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.

REPLY TO BRIEF OF AMICI CURIAE IN OPPOSITION TO CERTIORARI

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Petitioner, the Regents of the University of California (the "University"), files this reply brief in response to the Brief of Amici Curiae ("Amici"). Announcing their support for the University on the merits, Amici nonetheless oppose review of the decision of the California Supreme Court outlawing minority special admissions programs for professional schools. In an effort to forestall this Court's consideration of a crucial constitutional issue, Amici challenge standing and the adequacy of the record on assorted grounds. Quite apart from the tenor of their expression, the arguments are without merit.

The larger part of Amici's brief is devoted to an argument that the petition should be denied for lack of standing.[1] Amici assert that to have standing Bakke must have been certain of admission in the absence of the challenged

1. At one point in their brief, Amici contend that the appropriate disposition of the case is to vacate and remand for the taking of further evidence. Amici Brief 19. Amici's standing argument cannot be reconciled with this suggested disposition or

program. They further contend that the record establishes incontrovertibly that Bakke would not have been admitted had there been no special admissions program. Proceeding from these hypotheses, Amici accuse the University of giving up an "air tight case" on standing when it stipulated that it could not sustain the burden of proving that Bakke would not have been admitted, and of engaging in a "verbal game" to confer jurisdiction on this Court. Amici Brief 16, 19. Amici are wrong on the law, wrong on the facts, and wrongly impugn the University's motives.

The short answer to Amici's first point is that the law does not require certainty of admission in order to establish standing. For example, this Court assumed jurisdiction in *DeFunis v. Odegaard,* 414 U.S. 1038 (1973), in the face of an explicit statement by the Washington Supreme Court that "There is no way of knowing that plaintiff would have been admitted to the law school, even had no minority student been admitted." 507 P.2d 1169, 1177 (1973). This acknowledgment of standing in *DeFunis* is fully consistent with established standing doctrine. *E.g., Taylor v. Louisiana,* 419 U.S. 522 (1975); *Peters v. Kiff,* 407 U.S. 493 (1972); *Carter v. Jury Commission,* 396 U.S. 320 (1970); *Tumey v. Ohio,* 273 U.S. 510 (1927); *Strauder v. West Virginia,* 100 U.S. 303 (1880).

The short answer to Amici's second point—the purported certainty of Bakke's nonadmission—is that it is simply not so. Amici contend that it is possible to establish with

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with their professed endorsement of the University's position on the merits. To find a lack of standing is to leave prevailing the lower court decision overturning special admissions programs. For as language of this Court, quoted elsewhere by Amici, explictly points out, California courts are not bound by federal justiciability doctrines. Amici Brief 16 n. 9, quoting *Richardson v. Ramirez,* 418 U.S. 24, 36 (1974). Amici apparently are also willing to run the risk that the California Supreme Court opinion, left intact, will exert no influence on other courts, an assumption hardly consonant with common sense—or with the preservation of special admissions programs.

mathematical certainty that Bakke would never have been admitted even if Davis Medical School had no Task Force program. This argument cannot survive analysis in the context of the full record, rather than on the basis of selected facts. For example, at one point in their brief, Amici declare that it "is certain that at least 16 persons had priority over Mr. Bakke in 1973 . . .", and thus it is clear he would not have been admitted. Amici Brief 12. This ignores important facts, including the obvious one that some offers of admission are declined and thus, even assuming 16 persons had priority over Bakke in 1973, it is by no means clear that Bakke would not have been admitted if an additional 16 places had been available. Moreover, the notion of inflexible "priority" is itself inaccurate, for benchmark ratings were not wholly determinative of admission at Davis.

At the risk of some repetition of points made in the University's petition, an objective view of the full record leads to one conclusion only—Bakke came so close to admission that it cannot be demonstrated one way or another whether he would have been admitted absent the special program. The conclusion that flows ineluctably from an objective view of the entire record is reflected in the trial court's statement that, although Bakke had failed to sustain the burden on the issue, nevertheless ". . . there appears to the court to be at least a possibility that [Bakke] might have been admitted absent the 16 favored positions on behalf of minorities." CT 308.[2]

As pointed out in the petition, Bakke's admission *vel non* comes down to where the burden of proof on that

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2. "CT" references are to the clerk's transcript filed in the California Supreme Court. See also Pet. App. D, pp. 107a-108a. At p. 14 n. 7 of their brief, Amici attempt to make light of a report by the medical school to H.E.W. in response to an inquiry from that Department prompted by Bakke's complaint to H.E.W.

question is allocated. Only when the highest state court unequivocally ruled against the University on the burden of proof issue did the University stipulate what is obviously the reality on the "true facts" (to borrow Amici's language at p. 18 of their brief)—that the burden could not be sustained.

Thus, the short answer to Amici's impugning of the University's motives in stipulating its inability to carry the burden of proof is that there is little point in magnifying nonsense. The University vigorously argued in both courts below that Bakke properly bore the burden on his likelihood of admission and that Bakke could not meet the burden despite his proximity to admission. There is nothing inconsistent, much less unseemly, about sparing the parties and the trial court the pointless proceeding that would ensue if the University, under the mandate of the California Supreme Court, went through the motions of trying to carry an impossible burden. The stipulation concedes only that the burden cannot be met, not that it was properly imposed.

Finally with regard to standing, Amici ignore the inescapable fact that the judgment below would compel the

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that he had been denied admission as a result of the existence of the Task Force program. The most direct response is simply to quote in full the key passage of the report, which, following a recitation of Bakke's high rating, reads:

> "Thus, Mr. Bakke was found by the Admissions Committee to be a highly desirable candidate and came very close to being offered a place in the entering class for the fall of 1973. The single reason for his non-acceptance was the lack of available space in that group; had additional places been available, individuals with Mr. Bakke's rating would likely have been admitted to the medical school as well. As the chairman of the Admissions Committee noted in his letter to Mr. Bakke informing him of the reluctant decision not to accept him, 'it is indeed a very sad situation that we must refuse admission to a large number of well-qualified and well-motivated young men and women.' The University deeply regrets that it cannot accommodate all who, like Mr. Bakke, have the appropriate qualifications for a career in medicine with the facilities and resources presently available."

admission of an applicant that the University actively resisted and continues to resist admitting. They further ignore that Bakke has attacked[3] an admission program that the University has vigorously defended and believes to be an essential and lawful means for alleviating the corrosive effects of an all too lengthy history of societal discrimination. A more concrete adverseness, both in technical terms and in spirit, is difficult to imagine.

The remainder of the Amici Brief is devoted to a collection of contentions that the record is inadequate to support review in this Court of an issue of such fundamental importance. Amici do not dispute the facts set forth in the petition.[4] Nor do they dispute that the issue of the constitutionality of special admissions programs is framed by those facts.[5] Rather their argument reflects their conception of the trial strategy that is purportedly necessary to make the case an appropriate vehicle to permit this Court to address the issue.

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3. At p. 16, n. 10 of their brief, and in eight related pages of appendix, Amici hint that the University invited the suit. They base this notion on the letters of an individual, no longer with the University, who was an assistant to the dean (not the Dean or an Assistant Dean) of the medical school. Amici's reluctance to give this thought treatment in text is understandable, for they have omitted the immediately prior letter in the chain of correspondence to which they advert. That letter was sent by Bakke. In it *he* raised the prospect of the instant suit. CT 259.

4. Amici do dispute one fact in the record—that there were 16 Task Force admittees in 1974. Amici point out at p. 23 n.12 of their brief that in that year there were only 15 Task Force admittees. The University acknowledges this to be a fact. In 1974 one Task Force admittee withdrew before the start of classes. Admission was then granted to a nonminority applicant from the regular admissions process. The University further acknowledges that this fact evidences, as the University has maintained throughout this proceeding, that the Task Force program had a goal, not a quota, of filling 16 places per year. The reduction of Task Force admittees in 1974 from 16 to 15 occurred after the close of discovery in this case and did not become known to counsel until recently.

5. Amici mischaracterize the record as consisting of an eleven page declaration and "paper evidence generated by Mr. Bakke."

The absence of merit in Amici's assertions about the adequacy of the record is illustrated by brief reflection on some of the items they find to be missing. It would, for example, be pointless to attempt to develop a trial record on some of the issues, such as societal discrimination and instances of *de jure* segregation in state public schools, to which Amici advert. This country's unfortunate history of racial and ethnic discrimination is such common knowledge that it scarcely requires application of the doctrine of judicial notice. Moreover, that history, as well as the existence of unlawful *de jure* segregation in California public schools, is formally recognized in numerous opinions and holdings of state and federal courts, some of which are cited by Amici. Surely Amici do not suggest that the absence of a trial record on these two incontrovertible points will preclude this Court or the University from relying on them to support the constitutionality of the challenged program.

While there may be some point in arguing intentional discrimination where it has existed, in this case it is simply not possible. There has been no intentional discrimination by the Davis Medical School. The school opened only eight years ago, and very soon thereafter began to fashion the Task Force program. If Amici are arguing that discriminatory effect alone is sufficient to establish unlawful discrimination, it need only be noted that the record is complete on the racial and ethnic composition of the entering classes at Davis from 1968 to the years at issue in this case. The record reflects, as pointed out in the petition, that in 1968,

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Amici Brief 23. This ignores substantial portions of the record, including the deposition of the Chairman of the Admissions Committee and Associate Dean and extensive statistical data of the medical school, portions of which appear in the petition and the brief in opposition. The salient point is that there is and was no dispute with regard to the determinative facts. In such a situation, there is surely no virtue in undertaking a lengthy and costly proceeding to generate an unnecessary mass of record.

before implementation of the Task Force program, the entering class at Davis contained almost no minority students. To the extent that Amici's point sweeps in the University as a whole, they are taking for granted as an assumption the remarkable hypothesis that a university that has been a frontrunner in voluntary efforts to counter the effects of discrimination has engaged in intentional racial and ethnic discrimination. Above all, the University rejects the incongruous notion that the only professional schools permitted to undertake special admissions programs are those with a history of deliberate racial discrimination.

Amici also argue that the record is deficient to support review because of paucity of evidence on the inefficacy of purported alternatives to the Task Force program.[6] This position is equally unsound. The University's position throughout this litigation has been and is that it is a constitutionally valid objective for the medical school to seek to increase racial and ethnic diversity in the school and in the medical profession. The California Supreme Court accepted arguendo the validity of these objectives but held, in an unprecedented decision, that the school could not pursue them by race conscious means so long as the court could conceive of any other methods by which they

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6. This contention ignores the fact that the school's adoption of the special admissions program is an implicit determination that it is a better means than any other. In addition, as Amici recognize, the record contains the uncontradicted testimony of the Chairman of the Admissions Committee and Associate Dean that "in the judgment of the faculty of the Davis Medical School, the special admissions program is the only method whereby the school can produce a diverse student body. . . . [T]here would be few, if any, black students and few Mexican-American, Indian or Orientals from disadvantaged backgrounds in the Davis Medical School or any other medical school, if the special admissions program and similar programs at other schools did not exist. . . ." CT 67-68.

might possibly be advanced. This is one of the features of the decision below which most urgently calls for this Court's review. Its influence will disturb litigation of this kind until this Court resolves the matter. If, as the University believes, the California court's position is incorrect, this Court can prevent great injustice, as well as much anxiety and wasted effort, by saying so now. If, on the other hand, the court below is affirmed, the higher education community, litigants, and the lower courts will at least be able to take informed action. The pertinent question at this stage in the development of the law is the appropriate standard, not whether the University could meet the standard devised by the California court. The latter issue, and the University's ability to meet it in this case and in the future, properly can be reached only following the unlikely event of this Court's adoption of the precise rationale of the court below.

Amici's suggestion that there should be "extensive evidentiary development" of the lack of feasibility of alternatives, Amici Brief 27, implicitly concedes the correctness of the California court's novel rationale. Moreover, to attempt to anticipate and establish the inefficacy of any alternative means which an appellate court might later imagine is clearly a futile enterprise—both in theory and in fact the impossible task of proving a universal negative. Most fundamentally, it is to accept the illusion that it might be possible to achieve racially oriented results without utilizing racially oriented means. Surely by now this is untenable. *Cf. Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1970). Even the author of the opinion below, when Attorney General of California over a dozen years ago, said in the context of race conscious efforts to promote school integration that to hold

to the assumption that schools must be officially color-blind "would be to conclude not merely that the Constitution is color-blind, but that it is totally blind."[7]

The University believes it and the nation deserve a decision on the merits in this case. It does not believe that California, first among all the states, should be condemned to return to virtually all-white professional schools. The University does not share the Amici's evident apprehension that the Court that authored *Brown v. Board of Education* will be insensitive to what is truly required to carry out this Court's commitment to real equality of opportunity for all citizens.

Respectfully submitted,

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7. 42 Ops. Att. Gen. Calif. 33, 35 (1963).