IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLAN BAKKE,
Respondent.

BRIEF OF THE AMERICAN FEDERATION OF TEACHERS. AMICUS CURIAE.

LAWRENCE A. POLTROCK,
134 North LaSalle Street,
Chicago, Illinois 60602,
312-236-0606,
General Counsel American Federation of Teachers, (AFL-CIO).

WAYNE B. GIAMPIETRO,
Of Counsel.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To the Honorable Justices of the Supreme Court of the United States:

Now comes the American Federation of Teachers by its General Counsel, Lawrence A. Poltrock, and petitions the Court for leave to file a brief as amicus curiae in the above captioned cause and in support thereof states as follows:

1. The American Federation of Teachers is a union of teachers affiliated with the AFL-CIO. The overwhelming majority of its members teach in the public schools. The American Federation of Teachers is composed of over 1,000 locals throughout the United States and overseas with more than 450,000 members.

2. The American Federation of Teachers and its local unions and many of its members have been involved in much litigation throughout the United Stat s concerning the rights of teachers in all constitutional areas. It has filed briefs amicus curiae with this Court in *Sweatt* v. *Painter*, 399 U. S. 629, 70 S. Ct. 848 (1953), and *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686 (1964), as well as other cases.

3. The American Federation of Teachers is deeply interested in the case at bar, as the decision of this Court herein will have a substantial effect upon all education in both the public and private sectors.

4. Both parties to this cause have consented to the filing of a brief amicus curiae by the American Federation of Teachers.

WHEREFORE, petitioner requests leave that its brief amicus curiae may be filed with this Court.

Respectfully submitted,

LAWRENCE A. POLTROCK,
134 North LaSalle Street,
Chicago, Illinois 60602,
312-236-0606,
General Counsel American Federation of Teachers, (AFL-CIO).

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BRIEF OF AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE.

INTEREST OF AMICUS AND INTRODUCTION.

The American Federation of Teachers is an organization of more than 2,000 local unions with a total membership in excess of 450,000 teachers throughout the United States. They are committed to a policy of "democracy in education and education for democracy." Membership consists chiefly of classroom teachers in elementary schools, high schools, colleges and universities who do the actual training of young people in the nation's schools.

In its own affairs, Amicus is committed to a practice and policy of complete equality and non-segregation between persons of every race and persuasion. Article II, Section 7 of

its Constitution commits it to "fight all forms of bias in education due to race, creed, sex, social, political, or economic status, or national origin."

Other sections of its Constitution pledge the organization to the support and promotion of the ideals of democracy as envisioned in our basic national laws and provide guidelines for the full execution of these policies. The AFT has worked increasingly throughout its history for the abolition of all forms of discrimination and segregation in education based upon race. It has filed Amicus Curiae briefs in *Sweatt* v. *Painter*, 339 U. S. 629, 70 S. Ct. 848 (1953), and *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686 (1954). Its arguments were echoed in the landmark decision of the United States Supreme Court which followed.

Among the membership of the American Federation of Teachers are many locals of college teachers, containing thousands of members who are dedicated to these ideals. It is on behalf of this policy adhered to by the organization since its founding in 1916 that this brief is submitted.

Amicus files this brief not so much to support the individual claim of Allan Bakke but to support his contention that racial quotas have no place whatsoever under our laws in the admission of students to colleges, graduate or professional school level. It is dedicated to the principle that each individual should be judged upon his own merits without regard to who his parents happen to have been.

STATEMENT OF FACTS.

An applicant for admission to the University of California medical school is required to take the medical college admission test. In addition to his scores from this test, the applicant must describe his extra curricular and community activities, a history of his work experience, and his personal comments. In the year 1973, the school's application form inquired whether the ap-

plicant desired to be considered by a special committee which passed upon the applications of persons from economically and educationally disadvantaged backgrounds. The following year a revised form was adopted wherein the applicant was asked whether he described himself as a white Caucasian, or whether he fell within any of the following categories: Black/Afro American, American Indian, Mexican/American, or Chicano, Oriental/Asian-American, Puerto Rican (Mainland), Puerto Rican (Commonwealth), Cuban, or other. The applicant was also asked whether he wished to be considered as an applicant from a minority group.

Each year the medical school admits 100 students. Of these 100 positions, 16 are set aside for those selected by a special admission committee, which evaluates the applications of disadvantaged applicants only. While theoretically a white caucasian can be considered disadvantaged within this category, no white applicant has ever been selected for one of these positions.

Under the regular admissions procedures, any applicant who has a grade point average of below 2.5 on a scale of 4 is automatically disqualified. An applicant for the special admission program is not so disqualified.

Bakke had a grade point average of 3.51. In 1973, his combined numerical rating for purposes of admission was 468 out of a possible 500, and in 1974 when he reapplied, it was 549 out of a possible 600. He was not admitted nor placed on the alternate list for selection in either year. Some minority students who were admitted under the special program in 1973 and 1974 had grade point averages below 2.5, some being as low as 2.11 in 1973, and 2.21 in 1974.

The trial court held that the special admissions program constituted invidious discrimination in favor of minority races and against Bakke and others similarly situated, in violation of the Fourteenth Amendment to the United States Constitution. However, the trial court declined to order that Bakke be admitted,

on the ground that he had not shown that absent the discrimination he would have been admitted in any event.

The California Supreme Court upheld the finding that the special admissions program was discriminatory in violation of the equal protection clause of the Fourteenth Amendment. Finding that the trial court used the wrong standard in regard to the burden of proof of Mr. Bakke, it remanded the case to the trial court to determine under the proper burden of proof whether Bakke would have been admitted absent the special admissions program.

ARGUMENT.

I.

The Medical School's Special Admission Program Is Essentially a Quota System Which Is Invalid Under the Fourteenth Amendment.

At the time that this country was founded, it was a basic philosophical underpinning of the system created that "all men are created equal" as expressed in the Declaration of Independence. This, of course, means that all men stand equal before the law. No one is to be treated differently because of any factor other than his own actions and ability. While this philosophical goal has not always been attained in practice, it is an ideal which we must always strive to attain. If we ever loose sight of this principle, then our form of government is inevitably doomed to decay and destruction.

The history of our country shows a steady attempt to secure practical attainment of this ideal. Section II, Article IV, of the U. S. Constitution states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The Fifth Amendment guarantees that no person shall "be deprived of life, liberty, or property, without due process of law." Likewise, the Fourteenth Amendment provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

> States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Similarly, 42 U. S. C. § 1981, passed to enforce the Fourteenth Amendment provides:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pain, penalties, taxes, licenses, and exactions of every kind, and to no other."

That equality of treatment was a basic tenet of those who drafted our constitution is clearly set forth in Federalist Paper No. 57, where we find the following statement regarding the very basis of our form of government:

> "I will add, as a fifth circumstance in the situation of the house of representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy and connect the ruler and the people together. It creates between them that communion of interest and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked what it is restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of society? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the viligant, and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it."

One of the strongest pronouncements of the equality of all is found in the dissent of the first Justice Harlan in *Plessy* v.

Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), where he said:

> "But in the view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race."

This sentiment was echoed in *Cooper* v. *Aaron,* 358 U. S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958), one of the line of the school desegregation cases whether it was said:

> "The constitutional provision [of the Fourteenth Amendment], therefore, must mean that no agency of the state, or the officers or agents by whom its powers are exerted, shall deny to any persons within its jurisdiction the equal protections of the laws. Whoever, by virtue of public position under a state government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibitions; and as he acts in the name and for the states and is clothed with the state's power, his act is that of the state. This must be so, or the Constitutional prohibition has no meaning . . . thus, the prohibitions of the Fourteenth Amendment extend to all laws of the state denying equal protection of the laws; whatever the agency of the state taking action . . . or whatever the guise in which it has taken. . . ."

That endorsement was subsequently echoed in *Loving* v. *Virginia,* 388 U. S. 1, 10, 87 S. Ct. 1817, 1823 (1967): "the clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the states".

The principle is clear and unwavering, there shall be *no* discrimination based on race. To hold otherwise would be to pervert the very principle of equal protection. If we are to be true to the constitution, we cannot have a situation where all are equal, but some are more equal than others. If racial discrimination is wrong, it is wrong for all purposes and regardless of the ends sought to be attained by that discrimination. Once we conclude that there is "good" discrimination and "bad" discrimination, we have ceased to become true to our principles. We have discarded one of the basic underpinnings of our constitution.

To state the problem is to make obvious the fact that quotas are not only idealogically and philosophically wrong, but also undefinable as a matter of practicality. Our society is a pluralistic one, made up of a great cultural and ethnic mix. Once one begins setting quotas, where do we stop? How do we determine what groups of "minorities" are entitled to special treatment? The system of the University of California does not provide for preference for American Indians, or Orientals. Why are not they, and other groups entitled to special considerations as well as those chosen for such consideration?

The approach taken by the University of California here is clearly improper. This country was founded upon the proposition that it is the worth of the individual which is paramount. We are not a country of castes and discreet classes. We are a nation of individuals, each of whom is entitled to be judged upon his own merit, not his class or background. It cannot be emphasized enough that *no one* be they Black, White, Yellow, or any mixture thereof, should be discriminated against because of that accident of birth. No one has the right to impose such a classification, be he employer, union, educator, administrative agency, or judge.

Indeed, it has been well established that state action employing a racial classification is "constitutionally suspect . . . subject to the most rigid scrutiny . . . and in most circumstances

irrelevant to any constitutionally acceptable legislative purpose." *McLaughlin* v. *Florida,* 379 U. S. 184, 191-92, 85 S. Ct. 283, 288 (1974). When Title VII of the Civil Rights Act of 1964 was passed, its sponsors made it clear they did not intend quotas to be imposed for the selection of personnel in any situation. In fact, they stated just the opposite. In response to the objection that the bill would establish quotas for non-whites, Senator Clark responded with the statement that "quotas are themselves discriminatory". 110 Cong. Rec. 7218. Similarly, Senator Humphrey noted that "the proponents of the bill have carefully stated on numerous occasions that Title VII does not require any employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group." 110 Cong. Rec. 12723. Thus, it was clearly written in the law that Title VII was not to require any entity covered by it to grant preferential treatment to any individual or group because of the race, color, religion, sex, or national origin, of that individual group. 42 U. S. C. § 2000e-2(j). This was specifically recognized by this Court in *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 91 S. Ct. 849 (1971).

The constitution and the entire philosophical history of our country cries out against discrimination of any kind, in favor of or against anyone. Discrimination on the basis of background is improper in every respect be it privately or judicially imposed. Quota systems must not be sanctioned.

The special admissions program of the medical school is an example of how such a quota system in reality works against those sought to be helped. While the program purports to be a way of implementing the public policy of eliminating racial barriers and thereby providing equal opportunity for all Americans to enter into professions of their choice, in reality it does not eliminate such barriers, but only establishes a quota system in violation of the equal protection clause.

The regular admissions program of the school provides for the mingling of applications of every race and/or ethnic group.

It also provides for a use of a common standard to evaluate the qualifications of all applicants regardless of race, or nationality. Thus, it is unlikely that many economically or educationally disadvantaged applicants from any racial or ethnic background are admitted to the medical school under the regular program. Indeed, it is clear that a majority of black students and Chicano students, for reasons of past discrimination, would not be qualified for admission to the school under the provisions of the regular program.

The special admissions program, notwithstanding its purported goal, provides for the admission of a fixed number of applicants from racial or ethnic minority groups on the basis of economic and/or educational disadvantage. This program, *in effect*, places a limitation on the number of applicants from racial or ethnic minority groups who can be admitted to the medical school. Moreover, the existence of the special admissions program acts as a deterent to racial and ethnic minority group members from applying under the regular program in that the applicant must initially indicate under which program he desires to be considered. The promise of special favor forces such applicants to apply under the special admissions program thereby competing amongst each other for the fixed number of positions open to them under this program. Thus, this program is a cruel hoax perpetrated on members of racial or ethnic minorities who desire to become physicians. It is an old quota system in disguise, placing a maximum on the number of minority group applicants who would be admitted and providing them with a "privilege" of fighting it out for a fixed number of positions.

The goal of equal opportunity is not served by such a program. Indeed, it is disserved because it forces more economically and educationally disadvantaged minority group applicants to compete with less so disadvantaged minority group applicants for a fixed number of positions in the school. It is difficult to imagine a program, the effect of which is so contradictory to its purported goal.

The plan not only discriminates against applicants from racial and ethnic minority groups by placing a de facto limitation on the number admitted to the medical school, it also imposes an invidious racial classification when it excludes economically or educationally disadvantaged whites from the special admissions program.

There is no question that the operation of the program can result in the admission of minority group applicants and the exclusion of white applicants who are just as economically and/or educationally disadvantaged since the former compete only with members of other disadvantaged groups while the latter are forced to compete with the generally advantaged social group.

As stated above, state action employing a racial classification is "constitutionally suspect . . . subject to the most rigid scrutiny . . . and in most circumstances irrelevant to any constitutionally acceptable legislative standard." The special admissions program is a state—imposed racial classification which requires a showing of compelling government interests to survive the constitutional challenge. No such showing has been made by the Regents. All of the justifications presented for the imposition of a racial classification on medical school admissions satisfy, at best, the "reasonable basis" test for determining the constitutional validity of classifications that are not suspect and do not touch upon fundamental rights.

The special admissions program clearly operates to discriminate against economically and/or educationally disadvantaged whites solely on the basis of their race. There is no good reason for subjecting this form of discrimination to a less strict judicial scrutiny than any other form of discrimination. Indeed, the history of judicial application of the strict scrutiny test to forms of discrimination, other than those operating against racially disadvantaged groups, makes it clear that the origin of the Fourteenth Amendment in the need to protect recently freed slaves is no longer relevant to its application. See *Harper* v. *State Board of Election*, 383 U. S. 663, 86 S. Ct. 1079 (1966).

State-imposed racial classifications which exclude whites are no less "suspect" than those which exclude any other group *per se*. Consequently, the racial classification in the case at bar must meet the strict scrutiny standard since it additionally discriminates against everyone who is more economically and/or educationally disadvantaged than the 16 chosen under the program.

In order for the Regents to satisfy the strict scrutiny test it would not only have to show compelling government interest in discrimination against both racial minority groups and whites, but also that the means chosen to further the government interest is reasonable and the least harmful means of furthering that interest.

Specifically, the Regents must show that their stated goals "of promoting diversity in the school and the professional" and "expanding medical education opportunities for disadvantaged members of minority groups" are not merely desirable social goals, but governmentally compelling goals. The Regents must also show that there is no more reasonable nor less invidious means of achieving these objectives than by imposing a fixed quota affording an absolute preference to 16 disadvantaged minority group applicants solely on the basis of their racial or ethnic background. As it turns out, the Regents' fixed quota scheme is neither the most reasonable nor the least invidious means of achieving the above objectives even if it is assumed that there are governmentally compelling reasons.

II.

The Need Is for Programs That Guarantee Truly Equal Opportunities for All Persons.

The main problem with the special admissions program of the Regents of California is that it is a result-oriented approach which does not have the capacity to remedy past injuries. All that it may do is to answer at most, the demands of this day

only while creating new long range problems. The lowering of admissions standards for certain minority groups only undermines one of society's key moral concepts, that an individual's success is a product solely of his merit and that accidents of birth such as race are irrelevant to successful performance. The correct approach is obviously to provide equal opportunities to all, not to give temporary advantage to some. As we said Chief Justice Stone in *Hirabayashi* v. *United States,* 320 U. S. 81, 63 S. Ct. 1375 (1943) "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose constitutions are founded upon the doctrine of equality." State imposed preferences based on race creates not equality, but a government rule of social difference without regard to an individual's attributes or merit. Furthermore, such a government rule not only does not tend to do away with past effects of discrimination, but tends to perpetuate that discrimination under the guise of benign paternalism.

Indeed, the approach taken by the Regents is merely an expedient way of making it appear as if they are attacking the problem. The real question in this area is to identify the actual problems to be remedied. The goal is to see to it that no individual is discriminated against as a result of outside factors such as his racial and economic background. There are bettter ways of attacking this problem than that chosen by the Regents.

It is possible to devise educational programs which would achieve the goal of equal opportunity for all without undermining the practice of racial neutrality required by the equal protection clause of the U. S. Constitution.

One such program might be a special admissions program open to all applicants who are economically and/or educationally disadvantaged regardless of their race or national origin. Since those admitted under the provisions of such a program could not be said to "bump" better qualified non-minority applicants, there being no quota of openings from

which anyone is excluded solely on the basis of race or national origin, it in no way undermines the practice of racial neutrality. Indeed, even a race-conscious program could, under suitable remedial circumstances, be consistent with racial neutrality. Racial neutrality does not require racial blindness, although it does not permit racial preference. That is the plain meaning of *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U. S. 1, 91 S. Ct. 1267 (1971), and *Lau* v. *Nichols,* 414 U. S. 563, 94 S. Ct. 786 (1974).

Nothing could be simpler than to permit any graduate of any accredited state university to enroll in the medical school on the basis of a "first year try out". Unlimited remedial programs can be provided for those who are economically and/or educationally disadvantaged. Such a program would serve a variety of socially desirable goals including promoting diversity in the school and profession, expanding medical education and opportunities for disadvantaged members of all groups and increasing the number of physicians.

There are no easy solutions to the problems arising at the level of medical school admissions from the years of economic and education deprivation typical of the average black or chicano who has grown up in California. No one formula can right all the wrongs and restore the relative group competitive advantage of whites over minorities. Standards of admission not related to performance, artificial barriers such as wealth, past discriminatory practices and prejudices must be eliminated. Once this is achieved, then individual differences and preferences standing in the way of achievement in areas such as medicine, music or art will not be a legal or social problem. Thus, the only genuine solution to the social problem, of which one symptom is admission to medical schools, is to establish as a national social policy the elimination of all such artificial barriers.

The answer does not lie in setting up a class of doctors who may be perceived by those within their profession and the public

at large as being inferior, having achieved that position by dint of special consideration as a result of their race or ethnic background. Such an approach could attach a stigma to minority professionals. It could perpetuate the myth that minority group members are inherently inferior in performance and professionalism. This is the exact attitude which we are striving to overcome.

Our national goal must be to eliminate all barriers which are not relevant to individual achievement and personal worth. Once this is achieved, the same standards of admission and performance should apply to everyone. Our goal is to give each individual, no matter what his racial or ethnic background, the same opportunity to reach that level of achievement which he is able to attain by virtue of his own intrinsic ability. Individual goals and preferences must be recognized but artificial barriers, prejudices and irrelevant non-related standards must be eliminated.

The answer lies in commencing remedial programs at an early level. The answer lies in the Regents and those allied with them in California and all states seeing to it that the appropriate educational opportunities are granted to all persons in their early years of schooling. The answer lies in granting extra help, tutoring and counselling at the beginning levels, so that by the time a person reaches the age when he is to apply for graduate school he will not have been educationally disadvantaged.

Another answer lies in the area of recruitment. Nothing inhibits the Regents from contacting would-be applicants among minority groups at an early stage in their education career, and informing them of the advantages and opportunities which lie in the medical profession and encouraging them to take advantage of special tutorial programs. If a minority group member perceives that he will not be able to obtain entry into medical school, he will not strive to do so. If, on the other hand, it is made clear to him at an early stage that he will be given

an equal opportunity to enter the medical profession, he will then seek to do so. But, he must be informed of what it is that he must do in order to reach that goal. Thus, an affirmative action program is not prohibited, and is a much better approach to the larger problem than the one selected by the Regents here.

To the extent that lack of funds is a barrier to admission, waiver of fees, scholarships and the like are appropriate tools to be used, not only at the graduate and professional school level, but also at earlier levels of college so that those with the proper potential will be able to obtain the background necessary to prepare them for entry into the highest levels of academia.

Finally, it may well be an appropriate answer to increase the number of positions available in the school so that more minority members, in absolute numbers will be entitled to admission.

Obviously the problem is complex. There is no one simple panacea for the problem to which we find ourselves heir as a result of past discrimination. It is clear that quotas are not a proper solution. Their use will only perpetuate the discrimination and inhibit the search for real long-range solutions. The solution to the problem of past discrimination in this country is not found in special admissions programs which provide at best 16 more positions for minority groups and at the worst only 16 positions for minority group graduates from a particular medical school. On the contrary, only a national policy commitment to quality education for all can reduce the economic advantage of wealth and other artificial barriers to a level where the majority of whites and nearly all of every other group will be able to compete individually for higher educational opportunities.

CONCLUSION.

The American Federation of Teachers is concerned with two fundamental questions:

1. Whether the strict scrutiny test should be applied to state-imposed classifications which discriminate against any group of whatever race.

2. Whether the public interest is served by remedial educational programs which were founded upon or result in preferential benefits to some solely on the basis of race or national origin.

We think the Regents' program, while at first blush seemingly meritorious, will in the end be self-defeating. If allowed to become entrenched, its character is but another quota system, which is unacceptable to all.

The decision of the California Supreme Court should be affirmed.

Respectfully submitted,

LAWRENCE A. POLTROCK,
134 North LaSalle Street,
Chicago, Illinois 60602,
312-236-0606,
General Counsel American Federation of Teachers, (AFL-CIO).

WAYNE B. GIAMPIETRO,
Of Counsel.