Nos. 90-1205 and 90-6588

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

RAY MABUS, GOVERNOR OF MISSISSIPPI, ET AL.

JAKE AYERS, JR., ET AL., PETITIONERS

v.

RAY MABUS, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Mississippi has satisfied its obligation, under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, to dismantle its racially dual system of higher education, when state action continues to interfere on the basis of race with a qualified student applicant's choice of which school to attend.

II

PARTIES TO THE PROCEEDING

The petitioner, plaintiff-intervenor in this action, is the United States. The plaintiffs are Jake Ayers, Jr., Vernon B. Ayers, Williams B. Ayers, Hattie James, Margaret James, Leola Blackmon, Lillie Blackmon, Shirley A. Porter, Kenneth Spearman, James T. Holloway, Dave Collins, Louis E. Armstrong, Darryl C. Thomas, Albert Joe Williams, George Bell, Johnny Sims, Thelma H. Walker, Randolph Walker, Bennie G. Thompson, Virginia Hill, B. Leon Johnson, Pamela Gipson, Janice K. Miggins, and Floyd Alexander; and a plaintiff class consisting of all black citizens residing in Mississippi, whether students, former students, parents, employees, or taxpayers, who have been, are, or will be discriminated against on account of race in receiving equal educational opportunity and/or equal employment opportunity in the universities operated by the defendant Board of Trustees. The defendants are Ray Mabus, in his official capacity as Governor of the State of Mississippi;* the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi; members of the Board of Trustees, in their personal and official capacities: Cass Pennington, Joe A. Haynes, Dianne Miller, Nancy McGahey Baker, Frank Crosthwait, Jr., Will A. Hickman, J. Marlin Ivey, Bryce Griffis, William M. Jones, James W. Luvene, Sidney L. Rushing, and Dianne Walton; Delta State University, and its president, F. Kent Wyatt, in his official capacity; Mississippi State University, and its president, Donald W. Zacharias, in his official capacity; Mississippi University for Women, and its president, Clyda S. Rent, in her official capacity; the University of Mississippi, and its chancellor, R. Gerald Turner, in his official capacity; the University of Southern Mississippi, and its president, Aubrey K. Lucas, in his official capacity; and W. Ray Cleere, in his official capacity as Commissioner of Higher Education of the State of Mississippi.

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* Pursuant to Supreme Court Rule 35.3, the current governor of Mississippi, Ray Mabus, has been substituted for William Allain, governor at the time this case was tried.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-44a) is reported at 914 F.2d 676.[1] The panel opinion of the court of appeals (Pet. App. 45a-103a) is reported at 893 F.2d 732. The opinion of the district court (Pet. App. 104a-201a) is reported at 674 F. Supp. 1523.

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[1] Citations to "Pet. App." refer to the petition appendix in No. 90-1205.

JURISDICTION

The judgment of the court of appeals upon rehearing en banc was entered on September 28, 1990. The private petitioners filed their petition for a writ of certiorari (No. 90-6588) on December 14, 1990. On December 18, 1990, Justice Scalia extended the time in which to file a petition for a writ of certiorari to and including January 26, 1991 (a Saturday), and the United States filed its petition (No. 90-1205) on January 28, 1991. The petitions were granted on April 15, 1991.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment and Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, are set forth in the petition appendix (Pet. App. 202a).

STATEMENT

The State of Mississippi operates eight public universities. Prior to this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), Mississippi designated five of those universities as schools for white students and three as schools for black students, and it strictly enforced a racially segregated system of higher education. Mississippi has since adopted what it submits are race-neutral admission policies and practices with respect to those institutions. The question in this case is whether Mississippi has satisfied its obligation under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, to dismantle its racially dual system of higher education.

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[2] The Court limited its grant of the petition in No. 90-6588 to the first two of the five questions presented in that petition. J.A. 1888.

A. The Mississippi System of Higher Education

1. *Mississippi's Universities at the Time of* Brown *v.* Board of Education. Mississippi manages and controls its eight public universities through the Board of Trustees of State Institutions of Higher Learning, which has plenary authority over the institutions' operations. Pet. App. 106a, 109a, 114a. At the time of this Court's decision in *Brown* v. *Board of Education*, Mississippi had in place a rigid policy of racial segregation in higher education. Mississippi maintained five institutions—the University of Mississippi (UM), Mississippi State University (MSU), the University of Southern Mississippi (USM), Mississippi University for Women (MUW), and Delta State University (DSU)—for white students. The State maintained three other institutions—Jackson State University (JSU), Alcorn State University (ASU), and Mississippi Valley State University (MVSU)—for black students. Pet. App. 109a-114a.[3] Racial segregation permeated every aspect of Mississippi's university system, including governance and administration, student enrollment, faculty selection, and staff employment. *Id.* at 114a, 169a.

At the time of *Brown*, Mississippi's white and black universities were "both separate and unequal." Pet. App. 114a. The white institutions offered "a full range of program offerings" at the undergraduate, graduate, and professional levels. The educational offerings at the black colleges, however, "were limited to teacher education, agriculture and mechanical arts, and the practical arts and trades." Pet. App. 114a-115a & n.2. And even where the white and black schools offered similar programs, as in the case of agricultural training, the programs at the white schools were far superior to those at the black schools.[4]

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[3] The names of the institutions have changed over time. We refer to them throughout this brief by their current names.

[4] For example, both Mississippi State and Alcorn State are land grant colleges that provide agricultural training. The State, how-

In 1954—the year of this Court's decision in *Brown*—the Board of Trustees issued a report describing higher education opportunities under the dual system. The Board's report, entitled "Higher Education in Mississippi" (the Brewton Report), acknowledged that educational equality for white and black students in Mississippi was "very distant." Pltf. Exh. 200, at 146 (J.A. 813). The Brewton Report found that in 1954, while blacks made up more than 45% of the State's population, Mississippi spent only 15.7% of its higher education budget on its black colleges. *Id.* at 127, 148 (J.A. 816); see also *id.* at 297. Mississippi lagged behind even most other southern States in the funds it allocated to black higher education and in the proportion of the black population enrolled in institutions of higher learning. *Id.* at 130-132. Black faculty members were paid less than their white counterparts, and the faculties at the black institutions were characterized by "serious" deficiencies in "training, experience, and tenure." *Id.* at 143, 148; see *id.* at 142, 293, 294. Mississippi provided no graduate or professional education for blacks within the State, and it provided limited funds for black students to pursue such studies outside the State. *Id.* at 148-149 (J.A. 816). Facilities such as libraries at the black institutions were far more limited than those at the white institutions. *Id.* at 239, 335-336.

2. *The First Decade After* Brown. Mississippi's policy of de jure segregation in higher education continued despite this Court's decision in *Brown*. Rather than desegregating its universities, Mississippi reinforced the dual system by allowing its white universities to establish and operate off-campus centers, offering duplicative programs for white students, near the black colleges.

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ever, preferentially directed funds (including federal funds) to Mississippi State rather than Alcorn State. See, *e.g.*, Pet. App. 151a-152a; U.S. Exhs. 695e, 695h (J.A. 386, 389).

Pet. App. 146a-150a, 169a; see Tr. 107-109 (J.A. 1314-1315).[5]

In 1961, James Meredith, a black applicant, sought admission to the University of Mississippi. The Governor and Lieutenant Governor of Mississippi, the Mississippi Legislature, members of the Board of Trustees, and University officials all attempted to "impede and deter" his admission through various means, including restrictive admission policies. Pet. App. 116a. Meredith invoked his Fourteenth Amendment rights in federal court, and, in 1962—eight years after the *Brown* decision—was admitted under court order as the first black student to attend one of Mississippi's historically white universities. *Ibid.* See *Meredith* v. *Fair*, 306 F.2d 374 (5th Cir.), cert. denied, 371 U.S. 828, enforced, 313 F.2d 534 (5th Cir. 1962).

3. *The Second Decade After* Brown. The segregated character of Mississippi's university system changed little between 1964 and 1974. By 1967, all of Mississippi's historically white universities had admitted at least one black student. Pet. App. 116a-117a. The undergraduate enrollments at those universities remained, however, overwhelmingly white, and the enrollments at the historically black universities remained (with the exception of five white students at Alcorn State) exclusively black.[6] While the black institutions began hiring white

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[5] The University of Mississippi, Mississippi State, and the University of Southern Mississippi began offering courses at Jackson, near Jackson State University, in 1951, 1961, and 1964, respectively. Pet. App. 147a-148a. By 1966, the three centers had been merged into the Mississippi University Center in Jackson, offering continuing education, but not degrees, for area residents. *Ibid.* Mississippi State opened the Vicksburg Center in 1952, offering courses for local school teachers. *Id.* at 150a. The University of Southern Mississippi opened the Natchez Center, about 40 miles from Alcorn State, in the fall of 1962. *Id.* at 148a-149a.

[6] Undergraduate enrollments at the eight institutions in the fall of 1968 were:

faculty members in the 1960s, the faculties at the white institutions remained all white until the 1970s. *Id.* at 117a.

The relative educational opportunities at the various institutions also remained much the same. In 1966, the three largest white institutions (the University of Mississippi, Mississippi State, and the University of Southern Mississippi) offered a broad range of undergraduate and graduate programs. Pltf. Exh. 202, at 22-40. The course offerings at the largest black institution, Jackson State, focused primarily on undergraduate training in education and liberal arts and were comparable in scope and number to those offered at the two smallest white colleges, Delta State and Mississippi University for Women. *Id.* at 41-48. The programs at Alcorn State and Mississippi Valley remained essentially limited to agricultural and vocational courses and teacher training.[7]

	Total	Black	% Black
Historically White Institutions:			
UM (main campus)	2765	39	1.4%
MSU	7754	73	0.9
USM	6536	105	1.6
DSU	2275	79	3.5
MUW	2480	26	1.0
Historically Black Institutions:			
JSU	3686	3686	100.0
ASU	2355	2350	99.8
MVSU	2497	2497	100.0

See U.S. Exhs. 456a-456i.

[7] Alcorn State had retained its land grant functions, and offered limited additional programs in undergraduate arts and sciences and teacher training. Pltf. Exh. 202, at 41. Mississippi Valley provided training in education and vocational subjects, with a small number of fields of study in the liberal arts. *Id.* at 49-50. Only three graduate programs were authorized at the black colleges: two master's programs in education at Jackson State and one master's program in agricultural education at Alcorn State. *Id.* at 41, 46; U.S. Exh. 490 (J.A. 249).

In 1969, the United States Department of Health, Education and Welfare (HEW) initiated Title VI enforcement efforts, seeking from the defendants a plan to disestablish the formerly de jure segregated system. Pet. App. 118a. The Board of Trustees responded in 1974 through the submission of a "Plan of Compliance." The Plan of Compliance expressed the goal of improving educational opportunities for all Mississippi citizens, with "particular emphasis on equal access and retention for members of minority races to be enrolled and/or employed" at all institutions. U.S. Exh. 1, at 3 (J.A. 66) (footnote omitted). It set numerical goals for increased other-race student enrollment, *id.* at 31, which had changed only marginally since 1968.[8] The Plan also set numerical goals to increase other-race faculty employment at each of the institutions, *id.* at 32, and called for remedial programs and special recruitment to achieve these goals, *id.* at 6-17 (J.A. 66-77).

The Plan acknowledged the need for alterations in the curricula and programs of all the institutions to "help stimulate changes in the racial mix on the campuses." U.S. Exh. 1, at 18 (J.A. 78). It placed a "high priority on strengthening existing programs at the three histori-

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[8] Full-time undergraduate enrollments for the 1974-1975 school year were:

	Total	Black	% Black
Historically White Institutions:			
UM (main campus)	5771	239	4.1
MSU	8404	634	7.5
USM	6770	544	8.0
DSU	2123	268	12.6
MUW	2047	266	13.0
Historically Black Institutions:			
JSU	4477	4323	96.6
ASU	2377	2376	99.9
MVSU	2457	2457	100.0

See U.S. Exhs. 172-180. See also Pet. App. 50a.

cally black institutions," *id.* at 19 (J.A. 79), and stated that those institutions were to be given priority in the allocation of new programs, *id.* at 20 (J.A. 80). The Plan also called for increased cooperation among the historically white and black institutions throughout the State. *Id.* at 21-24 (J.A. 83-84). Finally, the Plan stated the Board's intention to request a special legislative appropriation of some $3 million for the implementation of the Plan, with $2 million of this fund to be allocated to the three historically black universities. *Id.* at 25, 34 (J.A. 85, 92).

HEW ultimately rejected the Plan of Compliance because, among other deficiencies, it failed to address the desegregation of the State's separate system of junior colleges. U.S. Exh. 407 (J.A. 195-219); see also Pet. App. 119a. The Board of Trustees nevertheless adopted the Plan. The Plan, however, was never fully funded by the Mississippi Legislature, Tr. 951, 1065-1068, 1072-1073 (J.A. 1444-1445, 1448), and its other-race enrollment goals—particularly those for the University of Mississippi and for the black institutions—were not met.[9]

4. *The Third Decade After* Brown. In 1975, the private petitioners, representing black citizens of Mississippi, initiated this action against respondents, the Governor and State educational officials. Their complaint alleged that Mississippi had maintained the racially segregative effects of its historically dual system of public higher

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[9] Compare U.S. Exh. 1, at 31, with enrollment data, note 11, *infra*. The Plan's faculty employment goals were not met at the white institutions. Compare U.S. Exh. 1, at 32, with Bd. Exhs. 208-212 (J.A. 1225-1234); see U.S. Exhs. 742a, 742c, 742f (J.A. 398-400). Other portions of the Plan, such as the priority for new programs at the black institutions and the reallocation of programs to enhance integration, were not carried out. See pp. 11-14, *infra*; see also U.S. Exh. 1, at 13 (J.A. 74); Tr. 952-953 (J.A. 1446-1448) (clearinghouse for faculty applications discontinued); U.S. Exh. 1, at 13-14 (J.A. 74-75); Tr. 1070-1072 (J.A. 1448-1449) (special efforts to train minority faculty not fully implemented due to lack of funding).

education, thereby violating the Fifth, Ninth, Thirteenth, and Fourteenth Amendments, 42 U.S.C. 1981 and 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Pet. App. 105a-106a. Shortly thereafter, the United States intervened pursuant to 42 U.S.C. 2000h-2. The United States alleged that the State authorities had failed to satisfy their obligation under the Equal Protection Clause of the Fourteenth Amendment and Title VI to dismantle Mississippi's dual system of public higher education.

During the next twelve years, the private petitioners, the United States, and respondents attempted, ultimately without success, to reach a consensual resolution of their differences. See Pet. App. 108a-109a. During this period, the State conducted further studies of its system of higher education. In 1980, the Board of Trustees began a system-wide review of all programs below the doctoral level. *Id.* at 142a-143a. That review revealed that despite the goal of the 1974 Plan of Compliance to "strengthen[] existing programs at the three historically black institutions," U.S. Exh. 1, at 19 (J.A. 79), those universities continued to offer inferior educational opportunities.[10]

The State also made several changes in its administration of its university system. In 1981, in conjunction with the Board of Trustees' system-wide program review, the Board issued "Mission Statements," which assigned missions to each institution. The Mission Statements were to identify the academic objectives of each institution in the context of a state university system. The Statements were based upon conditions at the institutions in

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[10] Under the program review, most academic programs were rated either "approval" (meaning a "good quality program") or "marginal" (meaning a "poor" quality program). The historically white universities accounted for 83% of the programs given an "approval" rating while the historically black universities accounted for 75% of the programs given a "marginal" rating. Tr. 3610-3612 (J.A. 1737-1738).

1981, including enrollment, faculty, resources, and traditional areas of strength, and thus had the effect of maintaining the status quo with respect to program offerings at the various institutions. See Tr. 3653-3656 (J.A. 1744-1746).

The Board identified the three largest historically white institutions—the University of Mississippi, Mississippi State, and the University of Southern Mississippi—as "comprehensive" universities. Those schools were authorized to offer a greater range of programs and more advanced training than the other institutions and were permitted to continue to offer doctoral degrees. Each was assigned a leadership role in certain disciplines. Pet. App. 141a. The Board designated Jackson State, the largest of the historically black schools, as an "urban" university. The Board directed Jackson State to offer programs and conduct research, on a more limited basis than the comprehensive institutions, relating to its urban community. *Id.* at 141a-142a.

The remaining two historically white schools (Delta State and Mississippi University for Women) and the remaining two black schools (Alcorn State and Mississippi Valley) were designated as "regional" universities. Despite the geographic connotation of that designation, those schools are not "regional" in the sense that each serves a designated region or locality. For example, Delta State and Mississippi Valley compete for students within the same region, and Mississippi University for Women serves primarily women students. Rather, the "regional" designation denotes that the schools were to offer primarily undergraduate programs, but could continue their limited graduate offerings if those programs were accredited. Bd. Exh. 274, at 3-4 (J.A. 1257).

Thirty years after this Court's decision in *Brown*, more than 99% of Mississippi's white students were enrolled at the historically white schools, while more than 71% of the State's black students were enrolled at the historically black schools. Mississippi's historically white uni-

versities continued to serve student bodies that were from 80% to 91% white, and Mississippi's historically black universities continued to serve student bodies that were from 92% to 99% black.[11]

The historically black schools continued to provide fewer educational opportunities than the historically white schools. On the whole, the historically black schools offered fewer programs, fewer graduate programs, and fewer fields of study than did the historically white schools, and they had a higher percentage of unaccredited programs. U.S. Exhs. 685h-685j (J.A. 311-313).[12] This pattern persisted even when comparing schools with the same "Mission" assignment. For example, the historically

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[11] Undergraduate student enrollments for the 1985-86 school year were:

	Total	White	Black	% White	% Black
Historically White Institutions:					
UM (main campus)	7354	6657	436	90.52	5.93
MSU	9942	8823	1119	88.74	11.26
USM	9017	7258	1284	80.49	14.24
DSU	2911	2399	512	82.41	17.59
MUW	1979	1622	350	81.96	17.69
Historically Black Institutions:					
JSU	5271	84	4845	1.59	91.92
ASU	2290	99	2191	4.32	95.68
MVSU	2103	11	2089	0.52	99.33

See U.S. Exhs. 738a-738h. See also Pet. App. 50a-51a. The data represents headcount enrollment (total students) except for the University of Southern Mississippi, for which full time equivalent data (number of students adjusted by a factor for credit hours) is shown. See Tr. 364.

[12] In 1980, only 52% of the eligible programs offered at the historically black institutions—including only 20% of the eligible programs offered at Alcorn State and only 10% of those at Mississippi Valley—were accredited. U.S. Exhs. 500-501 (J.A. 256-258). In 1984, despite the Board's comprehensive program review, only 70% of the eligible programs offered at the historically black universities were accredited. U.S. Exhs. 685h-685j (J.A. 313).

white "regional" school, Delta State, was superior to the historically black "regional" schools, Alcorn State and Mississippi Valley, on the basis of the numbers of programs and major fields, library volumes, percentage of faculty with doctorate, percentage of faculty with highest degree from a research university, and freshmen ACT scores. Indeed, Mississippi Valley ranked last in nearly every objective measure of academic quality. U.S. Exhs. 685h-685n (J.A. 311-317).[13]

Measures of faculty quality followed the same pattern. In 1986-1987, as in 1979, Jackson State's average faculty salary was lower than those of the three historically white comprehensive universities, and the average salaries at the two historically black regional schools, Alcorn State and Mississippi Valley, were lower than salaries at the two historically white regional schools, Delta State and Mississippi University for Women. U.S. Exh. 694q (J.A. 371-381).[14] As in 1981, the faculties at the historically

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[13] The 1986 rankings of the institutions on various criteria were:

	Traditionally White Institutions					Traditionally Black Institutions		
Criteria	UM	MSU	USM	DSU	MUW	JSU	ASU	MVSU
No. of bach. programs	3	1	2	4	7	5	5	8
No. of grad. programs	2	1	2	5	7	4	6	7
Total programs	2	1	3	5	7	4	6	8
Fields—bach.	2	2	1	4	6	5	6	8
Fields—masters	2	3	1	5	7	4	5	7
Fields—doct.	1	3	2	4	—	4	—	—
Library vol.	3	2	1	6	5	4	7	8
% Faulty with doct.	2	1	4	3	7	5	5	8
% Faulty with degree from research univ.	1	2	4	5	8	3	6	6
Average ACT score	1	2	5	4	2	7	5	8

See U.S. Exhs. 685h, i, k-n (J.A. 311, 312, 314-317). See also Pet. App. 60a-61a n.24 (as corrected above).

[14] The average faculty salaries were:

black schools tended to be less experienced and less highly educated than those at the historically white schools (*ibid.*).[15]

The same pattern persisted in the case of the quality of the institutions' physical facilities. A comparison of the replacement values of the various institutions—the best aggregate measure of current disparities—revealed that the physical facilities at the historically white schools were superior to those at the historically black schools with identical "Mission" assignments. For example, the 1985 plant investment value at either Delta State or Mississippi Valley University for Women, the two historically white "regional" schools, exceeded that at either of the two historically black "regional" schools, Alcorn State and Mississippi Valley. U.S. Exh. 836m

	1979-80	1986-87		1979-80	1986-87
Historically White Institutions			Historically Black Institutions		
UM	$20,794	$30,757	JSU	18,047	26,669
MSU	21,153	31,957	ASU	16,019	21,291
USM	19,817	31,964	MVSU	15,546	22,746
DSU	17,265	26,213			
MUW	17,836	26,507			

U.S. Exh. 694q (J.A. 372-473).

[15] The 1985 faculty data showed:

	Total	% Full Professors	% Instructors	% With Doctorate
Historically White Institutions				
UM	673	25.9%	24.4%	59.0%
MSU	895	42.8	6.5	70.0
USM	675	26.4	12.9	64.4
DSU	203	32.0	20.7	52.7
MUW	129	35.7	14.0	52.7
Historically Black Institutions				
JSU	359	22.6	16.7	64.9
ASU	174	10.9	43.1	46.6
MVSU	138	18.8	21.7	42.0

See U.S. Exh. 694q (J.A. 380-381). See also Pet. App. 55a n.16.

(J.A. 609); Tr. 412-419 (J.A. 1362-1368). Additionally, the historically white "regional" schools also showed a greater *increase* in plant investment value from 1964 to 1985—reflecting that the gap between the historically white and historically black schools was widening rather than narrowing. U.S. Exh. 836m (J.A. 607).[16]

B. The Legal Proceedings

1. *The United States' Position.* The United States maintained at trial that Mississippi had failed to satisfy its obligation, under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, to dismantle its racially dual system of higher education. Although the five-week trial (which involved 71 witnesses and 56,700 pages of exhibits) gave rise to numerous disputed issues of fact, the fundamental disagreement between the United States and Mississippi centered on the scope of the State's legal obligation to dismantle its racially segregated system of higher education. Mississippi maintained that it had fulfilled its legal obligations by adopting race-neutral

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[16] Current values for plant investment (as measured by the cost of replacing existing facilities) were:

	1964/65	1984/85	Increase 1964/65-1984/85
Historically White Institutions:			
UM	$48,405,525	$199,526,432	$151,120,907
MSU	62,245,953	305,721,970	243,476,017
USM	44,143,743	120,193,938	76,050,195
DSU	11,992,239	63,169,993	51,177,754
MUW	22,434,678	63,485,898	41,051,220
Total	189,222,138	752,098,231	562,876,093
Historically Black Institutions:			
JSU	$12,242,349	$74,315,678	$62,073,329
ASU	10,701,096	49,915,240	39,214,144
MVSU	12,229,539	43,837,040	31,607,501
Total	35,172,984	168,067,958	132,894,974

U.S. Exh. 836m (J.A. 607).

admission, hiring, and resource allocation practices. The United States disagreed with Mississippi's assertion that the State's policies were truly race-neutral. The United States further urged that Mississippi's ultimate obligation under *Brown* is to replace its de jure system of separate "white" and "black" schools with a unitary system of public higher education; accordingly, Mississippi must also eliminate state policies and practices that, when conducted in the aftermath of the past system of de jure segregation, perpetuate the dual system. The United States pointed to such policies and practices in the case, for example, of admission requirements and duplicative program offerings, which acting in combination perpetuated the dual system.

a. *Admission policies.* The United States maintained at trial that Mississippi's admission practices perpetuate a dual system of higher education by continuing and reinforcing the historic distinctions between "white" and "black" schools. The United States pointed, in particular, to Mississippi's use of the American College Test (ACT), a standardized admissions examination. Mississippi employs the ACT in a manner that is expressly contrary to the directions of those who designed the test and that channels black students to the historically black universities.

Mississippi requires all freshman applicants to take the ACT, which consists of a battery of four examinations—in English, mathematics, social studies reading, and natural science reading—that measure the applicant's general educational development on a nationally standardized basis. Pet. App. 129a. The ACT also produces a composite score, which is the average of the four test scores. Bd. Exh. 186, at 4 (J.A. 1209). Basically, at the time of trial, an applicant who received a composite ACT score of 13 or more was eligible for automatic admission to any one of the historically black universities. Pet. App. 128a. A student who sought automatic admission to any one of the historically white schools, however, was re-

quired to achieve a composite ACT score of 15 or more. *Id.* at 127a.[17]

The United States demonstrated at trial that Mississippi's use of composite ACT scores is inconsistent with the directions of the American College Testing Program (ACTP), the private organization that designed and administers the test. The ACTP offers the ACT as one element of a service known as the ACT Assessment, which is designed to present "a comprehensive picture of students." Bd. Exh. 186, at 6-7 (J.A. 1209-1210).[18] The ACTP strongly urges universities to make use of *all* of the information provided in the ACT Assessment—and not rely simply on ACT scores—when making admission decisions. *Ibid.*[19] Indeed, the ACTP has specifically

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[17] Mississippi began employing the ACT in its admissions process in February 1961, six days after James Meredith applied for admission to the University of Mississippi. Pet. App. 120a. The district court recognized that Mississippi adopted its 1961 requirement to discourage the admission of blacks to historically white universities. *Id.* at 179a. Although Mississippi's precise use of the ACT has varied over the years, State authorities have consistently required significantly higher ACT scores for admission to the historically white schools than for admission to the historically black schools. See *id.* at 121a-128a.

[18] The ACT Assessment includes not only the applicant's ACT test results, but also the applicant's report of his high school grades and a "profile" section that provides information on the applicant's background, interests, activities, and needs. Bd. Exh. 186, at 1 (J.A. 1210); Bd. Exh. 162, at 2-11 (J.A. 1126-1135). The ACTP makes the ACT Assessment data available to universities in a concise format known as the ACT College Report, which (among other things) predicts an applicant's freshmen year grades based upon his or her individual (not composite) scores and reported high school grades. Pltf. Exh. 292, at 17-27 (J.A. 838-850).

[19] The ACTP has explained:

> Because many factors (e.g., socioeconomic status, differences in educational opportunities, culture, etc.) can potentially affect the test performance of many students who are members of minority groups, ACT believes that assessment for the purpose of college admissions should reflect as complete a picture as

warned that it is particularly important to consider ACT scores in conjunction with other criteria—such as high school grades, special interests, and experiences—when assessing educationally disadvantaged applicants. *Ibid.*; Bd. Exh. 163, at 5 (J.A. 1210-1211); Pltf. Exh. 292, at 4 (J.A. 835-838). Despite the ACTP's specific directions and warnings, and despite the State's long history of denying equal educational opportunities to its black youth, Mississippi has persisted in the use of ACT scores alone, without regard to high school grades or other criteria, to determine automatic admissions.[20]

The United States demonstrated at trial that Mississippi's unconventional use of ACT test scores placed

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possible of students and should include other information in addition to test scores.

Bd. Exh. 186, at 6-7 (J.A. 1209-1210). The ACTP emphasized the following points "in the interpretation and use of ACT Assessment data with minority students" (*ibid.*):

> The ACT Assessment Program presents a comprehensive picture of students. The ACT tests are but one element of a data base that includes information about a student's background, interests, plans, accomplishments, and needs for various types of assistance. * * *
>
> The ACT tests measure academic competencies developed by students through their past educational experiences. The scores should, therefore, be interpreted in view of previous educational opportunities and conditions.
>
> The ACT tests assess a student's current educational development and are not intended to measure either innate aptitudes or the capacity to acquire the academic skills stressed in the tests through subsequent interventions.
>
> ACT data should be used along with other information about students (e.g., personal qualities). The type of additional information that is of value is dependent upon the types of uses being made of the data.

[20] Beginning in 1986, Mississippi has also required that freshman applicants complete a "core curriculum" of high school classes prior to admission. Pet. App. 125a; Bd. Exh. 183a, at 4-5 (J.A. 1179-1180). An applicant must nevertheless achieve an ACT score of at least 15 to obtain automatic admission to any of the historically white schools, regardless of his grades in those classes.

a substantial obstacle to black applicants who sought admission to the historically white universities.[21] The United States also demonstrated that, while both high school grades alone and ACT test scores alone may be valid predictors of college performance, the best predictor is the use of the two criteria together. Tr. 905-910, 1855-1856, 3776-3777 (J.A. 1529, 1788-1789); U.S. Exh. 56, at 2, 6 (J.A. 175, 177). Furthermore, specific ACT studies of freshmen at Mississippi universities in 1985-86 showed that high school grades alone and high school grades in combination with ACT scores were *better* predictors of first year college grades than were ACT scores alone. Tr. 3753-3756 (J.A. 1779-1782); U.S. Exh. 903, at Table H-1 (J.A. 670). In short, the United States submitted that Mississippi employs ACT scores in a manner that underestimates the academic potential of black students and then effectively relegates those students to the historically black schools, where Mississippi maintains lower admission standards.

b. *Duplication.* The United States also demonstrated at trial that Mississippi's practice of duplicating programs at the historically white and historically black schools continued and reinforced Mississippi's dual system of education. The evidence showed, for example, that

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[21] In 1985, 72% of Mississippi's white high school seniors achieved an ACT composite score of 15 or better, while less than 30% of Mississippi's black high school seniors achieved that score. Thus, whites qualified for automatic admission to Mississippi's historically white institutions at nearly two-and-a-half times the rate of blacks. Tr. 1849-1851 (J.A. 1523-1527); U.S. Exhs. 894i, 894j (J.A. 855-864). While the white high school students also had higher average grades than the black students, the difference was not as extreme as the difference in ACT scores. Among Mississippi students in 1985, 43.8% of whites and 30.5% of blacks had a grade point average of at least 3.0, while 62.2% of whites and 49.2% of blacks had at least a 2.5 GPA. Tr. 1851-1854 (J.A. 1524-1526); U.S. Exhs. 894i, 894j (J.A. 1524-1526). The use of high school grades in conjunction with ACT test scores would therefore increase the number of black students eligible for admission to the historically white schools. Tr. 1855 (J.A. 1527).

the historically white institutions unnecessarily duplicated 90% of the master's level programs and 34.6% of the bachelor's level programs offered at the historically black institutions. Pet. App. 144a, 200a. See Tr. 68-102; U.S. Exhs. 479-489, 685a-685g, 685o-685t (J.A. 220-248, 283-310, 318-335).[22] That phenomenon of unnecessary duplication existed whether one compared schools serving the same or different "Missions." For example, the comprehensive (and historically white) universities unnecessarily duplicated more than 30% of the programs at Mississippi's uniquely "urban" (and historically black) Jackson State, including degree programs in Banking and Finance, Social Work, and Law Enforcement. U.S. Exhs. 685b, 685r (J.A. 284-289, 327-329). Likewise, the historically white regional university, Delta State, unnecessarily duplicated 38% of the bachelor's degree programs at the historically black regional university, Mississippi Valley, even though the two schools were a mere 35 miles apart. U.S. Exhs. 685b, 685r (J.A. 290, 330).[23] The United States submitted that Mississippi's unnecessary duplication of programs at historically white and historically black schools served no useful academic function while continuing and reinforcing Mississippi's dual system of higher education.

c. *The Combined Effect of Mississippi's Admission Policies and Duplication.* The United States argued at trial that Mississippi's admission policies and program duplication, as well as other policies and practices, perpetuated a dual system of public higher education. Mis-

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[22] "Unnecessary" duplication refers to the duplication of programs that are not considered to be "core" programs essential to a liberal arts education. Pet. App. 143a-144a; Tr. 74-75, 96-97.

[23] The United States also showed that the number of unique programs at Jackson State, when compared to the white comprehensive schools; at Mississippi Valley, when compared to Delta State; and at Alcorn State, when compared to the University of Southern Mississippi, had dropped between 1981 and 1986. U.S. Exhs. 685s, 685t (J.A. 330-335); Tr. 190-192 (J.A. 1326-1330).

sissippi's reliance on ACT scores to determine automatic admission—even though consideration of grades and other criteria would provide more accurate predictions of academic performance—turns black students away from the historically white schools and toward the historically black schools, which have lower ACT requirements. At the same time, Mississippi's duplication of programs among the historically white and historically black schools —which serves no educational function—perpetuates the dual system in a very concrete manner. In combination, the State's actions encourage and reinforce the hallmarks of Mississippi's de jure segregated system: white students and black students engaged in the same course of study in the same locality attend separate schools.

To demonstrate the continuing existence of a dual system of higher education, the United States did not rely solely on the statistical evidence showing, inter alia, that more than 99% of Mississippi's white students attended the historically white universities, and that the combined student enrollment at the historically black universities was more than 94% black. See pp. 10-11, *supra*. The United States also pointed to the testimony of Mississippi's school administrators and expert witnesses, who stated that the historically white and historically black schools continue to have distinct racial identities and missions.

For example, the President of Mississippi Valley, Dr. Boykins, stated that prospective applicants continue to identify Jackson State, Alcorn State, and Mississippi Valley as "black" schools. U.S. Exh. 944c (9/14/79), at 60-63 (J.A. 756). He also acknowledged that prospective white students identified Mississippi Valley as "second class," with the result that white students were reluctant to enroll there. *Ibid.* Dr. Boykins testified that Delta State and Mississippi Valley differed because Mississippi Valley had a mission of enrolling "academically" disadvantaged students—meaning "[p]rimarily" black students. U.S. Exh. 944c (10/4/79), at 127-128 (J.A. 760). Asked to compare perceptions of Delta State and

Mississippi Valley, he said that the former was the "University of the Delta" for white students, while the latter was the "University of the Delta" for black students. *Id.* at 129-130 (J.A. 761).[24]

2. *The District Court Decision.* On December 10, 1987, the district court issued a decision ruling for respondents on all issues and dismissed the case. Pet. App. 104a-201a. The district court recognized that there remained significant differences between the historically white and historically black schools as to admission standards, student and faculty composition, and funding, see, *e.g.*, *id.* at 127a-128a, 133a, 135a-138a, 156a-163a, and that the historically white and historically black universities "duplicate as many as 75% of each other's baccalaureate programs," *id.* at 200a. The district court ruled, however, that the State fully satisfied its affirmative obligation to dismantle its racially dual system by discontinuing official discrimination and adopting "race-neutral policies and procedures." *Id.* at 201a. The court found that the continuing differences among the historically white and historically black institutions "are reasonable and were not motivated by discriminatory purpose." *Ibid.* The court concluded that there accordingly was no denial of equal protection. *Ibid.*

3. *The Court of Appeals' Decisions.* The United States and the private petitioners appealed. A divided panel of the Fifth Circuit reversed and remanded the case for remedial proceedings. Pet. App. 45a-103a. The panel ruled that a State that previously maintained a racially dual system of higher education does not satisfy its obligation to desegregate merely by discontinuing intentional

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[24] Similarly, respondents' expert in higher education administration testified that, in addition to its instructional programs, a historically black institution had "a mission in connection with racial identification." Tr. 2991 (J.A. 1658). He said that, while "[a]n effort has to be made" to attract white students, black institutions should remain predominantly black "for the time being" because they provided "a better residential, social, academic atmosphere for many black students than they receive in a predominantly white institution." Tr. 2993 (J.A. 1657).

discrimination. Rather, respondents were required "to eliminate all of the 'vestiges' or effects of de jure segregation, root and branch, in a university setting." Pet. App. 72a. The panel further concluded that respondents had failed to meet that obligation. *Id.* at 94a. Judge Duhé dissented, relying primarily on Justice White's concurring opinion for the Court in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), which held that state officials had adequately disestablished segregation of state-supported 4-H and Homemaker Clubs by allowing "voluntary choice" in attendance (*id.* at 407-408). Judge Duhé reasoned that because university attendance choices are "voluntarily made," the State's duty "to eliminate all vestiges of de jure discrimination 'root and branch' does not reach the university." Pet. App. 102a-103a.

The court of appeals granted a suggestion for rehearing en banc and vacated the panel opinion. Pet. App. 2a. On rehearing, a divided en banc court affirmed the district court, concluding that "Mississippi has adopted and implemented race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish." *Id.* at 2a. The en banc court acknowledged that the State was "constitutionally required to eliminate invidious racial distinctions and dismantle its dual system." *Id.* at 13a. In defining that duty in the higher education context, however, the court concluded that it must choose between the principles set forth in Justice White's concurring opinion for the Court in *Bazemore* and those set forth in *Green* v. *County School Bd.*, 391 U.S. 430 (1968). Pet. App. 13a-14a, 20a. The en banc majority determined that *Bazemore*, rather than *Green*, provided the standard for desegregation of public universities, Pet. App. 23a, stating:

> [T]o fulfill its affirmative duty to disestablish its prior system of de jure segregation in higher education, the state of Mississippi satisfies its constitutional obligation by discontinuing prior discriminatory prac-

> tices and adopting and implementing good-faith, race-neutral policies and procedures.

Id. at 26a. The court then concluded that Mississippi had satisfied that standard in this case. See *id.* at 26a-37a.

Judge Goldberg, joined by Judges Politz, King, and Johnson, dissented, endorsing the panel majority's opinion. Pet. App. 37a-38a. Judge Higginbotham concurred in part and dissented in part. *Id.* at 38a-44a. He would have affirmed the district court's judgment that Mississippi had ceased its intentional discrimination against blacks in higher education. *Id.* at 38a n.*. He concluded, however, that the district court erred in holding that the State's "obligation ended when it adopted an open admissions policy and stopped purposeful racial discrimination." *Id.* at 38a-39a. Instead, Mississippi remains under an obligation to dismantle its racially dual educational system, and it therefore must also discontinue practices that "directly reinforce the historical traces of separate post-secondary educational paths for blacks and whites" and that lack a legitimate educational justification. *Id.* at 42a.

SUMMARY OF ARGUMENT

This Court declared in *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954), that "in the field of public education the doctrine of 'separate but equal' has no place." That declaration applies to *all* systems of public schools, regardless of whether the system provides primary, secondary, or higher education. Thus, as the court of appeals recognized, the State of Mississippi is under a constitutional obligation "to eliminate invidious racial distinctions and dismantle its dual system." Pet. App. 13a.

The court of appeals erred in concluding that the State of Mississippi satisfies that obligation by simply ending intentional discrimination and adopting race-neutral pol-

icies and procedures. As in the case of primary and secondary education, the State must also eradicate, to the extent practicable, the remnants of unlawful discrimination. *Board of Education* v. *Dowell*, 111 S. Ct. 630, 638 (1991). The court of appeals correctly recognized that higher education differs from primary and secondary education in a fundamentally important respect—the decisions whether and where to attend college are largely matters of individual choice. That distinction, however, does not mean that the remnants of a dual system may be disregarded. Rather, the State's obligation to eliminate the remnants of unlawful discrimination must necessarily focus on the elimination of those remnants of the former dual system that affect free choice. *Bazemore* v. *Friday*, 478 U.S. 385, 387-388, 407-409 (1986).

A State fulfills its obligation to dismantle its dual system of higher education when a graduating high school senior's choice of which college to attend is "wholly voluntary and unfettered" by state action based on race. *Bazemore*, 478 U.S. at 407. As this Court recognized in *Green* v. *County School Bd.*, 391 U.S. 430 (1968), however, simply saying that free choice exists does not necessarily make it so. Accordingly, the mere adoption of race-neutral policies and practices does not suffice to dismantle a dual system of higher education. The State, in addition, must eliminate those continuing elements of its former dual system that perpetuate segregation by fettering choice, that do not serve legitimate educational interests, and that can be practicably eliminated.

We submit that the State of Mississippi has failed to discharge that obligation. In particular, the State continues to employ the ACT, a standardized admissions test, in a manner that underestimates the academic potential of black students, even though the use of other readily available admission criteria would provide a more accurate indicator of academic performance. In addition, the

State continues to duplicate academic programs at the historically white and historically black colleges—effectively endorsing and encouraging continued segregation—even though, as the district court recognized, principles of sound administration would dictate the elimination of the unnecessary duplication. The lower courts' exclusive focus on whether the State has eliminated intentional discrimination has prevented any inquiry into whether those continuing elements of Mississippi's former dual system should be cured.

ARGUMENT

MISSISSIPPI HAS FAILED TO SATISFY ITS OBLIGATION TO DISMANTLE ITS RACIALLY DUAL SYSTEM OF HIGHER EDUCATION

A. The Equal Protection Clause of the Fourteenth Amendment Requires the States To Dismantle All Racially Dual Systems of Public Education

1. This Court declared nearly 40 years ago that the Equal Protection Clause prohibits racially dual systems of public education. Simply put, "in the field of public education the doctrine of 'separate but equal' has no place." *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954). The Court accordingly directed that those States that had established segregated educational systems were under a constitutional obligation to effect "the transition to a system of public education freed of racial discrimination." *Brown* v. *Board of Education*, 349 U.S. 294, 299 (1955) (*Brown II*). The Court recognized that school authorities have the "primary responsibility for elucidating, assessing, and solving" the problems associated with dismantlement of the dual systems, while the courts "consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." *Ibid.*

This Court's declaration in *Brown* that "the doctrine of 'separate but equal' has no place" in public education

applies to *all* dual systems of public schooling, regardless of whether the system provides primary, secondary, or higher education. Both the language and logic of *Brown* indicate as much.[25] Thus, the court of appeals properly recognized that a State, such as Mississippi, that has "operated a racially dual system of public higher education" is under a constitutional obligation "to eliminate invidious racial distinctions and dismantle its dual system." Pet. App. 13a.[26]

2. This Court has also set forth a general standard for determining whether a formerly dual system of public education has achieved "unitary" status. The Court has explained that a State's dismantlement of a segregated system of public education is complete when the State has terminated its policy of intentional discrimination, adopted race-neutral policies and practices, and eradi-

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[25] For example, the *Brown* opinion specifically includes legal and graduate level training within its description of "public education." 347 U.S. at 491-492, 493. Thus, shortly after the *Brown* decision, the Court observed that "there is no reason for delay" in implementing *Brown*'s mandate in graduate professional schools. *Florida ex rel. Hawkins* v. *Board of Control*, 350 U.S. 413, 414 (1956) (per curiam). Moreover, higher education serves many of the same important roles as primary and secondary education in preparing an individual for responsible citizenship, awakening cultural values, and providing full opportunities for participation in a democratic society. See *Brown*, 347 U.S. at 493-495. Racial segregation is no less injurious to those roles in the higher educational context. See, *e.g.*, *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 641 (1950).

[26] See also, *e.g.*, *Geier* v. *Alexander*, 801 F.2d 799, 800 (6th Cir. 1986); *Geier* v. *University of Tennessee*, 597 F.2d 1056, 1065 (6th Cir.), cert. denied, 444 U.S. 886 (1979); *Lee* v. *Macon County Bd. of Educ.*, 453 F.2d 524, 527 (5th Cir. 1971); *Norris* v. *State Council of Higher Educ.*, 327 F. Supp. 1368, 1373 (E.D. Va.) (three-judge court), aff'd *sub nom. Board of Visitors of the College of William & Mary* v. *Norris*, 404 U.S. 907 (1971); *Alabama State Teachers Ass'n* v. *Alabama Pub. School & College Auth.*, 289 F. Supp. 784, 787 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 400 (1969); *Sanders* v. *Ellington*, 288 F. Supp. 937, 942 (M.D. Tenn. 1968).

cated, to the extent practicable, the remnants of unlawful discrimination. See *Board of Education* v. *Dowell*, 111 S. Ct. 630, 638 (1991).[27]

The en banc court of appeals refused to apply that standard to racially dual systems of higher education, concluding that a "different standard" should be employed in that context. Pet. App. 14a. Under that court's standard, a State should be deemed to have satisfied its constitutional obligation by "discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures." *Id.* at 26a. In short, the State need not address any remnants of past discrimination. The en banc court based its decision on a determination that universities "differ in character fundamentally from primary and secondary schools." *Id.* at 23a.[28] It concluded that this Court's decision in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), compelled its application of the "different standard." See Pet. App. 23a-24a, 25a-26a.

In our view, the same basic standard for assessing whether a State has dismantled a racially dual public school system applies regardless of whether the system involves primary, secondary, or higher education. In each of these contexts, a court must consider not only

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[27] As we explained in our amicus curiae brief in *Freeman* v. *Pitts*, No. 89-1290 (at 13-14), what courts have termed the "vestiges" of a racially dual system are best understood as "remnants," in the sense that they were a discriminatory part of the dual system and were not simply caused by it. We therefore use the term "remnants" rather than "vestiges" in this brief.

[28] Specifically, it observed that university attendance is not mandatory, that students exercise choice in determining which university to attend, and that universities frequently exhibit diversity in institutional character and program offerings. Pet. App. 23a-25a. It concluded that a requirement that States eliminate the remnants of a segregated system would interfere with those characteristics and subject the "aspiring student" to a "severe disservice by remedies which, in seeking to maximize integration, minimize diversity and vitiate his choices." *Id.* at 25a.

whether the State has stopped intentional discrimination and adopted race-neutral policies, but also whether the State has eliminated—to the extent practicable—the remnants of its prior unlawful discrimination. This is not to say that differences in the contexts are not pertinent in assessing what constitutes a remnant of discrimination the State must cure; they are, in significant respects. But the proper inquiry is advanced by a focus on what is or is not a remnant of the prior system with continuing discriminatory effect in the higher education context, rather than on formulating a new legal standard.

The fact that this case concerns discrimination in the higher education context *does* affect what the State must do to dismantle its dual system. The central vice of the "separate but equal" primary and secondary systems struck down in *Brown* was the *assignment* of students to particular schools on the basis of race. *Brown*, 347 U.S. at 493. At the college level, however, graduating high school students are not typically assigned by the State to a particular college or university; the decision whether to attend college, and which college to attend, has historically been in this country a matter of individual *choice* rather than state direction. The central vice of the dual system of higher education previously maintained by Mississippi was that it fettered this choice on the basis of race. The pertinent question in assessing Mississippi's obligation to dismantle its dual system, then, is whether state action continues to fetter on the basis of race a graduating high school student's choice of which public college to attend. See *Dowell*, 111 S. Ct. at 637 ("[F]ederal-court decrees must directly address and relate to the constitutional violation itself.") (quotation omitted); *Milliken* v. *Bradley*, 418 U.S. 717, 757 (1974) (Stewart, J., concurring) (the "task * * * is 'to correct . . . the condition that offends the Constitution' ").

This Court's decision in *Bazemore* v. *Friday*, *supra*, confirms that in a regime in which the vice to be remedied is state interference with individual choice on the basis

of race, a State fulfills its constitutional obligation by taking the necessary affirmative steps to ensure that an individual's choice is "wholly voluntary and unfettered." 478 U.S. at 407. *Bazemore* presented the question whether North Carolina State University's Extension Service, which provided agricultural and other information to the public, violated the Equal Protection Clause when providing financial and operational assistance to voluntarily established, community-based 4-H and Homemaker Clubs. The record showed that prior to 1965, the Extension Service supported those clubs on a segregated basis, but since that time had discontinued its segregated club policy and required that membership in all then-existing or newly organized clubs be open to all participants regardless of race. 478 U.S. at 407. The plaintiffs' claim was founded solely on the continuing existence of numerous "all-white" and "all-black" clubs.[29] This Court concluded that "this case presents no current violation of the Fourteenth Amendment since the Service has discontinued its prior discriminatory practices and has adopted a wholly neutral admissions policy." *Id.* at 408.

The Court also determined that its decision in *Green* v. *County School Bd.*, 391 U.S. 430 (1968)—holding that a "voluntary choice program" was ineffective to dismantle the racially dual primary and secondary school system involved in that case—"has no application to the voluntary associations supported by the Extension Service." 478 U.S. at 408. The Court noted that "[w]hile school children must go to school, there is no compulsion to join 4-H or Homemaker Clubs" and that "school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend * * *." *Ibid.* The Court agreed with the United States that "however sound *Green* may have been in the context of the public schools, it has no application to this wholly different milieu." *Ibid.*

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[29] The district court found "no evidence to show that the quality of [the State's] services is any different for the clubs of one race than for the other." *Bazemore* Pet. App. 165a n.50.

The private petitioners argued below that *Bazemore* has no applicability in the context of public higher education, and that the State's obligation should instead be measured against the standards set forth in *Green*. The en banc court of appeals, on the other hand, held that *Bazemore* applied and meant that the State need not address possible remnants of prior discrimination, but instead need only discontinue intentional discrimination and adopt race-neutral policies and procedures to fulfill its constitutional obligation.

In our view, both of these positions are flawed. This Court's decision in *Bazemore* was not like "a restricted railroad ticket, good for this day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). The equal protection principles announced in that case are fully applicable in the context of public higher education; those principles confirm that the proper focus is on whether the State interferes with choice on the basis of race. At the same time, a State can interfere with choice on the basis of race by indirect as well as direct means, and nothing in *Bazemore* suggests that a State is relieved of its obligation to cure any remnants of prior de jure segregation that continue to fetter choice on the basis of race.

In short, *Bazemore* teaches that a State fulfills its obligation to dismantle its dual system of higher education when a graduating high school senior's choice of which public college to attend is "wholly voluntary and unfettered" by state action based on race. 478 U.S. at 407. That is because a system of higher education, like the 4-H Clubs at issue in *Bazemore*, is a regime in which individual choice is the key factor. *Green*, however, teaches that saying so does not make it so, and that the remnants of prior illegal conduct can fetter choice and render a facially neutral plan discriminatory in operation. Collectively, *Bazemore* and *Green* teach that, in the context of higher education, a State's adoption of a "freedom of choice" admission policy to desegregate a racially

dual university system "merely begins, not ends, [the] inquiry whether the Board has taken steps adequate to abolish its dual, segregated system." *Green*, 391 U.S. at 437. Specifically, a State also must ensure that it has eliminated, to the extent practicable, remnants of the dual system that may fetter free choice. *Dowell*, 111 S. Ct. at 638.[30]

3. In the higher education context, then, the focus remains on free choice. As *Bazemore* makes clear, in such a context the mere continued existence of single-race institutions "does not make out a constitutional violation," and there is no obligation on the State to "take affirmative action to integrate their student bodies." 478 U.S. at 408. What the State must do is take affirmative action to remove any remnants of the prior dual system that affect choice. A remnant is a part of a formerly dual system that has had and continues to have a discriminatory

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[30] As we explained in our brief in *Bazemore*:

> This is not to say that a voluntary attendance system is unitary with respect to admissions because the state entity simply announces that it will henceforth conduct admissions without regard to race. Rather, such a formerly segregated government program is unitary only if the state has, in fact, established an admissions "system in which racial discrimination [is] eliminated root and branch." *Green*, 391 U.S. at 438. Thus, the relevant program must be free from all practices that either indicate that the program is not genuinely open to all free from subtle discrimination or that otherwise create further racial separation.
>
> This transition will normally involve diligent oversight and remedial efforts to ensure that the defendant's existing administrative and admissions practices are not tainted by discrimination, and do not send a subtle discriminatory message, that its personnel are sensitized to the need to treat applicants and potential applicants in a wholly nondiscriminatory manner, that its present and future practices do not have the effect of impeding desegregation, and that it is made clear to all that any practices discouraging or diminishing racial mixing are truly a thing of the past.

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effect. The fact that individuals choose whether to attend college and which college to attend is highly pertinent in considering whether a particular feature of the system has such a discriminatory effect; choice can operate independent of such effects, and it is no part of the State's obligation to address the results of private decisionmaking. See *Bazemore*, 478 U.S. at 407-408; *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 436 (1976). Thus, the fact that blacks in Mississippi who wished to attend a public college were once forced to choose between Jackson State, Alcorn State, or Mississippi Valley does not mean that black attendance at those schools today is a result of illegal state action, so long as the State no longer interferes with the student's choice on the basis of race.

Nor do we discern an independent obligation flowing from the Constitution to correct disparities between what was provided historically black schools—in terms of funding, programs, facilities, and so forth—and what was provided historically white schools. In the first place, such a requirement would be at odds with the overriding objective that there no longer be "a 'white' school and a 'Negro' school, but just schools." *Green*, 391 U.S. at 442. The idea is to end duplication, not to perfect it by ensuring that separate schools are in fact equal. It would be the height of irony for the resounding mandate of *Brown* that separate schools are inherently unequal (347 U.S. at 495) to be taken, 37 years later, as dictating a focus on whether funding of separate historically black and historically white schools is equal. Indeed, "improved" duplication might well have the perverse effect of encouraging students to attend a school where, other things now being more nearly equal, their own race predominates. That odd result surely is not required by the Equal Protection Clause.

There can be no question that the historically black colleges share the distinctive trait of a shameful history of inadequate state funding. See Kujovich, *Equal Opportu-*

nity in Higher Education and the Black College: The Era of Separate But Equal, 72 Minn. L. Rev. 29 (1987). What is not clear is why the Constitution demands that, at this late date, the State turn its energies to redressing an historical imbalance in spending on those institutions, rather than on ensuring that each of its young people be free to choose among all that the State has to offer, limited only by ability and not by race. As a practical matter, moreover, it will be an enormous, and endlessly litigious, undertaking to ensure that there are no longer any spending disparities. The extraordinary difficulty in that respect is illustrated by the voluminous record in this case.[31] The difficulty would be aggravated by the fact that colleges, much more so than elementary and secondary schools, have never been fungible, but have had distinct specialties and characteristics.[32]

There is, in any event, a fundamental point to the demands imposed on the State by the Constitution, as opposed to a State's considered view of what constitutes sound educational policy: It is the students—and not the colleges—that are guaranteed the equal protection of the laws. Thus, the mandate of the Equal Protection Clause

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[31] As the trial transcript reveals, the litigants will inevitably dispute not only the relative quality of distinct institutions, but also the appropriate factors on which to base a comparison. See, *e.g.*, Tr. 457-460 (J.A. 1373-1377) (testimony comparing increases in the "gross space" of Mississippi's historically white and historically black institutions); Tr. 460-461 (J.A. 1377-1378) (testimony comparing "net space"); Tr. 475-476 (testimony comparing recreation and student activity facilities); Tr. 491-492 (testimony comparing funding based on enrollment); Tr. 543 (J.A. 1384) (testimony comparing faculty qualifications); Tr. 611-642 (J.A. 1405-1408) (testimony comparing educational and general expenditures).

[32] There is, of course, no constitutional principle that compels a State to maintain various institutions serving different missions. Nevertheless, the States have concluded, as a matter of educational policy, that there is value in maintaining diverse institutions. Thus, every State (except Wyoming, which has only one public university) classifies its public colleges and universities according to respective missions of the various institutions. See Pet. App. 140a-141a.

is met once all students have the same right to decide where to attend school, with no discriminatory prompting from the State. Once choice is free, there will be no other remnants of the dual system, for there will no longer be a state-mandated dual system.

B. The District Court Erred by Failing To Consider the Evidence That Mississippi Has Not Eliminated Readily Eradicable Remnants of Past Discrimination That Continue To Fetter Free Choice

The United States submitted evidence at trial showing that Mississippi has not satisfied its constitutional obligation to dismantle its dual system, because remnants of that system that could practicably be eradicated continue to fetter free choice on the basis of race. Specifically, the State's use of ACT test scores to determine admission to particular schools, and its perpetuation of the dual system by pointlessly duplicative programs at historically black and historically white colleges, combine to make race a factor in a graduating senior's decision of which public college to attend. The district court erred in failing to consider this evidence.

1. The district court failed to analyze properly the significance of Mississippi's use of the ACT. The court correctly recognized that Mississippi began using the ACT in 1961 specifically because it was an effective tool for excluding blacks from the historically white universities. See Pet. App. 179a; see also *id.* at 32a. The court concluded, however, that the circumstances surrounding Mississippi's subsequent imposition of minimum ACT score requirements "do not indicate that this policy was adopted for discriminatory purposes." *Id.* at 179a. The court concluded that Mississippi was entitled to rely on ACT scores alone in determining automatic admissions because the ACT score by itself is "a valid indicator" of college performance and the Board of Trustees was "concerned about grade inflation and the lack of comparability in grading practices and course offerings among Mississippi's

diverse high schools." *Id.* at 180a. If the district court had employed the correct standard, it would have inquired whether Mississippi's use of the ACT alone was an element of the State's historically dual system, whether it perpetuates segregation, whether it nevertheless serves legitimate educational objectives, and whether it could readily be eliminated. The evidence supports the United States' case as to each of those inquiries.

First, there is no serious question that determination of automatic admissions through exclusive reliance on ACT scores—without regard to other valid indicia of academic potential—is a remnant of Mississippi's racially dual system. The historically white universities adopted minimum ACT score requirements in 1963 in direct response to James Meredith's application for admission to the University of Mississippi. See Pet. App. 120a-121a.[33] The district court observed that the Board of Trustees did not adopt State-wide minimum test score requirements until 1976. Pet. App. 179a. The Board's 1976 policy, however, only formalized at the State level the discriminatory standard that the historically white universities had set more than ten years before.

Second, the State's admissions policy *continues* to steer black students away from historically white schools. The district court acknowledged that "[b]lack students on the average score somewhat lower" than white students. Pet. App. 130a, 181a-182a. Indeed, in 1985, more than 70% of all white Mississippi students—but less than 30%

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[33] Six months after James Meredith had applied for admission, the Board of Trustees authorized each university "to set a minimum score which applicants to such institution must each make on the [ACT] in order to be eligible for consideration for admission." Pet. App. 120a. The three largest white universities promptly adopted policies requiring applicants to achieve a minimum composite ACT score of 15. *Id.* at 121a. When asked about the adoption of this requirement at his university, the Vice President of Mississippi State stated that the cutoff was "drawn out of the air in the Meredith days. Don't get me off on that either because I'm liable to tell secrets." U.S. Exh. 949, at 50-51 (J.A. 776).

of all black Mississippi students—who took the ACT received a score of 15 or higher. See note 21, *supra*.[34]

Third, Mississippi's exclusive reliance on ACT scores lacks a legitimate educational justification. That practice cannot be defended on the theory that grades are unreliable indicators of academic performance because—as the ACT's designers stress and studies in Mississippi demonstrate—the use of grades in conjunction with ACT scores provides more accurate predictions of college performance. See pp. 17-18, *supra*. There is simply no logical justification for relying on a single criterion that underestimates the potential performance of black applicants when the addition of other readily available criteria would lead to more accurate results. It is no answer that "use of the ACT test score alone was also

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[34] The district court observed that most black applicants who actually applied for admission to the historically white universities were ultimately admitted. Pet. App. 131a, 184a. That fact, nowever, does not dispel the segregative character of the ACT requirement. See *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977) ("The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.").

Nor does Mississippi's "high risk" admissions program cure the segregative effect of using ACT scores alone to determine automatic admissions. The historically white schools allow up to 5% of the previous year's freshman class or 50 students (whichever is greater) to be admitted with composite ACT scores of less than 15 as "high risk" exceptions to the general admissions program. A State, however, cannot validate the remnants of past discrimination by providing limited exceptions that simply lessen their segregative impact. Finally, it is also no answer to observe that any black student who is denied admission to a historically white school as a freshman can transfer into that school after having taken 24 hours of instruction at a junior college, provided the student has maintained a C average or better. Pet. App. 8a, 32a-33a. A qualified black applicant whose admission is delayed as a result of unfair admission criteria is permanently deprived of the opportunity to pursue his education on an equal footing with similarly qualified white applicants.

a valid indicator." Pet. App. 180a. Mississippi's reliance on ACT scores alone is irrational because the State refuses to consider information that would provide a *better* indication of college performance. Instead, Mississippi adheres to a practice that it initially adopted for racially discriminatory purposes and that continues to have an unfair and racially discriminatory effect.

Fourth, there is no impediment to considering grades and other criteria in the admissions process. Most other States use high school grades and other criteria in conjunction with ACT scores to determine college admissions. Moreover, the ACTP provides such information—together with a prediction of college grades—in its ACT Assessment. See pp. 16-17, *supra*. Hence, Mississippi could remove this remnant of its dual system—and improve the accuracy of its predictions of college performance—without significant difficulty.

2. The district court also failed to analyze properly the significance of Mississippi's unnecessary duplication of programs at the historically white and historically black universities. The district court did not dispute that the historically white schools unnecessarily duplicate the programs at the historically black schools.[35] But the court concluded that program duplication was irrelevant because "this case * * * is about the charge of racial discrimination, in higher education," Pet. App. 146a, and specifically "whether any practices or policies of the State in the higher education field are racially motivated to bring about results which deprive black citizens of benefits provided to white citizens." *Id.* at 200a. Here as well, the district court should have inquired whether unnecessary program duplication was an element of Mis-

[35] The district court observed that at the time of trial, the historically white and historically black universities "duplicate as many as 75% of each other's baccalaureate programs." Pet. App. 200a. As we have explained (pp. 18-19, *supra*), the district court specifically found extensive—and concededly unnecessary—program duplication at historically white and historically black schools.

sissippi's historically dual system, whether it perpetuates segregation, whether it nevertheless serves legitimate educational objectives, and whether it could readily be eliminated. The evidence supports the United States' case as to each of those inquiries.

First, Mississippi's unnecessary duplication of programs at the historically white and historically black universities was plainly a central element of Mississippi's racially segregated system of higher education. Indeed, the notion of "separate but equal" universities rests on the establishment of duplicative educational programs for white and black students. See, *e.g.*, *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 344-345 (1938). Mississippi instituted program duplication at its white and black universities expressly to achieve "separate but equal" status, and it ultimately produced duplicative educational programs for white and black students that were both "separate and unequal." Pet. App. 114a.

Second, the maintenance of duplicative programs at the historically white and the historically black schools directly affects student choice in a way that perpetuates segregation. The State's retention of an academic program at a historically white university and a duplicative program at a nearby black university perpetuates, before the eyes of the community, the dual system that the State is supposed to be abolishing.[36] A State that engages in

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[36] Likewise, the State's maintenance of similar curricula at the two land-grant universities—Mississippi State and Alcorn State—represents an extraordinary duplication of programs for a relatively small State with limited financial resources. See, *e.g.*, U.S. Exhs. 685b, 685c (J.A. 293-294, 296). Similarly, testimony at trial tended to show that the State constructed degree-granting "centers," led by the University Center in Jackson, which either duplicated programs at historically black institutions or prevented new or enhanced programs from being placed at the historically black institutions. See note 5, *supra*.

program duplication at historically black and historically white colleges serving no useful educational purpose effectively endorses and encourages continued segregation. See *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 196 (1973) (noting that "community and administration attitudes toward the school" are relevant in determining whether a dual system has been dismantled). The State's message that there are schools for whites and schools for blacks will affect student choice.

That effect is exacerbated in this case by the State's admission policies. An applicant who receives an ACT score of 15—and thereby qualifies for admission to both the historically white schools and the historically black schools—is given the choice between enrolling in a historically white school, with its more attractive program, or at a nearby historically black school, with its less attractive, duplicative program. Plainly, the rational choice under those circumstances is to enroll in the program with superior faculty, facilities, and resources.[37] Mississippi's use of ACT scores, however, gives white applicants an advantage over black applicants in qualifying for admission to both schools. Thus, Mississippi's program duplication encourages white students preferentially to enroll at the historically white schools, while giving the black student who is prejudiced by Mississippi's admission standards no choice but to enroll at an historically black school. Consequently, Mississippi's retention of duplicative programs, operating in tandem with Mississippi's skewed admission policies, perpetuates Mississippi's historic system of "separate and unequal schools." See pp. 19-20, *supra*. Indeed, as discussed *supra* at pp. 20-21,

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[37] As the district court noted, a Carnegie Foundation study found that "62% of the students surveyed stated that facilities were the most important factor in their interest in an institution." Pet. App. 165a.

state officials frankly acknowledged the racial identity they thought the schools had and *should* have.[38]

Third, the court acknowledged that Mississippi's program duplication serves no useful educational purpose. The court specifically found, "[f]or example, the unnecessary duplication of programs and administrations by two noncomprehensive universities, Delta State and Mississippi Valley State, only 35 miles apart in the rural, financially strapped Mississippi Delta, cannot be justified economically or in terms of providing quality education." Pet. App. 145a-146a. See also *id.* at 200a. The court nevertheless concluded that the fact that program duplication served no legitimate educational interests was irrelevant because "this case is not about the efficiency or the economic wisdom of higher education policies." *Id.* at 146a. See also *id.* at 200a.

Fourth, Mississippi could readily eliminate program duplication—and its segregative effects—by the simple measure of consolidating the duplicative programs in a manner that eliminates those effects. See *Green* 391 U.S. at 442 n.6. We do not urge, as the en banc court suggested, that the State must establish a regime where the historically white and historically black schools "remain equal in funding, offerings and facilities." Pet. App. 37a. Indeed, that approach would have the pernicious effect of maintaining a "separate but equal" regime. We urge instead that Mississippi can eliminate program duplica-

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[38] Thus, the district court's blanket conclusion that "there is no proof that unnecessary program duplication is directly associated with the racial identifiability of institutions," Pet. App. 194a, misstates the record. Indeed, there is no question that program duplication plays a major role in maintaining racial identities. As the district court recognized, Mississippi very effectively employed duplicative programs at the historically white off-campus centers during the 1960s to maintain the racial identifiability of its historically white and black universities. See pp. 4-5, *supra*. Mississippi's successful use of duplicative programs to maintain racial identifiability demonstrates, at a minimum, that duplicative programs have that effect.

tion by the cost-effective technique of modifying and consolidating programs that persist *despite* their "inefficiencies and wastefulness." Pet. App. 200a. Indeed, one would expect that principles of sound administration alone would lead to that result.[39]

3. We agree with Judge Higginbotham that the problem here is that the en banc court has affirmed "the district court's answer to the wrong question." Pet. App. 39a. If the court had looked beyond racial motivation, *id.* at 37a, it would have discovered that Mississippi has failed to fulfill its constitutional duty to eliminate to the extent practicable discriminatory remnants of its racially dual educational system that continue to have a segregative effect. *Dowell*, 111 S. Ct. at 638. The United States and the private petitioners are entitled to have the evidence evaluated under the correct legal standard. See *Inwood Laboratories* v. *Ives Laboratories*, 456 U.S. 844, 855 n.15 (1982); *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 193 (1963). We accordingly submit that the judgment of the en banc court should be reversed and the case remanded for further proceedings. See Pet. App. 39a (Higginbotham, J., concurring).

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[39] It may be objected that any continued disparity in facilities, funding, and program offerings between historically white and historically black colleges will affect choice, just as duplication will. See pp. 32-34, *supra*. But duplication pushes whites to attend historically white schools *and* pushes blacks to attend historically black schools; it is, therefore, segregative in effect. Disparities, on the other hand, while they may encourage whites to attend historically white colleges and to avoid attending historically black colleges, will have precisely the same—and not a mirror—effect on black students. Disparities, therefore, are not segregative in effect, and certainly will not have any such discriminatory effect on choice if the ACT and duplication remnants are properly addressed.

C. Mississippi Has Also Failed To Satisfy Its Identical Obligation, Under Title VI of the Civil Rights Act of 1964, To Dismantle Its Racially Dual System of Higher Education

The court of appeals also erred in concluding that respondents had not violated Title VI of the Civil Rights Act of 1964. See Pet. App. 26a n.11. Mississippi's obligation to dismantle its racially dual system of higher education is the same under both Title VI and the Equal Protection Clause.[40] The State must take affirmative steps to remove the remnants of its racially dual system of education. This interpretation of Title VI is reflected in the Department of Education's relevant Title VI regulation, which provides:

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

34 C.F.R. 100.3(b)(6)(i).

Bazemore construed a similar regulation of the Department of Agriculture, as it was applied to the 4-H Clubs at issue in that case. 478 U.S. at 408-409. The Court agreed with the United States that the Extension Service had fully complied with the regulation by "tak[ing] affirmative action to change its policy and to establish what is concededly a nondiscriminatory admissions system." *Id.* at 409. And, as we explain above, while the adoption of a nondiscriminatory admissions policy is sufficient to "overcome the effects of prior discrimination" in the context of 4-H Clubs, more may be

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[40] See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); *id.* at 328 (opinion of Brennan, White, Marshall, Blackmun, JJ.); see also *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582, 610-611 (1983) (opinion of Powell, J.); *id.* at 612-613 (opinion of O'Connor, J.); *id.* at 639-643 (opinion of Stevens, J.).

required to eliminate the remnants of a past dual system of higher education so that state action will not continue to fetter choice on the basis of race.[41]

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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[41] In 1978, the Department of Health, Education, and Welfare (predecessor to the Department of Education) issued Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education. 43 Fed. Reg. 6658. Those Criteria, which remain in effect, were issued to assist six States—Arkansas, Florida, Georgia, North Carolina, Oklahoma, and Virginia—in the preparation of desegregation plans as part of the process of securing voluntary compliance with Title VI. 43 Fed. Reg. 6658. The Criteria are not directly applicable to Mississippi; however, they make it clear that States that have operated dual systems of higher education must do more than simply adopt nondiscriminatory policies; they must take affirmative steps to remove the remnants of past segregation. *Id.* at 6659-6660.

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