Nos. 90-6588 and 90-1205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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

Petitioners,

v.

RAY MABUS, Governor
State of Mississippi, *et al.*,

Respondents.

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 AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AMERICAN CIVIL LIBERTIES UNION, AND THE NATIONAL CONFERENCE OF BLACK LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JANELL M. BYRD
NAACP Legal Defense and
Educational Fund, Inc.
1275 K Street N.W.
Suite 301
Washington, D.C. 20005
(202) 682-1300

*JULIUS LEVONNE CHAMBERS
CHARLES STEVEN RALSTON
NORMAN J. CHACHKIN
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

JOHN A. POWELL
American Civil Liberties
Union Foundation
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

JOHN W. GARLAND
ADJOA AIYETORO
National Conference of
Black Lawyers
1926 6th Street, N.W.
Washington, D.C. 20001
(202) 387-5960

Counsel for Amicus Curiae

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

Nos. 90-6588 and 90-1205

In the

Supreme Court of the United States

October Term, 1991

Jake Ayers, Jr., *et al.*,

Petitioners,

v.

Ray Mabus, Governor
State of Mississippi, *et al.*,

Respondents.

United States of America,

Petitioners,

vs.

Ray Mabus, Governor,
State of Mississippi, *et al.*

Respondents.

MOTION OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AMERICAN CIVIL LIBERTIES UNION, AND THE NATIONAL CONFERENCE OF BLACK LAWYERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The NAACP Legal Defense and Educational, Fund, Inc. (LDF), the American Civil Liberties Union (ACLU), and the

National Conference for Black Lawyers (NCBL) respectfully move the Court for leave to file the attached brief as *amici curiae* in support of petitioners. Both the *Ayers* petitioners and the United States have consented to the filing of this brief. Respondents, Ray Mabus, Governor of the State of Mississippi, *et al.*, have not responded to request for consent.

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation established to assist African American citizens in securing their constitutional and civil rights. LDF has had a major role in litigation efforts challenging discrimination and segregation in education.[1] LDF successfully litigated the first court challenge to racial segregation in Mississippi's higher education system, *Meredith v. Fair*, 305 F.2d 343 (5th Cir.), *cert. denied*, 371 U.S. 828

---

[1] *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954). LDF represented the plaintiffs in litigation that resulted in the initiation of desegregation efforts in public higher education systems in 18 states, including the State of Mississippi. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *modified and aff'd unanimously en banc*, 480 F.2d 1159 (D.C. Cir. 1973), *dismissed sub. nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990). Other LDF higher education desegregation cases include: *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Adams v. Lucy*, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956).

(1962). The questions presented here involve the interpretation of five cases litigated by LDF.[2]

The American Civil Liberties Union (ACLU) is a non-profit, non-partisan organization with nearly 300,000 members dedicated to principles of liberty and equality embodied in the Constitution. As part of its commitment to legal equality, the ACLU has long opposed any forms of state imposed racial discrimination.[3] This case raises fundamental questions about the constitutionality of state imposed segregation in higher education. Its proper resolution, therefore, is a matter of direct concern to the ACLU.

The National Conference of Black Lawyers (NCBL), founded in 1968, is an organization comprised of approximately 2,500 black lawyers and legal workers, many

---

[2]*Bazemore v. Friday*, 478 U.S. 385 (1986); *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986); *Norris v. State Council of Higher Education for Virginia*, 327 F. Supp. 1368 (E.D. Va.), *aff'd mem.*, 404 U.S. 907 (1971); *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969).

[3]ACLU currently represents respondents in *Brown v. Board of Education*, 892 F.2d 851 (10th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. April 26, 1990) (No. 89-1681), and *Pitts v. Freeman*, 887 F.2d 1438 (11th Cir. 1989), *cert. granted*, 111 S. Ct. 949 (Feb. 19, 1991) (No. 89-1290).

of whom are graduates of historically black colleges. NCBL's membership is engaged in legal and legislative efforts to increase educational opportunities and advancements for black and other minority persons. Several NCBL lawyers filed the original complaint in this case.

Given *amici's* substantial experience in school desegregation litigation, it is submitted that the brief will be of assistance to the Court. *Amici*, therefore request that the motion be granted.

Respectfully submitted,

/s/ Janell M. Byrd

Janell M. Byrd
NAACP Legal Defense and
Educational Fund, Inc.
1275 K Street, N.W.
Suite 301
Washington, DC 20005
(202) 682-1300

* Julius LeVonne Chambers
Charles Stephen Ralston
Norman J. Chachkin
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

John A. Powell
American Civil Liberties
Union Foundation
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

John W. Garland
Adjoa Aiyetoro
National Conference of
Black Lawyers
1926 6th Street, N.W.
Washington, D.C. 20001
(202) 387-5960

Counsel for Amicus Curiae
**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES, CONSTITUTIONS, AND REGULATIONS **PAGE**

STATUTES, CONSTITUTIONS, AND REGULATIONS **PAGE**

GOVERNMENT REPORTS

GOVERNMENT REPORTS — PAGE

BOOKS

Interest of Amici

Amici NAACP Legal Defense and Educational Fund, Inc., American Civil Liberties Union, and National Conference of Black Lawyers[1] have extensive experience in desegregation litigation and share a committment to the goal of equal educational opportunity. *Amici* believe that their views will be of assistance to the Court.

STATEMENT OF THE CASE

Introduction

In broad terms, this case presents the question whether the State of Mississippi has taken sufficient steps to satisfy its statutory and constitutional duties to dismantle the racially dual and discriminatory system of higher education that it created and maintained for more than a century. In determining whether the dual system or its vestiges continue to have discriminatory effects, the history of the development, scope and duration of Mississippi's dual educational system is the necessary backdrop. The details of that history, therefore, are provided in the factual statement below.

---

[1]Each organization is described fully in the preceding Motion for Leave to File and incorporated by reference herein.

In *amici*'s view, race always has played an enormous role in shaping educational opportunities, and thus, life's opportunities, for the people of the State of Mississippi. In the 1870's Mississippi moved from enforced ignorance imposed upon its black population to a system of rigid segregation of blacks in grossly inferior educational systems. It is undisputed that this practice of rigid segregation and inequality continued unbreached at every educational level from the 1870's until at least 1962.

Pressured to abandon its discriminatory system, state officials engaged in "massive resistance" leading to widespread violence. Creative strategies instituted during the period of massive resistance and thereafter, as well as the continued existence of a dual structure itself, have successfully maintained Mississippi's segregated and profoundly unjust system of higher education, under which educational opportunities for the vast majority of black Mississippians are severely limited.

Today, 70% of Mississippi's black students are automatically excluded from its five historically white institutions (HWIs) of higher education by virtue of an

admissions test score requirement whose existence is indisputably rooted in intentional discrimination. Thus the vast majority of black students attending in-state public colleges are effectively limited to choosing among three historically black institutions (HBIs), which without apology Mississippi funds at a significantly lower rate than the three HWIs where 86% of its white college students are educated.

Mississippi at most has made meager efforts to change its dual system, as is evidenced by the limited success it has had. In 1974, in response to a notice from federal authorities that the state's higher education system remained racially dual and was in violation of Title VI of the Civil Rights Act of 1964, Mississippi submitted a "Plan of Compliance." However, the federal government found the plan inadequate. Mississippi proceeded to implement its inadequate plan, but refused to fully fund it.

More evident, in fact, than any attempts to dismantle the dual system, are Mississippi's efforts to maintain the dual system through the use of policies that are euphemistically labelled "race-neutral" only because their express racial characteristics have been eliminated. Those policies seize

upon the institutional and personal cumulative deficits born of the inequity of past discrimination as the very justification for perpetuating racial disparities.

Much more than "race-neutral" policies -- the thinly disguised tools of the massive resistance movement -- is required to eliminate "root and branch," the deep traces of a discriminatory system that has been so firmly implanted as Mississippi's. Nonetheless, a divided *en banc* Court of Appeals for the Fifth Circuit ruled that Mississippi can abandon even its meager efforts and need do no more. *Amici* urge the Court to reverse that decision and require affirmative measures to eliminate the vestiges of the dual system in order to provide black citizens of Mississippi full and equal rights to educational opportunities provided by the state.

STATEMENT OF RELEVANT FACTS[2]

I. *The Establishment and Maintenance of Mississippi's Racially Dual System from the Mid-1800's to 1962*

In 1823, Mississippi imposed a criminal prohibition on gatherings of blacks (free and slave) for the purpose of learning to read or write.[3] Most blacks, of course, were still enslaved in 1844 when the state established the University of Mississippi.[4] The school began operating in 1848, and in 1854 expanded to include a law school.[5] The legislature

---

[2]We adopt the detailed factual review provided by the Ayers petitioners. The following abbreviations are used herein: United States' Petition Appendix ("PA"), Ayers Petitioners' Petition Appendix ("PPA"), United States' exhibits ("USX"), defendants' exhibits ("BDX"), Ayers plaintiffs' exhibits ("PX"), stipulations of the parties ("S."), and the trial transcript ("Tr."). The Joint Appendix was not completed in time to allow citation by *amici*.

[3]The statute provided an exception for attendance at religious services conducted by a white minister or attended by two "respectable" white persons appointed for that purpose and established a penalty of corporeal punishment up to 39 lashes for violations. Ch. 37, art. 3, § 2, *Mississippi Code of 1798 - 1848* (A. Hutchinson, 1848); Ch. 33, § 10, art. 51, *Revised Code of Mississippi* (1857)(re-enactment).

[4]The current names of the institutions are used in this section, except where otherwise indicated.

[5]The University of Mississippi opened its School of Medicine in 1903 (PA 110a).

mandated that the school serve whites only. (PA 109a-110a.)[6]

In 1871, Mississippi's Reconstruction Legislature[7] opened Alcorn State University for blacks. In 1878, with the entry of the Redeemer Legislature,[8] the school was designated as the state's land-grant college for blacks pursuant to the 1862 Morrill Land Grant Act, Ch. 314, 24 Stat. 440. (PA 110a-111a.)[9] That same year, the state established Mississippi State University and designated it as the land-grant college for whites (PA 111a).[10] Thereafter, the state established the

---

[6]In 1846, Mississippi set up a system of common schools. Ch. 9, art. 37, *Mississippi Code of 1798-1848. See also,* ch. 9, art. 45 (¶ 1) *Mississippi Code of 1798-1848* (common schools for "free white youth").

[7]*See generally* W.E.B. DuBois, *Black Reconstruction in America* 431-51 (1935); E. Foner, *Reconstruction, America's Unfinished Revolution: 1863-1877* (1988).

[8]*Id.*

[9]The Redeemer Legislature also enacted a statute requiring racial segregation in the schools. 1878 Miss. Laws, ch. XIV, § 35. The requirement of racially separate schools was made part of Mississippi's Constitution in 1890. Miss. Const. of 1890, art. 2, § 207.

[10]State funding for Alcorn University has consistently been lower than that for Mississippi State. W.E. Trueheart, *The Consequences of Federal and State Resource Allocation and Development Policies for Traditionally Black Land-Grants Institutions: 1862-1954* 32-33 (University Microfilms International, Ann Arbor, Michigan) (1979). *See also* Brief of Alcorn State University National Alumni Association as Amicus Curiae in Support of Petitioners at 4-5.

Mississippi University for Women for whites in 1884, the University of Southern Mississippi for whites in 1910, and Delta State University for whites in 1924 (PA 111a-114a).

During this period of rapid expansion of educational opportunities for Mississippi's white population, persons of African descent comprised the majority of Mississippi's population.[11] The state, however, restricted educational opportunities for Mississippi's black majority.[12] As Mississippi's United States Senator in 1914, James K. Vardaman, a former Governor who at one point served as *ex officio* president of Alcorn, successfully argued against a

---

[11]Blacks were a majority of the population in Mississippi from at least 1840 until 1940, when whites first showed a slim majority. *Sixth Census or Enumeration of the Inhabitants of the United States* 250, 252 (1841); *Seventh Census of the United States: 1850* 447 (1853); *Population of the United States in 1860* 264, 266 (1864); PX 200 at 351 [census data].

[12]These restrictions developed out of a fear that blacks would once again seek to exercise the vote -- blacks were disenfranchised by 1890 under the Mississippi Plan, *see Williams v. Mississippi,* 170 U.S. 213 (1898)(upholding exclusionary measures); C. Vann Woodward, *Origins of the New South: 1877-1919* 321-350 (1951) -- the belief that the limited funding available for education should be spent on whites -- *see* A. Kirwan, *Revolt of the Rednecks* 145 (1951) -- and a desire to protect and maintain the dominant position of the white race -- *id.* at 145-46 (Mississippi's Governor James K. Vardaman argued that money spent for Negro education was a "positive unkindness" because it "simply renders [the Negro] unfit for the work which the white man has prescribed, and which he will be forced to perform." "The negro (*sic*) . . . will not be permitted to rise above the station which he now fills.").

provision in the Smith-Lever Act of 1914, Ch. 79, 38 Stat. 372, that would have guaranteed equal funding for black land-grant colleges. Vardaman argued that the funding for blacks should be limited and controlled by whites:

> [T]he negro (*sic*) has never enjoyed any civilization except that which has been inculcated by the white man, and that civilization has lasted only so long as he was under the control and domination of the white man. When left absolutely to himself he has universally retrograded to the barbarism of the jungles.

51 Cong. Record 3, at 2652 (1914); *see also id.* at 2931.[13]

At the elementary and secondary level, the Mississippi State Superintendent of Education reported that for school year 1930-31, 98.3% of the total enrollment for black children was in the first eight grades, with 64% in grades one to three.[14] A summary of the values of school plants for 1929-30 shows $40,000,000 for white schools and $3,052,300 for blacks.[15] Of the total expenditures for elementary and

---

[13]With the discretion given to the states by Congress to allocate the Smith-Lever Act funds, Mississippi did as Vardaman promised -- allocated all the funds to its white land-grant college. USX-695t.

[14]State Superintendent of Education, *Twenty Years of Progress, 1910-1930 and a Biennial Survey Scholastic Years 1929-30 and 1930-31 of Public Education in Mississippi* 24 (1931).

[15]*Id.* at 203.

secondary school for 1929-30, 69.5% went to instructional services -- 60.2% for whites and 9.3% for blacks.[16]

In higher education, Alcorn, the only public college for blacks until 1940, functioned largely as an elementary and secondary school. In 1926, of Alcorn's 702 students, 88 were in college, 377 in secondary school and 237 in elementary school.[17] Funding for Alcorn was severely limited compared to the five white institutions. The state appropriated over $7,000,000 between 1920 and 1930 for buildings and permanent equipment at the six higher education institutions. Alcorn received the least of any institution -- $364,000.[18]

---

[16]*Id.* at 224. The Superintendent reported that, "no one who is familiar with conditions in Mississippi would contend for a moment that public education in the rural districts would be possible on any satisfactory scale without transportation," *id.* at 60, and noted that the state provided $2,166,842 for transportation in 1929-30. Yet the comparison of the total number of vehicles available for transportation in school year 1930-31 reveals a shocking 4245 for whites compared to 27 for blacks. *Id.* at 57-58.

[17]Bureau of Education, United States Department of the Interior, *Survey of Negro Colleges and Universities* 405, 416-17 (1929).

[18]*Twenty Years of Progress*, *supra* note 14 at 31. *See also*, Trueheart, *supra* note 10 at 265, 266. The pattern of disparity in elementary and secondary schools also continued through the 1930's, with the state reporting expenditures of $6.8 million for the instruction of white children in 1937-38, while spending $1.3 million for black children. Twenty-five

(continued...)

In May of 1940, the state assumed control of Jackson College for the purpose of training black teachers (PA 113a).[19] In 1946, the legislature established Mississippi Valley State University for the education of black teachers and for vocational training for black students. Mississippi Valley began operating in 1950. (PA 113a-114a).

Four years later, this Court struck down racial segregation in the nation's public schools. *Brown v. Board of Education*, 347 U.S. 483 (1954). That same year, defendant Board of Trustees issued a report entitled, "Higher Education in Mississippi," commonly referred to as the "Brewton Report." (PX 200 and USX 29). The report, which describes blacks as a "substandard culture group," *id.* at 127,

---

[18](...continued)
Mississippi counties had no high school for blacks. State Superintendent of Public Education, *Biennial Report and Recommendations to the Legislature of Mississippi for the Scholastic Years 1937-38 and 1938-39* 15, 89-95 (1939).

[19]In his 1937 report, the Superintendent of Education reported that Jackson College had been offered to the state free of charge provided the state operate it as a teacher training institution for blacks. *Id.* When the legislature approved the operation of the school, it downgraded it from a college to the "Mississippi Negro Training School," and the school's president became a principal. 1940 Miss. Laws 352. The school's curriculum was reduced from a four-year to a two-year curriculum, but in 1944, the legislature renamed the school Jackson State College for Negro Teachers and the four-year curriculum was restored. 1944 Miss. Laws ch. 159; N. McMillen, *Dark Journey* 107-08 (1989).

concluded that the goal of educational equality for black citizens of Mississippi was "still very distant." *Id.* at 146. Linking higher education with elementary and secondary education, the Board stated:

> The quantity and quality of higher education is so inextricably bound to that on the lower level, particularly the secondary level, that it is not possible to consider inequalities in higher education at the exclusion of others. Opportunities for the Negro youth to get the basic secondary school training necessary for college admission have been considerably less than for the white youth of the State.

Id. at 146.[20]

The Board Report found that "[e]ven greater inequalities exist in the area of higher education." *Id.* at 148. The opportunities provided in the black colleges were limited to teacher education, agriculture, mechanical arts, practical arts and trades, while the five white colleges provided "a variety

---

[20]The report showed that for school year 1952-53 there were 398,866 white children of school age and 496,913 black children of school age (almost 100,000 more blacks), yet there were 452 high schools for whites and only 247 for blacks (most of which were unaccredited); almost 70% of the black teachers had two years or fewer of college training compared to 7.5% of the white teachers; average salaries of white teachers with all levels of training exceeded those of blacks with corresponding training; only 20% of the total spent on transportation was used for blacks; and 72% of the expenditures for instruction went to whites -- $23,536,022 compared to $8,816, 670. (PX 200 at 139, 146-47).

of undergraduate programs" and "extensive offerings on the graduate and professional levels," *id.*; salary range for blacks was lower in all ranks than the range for whites; of the total funding for higher education for the period 1952-54, only 15.7% was allocated for blacks; and, blacks were compelled to leave the state for graduate and professional study. *Id.*

In September of 1954, Medgar Evers, a black person, applied to attend the University of Mississippi Law School. The Board rejected his application and at that time imposed a "race-neutral" alumni voucher requirement whereby each applicant for admission had to submit five letters of recommendation from alumni (USX 64 at 379-380). 1955 and 1956 passed with Mississippi's separate and unequal educational system intact.[21]

---

[21]During the post-*Brown* period of "massive resistance," Mississippi furiously enacted laws to negate the effect of *Brown*. *See, e.g.*, Miss. Const. art. VIII, § 213-B (1954) (permitting the legislature to abolish all public schools in the state); Act of Feb. 24, 1956, 1956 Miss. Laws 366 (repealing the compulsory education laws); Resolution of Interposition, 1956 Miss. Laws 741 (Feb. 29, 1956) (declaring *Brown* and similar decisions null and void within the territorial limits of the state of Mississippi); Act of April 5, 1956, 1956 Miss. Laws 303 (giving effect to the Resolution of Interposition and to the principle of racial segregation); Act of April 5, 1956, 1956 Miss. Laws 337 (maintained racially separate school districts); Act of April 4, 1955, 1955 Ex. Sess. 133 (prohibiting whites and blacks from attending the same state funded high schools).

In 1961, James Meredith applied for admission to the University of Mississippi. The Registrar rejected his application on February 4, 1961. (PA 120a.) Three days later the Board required all persons seeking admission to the eight institutions of higher education to take the ACT. Shortly thereafter the Board reaffirmed the alumni voucher requirement, and authorized each institution to set a minimum ACT score for admissions. (PA 120a-121a.) The Mississippi Legislature approved the establishment of ACT minimum scores with the proviso that the minimum scores "need not be uniform between the various institutions" (USX 636, p. 16). By 1963, there was "a gentleman's agreement" that the three largest HWIs would require a 15 on the ACT (Tr. 3350 (T. Meredith)). By 1966, Delta State also required a minimum score of 15 on the ACT for admission (Tr. 3507-08).[22]

---

[22]Thus, with the exception of the University of Mississippi and the admission of Meredith by court order, each of these institutions adopted an ACT minimum score requirement prior to admission of their first black student. *See infra* note 31. Since at least 1954 Mississippi had recognized that reliance on standardized tests scores might discriminate against blacks because of the history of inequality. The Brewton Report concluded that "*much caution should be exercised in interpreting the results of standard tests administered to Negro children.*" PX 200 at 139 (emphasis added).

Meredith successfully challenged the rejection of his application. The Court of Appeals for the Fifth Circuit found a "policy of planned discouragement and discrimination." *Meredith v. Fair*, 305 F.2d 342, 346 (5th Cir.), *cert. denied,* 371 U.S. 828 (1962). The court described the alumni voucher requirement as "[o]ne of the most obvious dodges" of the desegregation mandate. *Id.* at 352.[23]

Mississippi strenuously resisted the order to admit Meredith. Authorized by the Board of Trustees to handle the matter, Mississippi's Governor Ross Barnett, in defiance of an order of the Court of Appeals for the Fifth Circuit, invoked Mississippi's Resolution of Interposition[24] and personally blocked Meredith's registration on September 25, 1962. Lieutenant-Governor Paul Johnson, Jr., repeated this action the following day.[25] In response, President Kennedy ordered United States Marshals, subsequently supplemented

---

[23]The court did not consider the ACT requirement because it was not applied to Meredith as a transfer student.

[24]1956 Miss. Laws 741 (Feb. 29, 1956).

[25]*United States v. Barnett*, 330 F.2d 369 (5th Cir. 1963) (*en banc*); *United States v. Barnett*, 376 U.S. 681, 686 (1964). Both were held in contempt of court. *Id.*

with federalized Mississippi National Guardsmen and regular army troops[26] to enforce the court's order.[27] Ultimately, Meredith registered at the University on October 1, 1962, accompanied by United States Marshals. There he studied "under continuous guard until his graduation."[28]

II. *The Separate and Unequal System of Higher Education Remains Substantially Intact: 1962-1987*

In the *post-Meredith* period, black Mississippians faced continued opposition to efforts to avail themselves of educational opportunities available at Mississippi's white institutions. On June 4, 1963, Cleve McDowell was forced to obtain a federal court order to gain admission to the University of Mississippi Law School.[29] Again, in 1964, black student Cleveland Donald had to obtain a court order

---

[26]*United States v. Barnett*, 330 F.2d at 380; *United States v. Barnett*, 376 U.S. at 686. *See also* C. Vann Woodward, *The Strange Career of Jim Crow* 174-75 (3rd revised ed. 1974).

[27]The federal forces faced armed opposition and a night-long battle ensued in which Marshals tried to control the crowd with tear gas; two people were killed, 375 injured (166 of them Marshals, 29 by gunshot wounds). *United States v. Barnett*, 376 U.S. at 686; *Woodward*, *supra* note 26, at 175. *See also* T. Branch, *Parting the Waters, America In the King Years 1954-63* 647-53, 656-72 (1988).

[28]*United States v. Barnett*, 376 U.S. at 686.

[29]*McDowell v. Tubb*, No. 3425 (S.D. Miss. June 4, 1963); USX 636, p. 21.

allowing his admission to the University of Mississippi.[30] In March of 1966, the Mississippi College For Women refused to consider applications of six black women. The women were forced to file a complaint with the Mississippi Council on Human Relations (USX 913, S. 773).[31]

The decade of the 1960's brought little in the way of change in the elementary and secondary schools, whose students, faculty and staff remained rigidly segregated until at least the 1970-71 school year.[32] With the first real movement toward desegregated schools in 1970 came the rapid creation and enlargement of racially segregated private academies,

---

[30]*Donald v. Tubb*, No. 3583 (S.D. Miss, June 10, 1964); USX 636, p. 21.

[31]Mississippi's HWIs enrolled their first black students in the following years: University of Mississippi (1962), Mississippi State University (1965), Mississippi University for Women (1966), Delta State University (1966), University of Southern Mississippi (1967) (PA 116a). The HBIs enrolled their first white students in the following years: Alcorn State University (1966), Jackson State University (1969), Mississippi Valley State University (1970) (PA 117a).

[32]*See United States v. Hinds County School Bd.*, 417 F.2d 852 (5th Cir. 1969) (per curiam), *cert. denied*, 396 U.S. 1032 (1970), *delaying order rev'd sub nom. Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

which Mississippi supported through tuition grants, tuition loans, and free textbooks.[33]

In the winter of 1969-70, the Office for Civil Rights ("OCR") of the Department of Health, Education and Welfare notified Mississippi that it was operating a segregated system of higher education in violation of Title VI of the Civil Rights Act of 1964, and asked that the state submit a desegregation plan within 120 days. Mississippi did not respond.[34]

In 1973, OCR again advised the state that its higher education system was in violation of Title VI and asked the state to submit a desegregation plan (USX 407, p.1). OCR's November 10, 1973 letter to the state in response to the first plan submitted sets out the findings of OCR's investigation of the state system. These findings were not disputed at trial.

---

[33]Each such strategy to provide public support for a private segregated system had to be challenged by black citizens. *Norwood v. Harrison*, 413 U.S. 455 (1973) (Burger, J.)(textbooks); *Coffey v. State Educ. Finance Comm.*, 296 F. Supp. 1389 (S.D. Miss. 1969)(tuition grants) (unpublished order in same case entered Sept. 2, 1970 prohibiting tuition loans).

[34]*Adams v. Richardson*, 356 F. Supp. 92, 94 (D.D.C.), *aff'd*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*).

OCR concluded that the state's actions since the early 1970's served to reinforce and perpetuate the dual system. In comparing the two land-grant colleges, OCR found:

> Since 1971 Alcorn has constructed or begun to construct faculty housing, an agricultural building, a student union expansion, and student dormitories; M.S.U. has constructed or begun to construct a library annex, a forest products utilization laboratory, a veterinary science building, an entomology complex, a dairy sciences building, and a seed technology building.

Id. at 5. OCR concluded that the construction since 1971 "reinforced the different agricultural capabilities of the two institutions and generally has increased the disparity between their physical plants." *Id.*

Alcorn also suffered in comparison to the University of Southern Mississippi, the only other four-year institution in the southern portion of the state. OCR found that,

> [s]ince 1970 U.S.M. has initiated or reorganized 21 academic programs, begun a three-year Bachelor Degree program, and upgraded two resident centers to degree-granting branches, one of which is close to Alcorn in the southwestern corner of the State. In the same period Alcorn has approved nine new majors. *Thus U.S.M. currently grants 15 Bachelor Degrees in 8 divisions, covering 105 majors; Alcorn grants 2 Bachelor Degrees covering 30 majors.*

Id. at 5 (emphasis added). In addition to increasing disparities between the HBIs and the HWIs, OCR also found that the HWIs were adding programs designed to duplicate those offered by HBIs. While Jackson State had expanded its offerings in the education field, the University of Mississippi

> just created 6 new departments out of its former School of Education. This duplication of most of Jackson's programs in education appears to represent a substantial disincentive for white students to attend Jackson, although Jackson's growth in this area could have attracted such students.

Id. at 6.

OCR also concluded that the faculties and student bodies remained rigidly segregated. *Id.* at 2-4. Finally, OCR found Mississippi's then proposed plan of compliance inadequate, noting that it "states policies of prospective nondiscrimination . . . without detailing actions which will eliminate the effects of past racial segregation." *Id.* at 7.[35]

After OCR rejected Mississippi's revised Plan of Compliance in 1974, Mississippi nonetheless announced its

---

[35]During this period, the Mississippi Cooperative Extension Service, a division of Mississippi State University was discriminating against blacks in employment and promotion activities. *Wade v. Mississippi Coop. Extension Serv.*, 372 F. Supp. 126 (N.D. Miss. 1974), *aff'd in relevant part*, 528 F.2d 508, 518, 519 (5th Cir. 1976).

intent to implement the plan. One glaring omission in the plan was the failure to address admissions standards at HWIs. (USX 1; BDX 20). Thereafter, in January of 1975, black citizens of Mississippi filed this action, and on April 21, 1975, the United States intervened; both complaints identified the admission standards as discriminatory.

In 1975-76, the Board began to reexamine its admissions standards, Tr. 3550 (T. Meredith), and in the process was provided with numerous objections to the use of a minimum ACT score as the sole criterion for admission,[36] including the fact that a survey of 15 major universities in 13 Southern and

---

[36]Board documents reveal the following possible objections (USX 56):

1. High school grades have provided the best single predictor of college success. However, it is the consensus of opinion that aptitude test scores along with high school grades will give a better projection of college success in the first year of performance. [See PPA 110 (ACT confirming that grades and ACT scores combined are a better predictor of success in college than ACT scores alone)]

2. Standardized tests are generally considered to have a degree of cultural-ethnic bias.

3. The historically black institutions are committed to upgrade those citizens with the greatest educational deficiencies.

4. Allocation of resources is related to enrollment and production of student credit hours.

5. Substantial federal grants are available for special service programs (remedial) at institutions of higher learning.

border states revealed that none relied on test scores alone for admissions decisions and that 13 used high school grades in the admissions process (USX 56).[37]

On May 20, 1976, the Board adopted admissions policies requiring, for the 1977-78 school year, that the eight universities limit enrollment of entering freshman to those scoring nine or above on the ACT. The policy required that,

> [t]hose institutions which presently have an entrance standard requiring a higher [than 9] ACT score must *maintain* that minimum admission score.

(USX 48) (emphasis added). Thus, the institutions primarily affected by the 1976 policy were the HBIs, which previously had no minimum ACT score requirements.[38]

On February 17 and December 15, 1977, the Board amended the exceptional admission policy, limiting the number of students who could be admitted with ACT scores

---

[37]At this time the four HWIs utilizing a 15 cut-score on the ACT had probationary admissions policies for students with ACT scores below 15. None of these institutions had numerical restrictions on the number of students that could be admitted on probationary status (USX 39 pp.4-5).

[38]The HWIs previously had admitted relatively small numbers of students in the 9-14 ACT score interval (BDX 176, 177). For example, while 25,818 students attended HWIs in 1972 (USX 407, p.3), the five HWIs admitted only 485 students (1.8%) with scores below 15 for the following academic year (BDX 176).

between 9 and 14 (USX 48). Although each of the HBIs already maintained lower minimum score requirements for regular admission, the Board assigned each of them much more expansive exceptional admissions roles, while none of the HWIs was authorized to allow substantial numbers of exceptional admissions.[39]

In 1981, the Board adopted new mission designations for the eight universities (PX 316), dividing them into comprehensive, urban and regional categories.[40] *Id.*

---

[39]The HWIs may only enroll students with ACT scores below 15 through the exceptional admissions program; the total number admitted may not exceed 5% of the previous years freshman enrollment or 50 students whichever is greater (PA 127a). The number of students admitted under this program is further restricted by the fact that schools are not required to use their exceptional enrollment slots (Mississippi University for Women did not use any for the period 1982-83 to 1986-87) (BDX 173, p.6); HWIs often publicize the 15 requirement but not the exception (PA 52a., n.12. USX 967, pp. 82-84, BDX 141, BDX 161), and at least one HWI does not encourage those with scores below 15 to apply (Tr. 3467). The cumulative result of these restrictive admissions policies is that few exceptional admissions are granted. For example, in the fall term of 1984, only 250 of the 3,545 (7%) freshman admitted to HWIs came in under the policy, and only 101 of those 3,545 (2.8%) were black. (PX 277, Tr. 4361) (offer of proof).

[40]The Board assigned three historically white institutions (University of Mississippi, University of Southern Mississippi, and Mississippi State University), the broadest mission as "comprehensive universities" with substantive leadership roles in designated areas. Jackson State University was designated as an "urban university," and two HBIs (Alcorn and Mississippi Valley), along with the two smallest HWIs (Delta State and Mississippi University for Women), were designated "regional universities." PX 316.

Defendants admitted (Tr. 3656 (T. Meredith)), and the *en banc* majority found that mission designations locked in the existing disparities and inequities among the various institutions:

> [T]he disparities are very much reminiscent of the prior system. The inequalities among the institutions largely follow the mission designation, and the mission designations to some degree follow the historical racial assignments.

(PA 37a).[41]

These disparities and continued segregation are well-documented in the panel opinion.[42]

---

[41]Board witness, Dr. Thomas Meredith, testified that the mission designations precluded Jackson State from developing additional doctoral programs, but allowed it to continue with its one doctoral program in education. "I don't believe it encouraged Jackson State for further development in the doctorial (*sic*) arena. We already had three institutions doing that." Tr. 3649, T. Meredith. The mission designations also precluded Alcorn and Mississippi Valley from going beyond the master's degree level and limited the number of masters degree programs available to them. Delta State already offered degrees at the specialist and doctorate level, and Mississippi University for Women offered programs at the specialist level. Tr. 3654-55, T. Meredith.

[42]For example, salaries are higher at the HWIs than at the HBIs with Jackson State's salaries -- the urban university -- in line with those of the two historically white "regional" universities; the two historically black regional universities have the lowest salaries in the state; program offerings are much broader at the three largest HWIs and the two regional HBIs have the most limited programs in the state; the comprehensive universities receive the most funds per student credit hour, the regionals the least, and Jackson State is in the middle; the average total education and general expenditures per student in 1986 at HWIs was $8,516 compared to $6,038 at HBIs; the replacement value of the facilities at the (continued...)

The combination of the 15 ACT minimum score requirements and the narrow exceptional admissions provisions at the HWIs, work together with the mission designations to lock in past disparities. Today, Mississippi sends 86% of its white students to the three overwhelmingly white "comprehensive" universities that on every substantive measure are much better supported than the HBIs which 71%

---

[42](...continued)
two historically black "regional" institutions are the lowest in the state, with Jackson State slightly above the two historically white "regional" institutions but far below the lowest "comprehensive" institution (almost half the value); faculty, staff and students remain segregated by race (PA 50a-51, 55a-68a). As of trial, of the 13 members of the Board of Trustees, three were black (PA 166a-167a). With respect to the regional universities in particular, Delta State fares better than Alcorn or Mississippi Valley on almost any measure, and is fairly comparable to Jackson State on most measures. *See* PA 56a, 59a-61a, 68a. The Mississippi University for Women, is not a good model for comparison because of its small size and primary mission to serve a population that historically also has been accorded second-class treatment in education. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 727 n.13 (1982).

Problems of continuing segregation at the elementary and secondary level also persisted during the period. For example, the Natchez, Mississippi school system was desegregated for the first time in the 1989-90 school year. *United States v. Natchez Special Mun. Separate School Dist.*, No. 1120(W) (S.D. Miss. July 24, 1989)(unpublished). *See also United States v. Pittman*, 808 F.2d 385, 386 (5th Cir. 1987) (over 70% of Hattiesburg's elementary schools remained segregated); *United States v. Lawrence County School Dist.*, 799 F.2d 1031, 1040 (5th Cir. 1986) (over 50% of the elementary students were attending racially identifiable schools); *United States v. Mississippi*, 567 F.2d 1276, 1277 (5th Cir. 1978) (*per curiam*) (five out of seven elementary schools were virtually one race schools); *United States v. Columbus Mun. Separate School Dist.*, 558 F.2d 228, 229 (5th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (half of the elementary schools were racially identifiable).

of its black students attend.[43] Thus, profound racial disparity and segregation continue to be the hallmarks of Mississippi's higher education system.

SUMMARY OF THE ARGUMENT

Mississippi's higher education system violates 34 C.F.R. § 100.3(b)(6)(i), which requires that states which operated de jure segregated educational systems take "affirmative action to overcome the effects of past discrimination." The regulation has the force of law and clearly requires more than the adoption of good-faith, race-neutral policies. This is evident from 1) the plain language of the regulation, 2) the fact that it was adopted in 1973, after it was already clear that Title VI and the existing regulations required race-neutral policies, 3) an illustrative application in 34 C.F.R. § 100.5(h) indicating that "additional steps" beyond race neutrality are required, and 4) the HEW interpretive guidelines which enumerate a variety of affirmative remedial steps.

---

[43]PPA 137; USX 880. Ninety-nine percent of Mississippi's white students attend HWIs. *Id.*

Bazemore v. Friday, 478 U.S. 385 (1986) does not compel the opposite result, for *Bazemore* presented a radically different factual setting. Moreover, unlike *Bazemore*, where the Court placed heavy emphasis on the federal government's position that North Carolina had complied with the applicable Department of Agriculture regulations, in *Ayers* the government has never maintained that Mississippi has complied with § 100.3(b)(6)(i).

Mississippi is also in violation of the equal protection clause, which imposes upon the state an affirmative duty to eliminate "root and branch" the vestiges of its dual system. This obligation to take measures to undo past discrimination has always been a central tenet of school desegregation jurisprudence. It is logical and necessary that the affirmative duty be applied to higher education because, as the Court concluded in *Green v. New Kent County*, 391 U.S. 430 (1968), to do otherwise would leave in place the very discrimination condemned in *Brown*. Mississippi has not satisfied its affirmative duty because it continues to operate under a dual structure shaped by intentional discrimination. *Hunter v. Underwood*, 471 U.S. 222 (1985). In addition to

failing to eliminate continuing intentional discrimination, the state has failed to eliminate the vestiges of the dual system which present a continuing barrier to equal educational opportunity. The finding of the *en banc* majority that further dismantling of the racially dual structure would eliminate diversity among institutions and student choice was in error. The diversity and choice present in the Mississippi system today are legacies of the previous regime of de jure segregation and cannot be protected. As a remedy hearing would demonstrate, true diversity and choice, free of discriminatory stigma, are fully compatible with *Brown's* mandate of educational equality.

ARGUMENT

I. *Mississippi's Duty Under 34 C.F.R. § 100.3(b)(6)(i) To "Take Affirmative Action To Overcome The Effects Of Prior Discrimination" Is Not Satisfied By Abandoning Expressly Discriminatory Policies Where Mississippi's Prior Discrimination Continues to Have Effect.*

A. *Petitioners' Regulatory Claim Is Properly Considered Prior to the Constitutional Claim.*

This Court has maintained consistently that where constitutional and nonconstitutional claims are presented, it will first address the nonconstitutional claim where to do so

might obviate the need to consider the constitutional issue. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring).[44] Ayers' Petitioners have pressed their claim under 34 C.F.R. § 100.3(b)(6)(i) at each stage of this litigation,[45] however, the lower courts have failed to address it adequately.[46]

B. *34 C.F.R. § 100.3(b)(6)(i) Has The Force Of Law.*

Mississippi's system of higher education is in violation of 34 C.F.R. § 100.3(b)(6)(i), 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 recipient must take affirmative action to overcome the effects of prior discrimination.

---

[44] *Accord United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); *Mobile v. Bolden*, 446 U.S. 55, 60 (1980); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979).

[45] *See e.g.*, District Court: Private Plaintiffs' Findings of Fact and Conclusions of Law at C-1. Court of Appeals: Brief for Plaintiffs-Appellants at 56 & n.106, 64 & n.123, 66-67 & n.126. U.S. Supreme Court: Ayers Petitioners' Petition for Writ of Certiorari at i, and 41-43.

[46] The district court referred generally to the Title VI regulations but did not apply § 100.3(b)(6)(i) (PA 168a, 182a-184a). The *en banc* majority addressed the regulatory claim in a cursory manner (PA 26a, n.11). The district court apparently applied § 100.3(b)(2) with respect to the ACT minimum score requirement (PA 182a), but did so improperly because it held that the ACT cut-score was valid even if there were less exclusive alternatives that were educationally sound (PA 182a). *Compare Albermarle v. Moody*, 422 U.S. 405, 425 (1975).

(PPA 89).[47] The regulation was promulgated pursuant to § 602 of Title VI which provides, in relevant part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is *authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability.*

42 U.S.C. § 2000d-1 (emphasis added).[48]

This Court has held that where Congress expressly delegates to an agency the power to implement a statute, as it did in § 602, Congress entrusts to the agency rather than the courts primary responsibility for interpreting the statute. Moreover, substantive rules adopted pursuant to that delegation have the force of law. *See Chrysler Corp. v. Brown,* 441 U.S. 281, 301-03 (1979); *Batterton v. Francis,* 432 U.S. 416, 425 (1977).

---

[47]The regulation is both valid and applicable to Mississippi. The district court found that Mississippi has a lengthy history of discrimination in its higher education system (PA 114a-117a), and that its higher education system receives federal funding (PA 169a, n.7).

[48]Section 602 requires that such regulations be signed by the President. *Id.* President Nixon approved the adoption of § 100.3(b)(6)(i) by 21 Federal agencies in 1973. 38 Fed. Reg. 17920 (July 5, 1973).

C. *Where Continuing Discriminatory Effects of the De Jure System Exist, 34 C.F.R. § 100.3(b)(6)(i) Mandates Implementation of Affirmative Measures To Overcome Those Effects.*

In its brief reference to the Title VI regulation, the *en banc* majority ruled that the affirmative duty under § 100.3(b)(6)(i) is satisfied by "discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures" (PA 26a). Petitioners submit that this holding is in error.

The regulation requires more than simply the adoption of race-neutral policies. It requires the adoption of affirmative measures to eliminate the vestiges of Mississippi's dual higher education system. This conclusion is compelled by the plain language of the regulation, its history, an illustrative example in the regulations, and the HEW guidelines promulgated to interpret the regulation.

1. **The Plain Language of § 100.3(b)(6)(i)**

A common sense reading of the regulation's language, which requires "affirmative action to overcome the effects of prior discrimination," leads to a conclusion that more is required than simply the adoption of policies of

nondiscrimination. If the affirmative action requirement could be satisfied by adopting race-neutral policies, the drafters would have indicated such, by directing recipients to take, for example, "affirmative action to end previous discriminatory practices." That explicit and stronger language was used is an indication that strong steps are required.

2. The History of § 100.3(b)(6)(i)

The original Title VI regulations adopted in 1964 did not include § 100.3(b)(6)(i). That section was added in 1973. 38 Fed. Reg. 17,979 (July 5, 1973). At that time, a nondiscrimination edict already existed in both Title VI, 42 U.S.C. § 2000d, and the existing regulations, 29 Fed. Reg. 16,299 (Dec. 4, 1964). Thus, the purpose of the amendment to the regulation could only have been to make clear that in certain circumstances more than nondiscrimination was required. To view the 1973 addition of an "affirmative action" provision as requiring nothing more than race-neutral policies suggests that Title VI and the original regulations did not *themselves* mandate nondiscrimination policies. That position is not tenable.

3. The Illustrative Example

When § 100.3(b)(6)(i) was added to the HEW's Title VI regulations in 1973, the agency also added an "Illustrative application," which provides, in relevant part:

> In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient . . . have failed to overcome these consequences, it will become necessary under the requirement stated in [§ 100.3(b)(6)(i)] for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination.

34 C.F.R. § 100.5(h). The "additional steps" must refer to something more than race-neutral policies, for the steps become necessary only when those policies alone have failed to produce equal educational opportunity.

4. HEW Criteria Interpreting § 100.3(b)(6)(i)

In 1978, the Department of Health, Education and Welfare (HEW) published its "Revised Criteria Specifying the Ingredients of Acceptable Affirmative Action Plans to Desegregate State Systems of Higher Education." 43 Fed. Reg. 6658 (Feb. 15, 1978). While these guidelines do not have the force of law, they "do constitute a body of

experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift*, 323 U.S. 134, 140 (1944); *see Lau v. Nichols*, 414 U.S. 563, 568 (1974) (court deferred to HEW memorandum requiring schools to take affirmative steps to address needs of bilingual children).[49]

The guidelines first affirm the conclusion that states with a history of de jure segregation, "are required to take affirmative remedial steps and to achieve results in overcoming the effects of prior discrimination." 43 Fed. Reg. at 6659. The guidelines specify the nature of the affirmative remedial obligation in a wide variety of areas. Each element of the guidelines shares one feature: states are required to do more than adopt race-neutral policies.[50]

---

[49] *See also Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 517-18 (1986); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

[50] For example, they specify that an acceptable desegregation plan shall eliminate program duplication among HWIs and HBIs, adopt specific goals and timetables to increase the number of blacks who enter and graduate from HWIs and whites who enter and graduate from HBIs, 43 Fed. Reg. at 6662, and adopt specific goals and timetables to increase the number of blacks on university governing boards, and on the faculty and staffs of HWIs. *Id.* at 6661-62.

In summary, all of the available indicators -- the regulation's plain language, its history, the illustrative example, and the HEW criteria -- compel the conclusion that 34 C.F.R. § 100.3(b)(6)(i) mandates that fund recipients with a history of discrimination must do more than adopt race-neutral policies when faced with the continuing effects of past discrimination.

D. *The En Banc Majority Erred In Concluding that Bazemore v. Friday Precludes Liability Under 34 C.F.R. § 100.3(b)(6)(i).*

The *en banc* majority's cursory dismissal of petitioners' regulatory claim (PA 26a & n.11; *see also* PA 37a), relied on this Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986). That case involved the application of an identical Department of Agriculture regulation to 4-H Clubs and Homemaker Clubs. However, the facts of *Bazemore* are so distinct from the facts here (the sole common element being the absence of mandatory assignments by the state to either clubs or colleges), that application of § 100.3(b)(6)(i) to this case necessarily differs substantially.

Access. In *Bazemore* there were no barriers to access to any clubs. Here, 70% of black students are automatically denied access to the five HWIs by virtue of the ACT minimum score requirement.[51]

Current segregation. There was only limited evidence of continuing segregation in *Bazemore*, in contrast to the substantial showing in this case. In *Bazemore* the racially separate administrative structures servicing racially separate clubs were merged into a single organization in 1965;[52] all 4-H and Homemaker activities above the community level were fully integrated, including the 4-H camps;[53] there was no finding by any court on the actual extent of racial segregation;[54] only 15.7% of all participants in 4-H clubs belonged to one-race clubs;[55] and there was no information in the record about the racial composition of Extension

---

[51]PA 51a-54a & n.13.

[52]*Bazemore v. Friday*, 751 F.2d 662, 666 (4th Cir. 1984).

[53]*Bazemore* Resp. Br. at 48.

[54]*Bazemore* Fed. Br. at 37, n.39; *see Bazemore*, 478 U.S. at 410-11 (Brennan, J., dissenting).

[55]*Bazemore* Fed. Br. at 37, n.39.

Homemaker Clubs after 1972, some ten years before trial in the case.[56] Here, on the other hand, the evidence is uncontested that 99% of white students attend HWIs and 71% of black students attend HBIs, each of which has a black population of at least 92%;[57] the administration of all HWIs is overwhelmingly white and that of HBIs black;[58] and black students are disproportionately denied access to HWIs due to ACT minimum score requirements.[59]

Other discrimination. In *Bazemore* there was no evidence of discrimination in the provision of any services or materials;[60] there was no evidence that any person had been discriminated against, nor was there evidence that any individual had been denied membership in any club.[61] In *Ayers*, individual faculty and students testified about the

---

[56]*Bazemore*, 478 U.S. at 410-11 (Brennan, J., dissenting).

[57]PA 50a, PPA 137.

[58]PA 58a, n.22.

[59]PA 51a-54a.

[60]*Bazemore*, 751 F.2d at 687 n.128.

[61]*Bazemore*, 478 U.S. at 407.

discriminatory treatment that they personally suffered;[62] facilities, funding, and programs provided for the majority of black students are inferior to those provided the majority of white students;[63] and the state continues to use an ACT admissions requirement adopted with discriminatory intent.[64]

Participation rates. There was no evidence in *Bazemore* that blacks participated in the 4-H and Homemaker clubs in lower proportions than did whites. Indeed, membership in North Carolina 4-H clubs during the ten years prior to trial in *Bazemore* was 32% black, while North Carolina's population was only 22% black.[65] Here, in contrast, the participation and graduation rates of blacks are significantly lower than the participation and graduation rates of whites, particularly at the graduate and professional levels.[66]

---

[62]Tr. 2659-2692, 2709-2774, 2777-2803 (students); 2072-2097, 1739-1759 (faculty).

[63]PA 59a-68a.

[64]PA 51a-54a.

[65]*Bazemore* PA 181a-182a.

[66]USX 172-204, 880; PX 329(3); PPA 114, 116, 151.

Remedial Measures. The concern in *Bazemore* that the only action North Carolina could take to promote integration of the clubs would be to make mandatory, race-based assignments, is not present here.[67] At no stage of this litigation have petitioners suggested that students be mandatorily assigned to institutions of higher learning based on race. Moreover, Mississippi's complex institutional structure provides many opportunities for the state to take steps to overcome the effects of past segregation.[68] As the HEW Criteria make clear, Mississippi can eliminate unnecessary program duplication, provide supportive services so that more black students graduate from its colleges and professional schools, increase the numbers of blacks who serve on the Board of Trustees and who teach at HWIs, and

---

[67] *See Bazemore* Fed. Reply Br. at 18, n.18.

[68] While North Carolina had an attenuated relationship to the clubs in *Bazemore*, Mississippi has a powerful and direct relationship to the institutions of higher education in this case. The Homemaker and 4-H clubs were voluntary groups formed in communities by adult volunteers who received only advice and support from the North Carolina Extension Service; moreover, their activities did not take place in public facilities. *Bazemore* PA 19a (district court decision). Here, on the other hand, there is an entire structure of governing boards, administrators, faculty and staff hired by the state, all of whom administer a state-sponsored, state-funded, state-controlled system of public education. PA 59a-68a.

increase white enrollment at HBIs by ending these schools' inferior status. 43 Fed. Reg. 6658-6649.

Importance of Higher Education: The Court in *Bazemore* relied upon the "wholly different milieu" of 4-H clubs and Homemaker Clubs in contrast to elementary and secondary schools involved in *Green* in making its determination of no liability. 478 U.S. at 408. Higher education is, of course, radically different from 4-H clubs and Homemaker Clubs in its structure (as illustrated above) and in its goals. As the three-judge district court stated in *United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988),[69] the value of the experience provided in 4-H and Homemaker clubs "cannot compare to the national need for educated citizens." *Id.* at 656.

In all of these respects, *Bazemore* and *Ayers* could not be more distinct. Moreover, in *Bazemore* the Court relied heavily on the fact that the United States took the position that North Carolina was in full compliance with the applicable Department of Agriculture regulation. The Court

---

[69][*vacated*, 751 F. Supp. 606 (E.D. La. 1990) (pursuant to *en banc* decision in *Ayers*.)]

ruled that "[i]n view of the deference due the Department's interpretation of its own regulation, we cannot accept petitioner's submission that the regulation has been violated." 478 U.S. at 409.[70] Here, the United States has never taken the position that Mississippi is in compliance with the Title VI regulations. Thus, the absence of agency support for the State's position, as in *Bazemore*, as well as the strikingly different fact pattern, compel the opposite result in this case.

Given the continued existence of a sophisticated and extensive dual system that limits educational opportunities for black students, and the state's failure to undertake sufficient measures to remedy these continuing discriminatory effects, *see supra* pp. 55-56, there is a current violation of § 100.3(b)(6)(i) which requires a remand for development and implementation of a remedy.

---

[70]Unlike the Title VI regulations at issue here, the Department of Agriculture regulations that applied in *Bazemore* did not include a provision parallel to the "illustrative application" contained in 34 C.F.R. § 100.5(h), which together with § 100.3(b)(6)(i) makes explicitly and undeniably clear that affirmative steps beyond the mere adoption of nondiscriminatory policies are required.

II. *The Fourteenth Amendment Imposes Upon Mississippi An Affirmative Duty to Eliminate the Vestiges of Its Racially Dual Higher Education System "Root and Branch."*

The *en banc* court purported to apply established Fourteenth Amendment jurisprudence requiring affirmative steps to eliminate the vestiges of state-created racially dual structures:

> We therefore hold that to 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 practices and adopting and implementing good-faith, race-neutral policies and procedures.

(PA 26a). This formulation of the state's duty, however, eviscerates the standard which it claims to apply. It fails to require the eradication of the very conditions created by the dual system that continue to disadvantage the African American population whose subordination was the target of Mississippi's dual system. And it is wholly unnecessary to adopt such a standard in order to give appropriate recognition, in the remedial process, to the values of institutional diversity and student choice.

A. *A Fundamental Tenet of the Court's Equal Protection Jurisprudence Is the Affirmative Duty to Eliminate the Vestiges of a Discriminatory System.*

In *Brown v. Board of Education*, 349 U.S. 294, 301 (1955)(*Brown II*), the Court required states and districts that had operated racially dual school systems "to effectuate a transition to a racially nondiscriminatory system," while recognizing that the task "may call for elimination of a variety of obstacles," *id.* at 300, and would necessarily involve resolution of "varied local school problems." *Id.* at 299. Applying *Brown II* in *Green v. County School Board of New Kent County*, 391 U.S. 420 (1968), the Court made it clear that state authorities were required to act affirmatively to effectuate this goal, rather than merely to cease assignment of students by race:

> *In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. . . .* [In *Brown II,* school boards that had operated dual systems were] clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

Id. at 437-38 (emphasis added and citation omitted).

The affirmative duty principle has repeatedly been emphasized, in school desegregation cases. Thus, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971), after summarizing the course of experience from *Brown* to *Green*, the Court reaffirmed that "[t]he objective today remains to eliminate from the public school *all vestiges* of state-imposed segregation" (emphasis added). *Accord, e.g., Bd. of Educ. of Oklahoma City v. Dowell*, 111 S. Ct. 630, 638 (1991); *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 200 (1973).[71]

The Court also has applied the afirmative duty to eliminate the vestiges of past discrimination in other racial discrimination cases. *See, e.g., Louisiana v. United States*, 380 U.S. 145, 154 (1965) (remedy suspending new "race-neutral" voting test sustained where prior discrimination had drastically reduced potential black voters; the court "has not

---

[71] *See also Milliken v. Bradley*, 433 U.S. 267 (1977) (approving supplemental remedies designed to increase educational achievement and holding that decrees in school desegregation cases "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'"). *Id.* at 280 (citations ommitted).

merely the power but the duty to render a decree which will so far as possible *eliminate the discriminatory effects of the past* as well as bar like discrimination in the future") (emphasis added);[72] *Gaston County v. United States*, 395 U.S. 285, 297 (1969)("'Impartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form"); *Carter v. Jury Comm. of Greene County*, 396 U.S. 320, 339-40 & n.46 (1970)(further discriminatory selection of individuals for jury rolls enjoined *and* immediate emptying of current jury box ordered to remedy *past* discrimination).

The affirmative duty to eliminate vestiges in racial discrimination cases parallels the scope of equitable relief administered by federal courts in other areas.[73] In *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), for example, the

---

[72]*See also Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 232-34 (1964) (in addition to enjoining the closing of public schools to avoid desegregation, district court could require Board to levy taxes to support public educational system, and the trial court should "enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools").

[73]Of course, "[a] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right," *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 15-16.

Court articulated the need for remedies of adequate breadth as follows:

> Remedies two-fold in character become[ ] essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

Id. at 77-78. The principle there declared has been consistently applied in antitrust suits.[74]

In summary, the affirmative duty principle is firmly rooted in the Court's jurisprudence regarding equitable remedies.

---

[74] *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8 (1972)("relief must be directed to that which is 'necessary and appropriate in the public interest to *eliminate the effects* of the acquisition offensive to the statute,'" *quoting United States v. DuPont de Nemours & Co.*, 353 U.S. 586, 607-08 (1957)[emphasis in original]); *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950)(trial court which has found monopoly to exist "has the duty to compel action by the conspirators that will, so far as practicable, *cure the ill effects* of the illegal conduct, and assure the public freedom from its continuance") *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944) (emphasis added).

B. *The Affirmative Duty To Eliminate The Vestiges Of A Formerly De Jure System Is Appropiately and Necessarily Applied In the Higher Education Context If the Harm to Petitioners Is to Cease.*

It is wholly logical, necessary, and consistent with the Court's Equal Protection jurisprudence that Mississippi be requried to eliminate the vestiges of its dual system. The importance of higher education to individuals, the state and the nation cannot be gainsaid, and application of a lesser duty here would perpetuate educational disparities among the citizens of Mississippi that are directly traceable to the state's racial discrimination.

Prior to the decisions of the district court and *en banc* majority here, every court that had considered the issue, with the exception of one, had concluded that the affirmative duty applies with equal force in the higher education context. Courts considering desegregation of the Tennessee higher education system repeatedly reached this conclusion. *Geier v. Alexander*, 801 F.2d 799, 804-05 (6th Cir. 1986).[75]

---

[75]See also *Geier v. Univ. of Tenn.*, 597 F.2d 1056, 1065-67 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979); *Geier v. Dunn*, 337 F. Supp. 573, (continued...)

Three-judge district courts in Virginia and Louisiana ruled similarly in *Norris v. State Council of Higher Educ. for Virginia*, 327 F. Supp. 1368 (E.D. Va.), *aff'd mem.*, 404 U.S. 907 (1971),[76] and *United States v. Louisiana*, 692 F. Supp. 642, 653-58 (E.D. La. 1988), *vacated*, 751 F. Supp. 606 (E.D. La. 1990) (pursuant to *Ayers*).[77]

---

[75](...continued)
576-81 (M.D. Tenn. 1972); and *Sanders v. Ellington*, 288 F. Supp. 937, 942-43 (M.D. Tenn. 1968).

[76]*See also Ayers*, 914 F.2d at 692 (Goldberg, J. dissenting); *id.* at 693 (Higginbotham, J., concurring in part and dissenting in part); *United States v. Alabama*, 628 F. Supp. 1137, 1171-72 (N.D. Ala. 1985), *rev'd on other grounds*, 828 F.2d 1532 (11th Cir.) (applying affirmative duty), *cert. denied*, 487 U.S. 1210 (1987); *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458, 474 (M.D. Ala.) (per curiam) (state colleges have an "affirmative duty to effectuate the principles of *Brown*"), *aff'd sub. nom. Wallace v. United States*, 389 U.S. 215 (1967).

[77]The sole exception prior to the decisions below is *Alabama State Teachers Ass'n v. Alabama Pub. School and College Auth. (ASTA)*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969). In *ASTA* however, the question presented did not involve the dismantling of a formerly *de jure* state-wide system of higher education. The court there dealt only with the question whether to enjoin the construction of a new institution. The court refused to grant the injunction emphasizing, *inter alia*, that "much of the plaintiffs' argument is based on speculation." *Id.* at 789. The court concluded that on the record before it, creation of the new school was at least arguably as consistent with the asserted "duty to maximize desegregation" as the plaintiffs' proffered resolution. In that context, the *ASTA* court refused to enjoin the construction. We do not, therefore, read *ASTA's* language regarding the scope of the affirmative duty in higher education as announcing a principle of general applicability different from that which has been recognized by all other courts except in the instant case.

Significantly, the decisions of this Court relied upon in *Brown I* were challenges to segregation in the higher education arena.[78] The Court's statement in *Brown* regarding the importance of elementary and secondary education is as compelling today with respect to higher education as it was in 1954 with respect to a high school diploma:

> Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.

Brown I, 347 U.S. at 492-93.

Since the 1950's, the importance of higher education has become increasingly evident with dramatic increases in appropriations by the federal government in order to expand higher education opportunities.[79] Limitations on higher education opportunities have severe consequences,[80] as the

---

[78]*McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Univ. of Oklahoma*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

[79]In the post-*Brown* era, the federal government enacted a massive array of statutes aimed at improving the quality of, and facilitating access to higher education. *See generally* 20 U.S.C.S. § 1001-1146a.

[80]College graduates and those with some college education were the fastest growing groups in the work force in the 1980's. Dept. of Labor, (continued...)

three-judge district court recognized in *United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988):

> In vast, ever-growing segments of the American workforce, a high school diploma is not enough; a college education is often more critical than a high school education. The argument that the State requires students to attend primary and secondary school but cannot, or at least does not, require them to attend college fails to acknowledge the realities of our nation today.

Id. at 656 (citations omitted).

Limitations on higher educational opportunities for blacks in Mississippi have severely and adversely impacted the lives of black Mississippians. The Brewton Report pointed out the following:

> [W]hen the 1945 survey was made there were 22 times as many white doctors in Mississippi in

---

[80](...continued)
Occupational Quarterly Outlook 3 (Summer 1990). The Dept. of Labor found that this trend will continue as jobs become more complex and the skills required to perform them increase. While the total number of jobs available will increase by only 15% by the year 2000, the number of jobs available for college graduates will increase by 50%. *Id.* at 6. In sum, more than half of all new jobs created by the year 2000 will require more than a high school education. Dept. of Labor, Dept. of Educ., and Dept. of Commerce, *Building a Quality Workforce* 10 (1988). In addition to employment opportunities, higher education leads to increased earning power. For example, the average monthly income for persons with doctorate ($4,118) and professional ($4,323) degrees is approximately double that for those with bachelors degrees ($2,109) and four times that for those who hold only high school diplomas ($1,135). Bureau of the Census, U.S. Dept of Commerce 8, (Series P-70, No. 21) (Spring 1987).

> proportion to the white population as Negro doctors in proportion to the Negro population; 13 times as many dentists, 5 times as many pharmacists, 420 times as many lawyers, and 40 times as many social workers.
>
> From 1948-1953, the institutions for white students in the State conferred 14,205 degrees, one for every 131.1 white persons in the population; whereas the colleges for Negroes conferred 1,268 degrees, or one for every 778.1 Negroes in the total population.

(PX ~~200 at~~ 149-50.)[81] The impact of the cumulative educational deficit suffered by black Mississippians is reflected in the fact that in 1979, 44.4% of Mississippi's black citizens still lived below the poverty line, compared to 12.7% of its white citizens (PPA 116).

This Court's resolution of the question whether the affirmative duty applies to Mississippi's higher education system will determine whether Mississippi's black citizens will be afforded educational opportunities equal to those

---

[81]These disadvantages continue today, as reflected in the facts proved at trial. In Mississippi, between 1982 and 1986, for example, blacks received only 4.5% of the medical degrees and 4.4% of the dental and law degrees granted (PPA 179-204). The proportion of degrees received by blacks ~~from undergraduate~~ (23.9%) and graduate (20.6%) schools, *id.*, while higher than that for professional schools, remains significantly below the proportion of black public high school graduates (45.4%)(PPA 151). Furthermore, black participation in graduate programs has declined in *absolute and relative* terms since the 1970's. While non-black enrollment in graduate and undergraduate programs increased between 1978 and 1986, black enrollment decreased by 28% in graduate programs and 14% in undergraduate programs. (USX 172-190, PPA 137).

afforded Mississippi's white citizens. This is the same question the Court faced in *Green* where it found that 13 years of inaction had left the school children of New Kent County in segregated schools, where black children faced overcrowding and other educational disadvantages. The situation in Mississippi's higher education system today is no different. It cannot be argued with reason or persuasion that the majority of the black college students in Mississippi receive an education of a quality equal to that received by Mississippi's white students. Nor could it be argued that the same harmful effects of racial segregation and discrimination condemned in *Brown* are not present here. The constitutional promise of equal protection for Mississippi's black citizens makes it imperative that much more be done. The standard endorsed below is flawed because it denies a remedy for this constitutional violation.

C. *Mississippi Has Failed to Eliminate the Dual System "Root and Branch."*

1. Mississippi Must Eliminate Continuing Intentional Discrimination.

This Court has mandated that states must cease the operation of intentionally discriminatory practices. *Hunter v.*

Underwood, 471 U.S. 222 (1985). Mississippi continues to operate a system whose structure and admissions standards concededly are based on intentional discrimination and the effect of which continues to be discriminatory. While, Mississippi has abandoned its laws explicitly assigning students on the basis of race, it has otherwise continued to operate the same system through the use of facially race-neutral policies that incorporate, rather than eliminate, the effects of past intentional discrimination.[82]

The record reveals and the district court found an unbroken chain of intentionally discriminatory state action in establishing the structure of the dual system from its inception until at least the late 1960's when the first blacks were admitted to HWIs.[83] This record of inequality continued

---

[82]The district court's analysis, ultimately affirmed by the *en banc* majority, was inadequate in part because it appears to have concluded that the continued existence of policies and practices rooted in discrimination were to be judged by the current intent of state actors ("defendants do not dispute [the existence or scope of the dual system]. The fundamental issue before the court at this time, however, is whether defendants are *currently* committing violations of the Thirteenth and Fourteenth Amendments, Title VI and 42 U.S.C. § 1981" (empahsis added) (PA 169a-70a).

[83]The district court found that defendants racially segregative policies in 1962 encompassed: "(1) student enrollment, (2) maintenance of branch centers of historically white universities in close proximity to the historically black universities, (3) employment of faculty and staff, (4) (continued...)

through the 1970's, when the state, disregarding federal mandates, continued to make funding, admissions, and curricular decisions that reinforced the dual structure of the system.[84] The findings of the *en banc* majority acknowledge that the current "disparities are very much reminiscent of the prior system," (PA 37a), and that the "inequalities among the institutions largely follow the mission designations, and the mission designations to some degree follow the historical racial assignments." *Id.* Defendants admit that the mission designations simply maintained the status quo. (Tr. 3656 (T. Meredith)). In short, the chain of intentional discrimination remains unbroken.

In addition to the intentionally discriminatory structure maintained by the mission designations, the two-tiered admissions standards for HBIs and HWIs (uniformly higher at HWIs) does not pass a test of even facial neutrality. The uniformly higher score required at the HWIs is the product of

---

[83](...continued)
provision and condition of facilities, (5) allocation of financial resources, (6) academic program offerings, and (7) racial composition of the governing board and its staff. PA 169a. *See also* PX 200.

[84]*See supra* at 18-19; USX 407.

intentional discrimination from the "Meredith days," (USX 949 at 51), found by the district court to have been adopted because of its discriminatory impact on black students (PA 179a.) The Board expressly "maintained" those policies in 1976 (USX 48). They remain unchanged and continue to exclude black students from HWIs. Given Mississippi's failure to modify the two-tiered structure of its admissions policies at HWIs and HBIs which is the product of impermissible state action, the legacy of intentional discrimination continues.[85]

The continued use of a policy or practice founded with the intent to discriminate violates *Hunter v. Underwood*, 471 U.S. 222, unless the state proves that it would have taken the same action had it not acted with discriminatory intent. *Id.* at 228, *citing Mt. Healthy Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977). Mississippi did not come forward with any evidence suggesting that the current structure of the system of higher education as set out in its mission designations would

---

[85]In *Hunter*, the Court rejected the state's arguments that the passage of time (80 years) had cleansed the provision of its impermissible purpose, even where the more blatant discriminatory measures had been removed. 471 U.S. at 232-33.

have been established absent racial discrimination. Nor did the state show that the uniformly higher admissions standards adopted at each HWI prior to the admission of a single black person would have been established absent racial discrimination. Without such a showing, a violation of the Equal Protection Clause clearly is established.

2. The State Must Eliminate Vestiges of the Dual System Which Continue to Impede Equal Educational Opportunity.

Even in the absence of a finding of continuing intentional discrimination, where a state has operated a former de jure segregated system, the affirmative duty requires it to eliminate the vestiges of that illegal system and their continuing impact.[86] Mississippi has failed to meet that obligation.

Mississippi has not taken adequate measures to desegregate its higher education system and to ensure that the legacy of segregation does not continue to deny black citizens

---

[86]*Bd. of Educ. of Oklahoma City Pub. Schools v. Dowell*, 111 S.Ct. 630 (1991); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972); *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972).

equal educational opportunity. For example, the state has largely restricted blacks to token representation on the Board of Trustees, never giving them an effective voice in the body charged with making fundamental decisions regarding the university system. Similarly, Mississippi has not overcome the legacy of the exclusion of black professors from employment at HWIs, but instead has allowed the faculty at those institutions to remain overwhelmingly white, while qualified black professors remain concentrated at HBIs. Nor has Mississippi substantially improved the quality of education offered at its HBIs in order to attract white students to those institutions. Instead it has ensured that those institutions offer fewer programs and receive less funding than HWIs, and, as a result, attract few white students.

At bottom, Mississippi, having discriminated against its black citizens by constructing a higher education system notorious for being both separate and unequal, has failed to take measures to overcome the effects of such discrimination and is in violation of the Constitution.

D. *The En Banc Majority Erred In Concluding That Mississippi Need Not Take Additional Steps To Dismantle Its Racially Dual Structure Because To Do So Would Preclude Diversity Among Institutions and Student Choice.*

1. The Diversity and Choice Ultimately Protected By the Majority Decision Are Based Upon the Stigma of Racial Inferiority Precluded By *Brown*.

Amici agree that diversity among institutions of higher education is a legitimate and valued goal. But, diversity based on racial distinctions derived from notions of racial inferiority is not. The diversity protected by the *en banc* decision, however, is that of the latter sort, and as such, it is constitutionally impermissible.

The *en banc* majority found the existing disparities among institutions "very much reminiscent" of the dual system (PA 37a). Neither the district court nor the *en banc* court found that the state had disestablished the racial designations of its institutions or the structure supporting the dual system. Nonetheless, the courts approved the continued racial identity of institutions and operation of a dual structure on the ground that students may now choose to follow the

state's continuing racial designations or, in effect, decide to cross the color line. Student selection of universities in Mississippi today is not free of the vestiges of the state-enforced racial discrimination that permeated all aspects of life,[87] or the continued operation of the dual system today.[88] Choices so heavily influenced by state action are not free. Thus, it is not surprising that 99% of Mississippi's white students continue to "choose" historically white institutions.[89] The small number of black students who can overcome the ACT barrier[90] can "choose" between attending an

---

[87]In *Brown II*, the Southern States were adamant that segregation was so firmly rooted that it would take years to undo. *See e.g.* Amicus Brief for Attorney General of North Carolina at 36 ("[a] social order which is the product of three centuries . . . cannot be transformed overnight"); Oral Argument in *Brown II* of S.E. Rogers, on behalf of R.W. Elliott, at 24 (we cannot "push the clock forward abruptly to 2015 or 2045"); *see* R. Kluger, *Simple Justice*, 729-36 (1976).

[88]The record demonstrates that there are strong disincentives for white students to attend HBIs (even where an HBI is the most convenient geographically or offers the programs the student needs), because of the continuing racial identifiability and stigma of inferiority originally imposed on HBIs by the state (USX 16, USX 23 [letters from whites avoiding Jackson State because of perceptions that the school is an inferior institution and because of its racial identity]).

[89]USX 880.

[90]Black freshman enrollment in Mississippi's system in the early 1980's was approximately 30%, but has steadily declined since. USX 172-90. Of that 30% system-wide, only 30% are eligible for the HWIs. Thus, no HWI has an enrollment above 18% black. In school year 1985-

(continued...)

underfunded and stigmatized HBI or an HWI where there are few black faculty or administrators and where racial abuse is expected, received and unaddressed by the institution.[91] The *en banc* majority concluded that "all students have real freedom of choice to attend the college or university they wish," (PA 2a), but for 70% of the black students those choices are restricted to the three underfunded HBIs or, according to the lower courts, a junior college.[92]

---

[90](...continued)
86, the University of Mississippi had a 5.9% black student enrollment and Mississippi State had a black student enrollment of 11.3%. PPA 137.

[91]Tr. 2659-2692, 2709-2774, 2777-2803.

[92]The junior college option relied upon by the *en banc* majority and the district court as an avenue for blacks to gain admission to HWIs (PA 32a-33a) does not provide equal opportunity to the black students who are precluded from direct admission as freshmen at HWIs. First, the state presented no evidence to suggest that the quality of education or funding of a junior college is equal or even comparable to that at the senior colleges. Second, there is an obvious difference between attending a comprehensive institution for four years as compared with attending a junior college for two years and a comprehensive institution for two years. Third, the state failed to produce any evidence regarding the actual numbers of blacks transferring from the junior colleges to senior colleges, or the extent to which such transfers are encouraged and explained to students in the junior colleges or high schools. For its conclusion that substantial numbers of students transfer, the district court relied upon the deposition testimony of one witness from the Mississippi University for Women. (PA 133a.) The testimony refers only to a two-year period at that University, does not provide any numbers of actual transfers, and states only that the "number of transfers had significantly increased" during that period (USX 965, p. 117). The witness did not provide the number of junior college transfers previously at the institution in order to allow the court to weigh the meaning of "significantly increased". (continued...)

The choices that Mississippi makes available are the products of racial discrimination. *Brown* decided that a state may not make such choices available to its citizens.[93]

2. The Majority Erred In Concluding That Any Remedy Would Destroy the System By Precluding Diversity of Institutions.

The majority rejected *Green's* affirmative duty standard because it concluded that it "would impose a regime of imperatives and uniformity on what are in essence diverse institutions, and in doing so would destroy the choices available to both black and white citizens" (PA 24a). Initially, it must be emphasized that there has never been a remedial hearing in this case (PPA 99-101). Therefore, the majority was at least premature in its conclusion that any

---

[92](...continued)
Moreover, it is clear that whatever the transfer rate, the number of blacks attending HWIs is quite low.

[93]Other than the arguments specifically relating to the Title VI regulations, the discussion of *Bazemore*, *supra* at § II.D, is equally applicable to the constitutional issues discussed here. An additional distinction, however, exists in the constitutional argument. In *Bazemore* the Court accepted the government's argument, which stated, *inter alia*, that "a system does not become unitary in all respects simply by curing its prior discriminatory *admissions*," *Bazemore* Fed. Br. at 41 n.45 and that a higher education system "must take affirmative remedial action not only with respect to admissions, but also, for example, faculty, facilities and lingering funding disparities before it will become unitary in all respects." *Id.* at 49 n.48. Under this approach, the lower courts erred in applying *Bazemore*.

remedy would preclude diversity among institutions (PA 24a), and *amici* submit, ultimately wrong that desegregation precludes legitimate diversity and student choice.

There are many remedial measures that advance disestablishment of a segregated and discriminatory system and encourage legitimate diversity among institutions and student choice. The HEW Criteria, developed with the aid and advice of college presidents, education officials, aides to governors, students and others, reflect the agency's expertise in higher education desegregation and suggest desegregation strategies that recognize and incorporate institutional diversity and student choice. 43 Fed. Reg. 6658. Nothing in the guidelines suggests or encourages a structure of uniformity in state systems of higher education. In fact, the opposite is encouraged as the Criteria urge the elimination of unnecessary program duplication and the development of unique program offerings at HBIs to attract white students.[94]

---

[94]Nor have any of the more than ten state systems of higher education that designed and operated desegregation plans developed pursuant to the HEW Criteria developed into the uniform and non-diverse systems anticipated by *en banc* majority. Maryland, Kentucky, Texas, Arkansas, Oklahoma, Florida, Georgia, Delaware, Virginia and other states have operated under plans developed pursuant to the Criteria.

Furthermore, *amici* respectfully, but strongly, disagree with the conclusion of the *en banc* majority that measures taken to upgrade the HBIs would lead to "separate but equal" schools (PA 37a). *Amici* note that Mississippi's current system is, as it has always been, a separate and most unequal system that perpetuates notions of racial inferiority challenged and rejected in *Brown*.[95] The inclination toward separateness cultivated by Mississippi's long history of discrimination can be addressed in the remedial phase of the case by requiring the state to take all steps practicable to encourage other-race attendance at HBIs and HWIs. Again the HEW Criteria suggest available measures, and require that the HBIs be desegregated, 43 Fed. Reg. 6662. Clearly, remedial measures are available that would not force "separate" schools.

No discussion of potential remedies can ignore the suggestions made throughout this litigation that the appropriate remedy would be simply to close or neglect the

---

[95]*Brown I*, 347 U.S. at 494. *See* Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument in *Brown I* at 50-66.

HBIs. *Amici* strongly urge the Court to reject that notion as offensive to the Constitution. In *Adams v. Richardson*, 480 F.2d at 1165, the *en banc* Court of Appeals for the District of Columbia Circuit unanimously recognized the crucial role played by the HBIs in higher education and the need to "take into account the special problems of minority students and Black colleges." On remand, the district court ruled, consistent with other courts supervising desegregation remedies, that the burdens of desegregation must be borne equitably.[96] Fulfillment of *Brown II's* mandate of a "racially nondiscriminatory school system" requires that old forms of discrimination not be replaced with new ones. A remedy that abandons or neglects the HBIs,[97] the only institutions that

---

[96] *Adams v. Califano*, 430 F. Supp. 118, 120 (D.D.C. 1977) ("The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education.") *See also United States v. Bd. of Educ. of Waterbury*, 560 F.2d 1103 (2d Cir. 1977); *Keyes v. School Dist. No. 1, Denver*, 521 F.2d 465, 479 (10th Cir. 1975); *Arvizu v. Waco Indep. School Dist.*, 495 F.2d 499, 504 (5th Cir. 1974); *Lee v. Macon County Bd. of Ed.*, 448 F.2d 746, 753-54 (5th Cir. 1971); *McPherson v. School Dist. No. 186*, 426 F. Supp. 173, 187 (S.D. Ill. 1976).

[97] *Amici* are not suggesting that no changes could be made in HBIs or that no programs at HBIs could ever be discontinued, or that no HBI could ever be closed. *Amici* are suggesting that it would be unconstitutional to close or downgrade only HBIs and to rationalize these decisions by pointing to the results of generations of the state's neglect and underfunding. *cf. Mt. Healthy, supra* at 54.

consistently show a commitment to redressing the educational deficits visited upon the black citizens of Mississippi, will further limit equal educational opportunity for black citizens.[98] That would be a perverse remedy for the victims of Mississippi's discrimination.

* * *

The critical finding by the *en banc* court is that the disparities among institutions continue, and that those disparities were rooted in the dual system. The mission designations simply maintain the dual system under another name. Likewise, the intentionally discriminatory ACT minimums at the HWIs exclude the majority of black students from those institutions that are best supported by the state and where the overwhelming majority of Mississippi's white students are educated. Thus not only has the dual system continued to exist, it has not even been cleansed of its intentionally discriminatory origins. Accordingly, Mississippi is in violation of the Equal Protection Clause because of the continuing nature of its intentional violation, *Hunter v.*

[98]43 Fed. Reg. 6662 (recognizing that certain approaches would be likely to impede educational opportunities for black students).

Underwood, and because it has failed to satisfy its affirmative duty to eliminate the vestiges of the dual system, *Dowell, Swann, Green, Brown II.*

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to reverse the decision below and remand the case for a remedial hearing.

Respectfully submitted,

Janell M. Byrd
NAACP Legal Defense and Educational Fund, Inc.
1275 K Street, N.W.
Suite 301
Washington, DC 20005
(202) 682-1300

*Julius LeVonne Chambers
Charles Stephen Ralston
Norman J. Chachkin
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

John A. Powell
American Civil Liberties Union Foundation
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

John W. Garland
Adjoa Aiyetoro
National Conference of Black Lawyers
1926 6th Street, N.W.
Washington, D.C. 20001
(202) 387-5960

Counsel for Amicus Curiae
**Counsel of Record*