No. 84-1340

In The
Supreme Court of the United States
October Term, 1984

WENDY WYGANT; SUSAN LAMSON; JOHN KRENKEL; KAREN SMITH; SUSAN DIEBOLD; DEBORAH BREZEZINSKI; CHERYL ZASKI; and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, JACKSON, MICHIGAN; RICHARD SUNBROOK, President; DON PENSON; ROBERT MOLES; MELVIN HARRIS; CECELIA FIERY; SADIE BARHAM; and ROBERT F. COLE,

Respondents.

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

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Page

CASES

TABLE OF AUTHORITIES CITED—Continued

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INTEREST OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of petitioners. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

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.

Pacific Legal Foundation has participated in several 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 Sixth Circuit Court of Appeals in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 746 F.2d 1152 (6th Cir. 1984).

STATEMENT OF THE CASE

This case presents the issue whether the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States tolerates racial preferences

in teacher layoffs when adopted by a public employer in the absence of findings of past discrimination. The case raises the further question whether such racial preferences may be based solely upon a disparity between the respective percentages of minority faculty and students.

The policy at issue was adopted in a collective bargaining agreement between the Board of Education of the City of Jackson, Michigan, and the Jackson Teachers' Association. It provides first a policy goal to have at least the same percentage of minority racial representation in the schools' faculty as is represented by the student population. Second, it provides that teacher layoffs will be conducted by seniority principles except that at no time may a greater percentage of minority personnel be laid off than the current percentage of minority personnel employed. *Wygant*, 746 F.2d at 1158.

The suit was brought by nonminority school personnel who contend that these provisions violate the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. §§ 1981, 1983, and 1985. The nonminority teachers argued below that an employer and a union cannot lawfully negotiate a voluntary affirmative action plan which gives preferential treatment to minorities where there have been no judicial findings of past employer discrimination. In other words, societal discrimination, as opposed to identifiable employer discrimination, is not a lawful basis for the adoption of a voluntary affirmative action plan. *Wygant*, 746 F.2d at 1154.

The lower courts rejected this argument and adopted a requirement of determining whether there is a sound

basis for concluding that minority underrepresentation is substantial and is impeding access and promotion of minorities. *Id.* at 1155. The lower courts further held that it was error to require proof that the persons receiving the preferential treatment had been individually subjected to discrimination; it was held to be enough that each recipient is within a general class of persons likely to have been the victims of discrimination. *Id.*

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 to the United States Constitution and the Federal Civil Rights Act. Pacific Legal Foundation believes that the key to the validity of such affirmative action plans lies in the adequacy of the findings necessary to support the plan. Only a finding of racially based discrimination can support a racially conscious remedy. Absent a finding of racially based discrimination, a governmentally imposed racial preference is clearly an arbitrary and capricious act and itself constitutes invidious discrimination.

The findings necessary to support an affirmative action plan must clearly demonstrate discrimination. A mere statistical disparity has never been held sufficient by this Court and, furthermore, such statistical evidence

must be relevant and must clearly define the nature of the discrimination. The Fourteenth Amendment protects individual rights and does not countenance group preference merely to obtain racial balance.

ARGUMENT

I

ADEQUATE FINDINGS OF IDENTIFIED DISCRIMINATION MUST BE ARTICULATED PRIOR TO THE IMPOSITION OF A RACIALLY CONSCIOUS REMEDY

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is clear that school district bargaining agreements are state action for the purposes of this amendment. *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977).

This Court has traditionally repudiated distinctions between citizens solely because of their ancestry as being "'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Regents of the University of California v. Bakke,* 438 U.S. 265, 294 (1978), quoting *Loving v. Virginia,* 388 U.S. 1, 11, 18 (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), and the sources of the justification must rest in the discrimination sought to be corrected by the classification.

If no discrimination requiring correction exists, amicus submits that a preferential affirmative action plan enacted by a governmental entity becomes racial discrimination outlawed by the Fourteenth Amendment.

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 it is precisely an arbitrary racial balance based on the percentage of students that the Board of Education has imposed on its faculty.

The divergent opinions of this Court in *Regents of the University of California v. Bakke,* 438 U.S. 265, *Fullilove v. Klutznick,* 448 U.S. 448 (1980), and their progeny indicate that the Court has not yet determined what is the appropriate standard of review for racially conscious affirmative action plans. But 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. at 497 (Powell, J.); *Regents of the University of California v. Bakke,* 438 U.S. at 307 (Powell, J.). The existence of findings of illegal discrimination is therefore a precondition to the adoption of a preferential affirmative action plan.

Because of the danger that preferential plans may violate the constitutional rights of the nonpreferred classifications, 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 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.

II

A COURT MUST EVALUATE ALL THE FINDINGS WHEN REVIEWING A RACIALLY CONSCIOUS AFFIRMATIVE ACTION PLAN

The District Court relied on a disparity between the percentage of minority teachers and students in the Jackson school system to justify the preferential seniority provision. *Wygant,* 746 F.2d at 1156. The key issue before this Court is whether that statistical disparity identified and described the problem sufficiently to warrant the remedy selected.

This Court has stated that "[s]tatistics are . . . competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety, and like any other kind of evidence, they may be rebutted. In short, their usefulness depends on *all of the surrounding facts and circumstances.*" *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977) (emphasis added). This caveat demonstrates that this Court is fully aware of the dangers of relying on mere statistics to support a purported finding of discrimination and is indicative of the necessity of evaluating all the findings in reviewing an affirmative action plan. The retrospective view that a reviewing court must take in evaluating plans creates the possibility that the court may attempt to examine the findings in light of the plan adopted rather than to review the plan as emanating from the findings.

The lower courts in this case evaluated the single statistic that during the period deemed relevant, the percentage of minority teachers grew from 3.9% to 8.8% while the percentage of minority students grew from 15.2% to 15.9%. *Wygant*, 746 F.2d at 1156. These statistics, however, also demonstrate that between 1968 and 1972, the percentage of minority teachers increased over 125% while the percentage of minority students increased a mere 5% and indicate that the disparity had been decreasing substantially over time. When viewed in light of this "circumstance," the lower courts' conclusion of "substantial" and "chronic" underrepresentation seems unfounded.

Amicus uses this quasi-statistical analysis merely to demonstrate that a simplistic reliance on some of the findings cannot and should not suffice to validate a preferential affirmative action plan. The findings must be a starting point for the development of the remedy and not as mere rhetoric to justify a remedy; neither can the extent of a racially conscious remedy define the quantity or quality of the findings to be selected to support the remedy.

As this Court specifically held in *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977):

> "There can be no doubt . . . that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." (Footnote omitted.)

Here, unfortunately, the Court of Appeals failed to follow the guidelines set forth by this Court in *Hazelwood*. *See Wygant*, 746 F.2d at 1156 n.1. The Court of Appeals also rejected the guidance of this Court in *Firefighters v. Stotts*, 81 L.Ed.2d 483. *See Wygant*, 746 F.2d at 1157, 1159. *Stotts* held that the use of a racially based quota as a device to protect those who have suffered legal injury is appropriate only where the persons who have been injured by the past discrimination would in fact benefit from the quota. *Stotts*, 81 L.Ed.2d at 499. But here, not only were such safeguards lacking, there was no showing of discrimination to begin with. The Jackson Board

of Education and the lower courts thus committed a double-barreled error.

It is unfortunate that in a desire to create its vision of educational utopia which eliminates historic discrimination, promotes racial harmony, and provides role models for minority students, *Wygant,* 746 F.2d at 1157, the Board of Education fell into the trap of itself discriminating on the basis of race. It is even more unfortunate that the lower courts embraced such rationalizations in lieu of the law set down in *Stotts* and *Hazelwood.* The fatal flaw in too many affirmative action plans is the promotion of class privileges at the expense of individual rights. This Court held in *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948): "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." (Footnote omitted.)

This Court has also 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." *Mitchell v. United States,* 313 U.S. 80, 97 (1941).

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 that 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.

———o———

CONCLUSION

In *Plessy v. Ferguson,* 163 U.S. 537 (1896), the State of Louisiana enacted a statute providing for separate railway carriages for black and white passengers. In upholding this pernicious arrangement, the Supreme Court accepted the doctrine of "separate but equal" accommodation on the basis of race. In dissent, Justice Harlan made his famous declaration: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559. That the complexion of the favored classes may change does not make "separate but equal," any more acceptable to the Constitution or the Civil Rights Act. As *Brown v. Board of Education of Topeka* held, separate but equal has no place in our society because separate accommodations are inherently unequal. 347 U.S. 483, 495 (1954). This rule applies to the segregation of teachers by race as much as it does to students.

Because the findings of faculty/student disparity were not adequate to demonstrate a pattern of ongoing discrimination sufficient to warrant a racially conscious remedy, amicus Pacific Legal Foundation urges that the decision of the Sixth Circuit be reversed.

DATED: June, 1985.

Respectfully submitted,

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