Cal.3d 280, 130 Cal. Rptr. 724, 551 P.2d 28 (1976).

[12] Declaration of Dr. George H. Lowery, p. 7.

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in every instance.

Green v. *County School Board of New Kent County,* 391 U.S. 430, 439 (1968). Among the options available to state officials in remedying segregation is the use of race-conscious criteria, as a starting point, in effecting a broader remedial plan. As this Court has noted:

> Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations.

Swann v. *Charlotte-Mecklenburg,* 402 U.S. at 25.

The limited use of racial criteria, as one of a number of considerations used in weighing the applications of disadvantaged students seeking acceptance through the special admissions program, is a wholly permissible device for desegregation.

II.

The Actions of the Regents Were Not Only Permitted, But Were Required Under California Law.

A. The Duty Owed

Since at least 1963, public officials in California, including school authorities, have been required to eliminate segregation within public institutions regardless of the cause of such segregation. The elimination of the *de jure/de facto* distinction in California was first set out in *Jackson* v. *Pasadena City School Dist.,* 59 Cal. 2d 876, 880, 31

Cal. Rptr. 606, 608-609, 382 P.2d 878, 880 (1963), where the State Supreme Court, in a unanimous decision, declared that:

> [T]he segregation of school children into separate schools because of their race, even though the physical facilities and the method and quality of instruction in the several schools may be equal, deprives the children of the minority group of equal opportunities for education and due process of law.

Jackson and its progeny have consistently held that minority children suffer serious harm when their education takes place in segregated public schools and that such harm is equally present whether such segregation is *de jure* or *de facto* in nature. Id. at 59 Cal.2d 876, 31 CAL. RPTR. 606, 383 P.2d 878; *San Francisco Unified School District* v. *Johnson,* 3 Cal.3rd 937, 92 Cal. Rptr. 309, 479 P.2d 669 (1971); *Santa Barbara Sch. Dist.* v. *Superior Court,* 13 Cal.3rd 315, 118 Cal. Rptr. 637, 530 P.2d 605 (1975). In *Crawford* v. *Board of Education of the City of Los Angeles,* 17 Cal.3d 280, 130 Cal. Rptr. 724, 551 P.2d 28 (1976), the California Supreme Court's most recent decision in this area, the Court stated that:

> . . . the importance of adopting and implementing policies which avoid "racially specific" harm to minority groups takes on special constitutional significance with respect to the field of education, because at least in this state, education has been explicitly recognized for equal protection purposes as a "fundamental interest." 17 Cal.3d at 297, 130 Cal. Pptr. at 734-735, 551 P.2d at 38-39.

The *Crawford* Court then went on to quote from its decision in *Serrano* v. *Priest,* 5 Cal. 3d 584, 96 Cal. Rptr. 601,

486 P.2d 1241 (1971), where it had emphasized that the "fundamental" nature of the right to an equal education derives in large part from the crucial role that education plays in "preserving an individual's opportunity to compete successfully in the economic market-place, despite a disadvantaged background . . . [T]he public schools of this state are the bright hope for entry of the poor and oppressed into the mainstream of American Society." 5 Cal. 3d at 609, 96 Cal. Rptr. at 619, 487 P.2d at 1259. Thus, based upon its previous holdings in *Jackson* and *Serrano*, the California Supreme Court in *Crawford* held that:

> Given the fundamental importance of education, particularly to minority children, and the distinctive racial harm traditionally inflicted by segregated education, a school board bears an obligation under article 1, section 7, subdivision (a) of the California Constitution, mandating the equal protection of the laws, to attempt to alleviate segregated education and its harmful consequences, even if such segregation results from the application of a facially neutral state policy.

17 Cal.3d at 297, 130 Cal. Rptr. at 735, 551 P.2d at 39.

While *Jackson* and *Crawford* dealt with the obligations of school districts, those holdings have been expanded to impose upon other California public officials in some circumstances an affirmative obligation to design programs or frame policies so as to avoid discriminatory results. 17 Cal.3d at 296-297, 130 Cal. Rptr. at 734, 551 P.2d at 38. See also, *People* v. *Superior Court*, 38 Cal. App. 3rd 966, 113 Cal. Rptr. 732 (Court of Appeals 1974).

From this brief discussion of California law, several points become clear. First, as a predicate for liability, the *de jure/de facto* distinction has been abandoned in California. Consequently, a finding of past racially discrimina-

tory action is not necessary for the assumption of an affirmative duty by public officials to eliminate segregation within public institutions in the State. As the Court in *Crawford* found:

> . . . local school boards are "so significantly involved" in the control, maintenance and ongoing supervision of their school systems as to render any existing school segregation "state action" under our state constitution equal protection clause.

17 Cal.3d at 294, 130 Cal. Rptr. at 732, 551 P.2d at 36.

Secondly, public officials in California have been held, in numerous circumstances, to be under an *affirmative* duty to eliminate segregation within their respective institutions. Thus, these officials must do more than merely abstain from intentional discrimination. 38 Cal. App. 3rd 966, 972, 113 Cal. Rptr. 732, 736. School officials in California have repeatedly been held to bear a constitutional obligation to take reasonable, feasible steps to alleviate school segregation regardless of its cause. Similarly, officials charged with formulating a panel for a grand jury selections have been found to:

> . . . have an affirmative duty to develop and pursue procedures aimed at achieving a fair cross-section of the community. *Id.*

Third, to the extent that education is a "fundamental interest" in California, it would logically follow that school officials at all levels, i.e., elementary, secondary, college, and post-graduate, bear the same affirmative obligation to assure that equal opportunities exist within public educational facilities.

Finally, and most significantly in relation to the case now before this Court, the California Supreme Court has

repeatedly interpreted the State's equal protection clause as guaranteeing to minorities and other victims of past discrimination the right to equal opportunities and access to public institutions in California. Applying these principles to the case at bar, it is clear that the Regents' actions were mandated by state law.

Having concluded that their 1968 and 1969 admissions policies were resulting in an almost exclusively white institution, and further concluding that such policies were not providing to minorities and other disadvantaged students, equal opportunities for access to the medical school at Davis, the Regents were not only permitted under California law, but were required to take affirmative steps to alleviate such conditions. The record below clearly indicates that the regular admissions policy serves to eliminate virtually all otherwise qualified minority applicants from admission to the School of Medicine. The record further establishes that in the opinion of the Chairman of the Admission Committee, such a condition was likely to continue under the then-existing admissions policy.[13]

Having acknowledged the segregated condition of the school, it was not necessary, under California law, for the Regents to make an inquiry into the causes of such segregation. Clearly, under established case law of the state, the Regents bore an affirmative obligation to alleviate the segregation existing at Davis, regardless of the cause. It should be noted, however, that even though a finding of "state action" was not necessary before a duty to act was imposed upon the Regents, the record clearly establishes that the segregation at Davis in 1969 was not adventitious. Such a condition was clearly the result of specific policies of the university. While not specifically denying admission

[13] Declaration of Dr. George H. Lowery, pp. 7-8

to minorities and other disadvantaged individuals, the admission criteria prior to the special admission program had an admittedly racially discriminatory effect. As Dr. Lowery stated in his Declaration:

> Another reason special consideration may need to be given to minorities is that quanitifiable data, such as the test scores and grades of applicants do not necessarily reflect the capabilities of disadvantaged persons.[14]

The use of the regular admission criteria and its effect upon minority and other disadvantaged applicants may be likened to the practice of school authorities in drawing school attendance zones and making student assignments. While such policies may, on their face, appear to be neutral, where the result is to incorporate and build upon residential segregation caused by public and private discrimination, racial neutrality is lost and such segregatory practices become illegal state action. *Keyes, supra; Bradley, supra; Crawford, supra.* Likewise, where university officials adhere to an admission policy which they acknowledge does not truly measure the capabilities of minority and other disadvantaged students, such officials are no longer free to continue to follow such policies, but must take affirmative steps to alleviate the segregatory results thereof.

B. The Method Chosen

School official have considerable discretion in devising method to eliminate segregation within California schools. As the California Supreme Court recently stated in *Crawford* v. *City School District of Los Angeles, supra* at 17 Cal.3d at 305-306, 130 Cal. Rptr. at 724, 551 P.2d 45:

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[14] Declaration of Dr. George H. Lowery, p. 8.

> . . . so long as a local school board initiates and implements reasonably feasible steps to alleviate school segregation in its district, and so long as such steps produce meaningful progress in the alleviation of such segregation and its harmful effects, we do not believe the judiciary should intervene in the desegregation process. Under such circumstances, a court thus should not step in even if it believes that alternative desegregation techniques may produce more rapid desegregation in the school district . . . In our view, reliance on the judgment of local school boards in choosing between alternative desegregation strategies holds society's best hope for the formulation of desegregation plans which will actually achieve the ultimate constitutional objective of providing minority students with the equal opportunities potentially available from an integrated education.

The formulation of desegregation plans and programs do, by necessity, involve the use of race conscious criteria, and such criteria have been approved as a starting point by both California courts and this Court. *Swann, supra; Keyes, supra; Crawford, supra.*

It is indeed ironic that the same Court which, over seventeen years ago, abolished the *de jure/de facto* distinction as a requisite for the desegregation of its public school facilities, and six years ago declared that education in California was a "fundamental interest," would strike down the special admission program, as implemented at Davis, as unconstitutional. Such a decision is clearly not consistent with a long line of cases previously decided by the California Supreme Court. The Court below attempts to distinguish *Bakke* from its previous holdings in several ways. First, the Court found that absent any showing of

past discrimination, any preferential treatment of minorities and other disadvantaged individuals is invalid. Yet, as already discussed, the California Supreme Court has long held that no showing of discriminatory or *de jure* action is necessary before public officials come under an affirmative duty to eliminate the segregation existing within their respective institutions. *Crawford, supra.* Moreover, the racially discriminatory results of the regular admission policy were not only shown in the record below, but were admitted by the Regents. Thus, as already noted above, not only were the Regents permitted to initiate a voluntary desegregation program, they were required to do so under the law of the State.

A second objection of the Court below was that the special admission program served to totally deprive *Bakke* of a medical school education solely because of his race. It is on this basis that the California Supreme Court distinguishes *Bakke* from school desegregation litigation. The distinction, according to the Court, is that in a school desegregation remedy, no child is absolutely deprived of an education, while that is exactly the loss suffered by Bakke as a result of the actions of the Regents. It can only be said that in finding that Bakke or any other medical school applicant has an absolute right to attend medical school, the California court erred. While education is a "fundamental interest" in California, no state court has yet interpreted such an interest to include an absolute right to attend medical school. Additionally, while the Court below states that no student attending schools in a system undergoing desegregation is precluded from attending school, the Court fails to note that such attendance, until a minimum age, is compulsory under state law. Moreover, *Bakke* was in no way absolutely deprived of a right to attend medical school by the actions of the Regents; rather, he was

only precluded from attending Davis, because he did not meet the admissions criteria.

As the California courts, as well as this Court, have held on numerous occasions, many remedies in a desegregation plan may be exclusionary. For example, and as was noted in the dissent below, magnet schools have been upheld as valid desegregative tools.[15] To be effective, however, these schools have to have controlled admissions policies to insure that the student population of the school will not become one-race, thus defeating the desegregative objective. The "magnets" used to attract students to these schools are usually specialized or unique programs or courses not offered in other schools in the district. Thus, a student who is precluded from attending a particular magnet school because his or her attendance there will negatively effect the desegregation of the school, suffers the same loss as Bakke, i.e., the "right" to attend a school of one's choice.

Controlled transfers are also incorporated, in many instances, in desegregation plans.[16] Under this type of transfer, a student wishing to transfer to a particular school may do so only if such a transfer will promote de-

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[15] See, 18 Cal.3d at 73, 132 Cal. Rptr. at 707, 553 P.2d at 1179-1180 (Dissent); *Hart* v. *Comm. School Board of Ed. N.Y. Sch. Dist. #2,* 512 F. 2d 37, 42-43, 54-55 (2nd Cir. 1975); *Spangler* v. *Pasadena City Bd. of Ed.,* 311 F.Supp. 501, 519 (C.D. Cal. 1970); *Goss* v. *Bd. of Ed. of Knoxville,* 301 F.2d 164, 168 (6th Cir. 1962), *vacated on other grds,* 373 U.S. 683 (1963); *Lee* v. *Macon County Bd. of Ed.,* 317 F. Supp. 103 (M.D. Ala. 1970) (three-judge court); *Arvizu* v. *Waco Independent Sch. Dist.,* 373 F.Supp. 1264 (W.D. Tex. 1973), *aff'd in part, revised as to other issues,* 495 F.2d 499 (5th Cir. 1974); *Booker* v. *Special School Dist., #1, Minneapolis,* 351 F.Supp. 799 (D. Minn. 1972); *Davis* v. *Baton Rouge Parish School Bd.,* 398 F.Supp. 1013 (D.La. 1975).

[16] Cases cited note 15, *supra.*

segregation. That student, as Bakke, is denied attendance at a school of his or her choice because of race. Such controlled transfers likewise have been upheld by numerous courts as valid desegregation components.[17] Therefore, the proposition that one may be excluded from the school of his choice on account of his race, in the context of a valid desegregation plan, is not new in the law. As a result, Mr. Bakke has suffered no constitutionally cognizable harm.

C. Summary

The decision reached in the Court below is inconsistent with a long line of decisions of the same Court involving school desegregation. In California, public officials, including school officials, have been since at least 1963, under an affirmative duty to alleviate racial segregation in their institutions regardless of the causes of such segregation. Moreover, while education has been declared to be a fundamental interest in California, no court in that state has interpreted the principle as providing every individual in the state the right to attend medical school. Indeed the fundamental interest in education to be protected is that minorities be afforded equal opportunities and access to integrated educational facilities in the State.

In section I-B and II A-B of the Argument portion of this Brief, pages 6-18, there is an extended discussion of the question of how the California Supreme Court has interpreted that state's constitution. Under ordinary circumstances, such would be inappropriate here because this court only becomes involved when such an interpretation runs afoul of the Supremacy Clause of the United States Constitution. However, the discussion becomes essential because the California Supreme Court in effect held that

[17] Cases cited note 15, *supra*.

the 14th Amendment prohibits the regents of the university from doing that which state law clearly requires. As we have shown, neither the due process nor the equal protection clause of the 14th Amendment contains any such prohibition.

The nobility of purpose behind the adoption of the special admissions program is conceded by all. That purpose was to guarantee that from a large pool of applicants, each of whom was wholly and fully qualified to pursue medical studies, and predictably, to perform satisfactorily in the medical profession, at least a few would be from ethnic minority groups. This is not the case in which a qualified white person was rejected, while an unqualified ethnic minority person was accepted. Here, the 16 ethnic minority students were in every way qualified as university medical students. Thus, the question, on a policy basis, is reduced to whether a court or the university should determine priority in the acceptance of students from the pool of qualified applicants. In a constitutional sense, the question is whether the 14th Amendment somehow dictates the order in which qualified applicants must be admitted to a state university's medical school.

If the purpose of the special admissions program had been to exclude white persons from the medical school we would be the first to concede that it could not survive the strict scrutiny to which such racial classifications are traditionally subjected. Where, however, as here, the clear and express intent is to effectuate the original purpose of the 14th Amendment, the situation is vastly different.

Proof that the same test is not applied in all situations is demonstrated by a comparison of two cases. In *Morgan* v. *Virginia*, 328 U.S. 373, a Virgina statute which re-

quired racial segregation in interstate commerce was invalidated under the commerce clause. In *Bob Lo Excursion Co.* v. *Michigan,* 333 U.S. 28, however, a Michigan statute was upheld under the same clause. Both affected interstate commerce, but the purpose of one was to require segregation, while that of the other was to prevent it. The difference in purpose was crucial.

In a number of recent cases this Court has weighed heavily the intent involved in state action under a 14th Amendment challenge. Such action has usually passed constitutional muster when the purpose was not to discriminate because of race or color, even though such discrimination may well have been an incidental result of the protested action. These cases recognize that in an immensely complicated society the vast complexities involved in competing claims preempt any reasonable possibility that any affirmative action effort, no matter how great the need or just the cause, will function without incidental disadvantage to someone. Yet, this fact of life need not render a great university impotent to deal with the urgent task of bringing meaningful equality of opportunity to its constituency.

When we use the phrase "meaningful equality of opportunity" we imply an opportunity of which a person may take advantage. That is the meaning this Court gave the phrase in *Lau* v. *Nichols,* 414 U.S. 563 (1974). There, pupils of Chinese decent admittedly had a theoretical equality of opportunity to attend the public schools of San Francisco. That, however, was not enough. It was held that steps had to be taken to remove language barriers so that these pupils could take advantage of the theoretical equal opportunity.

Here, we admit that from the outset all ethnic minorities had a theoretical equality of opportunity to attend

the medical school at Davis. What happened was that the university itself found that for number of reasons unrelated to one's ability to perform in school or in the profession certain ethnic minorities were being excluded. The special admissions program had as its sole purpose the correction of that situation. It was an effort to make the theoretical right to enter that medical school a meaningful reality for those for whom it had previously been only a dream.

In its decision the California Supreme Court completely overlooked the original purpose of the 14th Amendment. Though much debate has been engaged in over the years, there is now a general consensus that the 14th Amendment was originally a measure designed to facilitate the movement of former slaves into the mainstream of American life. Graham, Howard J., "Everyman's Constitution", State Historical Society of Wisconsin, 1968.

Congressional debates during the adoption of that amendment fully substantiates the foregoing determination of purpose. While we recognize the obvious fact that the benefits of equal protection and due process are the just due of all Americans of every race or color, we flatly assert that it is an outright perversion of the original intent of that sacred document to hold that, as a matter of law, it must now be altered from a shield for the protection of black people seeking entry into the mainstream of American life, into a sword for use in cutting off their legitimate hopes and aspirations to become professionals also, and not merely hewers of wood and drawers of water for a white society.

III.

The Use of Race Conscious Criteria For Admitting Qualified Minority Applicants to Scarce Educational Opportunities Is Not Rendered Unconstitutional by the Absence of a Judicial Finding of Past Discrimination.

The power of the federal judiciary to order race conscious remedies where past statutory or constitutional violations have been found has been firmly established, for it is precisely that finding of past illegal conduct which confers such jurisdiction upon the courts. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969); *Hills* v. *Gautreaux,* 425 U.S. 284 (1976); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976); *Beer* v. *United States,* 425 U.S. 130 (1976); *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966); *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* —— U.S. ——, 45 U.S.L.W. 4221 (1977). Indeed, upon a finding of illegal racial discrimination, it has been held that, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965).

This Court has recently held that the constitution does not require absolute color-blindness on the part of state officials in establishing electoral districts, but rather that they are permitted, even in the absence of a finding of past discriminatory conduct, to focus entirely upon race and ethnicity in their decisionmaking. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey, supra.* The *Carey* case was not the first instance in which the Court has

enunciated this principle. In *North Carolina Board of Education* v. *Swann,* 402 U.S. 43 (1971), the Court was presented with a statute requiring absolute color-blindness in assigning school children to schools, specifically prohibiting racial assignments "for the purpose of creating a balance or ratio of race, religion or national origins." *Id.* at 44, n. 1. The Court struck the statute down, commenting that the "apparently neutral form" of the statute "against the background of segregation, would render illusory the promise of Brown v. Board of Education . . ." *Id.* at 45-46. The Court held that while the Constitution does not prescribe any particular racial mix or balance, state officials are permitted wide latitude to take race into account as a "starting point" in achieving a racial balance in the schools.

This principle of approving officially sanctioned, race conscious decisionmaking where past exclusion has been found by state or federal officials has been applied as well in the lower courts. In *Southern Illinois Builders Association* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972), and *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir. 1971), *cert. denied,* 404 U.S. 854 (1971), the use of race in the allocation of future employment opportunities was permitted in the absence of a judicial finding of past discrimination. In *Associated General Contractors of Massachusetts* v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974), the Circuit Court approved the use of race conscious criteria imposed by state authorities which exceeded in scope the applicable federal regulations promulgated pursuant to an executive order. Recently, in *EEOC* v. *A.T.&T.,* —— F.2d ——, 14 EPD Para. 7506 (3rd Cir. 1977), the Court upheld the use of race in making promotions where it was required by a Consent Decree.

On the record of the present case before the Court, the Regents of the University of California made an emperical determination that the Davis Medical School would remain a white enclave unless racial or ethnic factors were taken into account in the admissions process. Its past conduct in 1968 and 1969 may not have resulted in a violation of the Fourteenth Amendment as articulated in *Washington* v. *Davis,* 426 U.S. 229 (1976), but once realizing the ethnic impact and lack of utility of the selection criteria, its continued use of those criteria may well have met the standards articulated. In any event it is not necessary for the Medical school to have engaged in unconstitutional conduct before it is permitted to take steps to prevent such conduct from occurring in the future. As this Court has repeatedly explained, the permissive scope of the Fourteenth Amendment is much broader when applied to state officials attempting to integrate a school or an electoral district than it is with respect to a federal court imposing a remedy for past unconstitutional conduct. *North Carolina Board of Education* v. *Swann, supra; United Jewish Organizations of Williamsburgh, Inc.* v. *Carey, supra.* The decision of the California Supreme Court requiring color-blind decisions and prohibiting efforts to achieve racial balance would have the same effect as the statute struck down in the *Swann* companion case. Consequently, it must be reversed.

IV.

The Use of Race Conscious Selection Techniques For the Admission of Medical Students Is Authorized by Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq., in the Circumstances of This Case.

As part of the Civil Rights Act of 1964, Congress enacted Title VI prohibiting discrimination on account of race, color or national origin in the exclusion of persons from participation in any program or activity receiving Federal assistance.[18] Enforcement responsibility was given to those Federal agencies which extend financial assistance, and with the approval of the President, they were empowered to issue rules, regulations or orders of general applicability to achieve the objectives of the statute.[19]

The legislative history of Title VI clearly indicates that the purpose of the statute was to accomplish racial and ethnic integration of federally financed facilities as quickly as possible, relying heavily on the encouragement of volun-

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[18] Section 601 of Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[19] Section 602 of Title VI provides, in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

tary compliance. The House Report accompanying H.R. 7152 noted that continued discrimination against Negroes was the "most glaring" problem to be addressed, and that while voluntary progress had been made on the State and local level, "it has become increasingly clear that progress has been too slow." House Report No. 914, 1964 U.S. Code, Cong. and Admin. News, p. 2393. Specifically discussing Title VI, the House report stated that federal agencies could utilize the termination of financial assistance as well as "any other means authorized by law" in enforcing the statute. *Id.* at 2401. Congressional proponents of the bill recognized its applicability to increasing the rate of entrance of Negroes into medical schools,[20] and opponents shared this recognition, stating in addition their concern for an expansive definition of "discrimination" as well as the burden which minority rights would cast upon the rights which the majority had always enjoyed.[21]

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[20] Seven Representatives submitted a joint statement of support for H.R. 7152 which accompanied the House Report. Their commentary stated:

> "Negro patients are denied access to hospitals or are segregated within such facilities. Negro doctors are denied staff privileges —thereby precluding them from properly caring for their patients. Qualified Negro nurses, medical technicians, and other health personnel are discriminated against in employment opportunities. *The result is that the health standards for Negroes to become doctors or to remain in many communities, after gaining a medical education, is reduced.* . . . Regrettable as it may seem, a number of universities and other recipients of these grants continue to segregate their facilities to the detriment of Negro education and the Nation's welfare." (Emphasis added) Additional Views on H.R. 7152 of Hon. William M. McCullouch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, and Hon. James E. Bromwell, 1964 U.S. Code Cong. and Admin. News, p. 2511.

[21] The Minority Report accompanying H.R. 7152, characterizing the entire bill as "the greatest grasp for executive power conceived in the 20th century," pointed out that "The right of boards of

Exercising the authority granted by Section 602 of Title VI, the Department of Health, Education and Welfare (hereafter, HEW) has published regulations effectuating its obligations under the statute and giving some guidance to financial recipients with respect to the kinds of discrimination prohibited under the Act. The guidelines in effect in 1969, for example, prohibited discrimination in the provision of training or other services provided by recipients of federal support.[22] The guidelines specifically applied to the admissions practices of institutions of higher learning,[23] and the concept of racial or other dis-

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trustees of public and private schools and colleges to determine the handling of students and teaching staffs" would be seriously impaired by Title VI's strictures. Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, 1964 U.S. Code, Cong. and Admin. News, p. 2433. The Minority Report of the House Judiciary Committee also expressed great concern that the concept of discrimination was not defined in the bill and that the concept of "racial imbalance" would become a controlling factor in defining discrimination. *Id.* at 2436. The Report additionally expressed concern that the granting of rights under the Civil Rights Act may curtail some of the advantages which the majority had always enjoyed:

> "In determining whether this bill should be adopted, it must be remembered that when legislation is enacted designed to benefit one segment or class of a society, the usual result is the destruction of coexisting rights of the remainder of that society. One freedom is destroyed by governmental action to enforce another freedom. The governmental restraint of one individual at the behest of another implies necessarily the restriction of the civil liberties and the destruction of civil rights of the one for the benefit of the other. . . ." *Id.* at 2437.

[22] 45 C.F.R. §80.3(a) (1969) stated:

> "No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies."

[23] 45 C.F.R. §80.4(d)(1) stated:

> "In the case of any application for Federal financial assistance to an institution of higher education . . ., the assurance re-

crimination was referred to broadly as the utilization of any criteria which has the *effect* of excluding persons on account of race or which otherwise has the effect of defeating the objectives of the program.[24]

The regulations were republished each year essentially unchanged until 1973, when provisions were added to place an affirmative obligation upon recipients to correct the effects of past racial or ethnic exclusion, regardless of whether the recipient considered the past exclusion to have been discriminatory. From that year to date, recipients were instructed that they "must take affirmative action to overcome the effects of prior discrimination" and that they "may take affirmative action to overcome the effects of conditions which resulted in limiting participa-

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quired by this section shall extend to admission practices and to all other practices relating to the treatment of students."

Appendix A to the regulations listed the types of programs to which the regulations applied, and included were a variety of grants for health and medical services, including teaching facilities for medical, dental, and other health personnel.

[24] 45 C.F.R. §80.3(b)(2) stated:

"A recipient . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color or national origin."

In the illustrative applications included in the regulations, exclusion accomplished indirectly through the use of criteria having a disparate impact upon racial or ethnic groups were described:

"A recipient may not take action that is calculated to bring about indirectly what this part forbids it to accomplish directly. Thus a State, in selecting or approving projects . . . may not base its selections or approvals on criteria which have the effect of defeating or of substantially impairing accomplishment of the objectives of the Federal assistance program as respects individuals of a particular race, color, or national origin." 45 C.F.R. §80.5(h).

tion by persons of a particular race, color, or national origin." [25] Illustrative applications of these two new sections describe in some detail the affirmative obligations to correct for past exclusion, and the use of race or ethnicity as a corrective factor granting "special consideration" is specifically approved by HEW.[26]

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[25] 45 C.F.R. §80.3(6) was added to the regulations stating:

"(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

"(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."

[26] 45 C.F.R. §80.5(i) and (j) were added, stating:

"(i) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under §80.6(d) . . . have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of §80.3(b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

"(j) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service."

Title VI, like its legislative companion in the 1964 Civil Rights Act, Title VII, therefore was enacted with a broadly stated prohibition on discrimination. Congress relied upon administering agencies such as HEW to define discrimination and develop the mechanics of enforcement through regulation. Until 1973, HEW's regulations did not contain references to remedial steps necessary to cure past exclusion of protected racial or ethnic groups, but they clearly established the "effects test" for defining what is and what is not a discriminatory practice under the statute. Since 1973, HEW's regulations have left no doubt that in the distribution of federally financed programs and services, any criteria applied to exclude beneficiaries which has the effect of disproportionately excluding an identifiable racial or ethnic group is prohibited. Whether this exclusion has taken place in the past on account of purposeful discrimination or whether it has simply occurred unintended is of limited distinction,[27] the regulations require corrective measures including race conscious decisions designed to include the groups previously excluded.

In *Lau* v. *Nichols,* 414 U.S. 563 (1974), the Court applied Title VI, as given substance by HEW's regulations, to prohibit the exclusion of Chinese-speaking minorities in San Francisco from receiving a meaningful, federally financed education. Applying the agency's regulations to the exclusionary language barrier, the Court stated that, "Discrimination is barred which has that *effect* even though

[27] C.F.R. §80.5(i) states that "it will become necessary" to take corrective measures where past discrimination has existed, while subsection (j) states that such steps "may" be taken in the absence of past discrimination. It is significant to note, however, that subsection (j), applying as it does to situations lacking a history of discrimination, is the more specific of the two subsections in terms of approving race conscious decisionmaking in the future to correct the effects of the past.

no purposeful design is present . . . " *Id.* at 568. Thus, the Court has upheld HEW's interpretation of what is prohibited by Title VI, adopting an "effects test" somewhat analogous to that held applicable to Title VII.[28] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Although the Supreme Court of California refrained from reviewing the trial court's decision as it was based in part upon Title VI, it is clear that the statute applied to the conduct of the Davis medical school and that any evaluation of Davis' special admissions program must include the school's Title VI obligations.

Utilization of the school's traditional entrance criteria—an amalgam of grade point averages, Medical College Admissions Test scores and interview performance[29]—have had a sharp exclusionary effect on identifiable minority racial and ethnic groups since the opening of the school. During the years 1968, and 1970-1974, a total of 429 stu-

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[28] Title VI and the implementing HEW regulations are actually much broader than the Guidelines on Employee Selection Procedures published by the Equal Employment Opportunity Commission under Title VII, 35 F.R. 1607 et seq. (1970). HEW regulations currently provide that if the application of a particular criteria or standard has resulted in disproportionate exclusion, remedial steps are to be taken. EEOC Guidelines, however, provide that if an employment standard or criteria has a disproportionate effect, it may continue to be utilized despite that effect if the standard or criteria has validity as defined in the Guidelines.

[29] The regular admissions criteria as described in the opinion below were not always controlling, and variances were made from the "benchmark" ratings of candidates. Dr. Lowery, the admissions officer, had the authority to override the committee selection process when some other factor such as a particularly strong recommendation or a candidate's marital circumstances so persuaded him. Deposition of George H. Lowery, CT-183. The California Supreme Court acknowledged that the alternate list of regular admissions applicants, used for selection of slots which first-round offerees refused, was not formulated in order of "benchmark" ratings. 533 P.2d 1158. Selection from this alternate list was made at the discretion of the dean of admissions. *Ibid.*

dents were admitted through the regular admissions program. Only one of these admittees was black and 6 were Chicanos. State officials responsible for determining admissions criteria could well be justified in determining, as they in fact did determine, that exclusive reliance upon traditional entrance standards would produce few, if any, minority medical students.[30] This realization, based upon emperical data and without any further considerations, would stand the school in violation of 45 C.F.R. §80.3(b)(2), particularly as illustrated in §80.5(h), and subject it to a potential loss of federal assistance or litigation. By 1973, when the statistical pattern of ethnic exclusion was well entrenched in the regular admissions program, and in addition when 45 C.F.R. §80.3(6)(i) and (ii) and §80.5(i) and (j) were added to the HEW regulations, there could be no doubt that a race conscious ameliorative device was not only authorized but required by Title VI.

The Davis medical school's response to the disappointing absence of minority students was the implementation of its special admissions program—in effect, a reservation of 16 percent of available positions for applicants who were qualified in absolute terms for admission but who possessed the two additional characteristics of being disadvantaged and members of racial or ethnic minorities. This was done primarily in order to provide integrated learning experiences for its students, and it was done with the knowledge

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[30] The emperical results of the first two years of admissions following the opening of the medical school would have alone led to this conclusion. The Davis medical school's minority admissions after the first two years was also substantially below the 1969 national average of 4.8 percent, a national average greatly deplored by the Association of American Medical Colleges. See, "Report of the Association of American Medical Colleges Task Force to the Inter-Association Committee on Expanding Educational Opportunities for Blacks and Other Minority Students," (Washington: AAMC, April 22, 1970).

that the "objective" regular admissions criteria bore little relationship to any student's performance in medical school.[31]

The medical school's special admissions program was a blunt but effective means of avoiding the exclusive reliance upon "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin," 45 C.F.R. §80.3(b)(2) (1969). Subsequent additions to HEW regulations governing the Davis medical school made it crystal clear that the special admissions program with its racial and ethnic criteria of application was precisely the "special consideration to race, color, or national origin" required of the medical school in order "to make the benefits of its program more widely available to such groups, not then being adequately served." 45 C.F.R. §80.5(j) (1973).

The race conscious admissions program is therefore approved by the HEW regulations published pursuant to statutory authority, *Lau* v. *Nichols, supra,* the statutory foundation for the regulations is well within Congress' legislative domain, and the regulations are reasonably related to the statutory objective—the hasty elimination of racially segregated training opportunities financed by the federal government.

[31] Dr. Lowery acknowledged that only one of the four scores computed from the Medical College Admissions Test correlated with academic performance in the first two years of medical school. Deposition of George H. Lowery, CT-152. He stated, "there is not very much correlation beyond that." *Ibid.*

CONCLUSION

WHEREFORE, for the reasons stated above, Amicus respectfully urges the Court to reverse the decision of the Supreme Court of the State of California below.

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