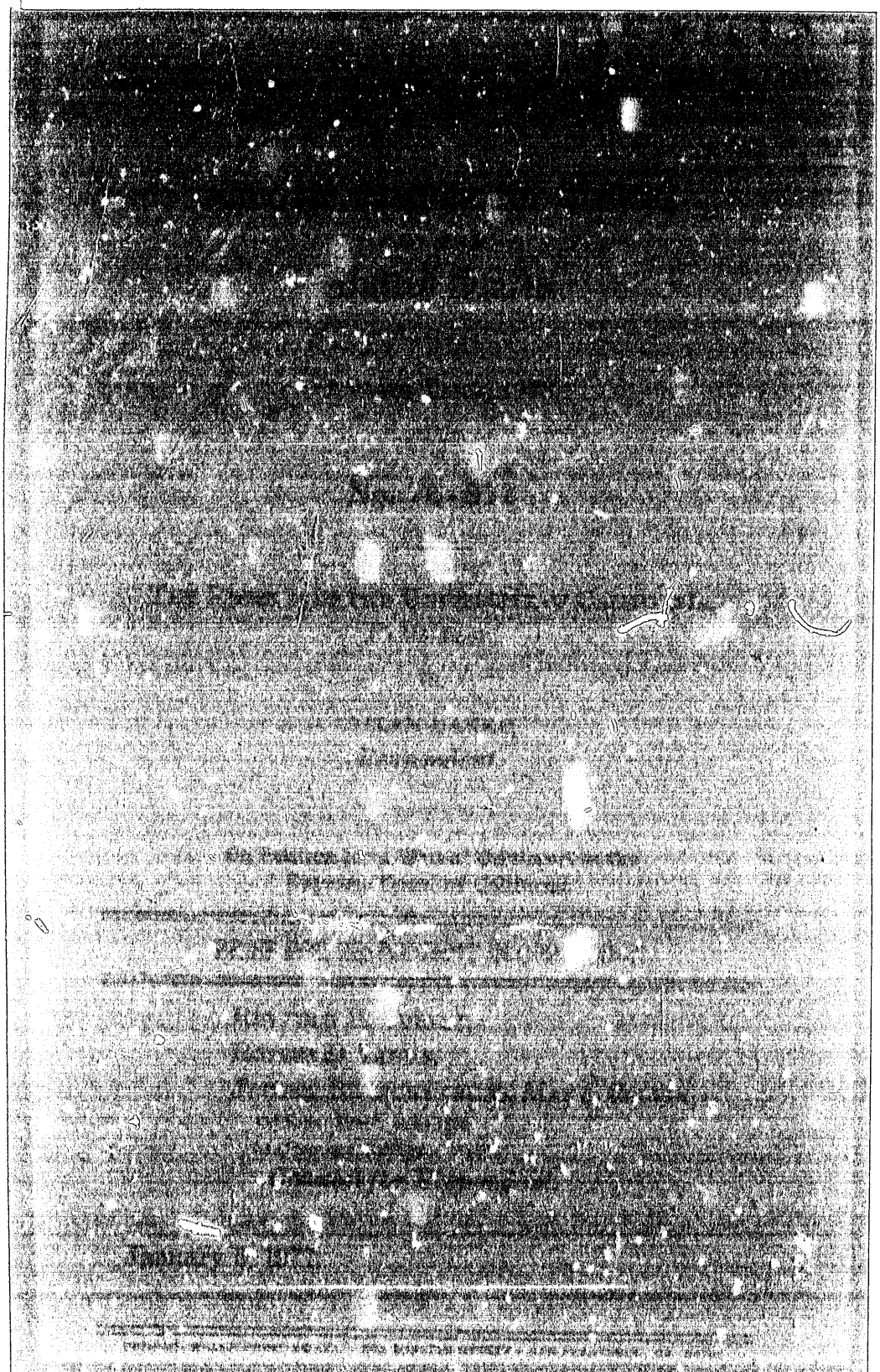

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

VS.

ALLAN BAKKE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Allan Bakke opposes the petition of The Regents of the University of California for a writ of certiorari to review the opinion, as modified, and judgment of the Supreme Court of California entered in this case on October 28, 1976.

OPINIONS BELOW

The opinion of the California Supreme Court and the modification thereof, as well as the opinions, find-

ings of fact and conclusions of law and judgment of the state trial court are adequately set forth and indexed in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Is Allan Bakke denied the equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution when he is excluded from a state operated medical school solely because of his race as the result of a racial quota admission policy which guarantees the admission of a fixed number of "minority" persons who are judged apart from and permitted to meet lower standards of admission than Bakke?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: " . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

COUNTERSTATMENT OF THE CASE

The primary issue in this case is Allan Bakke's right to be admitted to the medical school maintained by petitioner at the University of California at Davis

("the medical school") as well as the constitutionality of petitioner's procedure for selecting students to attend the medical school.

Bakke's Application

Allan Bakke graduated from the University of Minnesota in 1962 with a Bachelor of Science degree in mechanical engineering. After receiving his degree, he did graduate work in mechanical engineering at the University of Minnesota for a year and then served for four years in the United States Marine Corps. While in the service, Bakke began to inquire about the possibility of attending medical school. After completing his military service, he attended Stanford University and, in June of 1970, received his Master of Science degree in mechanical engineering. While studying for his master's degree, and for some time thereafter, Bakke completed the various courses that are prerequisites to a medical education (CT 112-116).[1]

Bakke's overall undergraduate grade point average (OGPA) is 3.51 on a scale of 4.0 (CT 115). His grade point average in the sciences (SGPA) is 3.45 (*Id.*). Upon graduation he was elected to Pi Tau Sigma, the national mechanical engineering honor society (CT 113).

Bakke took the Medical College Admissions Test (MCAT), which is divided into four sections (verbal, quantitative, science and general information) and is scored on a percentile basis. He scored in the 96th

[1] "CT" references are to pages in the Clerk's Transcript on Appeal, filed with the California Supreme Court.

percentile (verbal), 94th percentile (quantitative), 97th percentile (science) and in the 72nd percentile (general information) (CT 115).

In 1973 and 1974 Bakke duly and timely submitted his application to the medical school for admission to the classes of 1977 and 1978, respectively (CT 387).

Admission to The Davis Medical School

Petitioner, faced with the annual task of selecting an entering class of 100 students, has established not one, but two, admission committees. For the most part, the committees act independently of one another, apply different standards to the particular candidates they scrutinize and, ultimately, select students for the first year class whose qualifications differ markedly depending upon which committee considers their applications.

One of these committees, the regular admission committee, selects 84 of the 100 members of the first year class. The other committee, known commonly as the "task force committee" or "special admission committee", selects the remaining 16 members and bases its selection upon substantially lower requirements than does the regular committee. The specific differences in the standards, and the results of their application, are discussed below.

The Regular Admission Procedure

The regular admission procedure is conducted as follows:

(1) To be considered for admission, a candidate must submit his application to the medical

school between July and December of the academic year preceding the year for which admission is sought (CT 149, 248).

(2) Normally the regular admission committee reviews the applications to select certain individuals for further consideration. Once the committee has conducted this initial screening, the applicants selected are scheduled for personal interviews. The minimum standard adopted by petitioner provides that no student will be interviewed by the admission committee if he or she has an overall grade point average (OGPA) below 2.5 on a scale of 4.0 (CT 63, 150-151).

(3) In 1973 the interview procedure provided for one of the faculty members of the admission committee to interview each applicant. In 1974 applicants were interviewed twice, once by a faculty member and once by a student member of the committee (*Id.*).

(4) Following the interview, each applicant is rated by the various admission committee members. Taken into consideration for rating purposes are the interview summary prepared by the interviewer(s), the applicant's overall grade point average (OGPA), grade point average in science courses (SGPA), medical college admissions test score (MCAT) and other biographical information in the applicant's file, such as a description of extra curricular activities, work experience, a personal statement of reasons for wanting to attend medical school, and letters of recommendation (CT 62-63, 155-159).

The committee members rate each applicant on a scale of from 0 to 100. The ratings are then added

together and the applicant's total rating—in essence the admission committee's evaluation of his or her potential ability—is used as a "benchmark" in the selection of students (CT 63). In 1973 five committee members rated each applicant; thus, the highest possible rating for that year was a score of 500. In 1974 six committee members rated each applicant and the maximum possible total rating increased to 600 *(Id.)*.

Bakke's Interview and Rating

In both 1973 and 1974 petitioner considered Bakke's application pursuant to the above-described procedure (CT 389).

In 1973, Dr. Theodore H. West interviewed Bakke and concluded that:

> "[o]n the grounds of motivation, academic record, potential promise, endorsement by persons capable of reasonable judgments, personal appearance and demeanor, maturity and probable contribution to balance in the class I believe that Mr. Bakke must be considered as a very desirable applicant to this medical school and I shall so recommend him." (CT 225)

A summary of Dr. West's interview was circulated among the members of the admission committee. Bakke received a total rating of 468 out of a possible 500 (CT 180). Although Bakke's average rating was 93.6 out of a possible 100, petitioner rejected his application (CT 378).

Between the rejection of his 1973 application and his second application in 1974, Bakke wrote to Dr. George Lowrey, Associate Dean at the medical school

and Chairman of the Admission Committee, protesting the medical school's admission program insofar as it purported to grant a preferential admission quota to members of certain racial and ethnic groups (CT 259).

After submitting his 1974 application, Bakke was interviewed twice. One interview was with Mr. Frank Gioia, a student member of the admission committee. Mr. Gioia found that Bakke "expressed himself in a free, articulate fashion," that he was "friendly, even-tempered, conscientious and delightful to speak with . . . " and concluded that, "I would give him a sound recommendation for [a] medical career." (CT 228-29) Mr. Gioia gave Bakke an overall rating of 94 (CT 230).

The second interview was with Dr. Lowrey, who, by coincidence, was the person to whom Bakke had written in protest of the special admission program. Dr. Lowrey and Bakke discussed many subjects during the course of the interview, including the medical school's decision to grant a preferential admission quota to certain racial groups (CT 226). Apparently, they disagreed over the merits of that decision (*Id.*) In contrast to the two other persons who had interviewed Bakke, *supra,* Dr. Lowrey found him "rather limited in his approach" to problems of the medical profession and said that, "the disturbing feature of this was that he had very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." (CT 226) Dr. Lowrey gave Bakke an overall rating of 86 (CT 230).

Other members of the admission committee, after reviewing these interview summaries as well as Bakke's overall file, rated him 96, 94, 92 and 87, for a total rating of 549 out of a possible 600; Bakke's average rating on his second application was 91.2 (*Id.*).

Despite the fact that Bakke was "qualified for admission in each of the years he applied," petitioner rejected both of his applications (CT 390).

The Special Admission Program

At the same time it administers and maintains the above-described regular admission procedure at the medical school, petitioner also operates and maintains at Davis a "special admission program"[2] which, in petitioner's words, purports to "increase opportunities in medical education for disadvantaged citizens." (CT 195-96) Although the University declares that the program is for disadvantaged students regardless of race (CT 64-66, 86), no definition of the term "disadvantaged" has ever been formulated (CT 163-64) the program has been heavily staffed with minority personnel (CT 162-63) and only minority applicants have been admitted to the medical school through the program (CT 168, 201-23 and 388).[3]

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[2]The special admission program is also known as the "Task Force program" and is so labelled in the petition.

[3]At trial and in the court below, petitioner denied that race was the pivotal factor in the special admission program (CT 30, 65, 75, 86). In light of the instant record, which confirms the existence of a formal racial quota at the medical school (CT 388, 390), it is interesting to note that in its 1973-1974 Bulletin, distributed to Bakke and other potential applicants, petitioner states without qualification that, "Religious preference and race are not considered in the evaluation of an applicant." 1973-1974 Bulletin at 12.

The racial quota is almost as old as the medical school itself. The school opened in 1968 and the special admission program commenced only one year later, in September of 1969. Since that time, petitioner annually has set aside and allotted to the program 16% of the places in the first year class (CT 164, 168, 201-223 and 388).

Petitioner administers the special admission program as follows:

(1) Applicants are asked to indicate on their applications whether or not they wish to be considered for admission under the special admission program. The 1973 application form, prepared by the medical school, allowed an applicant to indicate whether or not he or she wished to be considered as an "economically and/or educationally disadvantaged" applicant. On the 1974 application form, prepared by the American Medical College Application Service (AMCAS), and used by slightly more than half of the medical schools in the country, the pertinent question asks: "Do you wish to be considered as a minority group applicant?" (CT 146, 197, 232, and 292) According to petitioner's published admission statistics, the word "minority" includes "Blacks", "Asians", "Chicanos", and "American Indians". (CT 216-218)

(2) Once an applicant has indicated a desire to considered under the special admission program, his application is evaluated by a special subcommittee, separate from the regular admission committee (CT 388). This spe-

cial subcommittee is composed of minority and non-minority faculty members, and students from only minority backgrounds (CT 162). It conducts a separate screening procedure, parallel to that of the regular admission committee. (CT 64-66). The special subcommittee however, is not bound by the medical school standard that no student will be interviewed if his OGPA is lower than 2.5. In 1973 and again in 1974, minority students were interviewed *and admitted* under the special admission program even though they possessed OGPA's well below the 2.5 cut-off point (CT 388). In 1973, minority students admitted under the special program possessed overall grade point averages as low as 2.11; in 1974 minority students were admitted to the medical school with overall grade point averages as low as 2.21 (*Id.*; see also CT 210, 223).

(3) Following the interview, the special subcommittee assigns the various special applicants an overall personal rating, similar to the "benchmark" procedure of the regular admission committee (CT 66, 164). Finally, the special subcommittee recommends to the regular admission committee various candidates for admission to the medical school (*Id.*). The recommendations continue to be made until the pre-determined quota of 16 is filled (CT 168).

The Discriminatory Results of the Special Admission Program

According to statistics published by petitioner, the average applicant admitted under the special admis-

sion program possesses academic and other qualifications inferior to those of Bakke and of the average student admitted under the regular procedure (CT at 388). The following chart summarizes the relationship of Bakke's qualifications to those of applicants who are regularly admitted and to those of applicants admitted under the special admission program.

Class Entering in Fall, 1973

			MCAT[6]			
	SGPA[4]	OGPA[5]	Verb.	Quan.	Sci.	Gen. Info.
Allan Bakke	3.45	3.51	96	94	97	72
Average of Regular Admittees	3.51	3.49	81	76	83	69
Average of Special Admittees	2.62	2.88	46	24	35	33

Class Entering in Fall, 1974

			MCAT			
	SGPA	OGPA	Verb.	Quan.	Sci.	Gen. Info.
Allan Bakke	3.45	3.51	96	94	97	72
Average of Regular Admittees	3.36	3.29	69	67	82	72
Average of Special Admittees	2.42	2.62	34	30	37	18[7]

The above chart contains only statistics relating to grade point averages and MCAT scores. Also considered in the admission process, as previously men-

[4]Undergraduate grade point average in science courses.

[5]Overall undergraduate grade point average.

[6]Medical College Admissions Test; the MCAT, as noted previously, is subdivided into four sections: Verbal (Verb.), Quantitative (Quan.), Science (Sci.), and General Information (Gen. Info.).

[7]The figures contained in this chart for the special admittees, like the figures contained for the regular admittees, represent *average* scores and do not indicate the highest or lowest achievements of either group (CT 210, 223).

tioned, is the personal interview, which provides a further basis for the "benchmark" personal rating given each special applicant. The benchmark rating takes into consideration both OGPA, SGPA, MCAT scores, the interview summary, and, *in addition,* other background data in the applicant's file, such as the particular details of a "disadvantaged" background (CT 63-66). Even with this rating procedure, designed to give the special applicants credit for overcoming "disadvantage", applicants admitted under the special program possessed overall ratings below those of students rejected under the regular admission procedure. Indeed, petitioner admits that some of the special admittees received overall ratings of as much as 30 points below Bakke's rating (CT 181, 388).

These facts establish that the special admission program is designed to grant, and in fact does grant, a preferential admission quota to members of certain racial and ethnic groups (CT 388-390). Petitioner never has defined the term "educationally disadvantaged", or the term "economically disadvantaged" (CT at 163). On the facts of this case, however, these terms are synonymous with "member of a minority group" for, as stated above, only minority applicants, and no non-minority applicants, are admitted to the medical school under the special admission program (CT 388).

Thus petitioner's special admission program is based upon race. The 16% allotment to the program of places in the first year class at the medical school

constitutes a racial quota of 16%. Under the program, minority applicants are judged apart from, and are allowed to satisfy lower standards than, Bakke and other non-minority applicants; they are also guaranteed at least 16 places in each entering class (CT 164-168, 388, 390).

Proceedings in the Trial Court

Following the rejection of his 1974 application, Bakke instituted this action. Specifically, he alleged that he is qualified in every respect to attend the Davis Medical School; that petitioner, by virtue of its maintenance and operation of the special admission program, has discriminated against him on the basis of his race and in violation of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of the California Constitution (Article I, Section 21), as well as the Federal Civil Rights Act of 1964 (42 U.S.C. § 2000 (d)); and finally, that because of this unconstitutional discrimination, petitioner denied him admission to the medical school. Bakke prayed for the court to issue an Alternative Writ of Mandate, an Order to Show Cause, and to enter its judgment declaring that he is entitled to admission to the medical school and that petitioner is lawfully obligated to so admit him (CT 1-5).

Petitioner denied the above allegations and cross-complained for a declaration as to the legality of the special admission program (CT 24-31).

On August 5, 1974 the trial court issued an Alternative Writ of Mandate, ordering petitioner to admit

respondent to the medical school or, alternatively, to appear and show cause why the writ had not been complied with; at the same time, the court issued an Order to Show Cause, directing petitioner to appear before the court and show cause why it should not be enjoined *pendente lite* for refusing to admit Bakke to the medical school (CT 34-37).

On September 27, 1974 the trial court heard argument on the Order to Show Cause and Alternative Writ of Mandate. Counsel for both parties stipulated that the hearing would also constitute a full hearing of the case on the merits. Following oral argument, the trial court ordered the case submitted (CT 282).

On November 25, 1974 the court filed its Notice of Intended Decision, declaring that the special admission program is unconstitutional (CT 286-308).

Both parties prepared proposed Findings of Fact and Conclusions of Law, as well as a proposed Judgment (CT 315-380). Following a further hearing on the matter, held February 5, 1975, the trial court proceeded to draft its own Findings and Conclusions (CT 376) and, on March 7, 1975, filed its Findings, Conclusions and Judgment in this case (CT 377-394).

The trial court specifically found as a matter of fact that,

> "[t]he special admissions program purports to be open to 'educationally or economically disadvantaged' students. In the years in which [Bakke] applied for admission, the medical school received applications for the special admissions program from white students as well as from members from minority races, but no white

> students were admitted through this special program in either of said years. In fact no white student has been admitted under this program since its inception in 1969. In practice this special admissions program is open only to members of minority races and members of the white race are barred from participation therein. In each of the two years in which [Bakke] applied for admission [petitioner] set a pre-determined quota of 16 to be admitted through the special admissions program. This special admissions program discriminates in favor of members of minority races and against members of the white race, [Bakke], and other applicants under the general admissions program . . . " (CT 387-388).

The trial court concluded that the special admission program at the Davis Medical School violated Bakke's rights under the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of the California Constitution (Article I, Section 21) and the Federal Civil Rights Act of 1964 (42 U.S.C. Section 2000 (d)) (CT 390).

In paragraph 2 of the Judgment, the trial court ruled that:

> "[Bakke] is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and [petitioner is] hereby restrained and enjoined from considering [Bakke's] race or the race of any other applicant in passing upon his application for admission . . . ." (CT 394)

The trial court also awarded Bakke his court costs, but refused to enjoin the operation of the special

admission program or to order Bakke's admission to the medical school. *Id.*

After the entry of judgment in this case, Bakke's counsel requested that petitioner consider the resubmission of Bakke's application for admission to the medical school pursuant to paragraph 2 of the Judgment. Petitioner's counsel responded that the University would consider such an application as it would "any other such application received at this late date." Petitioners' counsel later added that the medical school would only consider Bakke's application "in the normal course and without reference to paragraph 2 of the judgment . . . ." (CT 408-414)

Proceedings on Appeal

On March 20, 1975 petitioner filed a Notice of Appeal from those parts of the Judgment holding the special admission program unconstitutional, requiring petitioner to judge Bakke's application without regard to his race or the race of any other person, and awarding Bakke his costs of litigation (CT 398-399). Subsequent to the preparation of the Clerk's Transcript on Appeal, and on April 18, 1975, Bakke filed a Notice of Cross Appeal from that part of the Judgment denying his admission to the medical school. 18 Cal.3d at 39. Finally, while this case was pending in the California Court of Appeal for the Third Appellate District, the Supreme Court of California granted the University's Petition for Transfer and accepted the case for direct review. *Id.*

On September 16, 1976 the California Supreme Court issued its opinion in this case. The court, after

reviewing the facts of the case and the importance of the constitutional questions presented for decision (18 Cal.3d at 38-45), proceeded to consider, first, the appropriate standard of review to be used in determining whether the special admission program violates the Equal Protection Clause and, second, whether the program meets the requirements of the applicable test.[8] 18 Cal.3d at 49.

The court concluded that in a case such as this one, where the state has imposed a classification based upon race:

> ". . . not only must the purpose of the classification serve a 'compelling state interest' but it must be demonstrated by rigid scrutiny that there are no reasonable ways to achieve the state's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification. The burden in both respects is upon the government. (E.g., *Dunn v. Blumstein* (1972) 405 U.S. 330, 342-343; *Loving v. Virginia* (1967) 388 U.S. 1, 11; *McLaughlin v. Florida* (1964) 379 U.S. 184, 192-193.)" 18 Cal.3d at 49.

As to the second half of the inquiry, the California Supreme Court assumed, *arguendo,* that some of the objectives[9] of the special admission program "meet

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[8]The court below specifically based its holding on federal constitutional grounds. 18 Cal.3d at 63.

[9]The court below flatly rejected certain of petitioner's claims, such as the University's assertion that minority individuals would have a greater rapport with doctors of their own race and that Black doctors would have a greater interest in treating diseases prevalent among Blacks. "The record contains no evidence to justify the parochialism implicit in the latter assertion; and as to the former, we cite as eloquent refutation to racial exclusivity the comment of Justice Douglas in his dissenting opinion in *DeFunis:*

the exacting standards required to uphold the validity of a racial classification insofar as they establish a compelling governmental interest." 18 Cal.3d at 53. The court, however, held that the University had not satisfied its burden of justifying the racial means employed to achieve the goals of the program.

> " . . . [W]e are not convinced that the University has met its burden of demonstrating that the basic goals of the program cannot be substantially achieved by means less detrimental to the rights of the majority." 18 Cal.3d at 53.

The court did not prevent the University from formulating a special admission program based upon disadvantage. Indeed, the court's opinion encourages such a procedure:

> "In short, the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race. We reiterate . . . that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission." 18 Cal.3d at 55.

'The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans. . . .' " 18 Cal.3d at 53.

The court did not guarantee that alternative measures would result in the enrollment of precisely the same number of minority students as under the racial quota. 18 Cal.3d at 56. The court's conclusion was that the University had not established that the special admission program at issue "is the least intrusive or even the most effective means to achieve this goal." 18 Cal.3d at 56.

The California Supreme Court also ruled that, insofar as Bakke's right to be admitted to the medical school is concerned, the University bears the burden of proving that Bakke would not have been admitted had there been no racial quota. 18 Cal.3d at 63-64. The case was remanded to the trial court for the purpose of determining, under the proper allocation of the burden of proof, whether Bakke would have been admitted to the medical school absent this special admission program. 18 Cal.3d at 64.

The University filed a Petition for Rehearing, which included a request for a stay, and it stipulated that, given Bakke's academic credentials and his high "benchmark" rating, the University could not sustain its burden of proving that he would not have been admitted had there been no racial quota.

The California Supreme Court denied the Petition for Rehearing and denied the application for a stay. Petition for Writ of Certiorari, Appendix B, at 79a. In view of the University's stipulation, however, the court below modified its initial opinion to direct that Bakke be admitted to the medical school. 18 Cal.3d 252b.

On November 15, 1976, this Court granted for a period of thirty days the University's application for a stay of the execution and enforcement of the mandate of the California Supreme Court. The Court's order granting the stay provides that if a petition for a writ of certiorari is filed within the thirty day period, the stay is to remain in effect pending the disposition of the case by this Court.

REASONS FOR DENYING THE WRIT

There are three basic reasons for denying certiorari in this case. First, petitioner has incorrectly stated the facts of the case, distorted the holding of the California Supreme Court, and failed to demonstrate that anyone has been deprived of a constitutional right as a result of the decision below. Thus petitioner has not shown a sound basis upon which certiorari can be granted. Second, the alleged conflict between the decision herein and the decisions of other state courts is, upon analysis, not a true conflict meriting resolution by this Court. Third and finally, the California Supreme Court correctly decided this case and did so by way of a reasoned application of this Court's prior constitutional decisions. For these reasons, the Court should deny certiorari in this case.

PETITIONER HAS INCORRECTLY STATED THE CASE

In its petition for writ of certiorari, the University asserts that the persons admitted to the medical school under the special admission program were all "fully qualified to meet the requirements of a medical education at Davis." Petition at 8. Such a claim is at

odds with the facts of this case. The evidence clearly reveals that the school's one firm admission standard—no applicant will be interviewed if he or she possesses a grade point average below 2.5—is not applied by the special admission committee. In 1973, minority persons entered the medical school through the special program even though they possessed grade point averages as low as 2.11. In 1974, special admittees entered the medical school while possessing grade point averages as low as 2.21. Moreover, Dr. Lowrey, chairman of the regular admission committee, states flatly with respect to MCAT percentile rankings:

> "I think most of us who are doing the screening have been on admissions committees long enough. We put some value on a percentile of where this score of that particular individual lies and I suspect most of us would look very hard at other things that would be very positive for that individual *if he scored lower than 50 in science and verbal ability.*" (CT 153 [emphasis added])

Despite this rule, the average student admitted under the special admission program in 1973 placed in the 35th percentile (science) and in the 46th percentile (verbal ability). The averages dropped even lower in 1974 when the average was in the 37th percentile (science) and in the 34th percentile (verbal ability).

Furthermore, according to the University's overall "benchmark" personal rating system, which is employed by both admission committees and which repre-

sents a comprehensive appraisal of the potential ability of individual applicants, persons approved by the special committee possessed scores markedly below Bakke. In short, persons admitted under the special admission program in no way satisfy the medical school's own minimum admission criteria.

Petitioner has ignored this undisputed evidence and, in so doing, has sought to undermine the firm factual foundation of the opinion below. The attack on the California Supreme Court decision, however, is not limited to the facts of the case. Petitioner also disputes the court's legal analysis. A serious flaw in the petition, however, is that the University does not claim that it has been deprived of any constitutional rights. Instead, the University contends that the highest court of California has sanctioned the abandonment of minority students and has called for virtually all-white student bodies at professional schools all across the country. Petition at 4. In so arguing, petitioner misconstrues the holding of the California Supreme Court. The University has neither been empowered to discriminate against minority persons, nor constrained to judge applicants for admission solely on the basis of objective criteria, such as grades and tests scores. The court below encouraged the University to use flexible standards in its admission procedure and stated clearly that the University could, and should, consider the "disadvantaged" situations of its applicants. 18 Cal.3d at 55. The only limitation placed on the University is one consistent with the Constitution and previous deci-

sions of this Court; namely, that the University cannot employ race as the yardstick, or racial discrimination as the mechanism, for deciding who may attend the Davis Medical School.

THERE IS NO CONFLICT BETWEEN STATE COURT DECISIONS

As a further ground for seeking certiorari, petitioner claims that the Court must resolve an asserted conflict between the decision in this case and the decisions of two other state courts. The two "conflicting" cases are *DeFunis v. Odegaard,* 82 Wash.2d 11 (1973)[10] and a recent case from the state of New York, *Alevy v. Downstate Medical Center,* 39 N.Y.2d 326 (1976). Petitioner represents that these two cases, and the opinion below, "exhibit substantial confusion as to the controlling standards under the Equal Protection Clause." Petition at 14. A study of *DeFunis* and *Alevy* reveals that they do not conflict with the decision herein. Neither adopts a legal test of constitutionality different from that employed by the California Supreme Court, and neither sanctions the use of a preferential racial quota.

The California Supreme Court followed certain basic legal steps set forth in *DeFunis.* Both the California and Washington Supreme Courts ruled that so-called "benign" discrimination is "certainly not benign with respect to non-minority students who

[10]The subsequent history of the *DeFunis* case, *cert. granted* 414 U.S. 1038 (1973), vacated as moot 416 U.S. 312 (1974) is well chronicled. See, e.g., *DeFunis Symposium,* 75 Colum. L. Rev. 483 (1975). It is important to note that the Washington Supreme Court decision in *DeFunis* was not reinstated upon remand from this Court. 84 Wash.2d 617 (1974).

are displaced by it." 18 Cal.3d at 48, n. 12; *DeFunis v. Odegaard, supra,* 82 Wash.2d at 32. Both courts also applied the "compelling state interest" test to the racial program at issue and placed the burden of proof upon the school that had implemented the special admission program. 18 Cal.3d at 49, 52; 82 Wash. 2d at 32. Both courts rejected the "rational basis" test, commonly applied in non-racial cases. *Id.*

The California Supreme Court, after noting the existence of a racial quota and the University's failure to carry its burden of demonstrating that the "objectives of the program cannot reasonably be achieved by some means which impose a lesser burden on the rights of the majority," declared the special admission program unconstitutional. 18 Cal.3d at 60, 64. The Washington Supreme Court reached a different result, but did not do so because it selected a different test of constitutionality.

The other case cited by petitioner is *Alevy v. Downstate Medical Center, supra,* 39 N.Y.2d 326. In terms of legal analysis, the *Alevy* court did not find it necessary to reach the ultimate constitutional issue. The New York Court of Appeal concluded from the evidence that the plaintiff would not have been admitted to the Downstate Medical Center had there been no special admission program. "[T]hus," said the court, "the petition should be dismissed." 39 N.Y.2d at 338. Prior to reaching that conclusion, the court engaged in a *dicta* discussion regarding the appropriate judicial standard of review in a case of so-called "reverse discrimination." 39 N.Y.2d at 331-37.

The *Alevy* court's *dicta,* however, does not conflict with the holding of the California Supreme Court. Although it may not have used the familiar phrase "compelling state interest," the *Alevy* court would have required the Downstate Medical Center to justify the special admission program by demonstrating that "a substantial interest underlies the policy and practice and, further, *that no non-racial, or less objectionable racial, classifications will serve the same purpose.*" 39 N.Y.2d at 336-37 (emphasis added).[11] On can logically assume that, had the instant case been presented to the *Alevy* court, it would have struck down the Davis special admission program for the same reason as did the California court: because the University did not meet its burden of proving that the objectives of the program could not be achieved by less intrusive means. The California Supreme Court thus commented in its opinion that the difference between its holding and the language of the New York Court of Appeal is "more apparent than real." 18 Cal.3d at 60, n. 30.

Moreover, neither *DeFunis* nor *Alevy* involved a racial quota. 82 Wash.2d at 39; 39 N.Y.2d at 329-31.[12] The two cases are in this sense distinguishable

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[11]Both courts, it appears, would require the University to bear the burden of justifying the special admission program. The New York court noted that, "[W]here preference policies are indulged, the indulgent must be prepared to defend them." 39 N.Y.2d at 336; compare 18 Cal.3d at 49.

[12]The trial court in *Alevy* noted: "There is nothing in the record to indicate that acceptance of minority students by [the school] was based solely on race." 78 Misc.2d 1089, 1091 (Sup. Ct.).

from the instant case. The quota at issue herein grants a racial preference and guarantees admission to the medical school based upon group membership. No case supports the use of a racial quota to govern admission to professional school. The Court below recognized, and condemned, the evil inherent in the quota system:

> "Originated as a means of exclusion of racial and religious minorities from higher education, a quota becomes no less offensive when it serves to exclude a racial majority. 'No form of discrimination should be opposed more vigorously than the quota system' (McWilliams, A Mask for Privilege (1948) p. 238.) [footnote omitted]
>
> To uphold the university would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality." 18 Cal.3d at 62-63.

It is interesting to note that several other recent decisions handed down by state and federal courts square with the opinion below in rejecting the quota concept. In *Flanagan v. President and Directors of Georgetown College,* 417 F.Supp. 377 (D.D.C. 1976), the United States District Court for the District of Columbia rejected the use of a racial quota to distribute scholarship funds as part of an affirmative action program under Title VI of the Civil Rights Act of 1964. The Court held that:

> "While an affirmative action program may be appropriate to ensure that all persons are afforded the same opportunities or are considered for benefits on the same basis, it is not permissible when it allocates a scarce resource (be it jobs, housing or financial aid) in favor of one race to detriment of others." 417 F.Supp. at 384.

In *Bridgeport Guardians, Inc. v. Members of The Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973), *cert. denied* 421 U.S. 991 (1975), the Second Circuit refused to sanction a racial quota to remedy past discriminatory promotion practices. The Court commented:

> "The imposition of quotas will obviously discriminate against those whites who have embarked on a police career with the expectation of advancement only now to be thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes ." 482 F.2d at 1341.

Another recent case is *Lige v. Town of Montclair,* ..... N.J. ..... (No. A-107, Slip Opinion filed November 30, 1976). In *Lige,* the Supreme Court of New Jersey struck down a racial quota imposed by the Director of the New Jersey Division of Civil Rights to correct past discrimination in the Montclair Police and Fire Departments. Although based upon state law,[13] the *Lige* opinion exhibits a concern similar to that expressed by the courts above. The New Jersey Supreme Court noted that when remedies are fash-

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[13] ..... N.J. ..... (Slip Opinion at 29, 31).

ioned on a class quota basis, "it leads to insoluble problems and piles discrimination on top of discrimination." ..... N.J. ..... (Slip Opinion at 27). The court concluded:

> "A quota creates castes and divides society. It is particularly abhorrent where we are striving for an equality in society in which race is totally irrelevant." ..... N.J. ..... (Slip Opinion at 30).

Petitioner's contention that the decision herein of the California Supreme Court is in conflict with other holdings around the country is incorrect. Such a claim does not withstand analysis and cannot support a grant of certiorari in this case. The constitutional framework of the decision below is consistent with other state and federal cases and, as we demonstrate below, follows directly from the precedents established by this Court.

THE CALIFORNIA SUPREME COURT CORRECTLY DECIDED THIS CASE

The constitutional inquiry conducted by the California Supreme Court has already been explored in some detail. A careful analysis of the court's opinion reveals that the highest judicial tribunal in California correctly interpreted and applied the prior decisions of this Court.

The California Supreme Court confronted a racial quota. No previous case nor any statute supports the imposition of this discriminatory device. "No college admission policy in history," said the court below, "has been so thoroughly discredited . . . ." 18 Cal.3d

at 62; cf. *Hughes v. Superior Court,* 339 U.S. 460 (1950); *Cassel v. Texas,* 339 U.S. 282 (1950).

The California Supreme Court recognized from the outset that the rights at stake in this controversy belong to Allan Bakke as an individual. 18 Cal.3d 47 (n. 11), 51 (n. 17). The right to be free from racial discrimination is a personal right, as this Court held in *Shelley v. Kraemer,* 334 U.S. 1 (1948):

> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may be also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through the indiscriminate imposition of inequalities." 334 U.S. at 22.

The court below held that the Equal Protection Clause, which by its own terms applies to "any person", means what it says and that "its lofty purpose, to secure equality of treatment to all, is incompatible with the premise that some races may be afforded a higher degree of protection against unequal treatment than others." 18 Cal.3d at 51.

Petitioner's request that this Court reverse the decision below jeopardizes these fundamental constitutional principles. If the Court were to reverse, or substantially modify, the decision below along the lines suggested in the petition, the Court would risk transforming what have historically been individual

rights into "group" rights. To cast aside a long history of individual freedom and replace it with a system of privileges based upon ancestry would mark a radical departure from the previous decisions of this Court. Untold and vexing questions would inevitably arise in future cases. Which groups are to be preferred?[13] How extensive a preference should be granted? For how long is the preference to be continued? Who shall decide when the preference is to be altered or concluded, and on what terms, and by what authority?

There follows a question of numbers. A quota in proportion to the national population? The state population? The county or city population? If, for example, the Japanese population of the United States were 1 in 400, then would each professional school class have only one member of that group, given 400 places in the class? If the state had no significant Japanese population, then could no Japanese qualify?

What shall be the test of membership in a particular racial group? Need one be a "full-blooded" American Indian to qualify? Or is one grandparent sufficient? Or one great-grandparent? Are we to become involved in the testing of legal rights according to blood lines? Such are the inquiries that will

[13]The instant quota grants a preference to Blacks, Chicanos, Asians and American Indians. In the *DeFunis* case, *supra*, the special admission program favored "Black Americans, Chicano Americans, American Indians and Phillipine Americans." 82 Wash.2d at 17-18. In *Alevy, supra*, the preferred groups were "Blacks, Puerto Ricans, Mexican Americans and American Indians." 39 N.Y.2d at 330.

flow from the adoption of petitioner's prayer that group rights be constitutionally established.

The Court below did more than recognize the individual nature of rights under the Equal Protection Clause. The California Supreme Court also employed a particular standard of review, referred to as the "strict scrutiny" or "compelling state interest" test. The decision to adopt this standard is consistent with previous decisions of this Court. *Dunn v. Blumstein,* 405 U.S. 330, 342-43 (1972); *Loving v. Virginia,* 388 U.S. 1, 11 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 192-93 (1964). The burden of proof always has been on the government in racial cases. *Id.*

The California Supreme Court stated that in order to satisfy the compelling state interest test, the University must demonstrate that there are no less intrusive means capable of achieving the goals of the special admission program. 18 Cal.3d at 49. As noted above, the courts in *DeFunis* and *Alevy* applied substantially the same rule. 82 Wash.2d at 32, 36; 39 N.Y.2d at 336. Petitioner's claim that this requirement is the result of a *"tour de force* reading of this Court's 'less intrusive means' cases" is without support. In the case of *Dunn v. Blumstein, supra,* 405 U.S. 330, the Court reviewed a challenge to the state of Tennessee's durational residence law which impinged upon the fundamental right to vote and also upon the right to travel. The Court applied the compelling state interest test:

> "In sum, durational residence laws must be measured by a strict equal protection test: they

> are unconstitutional unless the state can demonstrate that such laws are *'necessary* to promote a *compelling* governmental interest.' (citations omitted) . . .
>
> It is not sufficient for the state to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the state cannot choose means that unnecessarily burden or restrict the constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision', *NAACP v. Button,* 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed.2d 405 (1963); *United States v. Robel,* 389 U.S. 258, 265, 48 S. Ct. 328, 340, 19 L. Ed. 2d 508 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro v. Thompson, supra,* 394 U.S., at 631, 89 S. Ct., at 1329. And if there are other, reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed.2d 231 (1960)." 405 U.S. at 342-43.

Petitioner's assertion that the recent decisions of this Court call for a less demanding standard of review in racial cases cannot withstand analysis. The case cited by petitioner, *American Party of Texas v. White,* 415 U.S. 767 (1974) offers little support for petitioner's argument. In that case, the Court upheld certain provisions of the Texas Election Code. The Court, faced with a set of statutes that affected the

fundamental right to vote and the right to associate, applied the compelling state interest test, and did so consistent with its previous holding in *Dunn*:

> "We agree with the District Court that whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests, *Storer v. Brown,* 415 U.S., at 729-733, 94 S. Ct., at 1278-1281. (Footnote omitted.) But we also agree with the District Court that the foregoing limitations, whether considered alone or in combination, are constitutionally valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." 415 U.S. at 780-81.

Dunn and *American Party,* taken together, confirm the essential elements of the compelling state interest test. No decision of this Court indicates that racial discrimination is to be judged by any lesser standard, or is to be judged differently depending upon the asserted purposes of the discrimination. Indeed, the recent case of *McDonald v. Santa Fe Trail Transportation Co.,* ..... U.S. ....., 49 L. Ed.2d 493, 96 S. Ct. ..... (1976) demonstrates a commitment by this Court to apply a uniform standard in determining the rights of minorities and non-minorities alike. In *McDonald,* the Court held that Title VII of the Civil Rights Act of 1964 and Section 1981 of Title 42 of the United States Code, provisions that parallel the Fourteenth

Amendment, prohibit discrimination against all races on the same terms.

Petitioner unfairly condemns the California Supreme Court for substituting "speculation for careful inquiry". Petition at 18. The plain fact is that the instant record is devoid of any evidence respecting alternatives to petitioner's quota system. This is necessarily so, under the evidence of the case, since the medical school opened in 1968 and the racial quota was adopted only one year later. The University, which had the burden of demonstrating that the racial quota admission policy at the medical school was strictly necessary to promote a compelling state interest, could not have sustained its burden. The California Supreme Court reviewed possible alternatives to the racial quota. While it could not insure that such alternatives would be successful in reaching certain goals which it assumed, *arguendo,* to be valid, the court below properly decided that it could not sanction the imposition of a racial quota upon the record before it. There is no case which upholds a racial quota respecting admission to professional school, and there is no case in conflict with the reasoning or holding of the court below.

CONCLUSION

The California Supreme Court properly decided this case and did so guided by the previous decisions of this Court. The decision below upholds Allan Bakke's right to be free from racial discrimination and does so consistent with the United States Con-

stitution. The decision should stand as rendered. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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