

## STATEMENT OF THE CASE

In 1995, Ewing Boles, a white male, applied for admission to the Central University School of Law. He was ultimately denied admission. At the same time, Richard Samuels, an African American male, was admitted to the law school. Boles compared his qualifications and scores with those of Samuels and, finding them nearly identical, came to believe that he had been denied admission to the law school on the basis of his race. He then initiated a legal action against the Central University School of Law ("law school"), claiming that his Fourteenth Amendment rights had been violated. During the discovery stage of this action, the law school disclosed its admissions policies and procedures.

The law school uses a Central University Index ("CUI") to rank applicants. The CUI weights an applicant's undergraduate grade point average ("GPA") at 40% and his or her LSAT score at 60%. The GPA is multiplied by ten and the LSAT score is divided by three. The two resulting numbers are then added together for the formulation of the CUI. The highest possible CUI is 100. In 1995, those applicants with a CUI of 93 or above were automatically offered admission, while those applicants with a CUI below 85 were automatically denied admission. Applicants with a CUI between 85 and 92.99 were placed in a "discretionary zone." All of the files of all of the applicants in this zone were considered together by the school's Admissions Committee.

For applicants in the discretionary zone, the CUI was not the sole factor considered for admission as it was for the automatically accepted and rejected applicants. The Committee, when reviewing the applicants in the zone, was vested with the discretion to add or subtract points from an applicant's score depending upon such factors as the strength of the applicant's undergraduate program and his or her participation in extracurricular activities. Enhancement of the school's diversity could also be considered in adding points to a CUI. The Committee could not raise any applicant's score above 92.5. Because the law school was committed to having its student population reflect approximately the same percentage of minorities as there were minority graduates from Davis' undergraduate institutions, and because the school sought to remedy the effects of past discrimination, all African American and Native American candidates in the discretionary zone automatically had two points added to their CUIs. The law school intended to employ this procedure until the gap in minority and non-minority credentials had narrowed such that the procedure would no longer be required.

After the adjustment of the CUIs, the law school offered the 350 top-ranked applicants admission with the goal of enrolling 300 students. The next 100 students were placed on the waiting list. The remaining applicants were denied admission.

Boles' CUI was 91.77, while Samuels' was 91.70 before the addition of the two points on account of his race. Samuels' adjusted CUI was 92.5.

The district court ruled that the racial considerations employed by the school in its admissions process satisfied the strict scrutiny test required of all such affirmative action plans. The court found that the school had a compelling interest in employing racial considerations in the creation of a racially diverse student body. The court also found sufficient evidence of present effects of past discrimination in the Davis school system to justify the use of remedial action by the law school. The court further found that the affirmative action plan used by the school was narrowly tailored to achieve its goals.

On appeal, the school was found to be in violation of the Fourteenth Amendment by giving constitutionally prohibited preferential treatment to minority applicants. The court held that the law school presented no compelling interest in employing racial classifications. Further, the court determined that the law school was the only educational body to be considered in the examination of the remedial plan, rather than the whole Davis school system, and that the school had not practiced past discrimination. Because no compelling interest was found to exist for the use of racial classifications in the admissions process at the school, the court did not address whether the

program was narrowly tailored to achieve those interests. This Court granted certiorari on September 1, 1998.

#### **SUMMARY OF THE ARGUMENT**

The court of appeals erred in holding that the consideration of race in the admissions process of the University of Davis Law School for the purposes of achieving the enrollment of a diverse student body and of remedying the present harms of past discrimination were not compelling government interests under the strict scrutiny standard of review. The achievement of diversity in education is a compelling government interest so long as quotas and set-asides are not used to achieve it. The race of applicants may be considered as long as it is one of many factors evaluated in the admissions process. The law school only considered the race of applicants in the discretionary zone as one factor among many. Further, the Court's history of deference to academic decisionmakers requires that great weight be given to the academic community's professionally-based desire for diversity in student bodies.

The negative effects of past discrimination linger in the upper levels of the Davis school system, including the law school, because of the past segregation employed by the school system that persisted into the 1980s. Minority applicants enter the admissions process of the law school at a disadvantage due to the past discrimination that they have suffered within the lower

levels of the same educational system. Only through the use of a racially conscious admissions program can the law school remedy the effects of the discriminatory harms of the past.

When serving a compelling government interest, the consideration of race must be narrowly tailored to the achievement of that goal. The law school's admissions program falls well within the parameters of the narrow tailoring evaluation. First, the law school has shown that it is impossible to achieve a diverse student body or to remedy the present effects of past discrimination without the use a race-conscious admissions program. Second, the school's program has a logical and definite stopping point. Third, the program is closely related to the percentages of minorities in the relevant population. Finally, the impact of the affirmative action program on the rights of third parties is minimal compared to the compelling interests that it serves.

#### ARGUMENT

**THE ADMISSIONS POLICY OF THE CENTRAL UNIVERSITY SCHOOL OF LAW PASSES STRICT SCRUTINY, AND IS THEREFORE NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.**

The law school's admissions program passes the strict scrutiny analysis, which is the proper standard of review for race-based affirmative action plans. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). The Davis Law School has a compelling interest in achieving a diverse student body and in

remedying the present effects of past discrimination, and the use of a race-conscious admissions program is narrowly tailored to the achievement of those goals. Evaluation under this standard involves a determination of whether the governmental actor employing the racial classification has (1) "a compelling governmental interest" for doing so, and (2) whether the use of the classification is "narrowly tailored to the achievement of that goal." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion). "[W]henver the government treats any person unequally because of . . . race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection . . . The application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of that injury." *Adarand*, 515 U.S. at 229. The law school's admissions policy complies with the requirements of the strict scrutiny standard, and is thus permissible.

**I. A COMPELLING STATE INTEREST EXISTS TO JUSTIFY, UNDER THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION, THE USE OF RACE AS A FACTOR IN THE LAW SCHOOL'S ADMISSIONS POLICY.**

**A. THE LAW SCHOOL'S CONSIDERATION OF RACE IN ITS ADMISSIONS POLICY FOR THE PURPOSE OF ACHIEVING A DIVERSE STUDENT BODY IS A COMPELLING INTEREST UNDER THE FOURTEENTH AMENDMENT.**

The Appellate Court erred in finding that diversity in education is not a compelling governmental interest because of

its disregard of the precedential value of *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and its failure to defer to the academic judgment of the law school in how best to achieve its educational goals. In *Bakke*, Justice Powell, announcing the judgment of the Court, stated that diversity in education is a "compelling" interest "that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Bakke*, 438 U.S. at 320. Diversity is a compelling interest because "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Id.* at 312 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). Further, "the 'nation's future depends upon leaders trained through wide exposure' to ideas and mores of students as diverse as the Nation of many peoples." *Id.*, at 313.

The diversity rationale that Justice Powell introduced for affirmative action programs at institutes of higher learning under the strict scrutiny standard has since been cited by the Court with approval. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990) ("[A] 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race conscious university admissions program may be predicated . . .") (quoting *Bakke*, 438 U.S. at 311-313 (opinion of Powell, J.)); *Wygant*, 476 U.S. at 286 ("[A] state interest in

the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.") (O'Connor, J., concurring) (citing *Bakke*, 438 U.S. at 311-315 (opinion of Powell, J.)). In addition to this acceptance of *Bakke* as precedent by the Court, the United States Department of Education has approved of university admissions policies that use race-conscious evaluation of applicants as a means of achieving the educational benefits that flow from a diverse student body. See 59 Fed. Reg. 8756, 8760-62 (Feb. 23, 1994).

Because the *Bakke* decision has not been overturned and has been cited with approval by the Court, and because it has been treated as precedent by lower courts and the United States Department of Education, it stands as the current position of the Court on diversity as a valid compelling governmental interest. Because no other cases dealing with affirmative action in the setting of an admissions program of a state institute of higher education have been decided by the Court, lower courts must abide by *Bakke*, regardless of their views on the validity of the decision. "If a precedent of the [Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de*



*Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-85 (1989).

The academic community has identified diversity in education as one of its most pressing concerns and greatest goals. "If our institutional capacity to bring together a genuinely diverse group of students is removed—or severely reduced—then the quality and texture of the education we provide will be significantly diminished . . . We therefore reaffirm our commitment to diversity as a value that is central to the very concept of education in our institutions" Association of American Universities, *On the Importance of Diversity in University Admissions* (Apr. 14, 1997), New York Times, Apr. 24, 1997, at A27. The Supreme Court subscribes to a "principle of respect for legitimate academic decisionmaking." See *University of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) (unanimous opinion). This deference to academic decision makers is founded on the idea that such judgments are "not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978). The Court itself has recognized that a law school "cannot be effective in isolation from the individuals . . . with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

The mere assertion of a compelling interest by a governmental actor does not end the "compelling interest" inquiry. The governmental actor must support the use of the race-conscious program employed with "a strong basis in evidence that remedial action is necessary." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). Empirical studies establishing the beneficial educational and developmental effects of diversity (see Alexander W. Astin, *Diversity and Multiculturalism on Campus: How Are Students Affected?*, *Change*, Mar.-Apr. 1993 at 44; Mitchell J. Chang, *Racial Diversity: A Compelling Interest for Higher Education* (1998) (unpublished paper, on file with author) (cited in Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale And The Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 381, 435)) serve as satisfactory evidence for the need for the employment of racial classifications required in the wake of *Croson*. Granted, the effects of diversity in education do lend themselves well to the application of scientific study, but "[I]f academic research is required to validate any departure from strict rational neutrality, social experimentation in the area of race will be impossible despite its urgency." *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996) (unanimous opinion).

**B. THE REMEDIAL PURPOSE OF THE LAW SCHOOL'S RACE-CONSCIOUS ADMISSIONS PROGRAM IS A COMPELLING GOVERNMENT OBJECTIVE.**

The Appellate Court erred in finding that the law school, rather than the Davis educational system as a whole, must have been the relevant alleged past discriminator in order for its remedial policy to be deemed a "compelling interest." The government "unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v. Paradise*, 480 U.S. 149, 167 (1987). The Supreme Court has held that a system of higher education is under an affirmative duty to eliminate every vestige of racial segregation in its educational system and to reform those policies and practices that required or contributed to separation of the races. See *United States v. Fordice*, 505 U.S. 717, 742-43 (1992). The Court has also "insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 467 U.S. at 274 (plurality opinion of Powell, J.). A state's use of remedial racial classifications is limited to the harm caused by a specific actor. See *Id.* at 286 (opinion of O'Connor, J., concurring in part and concurring in judgment). While the *Croson* decision rejected an affirmative action program because of the city of Richmond's failure to provide adequate evidence of its own discrimination, this case does not lack such specific evidence.

The entire Davis school system is the proper state actor to be considered in this case because of the interconnection between its various branches. A state graduate school is merely an arm of a greater statewide system of public education, and the whole educational system must be considered in order to determine whether the residual effects of past discrimination are present.

Because an applicant to a state graduate school, which is intended for use and paid for by state citizens, has presumably been educated up to that point in his or her life at schools in the same state, "applicants do not arrive at the admissions office of a professional school in a vacuum." *Geier v.*

*Alexander*, 801 F.2d 799, 809 (6th Cir. 1986). The roots of the harmful discrimination must be considered if its vestiges are to be eliminated "root and branch." See *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

Because many public schools in Davis continued to have a substantial degree of racial and ethnic segregation during the 1970s and 1980s, the decade in which the majority of law applicants attended primary and secondary schools, the minority applicants from Davis have been handicapped in their educational achievements. The reputation of the law school in the minority community as a "white school," the perception that the law school is a hostile environment to minorities, and the difficulty in attracting minority applicants, along with the generally lower test scores and grades of those applicants are the present

manifestations of the past discrimination that existed within the Davis school system.

The Appellate Court erred in not recognizing that the affirmative action program at the law school addresses the direct effects of the past segregation within the Davis school system. Past societal discrimination, as opposed to the discrimination of specific governmental actors, does not justify remedial action. "[A] governmental agency's interest in remedying societal discrimination, that is discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny." *Wygant*, 476 U.S. at 288 (O'Connor, J. concurring in part and concurring in judgment). The remedial action taken by the Davis Law School in its race-conscious admissions process is not intended to remedy the negative effects of amorphous societal discrimination, but of the past discriminatory policies of the school system itself. Disparate performance on standardized tests and low admissions rates are evidence of segregation in an educational system. See *Wessman v. Boston Sch. Comm.*, 996 F.Supp. 120, 131 (D. Mass. 1998). The incontrovertible evidence of past discrimination in the Davis school system through the use of segregation in the primary and secondary schools in the 1980s provides the required evidentiary basis for the presence of an affirmative action program.

**II. THE ADMISSIONS PROGRAM OF THE CENTRAL UNIVERSITY SCHOOL OF LAW IS NARROWLY TAILORED TO ACCOMPLISH COMPELLING STATE INTERESTS.**

Satisfaction of the second prong of the strict scrutiny test requires that the admissions process at the Davis Law School is narrowly tailored to achieve its goals of diversity and the remediation of the present effects of past discrimination. The narrow tailoring consideration requires the application of four factors: (1) the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of the numerical goals to the percentage of minorities in the relevant population; and (4) the impact of the relief on the rights of third parties. *Paradise*, 480 U.S. at 171. The narrow tailoring requirement "should not be so strict as to chill the elimination of past discrimination." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring). The admissions process used by Davis Law School is narrowly tailored under this standard.

**A. THE ADMISSIONS PROGRAM AT THE LAW SCHOOL IS REQUIRED IN ORDER TO ACHIEVE THE ADMISSION AND ENROLLMENT OF MINORITY CANDIDATES.**

An admissions process that takes account of the race of minority applicants is critical in achieving a diverse student body and in remedying the present harms of past discrimination. Suggested alternatives to affirmative action in admissions may be commendable, like using socioeconomic classifications instead of racial ones, but such programs would not be tailored to the elimination of racial disparities. See *Geier*, 801 F.2d at 806.

Further, without the use of the racial classifications, strong evidence exists that resegregation would result at the law school. After the University of Texas Law School eliminated racial classifications from its admissions processes in 1996, only three African American and twenty Hispanic students deposited money for enrollment in the 1997-98 entering class. In contrast, thirty-one African American and forty-two Hispanic students enrolled at the school in the previous year. Peter Applebome, *Affirmative Action Ban Changes a Law School*, New York Times, July 2, 1997, at B12. Similarly, when California banned the use of racial preferences at its undergraduate and graduate institutions, the number of incoming freshmen at the Berkeley campus of the University of California who were African American, Hispanic American, and American Indian fell from 23.1% in 1997 to 10.4% in 1998, after the ban was enacted. Ethan Bonner, *Black and Hispanic Admissions Off Sharply at U. of California*, New York Times, Apr. 1, 1998 at A1. By allowing such resegregation to occur, the school system would become a "passive participant" in its existence, and would be justified in taking "affirmative steps" to eliminate it. See *Croson*, 488 U.S. at 492.

Dismantling the race-conscious admissions program at the law school would only create a segregated educational environment that the school would seek to remedy, placing it back to where it stood at the commencement of this action. The use of the affirmative action program at the law school is both effective in

achieving the enrollment of minority students and necessary in preventing the likelihood of resegregation.

**B. THE RACE-CONSCIOUS ADMISSIONS PROGRAM EMPLOYED BY THE LAW SCHOOL IS FLEXIBLE AND THE DURATION OF THE PROGRAM IS REASONABLE.**

The District Court found that the law school intended to employ its affirmative action program until the gap in minority and non-minority credentials had narrowed such that the State would remain in compliance with Title VI without the need for such a program. Race-based affirmative action programs must have a stopping point and not threaten to extend indefinitely into the future. See *Wygant*, 476 U.S. at 275. The affirmative action program at the law school will end when the disparity in performance levels between minorities and whites has been eliminated. Thus, as the benefits gained from the use of affirmative action programs gradually permeate our society, the consequently unneeded programs employing race as a consideration will be abandoned. The duration of the Davis Law School's race conscious admissions program is thus limited and flexible in its duration.

**C. THE CONSIDERATION OF RACE IN THE LAW SCHOOL ADMISSIONS PROGRAM IS CLOSELY RELATED TO THE PERCENTAGE OF MINORITIES IN THE RELEVANT POPULATION.**

The law school's only "goal" under its affirmative action program was to achieve a student body that reflected the percentage of minority students graduating from Davis' public and private institutions. This goal is to be differentiated from an



unyielding racial quota of the kind rejected in both the *Bakke* and *Croson* decisions. The law school's admissions program cannot be considered a quota system or a set-aside program because it is not rigid and not strictly defined. Further, because the law school serves the residents of Davis, its use of race in its admissions process is closely related to the number of minorities in Davis that make up the pool from which the law school draws its minority students.

**D. THE CONSIDERATION OF RACE BY THE LAW SCHOOL IN ITS  
ADMISSIONS PROCESS DOES NOT CREATE AN UNREASONABLE  
BURDEN ON THE RIGHTS OF THIRD PARTIES.**

The race-conscious program at the law school does impact the rights of third parties, but "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant*, 476 U.S. at 280-281 (opinion of Powell, J.) (plurality opinion). Nonetheless, there is "a measure of inequality in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making." *Bakke*, 438 U.S. at 298. The law school only uses race as a "plus" in the consideration of minority applicants and non-minority applicants, and the applicants in the "discretionary zone" are considered together, rather than in racially separated groups so that different races are considered together, and applicants are "not insulate[d] . . . from comparison with all other candidates for the available seats." *Id.* at 317. No non-minority is automatically rejected

from the law school on the basis of his or her race. Any applicant in the discretionary zone may have points added to or subtracted from his or her CUI, regardless of race, because the CUI is not the sole factor considered by the Admissions Committee for applicants in the zone.

The Court has found that postponement of a job promotion due to an affirmative action program poses a minimal burden on non-minorities because "there has been no foreclosure of opportunity." *Paradise* at 182-83. In other words, non-minority applicants denied admission to the law school may seek a legal education elsewhere. Their educational needs and goals have not been dashed.

Further, the Court has found that when non-minorities impacted by the use of affirmative action programs do not have deep-seated expectations or entitlements at stake, the use of affirmative action programs is permissible. "In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society . . . Denial of a future employment opportunity is not as intrusive as loss of an existing job." *Wygant*, 476 U.S. at 282-83. When anyone, regardless of his or her race, submits an application to the Davis Law School for consideration, neither an entitlement nor an expectation of admission has been created, thus non-minorities who bear the burden of the race-conscious program are not unreasonably harmed.

### CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court to reverse the ruling of the United States Court of Appeals for the Fourteenth Circuit as to the unconstitutionality of the Davis School of Law's use of racial preferences in its admissions program.

Respectfully submitted,

Counsel for Petitioner

Exam Number 154