No. 84-1656

In The
Supreme Court of the United States
October Term, 1985

LOCAL 638, LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE CITY OF NEW YORK, AND NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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This motion of Pacific Legal Foundation to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 36. Counsel for petitioners, Local 638, *et al.*, and respondents, Equal Employment Opportunity Commission and the City of New York, have consented to the filing of this brief and these consents have been lodged with the clerk of this Court. Consent has been withheld by counsel for the New York State Division of Human Rights.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for

the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

It is Pacific Legal Foundation's position that the purpose of American civil rights law is to compensate victims of discrimination and punish those who discriminate; the remedy ordered in this case does neither. Instead, the Second Circuit's decision punishes innocent nonminority job seekers while doing nothing to compensate the actual victims of discrimination.

Pacific Legal Foundation has participated in numerous cases which involved issues similar to that presented in this matter. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in light of the erroneous holding of the Second Circuit Court of Appeals in this matter.

For the foregoing reasons, Pacific Legal Foundation requests that the motion to file the annexed brief amicus curiae be granted.

DATED: November, 1985.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 753 F.2d 1172 (2d Cir. 1985).

STATEMENT OF THE CASE

This case presents the issue whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States tolerate race preference in the form of inflexible quotas.

The issue arose when the United States District Court for the Southern District of New York held petitioner union and its Joint Apprenticeship Committee (JAC) to be in contempt of a 29% nonwhite membership goal ordered in response to a Title VII action brought by the United States Equal Employment Opportunity Commission (EEOC), the New York State Division of Human Rights, and the City of New York. The order also included a court-appointed administrator who governs the union with respect to the program on a daily basis at the union's expense. The administrator approved the size of each class of apprentices which is the major entry point into the industry. These classes each consisted of approximately 45% persons of minority extraction.

From 1977 to 1982 was a period of extreme economic distress for the sheet metal industry. Yet the total nonwhite membership in Local 28 increased from 6.1% to 14.9% while the total membership declined. Even though the court-appointed administrator approved the union's efforts to meet the goal established in the court-ordered plan, the union and JAC were found to be in contempt, largely for their failure to comply with the ministerial provisions of the program. At the last contempt proceeding, a revised affirmative action program was ordered in

which earlier fines and penalties were to fund an education, training, counseling, and financial assistance program to be used exclusively for nonwhites and a new quota, termed "goal," was established requiring a 29.23% nonwhite membership by August 31, 1987. The new mathematical goal is the result of several unions merging into Local 28.

The petitioners in this action argued below that the required new percentage of nonwhite members into the union constituted a race-conscious quota which totally disregards individual circumstances and burdens both minority and nonminority races rather than a permissible goal in an affirmative action program, *Local 638*, 753 F.2d at 1185-86. It is thus illegal under Title VII and the Equal Protection Clause of the Fourteenth Amendment.

The Court of Appeals affirmed findings of contempt against Local 28 and JAC including the creation of the fund to benefit only nonwhites and the 29.23% nonwhite membership "goal." The court did not affirm the finding of the lower court concerning an older worker's provision which the court held could not be a basis for contempt because it was never instituted.

Judge Winter in dissent argued that the lower court had transformed the 29% figure from a goal guiding the administrator in his decision, to one of an inflexible racial quota. *Local 638*, 753 F.2d at 1189.

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SUMMARY OF ARGUMENT

This case presents a portion of the question left unresolved in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 81 L. Ed. 2d 483 (1984). It involves the issue of whether an affirmative action plan, enacted by a governmental entity that grants racially based preferences, violates the Fourteenth Amendment and the Federal Civil Rights Act.

The key to the validity of such affirmative action plans lies in the adequacy of the findings necessary to support the plan and precludes race-conscious quotas as a judicial remedy under Title VII and the Fourteenth Amendment. If allowed, it would result in burdening some minority members as well as members of the majority without reasonably advancing racial equality and integration. The Fourteenth Amendment protects individual rights and does not countenance group preference merely to obtain racial balance.

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ARGUMENT

I

ABSENT ADEQUATE FINDINGS OF PAST DISCRIMINATION A RACE-CONSCIOUS QUOTA VIOLATES TITLE VII

The District Court in this case established a rigid membership quota of 29.23%, the effect of which is to keep certain nonminority persons out of petitioner union solely on account of their race or ethnic background. This reverse discrimination contradicts the basic assumption of

Title VII that individuals are to be judged as individuals, not as members of particular racial groups. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

The purpose of Title VII is to prevent discrimination and achieve equal employment opportunity in the future and to make whole victims of past discrimination. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). Title VII prohibits preferential treatment in hiring practices to correct racial imbalance. It leaves to the courts much discretion in forming affirmative action programs and the use of mathematical membership goals has been occasionally affirmed when the court found a clear-cut pattern of long-continued and egregious racial discrimination and no showing of identifiable reverse discrimination. *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975), *reh'g en banc denied*, 531 F.2d 5.

In this case, the District Court found the union and JAC to be in contempt for failing to meet the minority membership goal of 29% required by July, 1981, because the union and JAC (1) underutilized the apprenticeship program, (2) refused to conduct a general publicity campaign ordered in the Revised Affirmative Action Program and Order (RAAPO), (3) adopted a job protection provision in their collective bargaining agreement that favored older workers who were predominantly white and, thus, discriminated against nonwhite (reversed by the Court of Appeals because it was never implemented), (4) issued unauthorized work permits to white workers from sister locals, and (5) failed to maintain and submit records and

reports. 753 F.2d at 1177. The court imposed a fine of $150,000.

At a second contempt proceeding before the administrator, and affirmed by the Second Circuit, the union and JAC were charged with violating certain ministerial provisions of the RAAPO which included (1) failure to provide required records, (2) failure to provide adequate data, and (3) failure to serve the Order and Judgment and RAAPO on contractors who hired Local 28 members. 753 F.2d at 1177. As a result of the second contempt proceeding the District Court established the employment, training, education, and recruitment program to be funded by the fine imposed in the first contempt proceeding. The District Court also established a nonwhite membership goal of 29.23% to be achieved by July 31, 1987. 753 F.2d 1177-78. No act of racial discrimination was alleged in the second contempt proceeding nor were there identified victims. The contempt proceedings were clearly premised on the failure to meet the requisite percentages of minority membership, which was treated as a "quota."

The Court of Appeals in affirming the District Court stated:

> "Finally, we believe that defendants' attempt to rely on *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S. Ct. 2576, 81 L.Ed.2d 483 (1984), is misplaced. Defendants argue that *Stotts* eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination. We do not accept defendants' expansive interpretation of that opinion." 753 F.2d at 1185.

As Judge Winter argued in his dissent: "This holding transforms the 29% figure from a goal guiding the administrator's decisions into an inflexible racial quota."

753 F.2d at 1189. It is amicus' position that the court-imposed racial quota runs afoul of the *Stotts* requirement for a race-conscious affirmative action program.

In *Stotts*, a black fireman filed a class action alleging that the Memphis Fire Department was violating Title VII by making its hiring and promotion decisions on the basis of race. Pursuant to a consent decree, the City of Memphis adopted a goal of increasing the percentage of black firemen until it approximated the percentage of blacks in the Memphis area's labor force. When fiscal conditioning required firefighter layoffs the District Court enjoined the city from making the layoffs solely on the basis of seniority if this would reduce the percentage of black fire fighters.

This Court overturned the injunction and stated that individual members of a plaintiff class must demonstrate that they have been actual victims of the discriminatory practice before being awarded competitive seniority. *Stotts*, 81 L. Ed. 2d at 499. The Court in essence held that Title VII does not permit affirmative action plans to be based on racial preference which would benefit employees who were not "actual victims" of discrimination. The *Stotts* holding is consistent with prior decisions. This Court has never approved race-conscious remedies in the absence of judicial, administrative, or legislative findings of discrimination in violation of the Constitution or statutes. *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (opinion of Powell, J.); *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). The existence of findings of illegal discrimination is therefore a precondition to the adoption of a preferential affirmative action plan.

Amicus submits that *Stotts* is controlling in this case. *Stotts* requires that where an affirmative action plan distributes benefits or abrogates rights, it must pursue a compelling state interest, identified by direct findings of discrimination. The plan must also pursue compelling state interests by the most narrowly tailored means. *Stotts* should be applied to this case because the government established a preferential affirmative action plan which became racial discrimination when the court distributed benefits under a quota system which totally disregarded individual circumstances and without direct findings of discrimination.[1]

Preferential treatment plans pose the threat that placing individuals in nonpreferred classifications may violate their civil rights. Such plans must contain some protections to ensure that the application of the racial criteria will be limited to accomplishing the remedial objectives of the plan as well as to ensure that misapplications of the plan will be promptly and adequately remedied. *See Fullilove v. Klutznick*, 448 U.S. at 487. The objectives are directly founded upon the scope of the identified discrimination and the safeguards in the plan must thus be derived from a studied consideration of the findings.

A governmental entity cannot, therefore, develop a racially conscious affirmative action plan without first establishing findings that clearly define the scope and duration of the discrimination sought to be remedied. The

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[1] The only allegation which might have justified the contempt finding was the underutilization of the apprenticeship program over which the court-appointed administrator had control. The finding of underutilization was based in part on an erroneous statistical analysis. 753 F.2d at 1180.

entity cannot determine the recipients of the preference nor the extent of the remedy without such findings. Nor can the governmental entity devise adequate safeguards to protect the rights of those disfavored by the classifications without defining the extent of the discrimination. A court reviewing a preferential plan cannot perform the detailed analysis necessary to determine if the plan is permissible unless it is presented with the detailed findings that prompted the adoption of the plan.

As this Court held in *In re Griffiths*, 413 U.S. 717, 721 n.8 (1973): "Discrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose." And more specifically, "quotas merely to attain racial balance are forbidden." *United States v. Wood, Wire and Metal Lathers International Union, Local Union No. 46*, 471 F.2d 408, 413 (2d Cir. 1973).

Yet a race-conscious quota is precisely what the District Court imposed on the union and JAC. It transformed the goal guiding the court-appointed administrator's decisions into a race-conscious quota.

The Court of Appeals in affirming the District Court rejected the guidance of this Court in *Stotts*, 81 L. Ed. 2d 483. Here, the court forced a race-conscious quota and a race-conscious fund upon the union and JAC without adequate safeguards, no further showing of discrimination, and no identifiable victims. The race-conscious quota creates a totally arbitrary program resulting in burdening nonminorities without reasonably advancing racial equality and thereby violates Title VII.

II

QUOTAS IMPOSED FOR RACIAL BALANCE VIOLATE THE FOURTEENTH AMENDMENT

Because this lawsuit is in part brought by the New York State Division of Human Rights and the City of New York it constitutes state action subject to the Fourteenth Amendment to the United States Constitution. That amendment provides in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." This clause requires as a constitutional guarantee that individuals be treated in a manner similar to others and governs all governmental actions which classify individuals for different burdens or benefits under the law. The Fifth Amendment provides similar protection against entities of the federal government such as EEOC. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

This Court has traditionally repudiated distinctions between citizens solely on the basis of their ancestry as being " 'odious to a free people whose institutions are founded upon the doctrine of equality.' " *Bakke*, 438 U.S. at 294 (opinion of Powell), quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967), and *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Therefore, a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). The sources of the justification must rest in the discrimination sought to be corrected by the classification.

The goals of racial equality and integration of minorities into the economic mainstream are laudable. The objections to "benign" discrimination programs have been

directed at the means used: racial preferences and race-conscious quotas. This creates an apparent conflict between the removal of any remaining barriers to full racial equality and the requirement that the government treat individuals on the basis of their personal merit rather than their race.

For a government-imposed affirmative action program to be constitutional, it must not violate the Equal Protection Clause of the Fourteenth Amendment. Justice Powell urges that the standard to be applied under the Fourteenth Amendment is strict scrutiny. *Bakke*, 438 U.S. at 361. The divergent opinions of this Court in *Bakke*, *Fullilove v. Klutznick*, 448 U.S. 448, and their progeny indicate that the Court has not yet determined what is the appropriate test to be applied when reviewing racially conscious affirmative action plans. Justice Powell advocates that the test should be one of compelling state interest and whether the "program's racial classification is necessary to promote this interest." *Bakke*, 438 U.S. at 315-16. He further states that strict racial quotas and strict racial preferences constitute unconstitutional reverse discrimination and violate the Civil Rights Act of 1964 unless tailored to make whole identified victims of past discrimination.

This is the view that must be taken of the Fourteenth Amendment, for discrimination is always personal and individual to the person who suffers it. It is of no consolation to that person to know his or her race as a whole may or may not have been subject to deprivations at other times in other places. What the individual of any race demands and deserves is equal protection from discrimination here and now.

CONCLUSION

When the government distributes benefits under a race-conscious quota, it rejects the concern for the individual that forms the basis for a free society. Such quotas make members of favored classes eligible for preferential treatment regardless of whether they personally have been disadvantaged by racial discrimination; at the same time quotas in their arbitrariness exclude others who may have been subject to equally onerous burdens.

In *Mitchell v. United States,* 313 U.S. 80, 97 (1941), this Court declared: "It is the individual . . . who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers."

The replacement of individual rights and opportunities by a program based on race-conscious quotas is inconsistent with a society dedicated to equal opportunity. Amicus, Pacific Legal Foundation, therefore, urges that the decision of the Second Circuit be reversed.

DATED: November, 1985

Respectfully submitted,

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