(5)

Nos. 90-1205, 90-6588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAKE AYERS, JR., *et al.*,

UNITED STATES OF AMERICA,

Petitioners,

v.

RAY MABUS, GOVERNOR,
STATE OF MISSISSIPPI, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE ALCORN STATE UNIVERSITY NATIONAL ALUMNI ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE ALCORN STATE UNIVERSITY NATIONAL ALUMNI ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Alcorn State University National Alumni Association respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of Petitioners. The United States and the Ayers Petitioners have consented to the filing of this brief. Respondents have not consented to the filing of this brief.

Approximately 7,000 graduates of Alcorn State University

are members of the Alumni Association. The Association has been active in raising funds for student scholarships and other purposes and in support of the University with regard to legislation affecting its development.

Alcorn State University is one of the three predominantly black institutions in the Mississippi system of public higher education. The history and current status of Alcorn are unique and distinct from that of the other public colleges in Mississippi. In the late nineteenth century, it was designated as Mississippi's "separate but equal" land grant college for black students. For seventy years, it was the state's only public institution of higher education that admitted black students.

The attached brief of Amicus Curiae sets forth facts and argument concerning Mississippi's operation of segregated land grant colleges, the history of discrimination against Alcorn State, its faculty, and its students, and the effects of that discrimination today on the status and operation of Alcorn State. Because of Alcorn State's century-long status as a land grant institution and because of its unique historical role in the higher education of the black citizens of Mississippi, the brief of Amicus Curiae will be of assistance to the Court.

Respectfully submitted,

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BRIEF OF THE ALCORN STATE UNIVERSITY NATIONAL ALUMNI ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CONSENT OF THE PARTIES

Private petitioners and the United States have consented to the filing of this brief. Respondents have not consented.

INTEREST OF AMICUS CURIAE

The Alcorn State University National Alumni Association has approximately 7,000 members all of whom are graduates of Alcorn State University. The National Alumni Association actively supports the University through fund raising and legislative activities.

STATEMENT OF CASE[1]

Amicus substantially agrees with the statement of the case presented by petitioners. Amicus will here focus on matters particularly relevant to Mississippi's land grant colleges. Alcorn State University is the land grant college Mississippi provided for black students. For 70 of the 90 years that Mississippi overtly excluded black students from its white institutions, Alcorn State was the only public college available to black Mississippians.[2] Mississippi State University is the land grant college originally designated for white students.[3] Consistent patterns of discrimination and segregation were evident in the two land grant colleges during the era of separate but equal

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[1] The Joint Appendix was not available in time for the filing of this brief. The opinions below are cited to pages in the official reports: *Ayers v. Allain*, 674 F.Supp. 1523 (N.D. Miss. 1987) (hereinafter *Ayers I*); *Ayers v. Allain*, 893 F.2d 732 (5th Cir. 1990) (hereinafter *Ayers II*); *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990)(en banc) (hereinafter *Ayers III*). Exhibits are cited by exhibit number; the trial transcript is cited as "Tr."

[2] Alcorn became the state's black land grant in 1871. *Ayers I* at 1527. Mississippi's white institutions enrolled their first black student 91 years later in 1962. *Id.* at 1529. Alcorn was Mississippi's only black public college from 1871 until the state acquired Jackson State College in 1940. *Id.* at 1528.

[3] Mississippi State opened in 1880 and offered educational opportunities to white students in addition to those already available at the University of Mississippi. Additional public colleges for white students were opened in 1885, 1912, and 1925. *Ayers I* at 1526-28.

and at the time that this Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). Those patterns have persisted to the present time.

I. Separate and Unequal Land Grant Colleges.[4]

The structure of the land grant system was established by four federal statutes. In 1862, the First Morrill Act granted federal land to each state to establish a land grant college. Ch. 130, 12 Stat. 503. The Hatch Act of 1887 began annual federal funding for research at the land grant colleges. Ch. 314, 24 Stat. 440. In 1890, the Second Morrill Act initiated annual federal funding for resident instruction. Ch. 841, 26 Stat. 417. Federal support for extension services began in 1914 under the Smith-Lever Act. Ch. 79, 38 Stat. 372. These statutes established the three primary functions of land grant colleges: resident instruction, research, and extension work.

From the beginning and continuing to the present, discrimination against Alcorn State, its students, and its faculty has followed the same basic pattern: inequality in funding for all three land grant functions and inequality in educational mission and programs.[5]

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[4] *See generally* Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate but Equal*, 72 Minn. L. Rev. 29 (1987) [hereinafter *Separate but Equal*].

[5] Several reports by federal agencies document this discrimination. *See* U.S. Dep't of Interior, Bureau of Educ. 1928 Bull. No. 7, *Survey of Negro Colleges & Universities* (1929) [hereinafter *Negro College Survey*]; U.S. Dep't of Interior, Office of Educ., 1930 Bull. No. 9, *Survey of Land-Grant Colleges & Universities* (1930) [hereinafter *Land Grant Survey*]; Office of Educ., Fed'l Security Agency, *National Survey of the Higher Education of Negroes* (1942) [hereinafter *National Survey*].

Inequality in Funding. Of the four statutes that established the land grant system, only the Second Morrill Act mandated a sharing of federal funds with black land grant colleges.[6] None of the federal laws required a sharing of state funds. Throughout the separate but equal era, Mississippi allocated federal funds to Alcorn State only when required by federal statute; state funds were directed primarily to the white land grant college.

Federal funds under the Second Morrill Act and other federal statutes supporting resident instruction were divided roughly equally between Alcorn and Mississippi State.[7] Tr. 3062-63. However, state appropriations were the primary source of instructional funding and Mississippi allocated its state appropriations without concern for equitable treatment. In 1930, for example, Alcorn and Mississippi State received roughly equal federal support for land grant instruction, but for the much larger amount of state appropriations, Mississippi State's share was six times that of Alcorn.[8]

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[6] Federal funds under the 1890 Act could not be used in colleges excluding black students unless a state maintained a separate college for black students and "equitably divided" Second Morrill Act funds. § 1, 26 Stat. 417, 418. Later statutes authorizing additional funding for instruction incorporated the requirement of an equitable division. *See* Ch. 2907, 34 Stat. 1256, 1281-82 (1906) ("Nelson Amendment"); Ch. 338, § 22, 49 Stat. 436, 439 (1935) (Bankhead-Jones Act).

[7] The same division was made for the proceeds from the land grant under the First Morrill Act. In 1871, the Reconstruction legislature allocated three-fifths of the proceeds to Alcorn. In 1878, Alcorn's share was reduced to one-half and the remainder allocated to Mississippi State. *Separate but Equal* at 42 & n. 45.

[8] Federal instructional funds were $40,000 for Alcorn and $36,000 for Mississippi State. State appropriations were $40,000 for Alcorn and $256,000 for Mississippi State. 1 *Land Grant Survey* at 101, 106-107; 2 *Land Grant Survey* at 856.

In funding for research and extension work, the exclusion of Alcorn was complete. The Hatch Act called for an equal division of federal research funds in states operating two land grant colleges, unless the state legislature "shall otherwise direct." § 1, 24 Stat. 440. The Smith-Lever Act provided that federal appropriations for extension be "administered by [the land grant] college or colleges as the legislature . . . may direct." § 1, 38 Stat. 372, 373. Although these federal statutes clearly permitted, even encouraged, a sharing of federal funds, the Mississippi legislature directed not only federal but also state research and extension dollars exclusively to its land grant college for whites only.[9] *Ayers I* at 1543-45.

Inequality in educational mission and programs. From the beginning, the black land grants were assigned the mission of educating students denied meaningful opportunities for preparatory education. *Separate but Equal* at 69-71. At all levels of instruction, their educational program was restricted by the white conception of "appropriate" education for blacks--a conception based on an assumption of racial inferiority. *Id.* at 64-69. Thus, their educational mission was further defined by the two other functions assigned to them: training teachers for segregated public schools and manual or industrial training. *Id.* at 71-81, 104-106.

That restricted educational mission was evident at Alcorn. For many years its primary function was elementary and secondary education. More than half a century after it became

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[9] In all the segregationist states, the extension services operated by the white land grants included an underfunded black component to serve the black population. *Separate but Equal* at 54-60. This was true in Mississippi. *See Wade v. MCES*, 372 F.Supp. 126, 132 (N.D. Miss. 1974).

Mississippi's black land grant college, 80 percent of its students were below the college level. 2 *Land Grant Survey* at 882. The only public college provided for Mississippi's black citizens, was "largely a school of secondary grade . . . in which the greater part of the work is concentrated in industrial and manual training. Courses are offered in laundering, carpentry, blacksmithing, horseshoeing, wagon and carriage building, painting, shoemaking, and domestic science." *Negro College Survey* at 405.

Throughout the 1930's and 1940's, the funds allocated to Alcorn ensured its inferior status.[10] Restricted funding and a restricted mission prevented the development of a higher educational program. As late as 1940 Alcorn and the newly acquired Jackson State College offered black students a total 23 undergraduate programs. Students at Mississippi's white colleges could choose from more than 115 graduate and undergraduate fields. 2 *National Survey* at 10, 14-15. Neither Alcorn nor Jackson State was fully accredited by the Southern Association of Colleges. *Id.* at 16.

By the time of this Court's decision in *Brown*, more than eighty years of discrimination had firmly imposed on Alcorn an identity that was defined not only by the race of its students and faculty, but also by the quality of its facilities and educational program.

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[10] From 1934-1943, annual educational expenditures at Alcorn averaged $94,000; Mississippi State's average was $273,000. From 1947-1952, the annual averages were $433,000 at Alcorn and $1.9 million at Mississippi State. Brewton, *Higher Education in Mississippi* 335-36 (1954) (hereinafter *Brewton Report*). This district court refers to this Report as U.S. Ex. 29. *Ayers I* at 1538. It was also designated as Pltf. Ex. 200.

II. Separate and Unequal Land Grants at Mid-Century.

In 1954, Mississippi State was a $15 million educational facility organized into Schools of Agriculture, Engineering, Business and Industry, Science, and Education and a Graduate School. *Brewton Report* at 9, 55, 57, 88, 98-99. In the field of agriculture it had an "excellent" teacher training program, *id.* at 57, "superior research and teaching facilities," *id.* at 99, and a doctoral program in agronomy, *id.* at 89. Its Engineering School offered aeronautical, agricultural, civil, electrical, and mechanical engineering. *Id.* at 16. At mid-century, Mississippi State offered white students the scientific and technical education upon which the land grant system was based.

Mississippi's black citizens were not so fortunate. Long-lasting discrimination had prevented Alcorn from supporting an educational program even resembling the land grant model. The *Brewton Report* recommended that if Alcorn were to remain a land grant college the staff and faculty had to be "considerably strengthened" and "immediate improvements" were necessary in "physical plant, library, and basic educational equipment." *Id.* at 159. Alcorn's educational program conformed to the discriminatory pattern of the past: its "chief function has been and continues to be the preparation of teachers for elementary and secondary schools." *Id.* at 62. Even in teacher training, Alcorn's facilities were "completely unsatisfactory" with "crowded conditions and poor equipment." *Id.* at 64. Overall, persistent discrimination in funding had left Alcorn with a physical plant and equipment valued at only seven percent that of the white land grant.[11] *Id.* at 130.

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[11] Discrimination was particularly evident in the institutions' libraries. The white land grant had a $900,000 library building that contained a

As in the past, Alcorn's mission was further constrained by the general inadequacy of Mississippi's public education for black students. It continued to serve students who were largely unprepared for college work. *Id.* at 139. Its faculty also bore the mark of discrimination. Compared to the 207 Mississippi State faculty members, nearly 40% of whom had doctoral degrees, Alcorn had one doctorate in a faculty of 66. *Id.* at 293-94. Continuing discrimination in faculty salaries, *id.* at 292, ensured the perpetuation of this discriminatory pattern.

Perpetuation of discrimination was also evident in the research function of land grant colleges. Six decades after the Hatch Act encouraged an equal division of research funds, the Mississippi legislature continued to deny Alcorn all state and federal research dollars.[12] *Id.* at 338. Although the *Brewton Report* recommended that Alcorn participate in research, *id.* at 155, the black land grant first received a token share of state funds for research in 1972, *Ayers I* at 1544.

The patterns of discrimination and segregation had continued for nearly a century. Unless mandated by federal statute, federal funds were allocated to the white land grant, as was all but a small share of state funding. Unequal funding and a restricted mission yielded deep inequalities in educational program. While Mississippi State provided its white students

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collection of 165,000 volumes. *Id.* at 223. Alcorn's "separate but equal" library was housed on the second floor of a classroom building, difficult to use at night because of insufficient lighting, and lacked space to shelve even its inadequate collection of 15,000 volumes. *Id.* at 232-33.

[12] In 1955, research at Mississippi State's Agricultural and Forestry Experiment Station was funded at the level of $1.7 million; Alcorn received no research funds. U.S. Ex. 695e.

an education in science, engineering, agriculture, and other fields, Alcorn's primary mission was to train underprepared black students for teaching positions in segregated schools or to offer them industrial training. The pattern of discrimination was further manifested in a faculty that included few with advanced degrees, that was denied any participation in land grant research, and that was paid less than the white land grant faculty. Racial separation was rigidly enforced, but Alcorn and its students and faculty received no measure of equality.

III. Perpetuation of Separate and Unequal.

The district court found that at the time of *Brown* higher education in Mississippi was "both separate and unequal." *Ayers I* at 1528. Educational opportunities for blacks were limited to undergraduate training in teacher education, agriculture, mechanical arts, and the practical arts and trades while white students enjoyed extensive offerings at the undergraduate, graduate and professional levels. *Id.* at 1538. The court further found that state-compelled segregation continued "[a]t least until October, 1962" and "at that time" Mississippi's racially segregative policies included student enrollments, program offerings, faculty and staff, funding, and facilities. *Id.* at 1529, 1551. The district court did not determine when the state's policies ceased being segregative and discriminatory, but there has been little change in the historic patterns.

A. Perpetuation of Racial Separation.

In 1961, when James Meredith sought to transfer from Jackson State College to the University of Mississippi, state officials responded with "a carefully calculated campaign of

delay, harassment, and masterly inactivity."[13] *Meredith v. Fair*, 305 F.2d 343, 344 (5th Cir. 1962). After the Fifth Circuit ordered that Meredith be admitted, the legislative, executive, and judicial branches of the state government all joined the effort to prevent his enrollment. *Meredith v. Fair*, 313 F.2d 532; 328 F.2d 586 (5th Cir. 1962); *U.S. v. Barnett*, 330 F.2d 369, 370-80 (5th Cir. 1963). Continuing defiance led President Kennedy to dispatch U.S. Marshals and armed forces to enforce the Fifth Circuit's order. *Barnett*, 330 F.2d at 379-80. When Meredith registered for classes, under the protection of federal Marshals, rioting broke out on the campus. After order was restored, "Meredith carried on his studies under continuous guard until his graduation." *U.S. v. Barnett*, 376 U.S. 681, 686 (1964). It seems clear that James Meredith's enrollment in 1962 did not inaugurate a new era of voluntary student choice.

Segregation was perpetuated by other means. The Board of Trustees authorized white colleges to require that applicants achieve a minimum score on the American College Test (ACT), a policy that had the purpose and effect of excluding black students. *Ayers I* at 1531, 1555. Mississippi State adopted this racially exclusionary technique in 1963. *Id.* at 1531. White college "branch centers" were opened in close proximity to black colleges. *Id.* at 1551. White students tempted to attend a black college could thus voluntarily choose a convenient and segregated alternative. During the 1960's and

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[13] Earlier, in 1958, Clennon King, a black faculty member at Alcorn State, attempted to enroll in summer school at the University of Mississippi. Professor King was "bodily ejected from the campus," taken to chancery court "where a lunacy warrant was drawn out" and King was committed to the State mental hospital for examination. U.S. Comm'n on Civil Rights, *Equal Protection of the Laws in Public Higher Education* 81 (1960).

1970's, the University of Southern Mississippi's (USM) "Natchez Center", near Alcorn State, granted degrees in programs duplicating those offered by Alcorn. *Id.* at 1542-43. Although USM's degree granting role at the center has been eliminated, *id.* at 1543, program duplication continues. When the Board of Trustees significantly reduced the degree programs offered at all colleges in the 1980's, it did not use this opportunity to give Alcorn an educational identity distinct from its discriminatory past and one that would encourage desegregation. Thus, in 1986 Alcorn offered only three non-essential bachelor's programs that were not unnecessarily duplicated at the geographically proximate and traditionally white USM.[14] U.S.Ex. 685s. The district court found that unnecessary program duplication was inefficient, *Ayers I* at 1541, 1564, but held that Mississippi had no remedial duty to eliminate it. *Id.* at 1561.

The pattern of segregated student enrollments has not significantly changed in the two land grant colleges. It was not until 1965 that Mississippi's white land grant enrolled its first black student; the first white student enrolled at Alcorn in 1966. *Ayers I* at 1529. Enrollment of a single "other-race" student does not desegregate a college and it did not desegregate the land grant colleges. Twenty years later, in 1985-86, black undergraduate enrollments were 95% at Alcorn and 11% at Mississippi State. *Ayers II* at 734-35. Faculty segregation also continued. Alcorn hired its first white faculty member in 1966; the first black faculty member did not appear at Mississippi State until eight years later. *Ayers I* at 1529. In 1985-86, the Mississippi State faculty was less than three

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[14] "Unnecessary duplication refers to those instances where two or more institutions offer the same nonessential or noncore programs." *Ayers I* at 1540.

percent black while two-thirds of the faculty at Alcorn were black. *Ayers II* at 736-37.

The district court found that Mississippi's public colleges continue to be racially identifiable in their student bodies, but concluded that this has resulted from "free and unfettered choice" by students. *Ayers I* at 1558. The court further concluded that the state had used "every reasonable means" in its student recruitment efforts and thus had satisfied its "affirmative duty to dismantle the former segregated system insofar as the duty pertains to student enrollments." *Id.* Similarly, the court held that the state had fulfilled its affirmative duty with regard to desegregation of faculty. The court was "not aware" of any recruitment procedures beyond those already adopted that would assure greater faculty desegregation. *Id.* at 1563.

B. Perpetuation of Inequality.

In the mid-1960's, when continuing discriminatory practices maintained the virtually complete racial identity of the black and white land grant colleges, Mississippi State offered its white students five times the number of bachelor degree programs as Alcorn offered its black students. U.S.Ex.490. The Board of Trustees' 1974 "Plan of Compliance" committed to give black colleges priority for new programs. U.S.Ex.1 at 20. That commitment was not fulfilled. From 1974 to 1980 the Board authorized twice as many new programs for Mississippi State as for Alcorn. U.S.Ex.494. In 1981 Mississippi State offered 204 degree programs while Alcorn offered only 48. U.S.Ex.496. The ratio was approximately the same in 1986. U.S.Ex.685h.

In its Compliance Plan, the Board further committed to

strengthen existing programs at black colleges so those programs could obtain professional accreditation. U.S.Ex.1 at 19. That commitment was not fulfilled. In 1980, 88% of the eligible programs at Mississippi State were professionally accredited; at Alcorn State only 20% were accredited. U.S.-Ex.501. The Board's own Program Review in the early 1980's revealed the same pattern of inequality. The Review defined "marginal" programs as those "so poor that changes must be made." Tr. at 3610-11. Nearly half of Alcorn State's programs were found to be marginal; the highest percent of marginal programs at any white institution was only 16% (Mississippi University for Women). Tr. at 3668. The determination that nearly half of Alcorn's educational programs were marginal produced no new resources for the black land grant; it was expected to "shift resources inhouse" to make necessary improvements. Tr. at 3642.

Past patterns of discrimination and segregation are clearly evident in other aspects of Alcorn's educational program. In the land grant "mechanic arts" curriculum, Mississippi State offers extensive programs in engineering, Bd.Ex.263 at 9-10, while the mechanic arts at Alcorn are found in its Industrial Technology Department with courses in welding, auto mechanics, construction, electricity, and plumbing. Tr. at 694-95. Of the five colleges offering a degree in home economics, a core area of land grant instruction, only Alcorn lacks accreditation by the American Home Economics Association. Bd.Ex.263 at 12. The Board's admissions policies assign to Alcorn, but not to Mississippi State, the mission of educating underprepared black students.[15] Seventy percent of Mississippi State's nearly

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[15] Automatic admission to Mississippi State requires a minimum ACT score of 15. *Ayers I* at 1533. Among ACT test-takers, 65% of the whites

900 faculty members but less than half of Alcorn's faculty of 174 hold the doctorate degree. *Ayers II* at 737. As in the past, Mississippi State's faculty salaries are substantially higher than Alcorn's at all levels. U.S.Ex.694q.

In 1981, missions were assigned to each college and university on the basis of the number and level of degree programs, research funding and program, and public service responsibility. *Ayers I* at 1539. Alcorn was given the most restricted designation of "regional" university, while Mississippi State the most expansive designation, "comprehensive" university. *Ayers I* at 1539-40. The court of appeals concluded that the mission designations had the effect of maintaining the more limited program scope of the black colleges. *Ayers III* at 690. The court further held that disparities between the black and white schools in program offerings, faculty, funding, facilities and land grant programs "are very much reminiscent" of the de jure segregated system because of the relationship between mission designations and "historical racial assignments." *Ayers III* at 692. Nevertheless, the court found no violation of the state's remedial duty because the mission designations and other policies were "race-neutral" and not racially motivated. *Id.*

The allocation of land grant research and extension funding is also very much reminiscent of the separate but equal era.

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and 24% of the blacks scored above 15 in 1985-86. U.S.Ex. 893i, 893j. Thus, Alcorn's minimum ACT score of 13 for automatic admission, *Ayers I* at 1534, admits more underprepared black students. Exceptions to the ACT requirement and to the requirement that applicants complete a core curriculum in high school, *id.* at 1533-34, have the same effect. In 1986-87, more than half of Alcorn State's entering freshmen had ACT scores below 15; at Mississippi State only 5% of the freshmen scored below 15. Bd.Ex.173.

Alcorn receives federal funds for research only when required by federal statute. Where the Mississippi legislature has discretion, federal research dollars are directed exclusively to Mississippi State and its Agricultural and Forestry Experiment Station (MAFES).[16] *Ayers I* at 1544. State appropriations for research at Alcorn did not exist prior to 1970 and have been negligible since that time.[17] While the Alcorn agricultural research program employs approximately 50 persons, MAFES maintains a research faculty of nearly 300 professionals and 500 other employees. Tr. 680; Bd.Ex.393 at 12.

It was not until the early 1970's, and only when federal statutes expressly required, that Alcorn received a small amount of federal extension funding.[18] Even then, state funds were denied to Alcorn for another decade. Since 1981 Alcorn has received the paltry sum of $108,000 in annual state funding for extension work. Annual state support for extension

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[16] In 1967, Alcorn began to receive research grants from the U.S. Department of Agriculture. Bd.Ex.392 at 5. In 1977, Congress expressly provided for annual research appropriations to black land colleges. § 1445, 91 Stat. 913, 1009-11; *Ayers I* at 1545. In the early 1980's, Alcorn annual share of federal research funding was approximately $1.3 million, while MAFES received $3.5 million per year. Tr. 662-74, 679; U.S.Ex. 695e.

[17] The state appropriated $105,000 to establish a branch experiment station at Alcorn in 1971. Bd.Exh.368. Annual state funding for research at Alcorn has been approximately $240,000 since that time. Tr. 678-79, 3189. The state appropriates approximately $10 million each year for research at MAFES. U.S.Ex.695e.

[18] Beginning in 1971, federal appropriations statutes for the Department of Agriculture expressly provided for extension work at the black land grants or "1890 institutions." 85 Stat 183, 186 (1971). In 1977, Congress authorized annual extension appropriations for the black land grants. § 1444, 91 Stat. 913, 1007-1008. These specially designated funds have usually been less than 10% of federal funding allocated to the Mississippi State extension program. U.S.Ex.695h.

work by Mississippi State's Cooperative Extension Service (MCES) has been approximately 100 times that amount. U.S.Ex.695h; Tr. at 680-81, 3322-23. The Alcorn extension program has an on campus staff of 12 persons. The field staff is limited to 45 "para-professionals," many without an undergraduate degree, who work under the direction of MCES field professionals. Tr. 682-84, 3236-37. Mississippi State's extension program has more than 400 professional employees. Bd.Ex. 393.

The patterns of discrimination and segregation that began in the nineteenth century have persisted with remarkably little change. The district court held that Mississippi has no remedial duty to alter those patterns because differences in the land grant programs are "educationally sound and are not motivated by discriminatory motive." *Ayers I* at 1563. The Court of Appeals agreed. *Ayers III* at 681.

SUMMARY OF ARGUMENT

In an uninterrupted line of elementary and secondary desegregation cases beginning in 1968, this Court has held that a state has an affirmative constitutional duty to disestablish de jure segregated school systems. The goal of that remedial duty is not limited to the distribution of students, but extends to all effects of segregation and discrimination including the condition of formerly de jure segregated schools. The effects of Mississippi's widespread and long-lasting violations of the Equal Protection Clause remain in institutions that are racially identifiable in their student enrollments, faculties, missions, and educational programs. Established principles require that Mississippi remedy the effects of its constitutional violation.

The absence of state control over student enrollment decisions does not alter the remedial goal or relieve the state of its obligation to correct the condition that offends the Constitution. In higher education, the remedy must be implemented through actions which the state does control. A properly framed higher education desegregation remedy is consistent with the legitimate need for diversity in institutions of higher education. Distinctions among institutions, other than racial distinctions, promote desegregation. A properly framed desegregation remedy need not impermissibly intrude into other educational policies. Traditional principles of equity call for a balanced evaluation of the remedial duty and the state's important and legitimate educational interests.

Even if the courts below appropriately interpreted the constitutional obligation to require only that the state's actions be racially neutral and student choice be truly voluntarily, they have misapplied those standards. In a desegregation remedy, neither racial neutrality nor voluntary choice can be considered apart from the continuing effects of past discrimination.

ARGUMENT

I. In Higher Education, Remedial Techniques But Not The Remedial Goal Differ from Those In Elementary And Secondary Education.

In *Green v. County School Board*, this Court observed that after *Brown* II the initial remedial effort was to obtain "for those Negro children courageous enough to break with tradition a place in the 'white' schools." 391 U.S. 430, 436 (1968). That initial effort was inadequate to alter well-entrenched patterns of discrimination and segregation. *Green*

therefore imposed on school authorities an affirmative constitutional duty to disestablish public school systems in which schools were racially identified not only by the composition of their student bodies and faculties, but by every other facet of school operations. *Id.* at 435-38. Subsequent cases have consistently held that a constitutionally adequate remedy must look beyond the racial distribution of students and also address the condition of schools that have been segregated by law. *Bd. of Educ. v. Dowell*, 111 S.Ct. 630, 638 (1991); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 460 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971).

In higher education, the initial remedial effort was also designed to obtain a place in white colleges for black students courageous enough to break with tradition. *E.g.*, *Florida* ex rel. *Hawkins v. Bd. of Control*, 350 U.S. 413 (1956). In Mississippi, that first step was taken by James Meredith in 1962. *See* pp. 9-10, *supra*. As in elementary and secondary education, the initial remedial effort was inadequate. The patterns of segregation and discrimination were well-entrenched. The Mississippi system of higher education was separate and unequal when *Brown* was decided and the state continued its intentionally segregative policies thereafter. *Ayers I* at 1538, 1551. The entrenched pattern of segregation has not been significantly altered by the state's more recent, facially neutral policies. As the example of Alcorn illustrates, the black colleges continue to be racially identified not only by the composition of their student bodies and faculties, but also in their missions and educational programs. *See* pp.11-16, *supra*.

Well-established remedial principles require that Mississippi address the continuing effects of its de jure segregation and

"correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann*, 402 U.S. at 16. The courts below recognized that the state has an "affirmative duty to disestablish its prior system of de jure segregation," *Ayers III* at 697, but fashioned a remedial standard wholly inadequate to accomplish that task.

As stated by the court of appeals, "Mississippi satisfies its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures." *Id.* This extraordinarily limited remedial standard was derived from two features of higher education not found in elementary and secondary education: (1) the state does not compel enrollment or assign students to colleges and universities and (2) higher education institutions are necessarily diverse in their program offerings and other characteristics. Neither of these differences supports rejection of the remedial principles this Court has established for desegregation cases.

A. Student Choice in Higher Education Does not Alter the Goal of a Desegregation Remedy

Traveling by slightly different routes, the courts below arrived at the same destination. The district court held that in the absence of "direct official control" over attendance patterns in higher education, the remedial focus shifts from the results of a state's actions to the racial neutrality of those actions.[19]

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[19] The district court appeared to adopt the additional remedial requirement that the state's actions "not substantially contribute to the continued racial identifiability of individual institutions," *Ayers I* at 1554, but did not consider this factor in evaluating most of the state's actions. *See id.* at 1561, 1563 (no duty to "maximize" desegregation). In affirming, the court

Ayers I at 1554. The court of appeals concluded that since remedial measures such as pupil assignment and zoning are not available in higher education, freedom of choice is an adequate remedy if the state discontinues its past discriminatory practices and adopts race-neutral policies. *Ayers III* at 686-87.

Both courts confused the goal of a disestablishment remedy with the means of achieving it. The fact that the state does not have direct official control over student attendance decisions in higher education necessarily constrains the range of remedial techniques. It is clear that measures such as student assignment and zoning are not available. However, the constraints on remedial techniques do not redefine the goal of a disestablishment remedy. The remedial duty to eliminate the effects of a constitutional violation is not limited to the elementary and secondary context or even to desegregation cases. *See Louisiana v. U.S.*, 380 U.S. 145, 154 (1965) (voting rights). As Chief Justice Burger put it in *Swann*:

> "[A] school desegregation case does not differ fundamentally from other [constitutional] cases involving the framing of equitable remedies. . . . The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." 402 U.S. at 15-16.

In the Mississippi system of higher education, the condition that offends the Constitution is the continuing racial identity of institutions, an identity defined not only by student enrollments but also by faculties, educational mission, programs, and

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of appeals made no mention of a duty to refrain from actions substantially contributing to racial identifiability.

quality. That condition is no longer determined by direct official control over attendance patterns, but it is determined by other official actions which the state does directly control. These include decisions concerning funding, mission assignments, program allocations, faculty hiring, and student admissions criteria.[20] It is through these official actions that the remedial duty is satisfied by a balancing of the individual and collective interests.

This Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), is not to the contrary. The youth clubs in *Bazemore* involved a "wholly different mileau" not only from the "context of the public schools" in *Green, id.* at 408, but also from the context of public higher education in this case. The youth clubs did not have different admissions criteria depending on the racial characteristics of their membership. There was "no statutory or regulatory authority to deny a young person the right to join any Club." *Id.* Nor did the funding, programs, or services of the youth clubs follow past patterns of discrimination and segregation. No black youth was denied club services or provided inferior services. Services were provided to the local clubs "equally regardless of their racial make-up" and club activities beyond the local level were fully integrated.[21] *Bazemore v. Friday*, 751 F.2d 662, 667 (4th Cir. 1984).

These differences between *Bazemore* and this case are not mere formalities. If the state officials in *Bazemore* had es-

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[20] In the highly centralized system of administration used in Mississippi, the state Board of Trustees has substantial control over these decisions. U.S.Ex.636.

[21] The plaintiffs in *Bazemore* agreed that apart from the racial makeup of club membership, all vestiges of past discrimination had been eliminated. *Bazemore*, 751 F.2d 662, 697, n. 15 (dissenting opinion).

tablished different admissions criteria for black and white clubs, provided less funding and fewer services to the black clubs, housed them in inferior facilities, and restricted them to a program associated with past discrimination and segregation, this Court would not have concluded that the "continued existence of single-race clubs does not make out a constitutional violation." 478 U.S. at 408. *Bazemore* did not fashion a new remedial principle that voluntary choice automatically relieves state officials of any obligation to remedy the effects of past discrimination. As Justice White's opinion for the majority makes clear, *Bazemore* stands for the proposition that in state-sponsored activities based on voluntary choice, the Constitution does not require compulsory assignment if state officials have successfully eliminated all other vestiges of past discrimination under their control.

Under *Bazemore*, the goal of disestablishment of a formerly de jure segregated system of higher education is not to be accomplished by compulsory assignment of students but through decisions concerning educational missions, program allocations, funding, faculty hiring, and student admissions criteria. It was through these decisions that Mississippi created and perpetuated its separate and unequal system of higher education. It is through these decisions that Mississippi must now implement an effective desegregation remedy.

B. Remedial Measures Other Than Compulsory Assignment Are Consistent with Institutional Diversity.

The courts below found further justification for their refashioning of the remedial goal in the fact that institutions of higher education are diverse and distinct from each other whereas elementary and secondary schools are essentially uni-

form and fungible. *Ayers III* at 687; *Ayers I* at 1554. The court of appeals assumed that a remedy addressed to the condition of the Mississippi's colleges would destroy institutional diversity and require that Mississippi's identifiably black colleges "shall at all times remain equal in funding, offerings, and facilities" with their identifiably white counterparts. *Ayers III* at 687, 692. That assumption ignores the role that diversity and the absence of compulsory assignment play in the higher education remedy.

In the context of higher education, actions that make racially identifiable colleges duplicates of each other would encourage racially based student choices and thereby impede rather than achieve the goals of a desegregation remedy. An effective remedy should be designed to ensure that racially identifiable colleges *are* diverse in mission and educational programs so that student choices can be based on institutional characteristics other than race. For the same reason, the educational features of a racially identifiable black college should be distinct from those which characterized its segregated and discriminatory past. In the land grant institutions, for example, Mississippi has perpetuated all of the prominent features of the separate but equal era that identified Alcorn as the land grant institution for black students and as the inferior land grant college. *See* pp.7-16, *supra*. The continuing connection between racial identifiability and the discriminatory past not only deters white students from enrolling at Alcorn, but also affects the educational opportunities provided to the black students who make up the overwhelming majority of Alcorn's enrollment.[22]

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[22] A remedial focus on the condition of the colleges does not confer constitutional rights on the institutions. Cases such as *Swann* require that a

A desegregation remedy that takes account of institutional characteristics and serves the higher education functions of uniqueness and diversity would not "force" potential students to attend particular colleges. Diversity in higher education is designed to present students with choices, and the characteristics of different institutions should and do influence those choices. In Mississippi, however, the continuing effects of past segregation and discrimination inject racial considerations into that choice. Each of the institutions is substantially identified by the race of their students and faculty. In addition, as the example of Alcorn makes clear, the black institutions retain the mission and program characteristics that have identified them as black and inferior colleges. No student has a right to choose a public college based on its racial characteristics. A desegregation remedy may properly restrict that basis for student choice.

C. Equitable Remedies Can Accommodate the Legitimate Needs of Higher Education.

Equity is "characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown II*, 349 U.S. 294, 300 (1955). The remedial power of equity seeks to achieve a "balanced evaluation of the obligation to promote desegregation . . . with other, equally important educational interests. . . . Neglect of either the obligation or the interests destroys the even-handed spirit with which equitable remedies must be approached."

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remedy address the condition of schools to eliminate all the "indicia of a segregated system." 402 U.S. at 18. A remedy addressing the indicia of segregation in Mississippi's system of higher education no more implies a finding of "institutional rights" than did *Swann*.

Keyes v. School Dist. No. 1, 413 U.S. 189, 240 (Powell, J., concurring and dissenting). The balanced evaluation of equity does not call for the neglect of Mississippi's educational policy concerns. A district court takes account of those concerns in considering "the feasibility or practicality of the proposed remedy." *Wright v. Council of Emporia*, 407 U.S. 451, 467 (1972). If the state demonstrates that a proposed remedy would prevent it from achieving "important, legitimate ends," an equity court should look to alternative remedial measures. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979).

The district court in this case had little occasion to evaluate possible remedial measures against the state's potentially competing interests. The proceedings below were directed to the question of violation, and not that of remedy.[23] Consequently, the focus was on the actions defendants had taken and not on the feasibility or practicality of remedial steps that might be taken. In some instances, the courts below accepted state practices that appeared to have only a tenuous relationship to any important state interest. Mission designations that perpetuate the restricted programs of black institutions, *Ayers III* at 690, and that were justified in part by a need to conserve resources, *id.* at 689, satisfied the remedial duty even though the designations are an inefficient allocation of the state's resources, *id.* at 690. A higher education system characterized by "inefficiencies and wastefulness," *Ayers I* at 1563, was excused from hiring more black faculty at its white colleges because it has insufficient funds to attract qualified black faculty, *id.* at 1538. An admissions policy that severely

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[23] By its order of July 23, 1986, the trial judge denied defendants' motion for a single trial on the issues of violation and remedy.

limits the number of black students eligible for admission to white colleges, *see* note 15, *supra*, does not conflict with the remedial obligation "even assuming the policy is narrow, inaccurate, and educationally unsound" as long as it is not intentionally discriminatory. *Ayers III* at 690-91.

The remedial power of equity is not so one-sided. Traditional principles of equity call for restraint in a higher education case, but not for abdication.

II. The Courts Below Incorrectly Applied Standards of Racial Neutrality And Voluntary Choice.

Amicus contends that voluntary choice and racial neutrality are not the touchstones of a constitutionally adequate higher education desegregation remedy. Even if they are, however, the courts below failed to engage in a proper inquiry into the racial neutrality of Mississippi's policies and practices and the voluntariness of student choices.

A. Racial Neutrality Requires More Than Restraint From Intentional Discrimination.

In *Swann*, Chief Justice Burger observed that a remedial plan that appears to be neutral is not acceptable if "school authorities present a district court with a 'loaded game board.'" 402 U.S. at 28. In this case as well, the state's actions have been played out on a "loaded game board" and should not be adequate simply because they appear to be neutral. The courts below accepted state actions under the standard of "racial neutrality" even if those actions perpetuate the continuing effects of segregation and discrimination. For example, the court of appeals concluded that disparities between the black

and white institutions in funding, programs, and faculty "are very much reminiscent of the prior [separate but equal] system" because they "largely follow mission designations [which] to some degree follow the historical racial assignments."[24] *Ayers III* at 692. Nevertheless, the court held that the state's policies were racially neutral, not racially motivated, and thus "met or exceeded [the state's] duty to disestablish prior de jure segregation in these areas." *Id.*

Because of its indifference to state actions that perpetuate the effects of past discrimination, the remedial standard applied below requires little more than the absence of discriminatory purpose. That limited standard is inadequate for precisely the reasons identified by Justice Powell in *Keyes*:

> "Any test resting on so nebulous and elusive an element as a school board's segregative 'intent' provides inadequate assurance that minority children will not be short-changed in the decisions of those entrusted with the nondiscriminatory operation of our public schools." 413 U.S. at 227 (concurring and dissenting opinion).

As applied below, Mississippi's remedial obligation is neither affirmative nor concerned with disestablishment. The district and appellate courts embraced that passive duty because of their assumption that students in the Mississippi system of higher education voluntarily choose a college or university. However, the courts' standard of voluntary choice, like that of racial neutrality, failed to consider the continuing effects of

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[24] The technique of building on past discrimination is more reminiscent of the past than the court of appeals may have realized. *See Meredith v. Fair*, 305 F.2d 343, 361 (5th Cir. 1962)(inferiority of facilities and programs at black colleges used to justify rejection of Meredith's transfer request).

past discrimination.

B. Determination of Voluntary Student Choice Must Consider Whether Choice Is Influenced By Continuing Effects of Past De Jure Segregation.

Despite the extraordinary remedial power attributed to voluntary choice, the opinions below did not define that concept. It is clear, however, that the "voluntary choice" found adequate to excuse continuing patterns of past segregation took no account of the influence those patterns have on student choice. Black students were found to have a free choice and were not channelled to black institutions, *Ayers I* at 1557, despite admissions requirements that give them greater accessibility to black colleges than white colleges, *see* note 15, *supra*.[25] Similarly, the decisions of white students not to enroll in a black college were considered voluntary even though the state's assignment of educational missions "maintain[ed] the more limited program scope at the historically black universities."[26] *Ayers III* at 690. The conception of voluntary choice applied below is inadequate

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[25] The courts below found sufficient explanation for the absence of low scoring black students in the white colleges in the fact that few such students had been rejected. But the white colleges did not publicize their willingness to accept students below their published minimum ACT score. *Ayers II* at 735-6 & n. 12. *See Dothard v. Rawlinson*, 433 U.S. 321, 330-331 & n. 13 (1977) (potential applicants unable to meet published standards and not informed of waiver provision deterred from applying).

[26] The court of appeals seemed to hold contradictory views on voluntary choice. It rejected remedial measures addressed to institutional missions and programs because they would "force a potential student to attend a particular university." *Ayers III* at 687. Yet institutional missions that perpetuate past segregative patterns and restricted the programs of black colleges, *id.* at 690, 692, were not seen as affecting the voluntariness of student choices.

because it fails to consider the effect that the "historical traces of separate post-secondary educational paths for blacks and whites" have on student choices. *Ayers III* at 694 (Higginbotham, J., concurring and dissenting).

The notion that continuing effects of past unlawful actions can impermissibly influence what would otherwise be voluntary choices is neither novel nor unique to school desegregation cases. This Court long ago recognized that employee organizations established by employers can restrict free choice of a bargaining unit after employer domination of the union has ceased: "The effects of long practice persist . . . [and] the disestablishment of an employee organization may be necessary to give untrammelled freedom for the creation of a bargaining unit." *NLRB v. So. Bell T&T Co.*, 319 U.S. 50, 57 (1943). In *Teamsters v. United States*, the Court recognized that potential minority applicants can be deterred from applying "by the racial . . . composition of that part of [an employer's] work force from which he has discriminatorily excluded members of minority groups." 431 U.S. 324, 365 (1977). The widespread and obvious effects of past segregation in Mississippi's college and universities similarly constrain the voluntary choice of black and white high school graduates.

CONCLUSION

The decision in this case will affect not only Mississippi but other states that constructed separate and unequal black public colleges, maintained separate and unequal colleges after *Brown*, and continue to operate racially identifiable colleges in which the effects of past discrimination persist. The remedial standard employed by the courts below would require that those states do little more than refrain from future intentional

discrimination. Neither this Court's decision in *Brown*, its subsequent remedial decisions, nor the Equal Protection Clause permits a remedy so indifferent to the continuing effects of past discrimination.

The judgment of the court of appeals should be reversed and the case remanded for further proceedings to determine the remedial measures necessary to eliminate continuing effects of discrimination and segregation.

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