In the

Supreme Court of the United States

HAZELWOOD SCHOOL DISTRICT, ET AL.,

PETITIONERS,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

No. 76-255

Washington, D. C.
April 27, 1977

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Washington, D. C.
546-6666

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v.	:	No. 76-255
UNITED STATES OF AMERICA, Respondent.	:	

Washington, D. C.

Wednesday, April 27, 1977

The above-entitled matter came on for argument at 2:05 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM H. ALLEN, ESQ., Covington & Burling, 888 Sixteenth Street, N.W., Washington, D. C. 20006; on behalf of the petitioners.

LAWRENCE G. WALLACE, Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-255, Hazelwood School District against United States.

Mr. Allen, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF WILLIAM H. ALLEN, ESQ.,

ON BEHALF OF THE PETITIONERS.

MR. ALLEN: Mr. Chief Justice, may it please the Court:

This case concerns charges by the government that the Hazelwood School District in suburban St. Louis discriminated against black applicants for teaching positions in violation of the Civil Rights -- of Title VII of the Civil Rights Act of 1964.

After a trial, the District Court found the charges not substantiated, and granted judgment for the school district. The Court of Appeals reversed, and directed the entry of a remedial order.

In this Court, two questions are raised on review of the Court of Appeals' judgment: one is whether the Court of Appeals could legally find a violation of Title VII on the basis of comparison of the proportion of black members of Hazelwood's faculty, with the proportion of blacks among teachers in the whole St. Louis area when evidence was

available in the record, as we contend, to show that Hazelwood did not discriminate against actual black applicants for jobs.

The other question is whether, given the findings and the evidence on which those findings rest, the Court of Appeals in this case, we submit, lack the element of purpose. There isn't any constitutional basis for the application of Title VII to this public school district.

Since it was formed about a quarter of a century ago, the Hazelwood School District has grown --

QUESTION: But if we disagreed with you on purpose, the -- your question is answered.

MR. ALLEN: We have no constitutional claim, no. There's no doubt, your Honor, that under Section 5 of the Fourteenth Amendment, without regard to the commerce clause, Congress can enforce the equal protection laws; yes.

The Hazelwood District in 25 years has grown from a small, rural collection of grammar schools, to a rather good-sized suburbanschool system. The area it serves is a populous, outlying suburb of St. Louis, a predominantly white suburb. There were no black residents in the district in 1954. Consequently, Hazelwood never maintained a system of separate schools that was required by Missouri law up until the time of Brown against Board of Education.

There were 59 black students in the school year

1967-68, and nearly 600 out of 25,000 total enrollment in the school year 1973-74.

Hazelwood hired its first black teacher in 1969. By the school year 1973-74, 22 of a faculty of about 1,200 were black. The official policy of the district since sometime before 1964, has been to hire the most competent, the best qualified teachers, without regard to race, color, or other extraneous factors.

In the 1960's, Hazelwood had to engage in rather extensive recruiting in order to find the most qualified and most competent teachers it wanted. At that time, the demand for teachers was greater than the supply.

Today, recruiting is not nearly so necessary. Hazelwood, indeed, is deluged with teaching applicants -- applications for teaching positions. Ten or a dozen for every vacancy. These applications are received in a central office, Hazelwood's personnel office. There, in that central office, vacancies are made known by the school principals, and the central office is asked to refer applicants for interviews. And they are referred for interviews without any real evaluation of their qualifications.

At the individual schools, the interviews are conducted. They're conducted by principals, and in some cases in the secondary schools, by department heads. They seek through the interviewing process, to find the best

qualified teachers.

Title VII was made applicable to Hazelwood and other public bodies in March of 1972. A few months later, in October, the Justice Department gave Hazelwood notice that it was considering filing a Title VII case against it. The suit was actually filed in August of 1973. It alleged a pattern or practice of discrimination against black applicants for teaching positions in violation of Title VII, and in addition, alleged violation of the Fourteenth Amendment.

The government searched through Hazelwood's files of applications, employment forms, and the like. It took depositions of Hazelwood's top school administrators -- principals, school superintendents, personnel officers, and so forth. Exhibits which consisted of copies of the file material, or were constructed from that file material, were a principal part of the government's case at trial. The depositions came in at trial. And in addition, 25 black applicants for teaching positions testified as to the circumstances of their applications.

The government set out to prove that Hazelwood had deliberately, purposefully engaged in a pattern or practice of discrimination against black job applicants generally. A showing of a few isolated cases of unfavorable treatment of individual black applicants for teaching positions would not

do, to make the kind of case the government set out to make.

It tried to show -- the government tried to show -- that Hazelwood's hiring procedures, this decentralized system of interviewing that I've described, disfavored black applicants generally.

The fact was that Hazelwood's files showed the contrary. Between 1971 and 1973, 17 black applicants were hired or offered jobs, and 52 were identified by the government as having been rejected for teaching jobs. That was just on the face of it, a much greater proportion of hires than there were for applicants generally in that period.

So the government adopted as the centerpiece of its attempted showing of a pattern or practice of discrimination a comparison, a comparison of Hazelwood's racial composition, of Hazelwood's faculty, in 1973-74, approximately two percent black, with the racial composition of the St. Louis city and county teachers. In other words, as shown by the census of 1970, 15 percent of all the teachers in St. Louis City and county were black.

IN addition, in addition, the government noted that an ad, a newspaper advertisement for teachers that appeared in Jackson, Mississippi over Hazelwood's name back in 1962, with the words, white only, in it, the same ad had run elsewhere without that notation at the same time, that Hazelwood had used application forms up until 1962-63, some

of which carried lines for racial identification; that Hazelwood had not recruited at predominantly black colleges in the 1960's, when recruitment was a part of its hiring process.

In addition, the government also cited the cases of the 52 unsuccessful black applicants that it had identified, and said that they had been rejected in favor of whites no better qualified.

Hazelwood argued that none of this showed discrimination. The District Court agreed.

On appeal, the Court of Appeals found --

QUESTION: Mr. Allen.

MR. ALLEN: Yes.

QUESTION: Who was the District judge, Judge Harper?

MR. ALLEN: Judge Harper, your Honor.

On appeal, the Court of Appeals found that the discrepancy between the racial composition of Hazelwood's faculty and this St. Louis city and county labor market, taken in light of the what it termed unstructured, standardless hiring procedures, with vague and subjective criteria, made a prima facie case of discrimination in violation of Title VII.

QUESTION: Mr. Allen, do you understand the Court of Appeals' holding to have rested solely on Title VII, and not on any violation of the Fourteenth Amendment?

MR. ALLEN: The Court of Appeals recited that there was the charge of a violation of the Fourteenth Amendment at the outset of its opinion; it found no such violation in the course of its opinion. I think it is fair, Mr. Justice Rehnquist, to say that the Court of Appeals did not find a violation of the Fourteenth Amendment. It found that this prima facie case that it based principally on the statistics of a violation of Title VII was buttressed by these incidents from Hazelwood's history that I've recited, and its analysis of the government's showing of rejected black applicants.

On that analysis, it found that 16 of them, 16 out of 52 of the black applicants, had been rejected for jobs for which whites, no better qualified, had later been hired. Andof those 16 -- of those 16 -- only two had gone through the interview process, which was the only part of the whole hiring procedure of which the Court was critical. It did not, in our view -- this has become a matter of contention; but in our view it clearly -- the Court did not find purposeful discrimination. And as I've said, in response to Mr. Justice Rehnquist's question, it did not find a violation of the Fourteenth Amendment.

We submit that the Court of Appeals erred in placing its reliance on the work-force labor-market comparison.

My argument on that score is a simple one, I think, despit e the impression thatmight be gotten from the rather

extensive discussion of the record that appears in the briefs here. Let me try to make it simple.

That sort of comparison, the racial composition of an employer's work force, and of the racial composition of a labor market, is -- is a -- in some circumstances, a valid test for whether there has been a violation of Title VII. But the circumstances simply did not obtain here.

For one thing, the circumstances didn't obtain because of the problem induced for the labor market statistics by the hiring practices of the City of St. Louis schools. City of St. Louis schools deliberately tried, and succeeded, in maintaining an approximate fifty-fifty racial balance between whites and blacks on its faculty.

QUESTION: Let me get my geography straight. Hazelwood abuts on St. Louis County?

MR. ALLEN: Well, it abuts in a sense, your Honor. The City of St. Louis, as I understand it, runs North along the bluffs of the Mississippi River. And that -- there is a small point there where the Hazelwood District, which generally lies North of the City of St. Louis, abuts it. But in no realistic sense is that a channel of trade or communication between the two. It is fairly described as an outlying district, your Honor.

QUESTION: Is it part of St. Louis County, do you know?

MR. ALLEN: It is part of St. Louis County, yes, your Honor.

QUESTION: And why do you think every black teacher-applicant in the St. Louis area would rather go to St. Louis than Hazelwood?

MR. ALLEN: I don't think that is the case, Mr. Justice Blackmun.

QUESTION: Well, isn't your statistical analysis based on that assumption?

MR. ALLEN: No, I think not, your Honor. I think our statistical analysis is based on the propisition that there are not 15 percent of teachers in the work force in -- who are black in St. Louis city and county who are available for hire by Hazelwood.

The government's position, as I understand, is, that the work force comparison is legitimate, because absent discrimination, it means that that would be the composition of the employer's work force. And that situation is simply not true, here, where one has this distorting effect. That is our position in that regard.

But there is really a deeper and more basic flaw in the use of the work force/labor market comparison in this case. At its best, even if constructed validly, that sort of comparison is a surrogate only for a true comparison of how an employer has treated black applicants, actual

black applicants for jobs on the one hand, and how he has treated applicants generally on the other hand.

Now, the government does not deny that, I don't think. They don't acknowledge it, but they don't deny it. And it seems an obvious enough point.

They say that this latter kind of evidence was not available in the record. But there was that evidence in the record,, evidence as to the number of applications generally, and the number of hires generally; the number of black applicants, and the number of black applicants hired. And that evidence, as I've indicated, showed that blacks fared at least as well as whites in the periods 1971-72, 1972-73 and 1973-74.

QUESTION: Mr. Allen, the record identifies I think it's 52 black applicants--

MR. ALLEN: 52 unsuccessful black applicants.

QUESTION: 52 unsuccessful; does the record indicate whether or not some of the other unsuccessful applicants may also have been black?

MR. ALLEN: That is exactly what I'm now going to turn to. Because that is the government's principal position with respect to the applicant flow data, and it's important to understand.

There were six -- there were six black members of the Hazelwood faculty at the beginning of the 1971-72

school year. At least 16 were hired by 1973-74, because there were 22 on the faculty in 1973-74.

QUESTION: When was it that you found that the Federal government was after you?

MR. ALLEN: In October, 1972, your Honor.

QUESTION: Could that account for the additional --

MR. ALLEN: It did not in fact -- well, I suppose it could, your Honor. The fact was that -- there were 13, according to the District Court, 13 black members of the faculty in the Fall of 1972. Presumably before the notification had been given, although after Title VII was made applicable.

QUESTION: My question was when they had official notification; when they found that the Federal government was moving around.

MR. ALLEN: As far as I know, it was October of 1972, your Honor. The record doesn't show any earlier date; I suppose there may have been an earlier date; I don't know.

The one -- there were 17, all told, in this period who were either hired or offered jobs. In that same period, the government, as I've said, identified 52 unsuccessful black applicants. The rate of success was about 25 percent on the basis of those figures.

At the same time, there were 7,800 applications generally, of whom 640 were hired; overall rate of success of 8 percent.

Now, in addendum A to our reply brief, we have made allowances for any that -- black applicants that may be missing from among those the government identified.

QUESTION: Didn't you say in recent years you didn't have race on the application?

MR. ALLEN: These data, as I understand, had to be gathered specially for the government. In other words, the identifications were made specifically for this case.

QUESTION: How was that done? You know? You don't know?

MR. ALLEN: I don't know. I know --

QUESTION: I can't imagine how.

MR. ALLEN: Well, let me -- Mr. Justice Marshall, one way that the figures of six --

QUESTION: One way they could do would be to see if the student was from Lincoln University; that would be one way.

MR. ALLEN: That is with respect to applicants; yes, your Honor. With respect to successful applicants, there are reports formerly to the Department of Health, Education, and Welfare, now the Equal Opportunity Commission, that asked for a racial breakdown on the faculty. And those reports are in the record. Thatis where -- but the racial identification of the applications was made, in part, by the school district, as I understand it, and part by the FBI , which

went through the school district's records.

The record, I submit, shows that there are no significant number of black applicants who were not identified by the FBI. The -- all the applications for 1973 and '74 school year, and the 1972-73 school year were available to the FBI and the time it conducted its file search. Some from 1971-72.

Hazelwood school principals were deposed, their depositions were taken. And they were all asked about the blacks they have interviewed. The analysis of their testimony on deposition is in addendum B to our reply brief, and indicates that at most a very few black applicants who were interviewed are unaccounted for.

And 70 percent, on the basis of the figures that are know, 70 percent of the black applicants who were interviewed, who were known to have been interviewed, were identified as having been interviewed, 70 percent of them were hired. And that is a larger percentage than obtained for applicants generally, although that precise figure is not of record. It can -- an estimate can be made of how many interviews there were for the number of hires, and the proportion would be much less for applicants generally.

QUESTION: Mr. Allen, if the District Court -- if you had made this argument to the District Court, and the District Court had found against you on it and decided to

consider just the evidence that the Court of Appeals ultimately relied on. And the Court of Appeals affirmed the District Court's finding as not clearly erroneous. Would you --

MR. ALLEN: No. I think that -- Mr. Justice Rehnquist, that would not be a clearly erroneous type of finding. I think this is a question of law, as to the kind of showing that has to be made, in order to justify a -- make a holding that a prima facie case has been made under Title VII.

QUESTION: This is a pattern of practice suit?

MR. ALLEN: Yes, yes, your Honor.

QUESTION: Apart from that, there's two basic types of Title VII violations, aren't there? There's the Griggs v. Duke Power Co. type, which deals only with effect --

MR. ALLEN: Yes, yes.

QUESTION: -- deliberate effect. And then there's this type, in which there has to be a proof of a discriminatory purpose; isn't that right?

MR. ALLEN: Well, I don't know if the government would concede that.

QUESTION: A policy or practice --

MR. ALLEN: A policy or practice --

QUESTION: -- of discrimination.--

MR. ALLEN: -- of discrimination.

QUESTION: -- which has to be proved by the

plaintiff, but after the plaintiff proves certain things, then it perhaps becomes the duty of the respondent, of the defendant, to rebut the prima facie case.

MR. ALLEN: Yes. Well, we would submit --

QUESTION: That was -- that's the McDonnell -- that's the basic McDonnell --

MR. ALLEN: That's correct, your Honor.

QUESTION: And this is the latter type of case.

MR. ALLEN: This is a pattern or practice type of case.

QUESTION: This is not a Duke Power kind of case at all, is it?

MR. ALLEN: Well, we believe, your Honor, that in deciding the case on the basis of the -- principally on the basis of the work force/ labor market comparison, the Court of Appeals decided what amounts to an effects case, regardless of what the case may have been conceived of by the government at the beginning; that the Court of Appeals did not itself draw the further inference of purpose from the findings it made. And we submit, that given the infirmity of the statistical showing; given the refutation of it in the applicant flow data that I have been talking about, that no such finding could have been made.

QUESTION: Well, Mr. Allen, what do you do -- am I right, did you say earlier -- the District Court found

sixteen --

MR. ALLEN: No, the Court of Appeals. The Court of Appeals found sixteen cases, your Honor.

QUESTION: -- cases of identifiable discrimination.

MR. ALLEN: Identifiable discrimination, yes, sir.

QUESTION: That's in the sense that more qualified -- no more qualified whites were hired?

MR. ALLEN: That is correct, Mr. Justice Brennan; yes.

QUESTION: And you suggest that no significance i s to be attached to it?

MR. ALLEN: I don't suggest there's no significance. Let me state --

QUESTION: Well, why isn't it dispositive?

MR. ALLEN: No, let me state two or three things about it. First, the government, in opposing certiorari, suggests that it was of dispositive significance, said that the judgment could be affirmed on that basis solely. They abandoned that position in arguing the merits, and no longer claim that.

QUESTION: Well, that's no answer to me.

MR. ALLEN: Well, that is a preface to what I was going to say about it. The fact is, your Honor, that the sixteen cases out of fifty two do not establish a prima facie case of discrimination, because Hazelwood showed that

the hiring procedures that the applicants were subjected to were operated fairly in the generality of cases. That is point one.

QUESTION: And yet they -- notwithstanding which, however fairly they operated, they resulted in sixteen cases of identifiable discrimination?

MR. ALLEN: They resulted in sixteen cases of --

QUESTION: Well, I can't imagine -- that doesn't strike me as a very fairly operated proceeding.

MR. ALLEN: What they resulted in, your Honor, was sixteen cases in which the McDonnel Douglas four point test was satisfied. And I suggest that even in a case where the rest of the evidence was neutral as to the fairness of the hiring procedures -- and that's not this case; in this case there's positive evidence that the hiring procedures were fair -- even in another case, the McDonnell Douglas -- satisfaction of the McDonnell Douglas test does not mean necessarily or even always reasonably to a finding that there was purposeful discrimination, and certainly not a pattern or practice of discrimination.

QUESTION: If we disagree, I guess that's the end of the case.

MR. ALLEN: Well, I think you have to -- to go one further step, your Honor, and find that these 16 cases, two of whom were interviewed -- only two of whom were interviewed

-- the others were -- all that happened to them was that they were not referred for interviews, according to this mechanical process of referral that I've referred to.

QUESTION: Mr. Allen, assuming that the party would be unable to get eligible school boards and all of the principals to admit that they discriminated; assuming that you couldn't get that, what other evidence could you get?

MR. ALLEN: In a case like this, Mr. Justice Marshall? If the applicant flow data that were in the record showed that a much lower proportion of black applicants were being hired than white applicants, I wouldn't have any problem with even inferring purposeful discrimination, if the discrepancy were great enough inthat kind of case. But that is not what this record showed.

QUESTION: That would show it? By statistics alone?

MR. ALLEN: You certainly can show, by proper statistics, one can make a case from which purpose can be inferred.

QUESTION: That's the trouble -- that's the trouble, isn't it?

MR. ALLEN: Well, I --

QUESTION: Mr. Allen, had you finished your answer to me?

MR. ALLEN: I think not quite.

QUESTION: I thought so.

MR. ALLEN: You would have to take one further step, Mr. Justice Brennan, and that is to find that the cases of the 16 made a pattern or practice by themselves of discrimination.

QUESTION: Even if purposeful.

MR. ALLEN: And purposeful?

QUESTION: Even if purposeful.

MR. ALLEN: Even if purposeful; that's correct, your Honor.

QUESTION: In other words, you are suggesting, are you, that there is -- must be a margin, a tolerance for mistakes?

MR. ALLEN: That in a situation of this sort, where there were thousands of applications each year for teaching positions, it -- not all blacks are going to be hired, just as not all whites are hired; yes, your Honor.

QUESTION: You don't mean thousands of applications to Hazelwood?

MR. ALLEN: Yes.

QUESTION: Thousands?

MR. ALLEN: Thousands.

QUESTION: The case isn't over, I take it, if -- even if we agree with you that purposeful discrimination was not challenged -- or found by the Court ofAppeals?

MR. ALLEN: Well, there are twoseparate points,

your Honor. I did not really get to the constitutional argument.

QUESTION: No, you haven't answered; the answer is, no, the case isn't over. We'd still have to decide that purposeful discrimination is necessary in order to sustain the Title VII case.

MR. ALLEN: No, your Honor, I think that is not quite what my argument is.

QUESTION: Well, what do you say? Do you say Title VII is unconstitutional? Unless there is a finding of purposeful discrimination?

MR. ALLEN: Unless -- and have evidence to support that finding.

QUESTION: All right, so that--

MR. ALLEN: We have urged that, your Honor.

QUESTION: So that if we don't find purpose in this case, then the Title VII -- you say the Title VII --

MR. ALLEN: Cannot constitutionally be applied --

QUESTION: Well, that's what I meant. You haven't argued that.

MR. ALLEN: I have not argued that, this morning. I have been -- devoted myself to the other point, which I thought would be better elucidated by counsel's argument.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Allen.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THERESPONDENT.

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

We find ourselves in the peculiar position here of not believing that either of the questions presented in the petition for certiorari, which this Court granted, is really presented by this case, unless it can be said that the second question is presented in a very limited sense.

We went into the District Court in this case, and introduced evidence to establish a four-pronged showing of a prima facie case of employment discrimination by the Hazelwood School District. And that four-pronged showing, as we presented our case, is very well summarized by Mr. Justice Clarks' opinion for the Court of Appeals set forth in the Appendix to the petition for a writ of certiorari --

QUESTION: Let me ask you, Mr. Wallace --

MR. WALLACE: -- page 8B.

QUESTION: -- since you're referring to Justice Clark's opinion, at page 3B, what seems to me a rather central conclusion of that opinion, at the top of page 3B, where it says, we have concluded that from its establishment in 1949-1951, until at least March, 1974, Hazelwood has engaged in a pattern or practice of discriminatorily failing and refusing to hire blacks in violation of the Act, and

that the United States and certain black teaching applicants are entitled to relief.

Now, it's my understanding that the Act as applied to private individuals was first enacted in 1964, and that it was made applicable to governmental subdivisions only in 1972. Do you support that statement in the opinion as a correct doctrine of law?

MR. WALLACE: Well, the statement is a little elliptical.

QUESTION: Well, it isn't elliptical at all.

MR. WALLACE: It's elliptical in saying, in violation of the Act attached to that whole period of time. The fact of the matter is, the school district was under an obligation under the Fourteenth Amendment not to discriminate in its hiring practices during that entire period of time, and the evidence showed a pattern or practice of discrimination during that period, the portion of which, from March 24th, 1972, was covered by the Act. But the --

QUESTION: What different standard is imposed by Title VII than is imposed by the Fourteenth Amendment?

MR. WALLACE: Well --

QUESTION: In this kind of case?

MR. WALLACE: In this kind of case, probably no different standard substantively. I don't think this case involves any substantive extension of the Fourteenth Amendment

obligation. I think that the impact of Title VII in this case, is a procedural impact in shifting the burden of proof to the defendant after a prima facie showing of discrimination has been made.

QUESTION: Purposeful discrimination?

MR. WALLACE: Purposeful discrimination, which is what's involved in this case, as we understand it.

QUESTION: Do you feel that it's a pattern or practice case?

MR. WALLACE: That -- we don't believe that the pattern or practice language of the statute is limited to purposeful discrimination. But this case is concerned only with purposeful discrimination. I think I can explain this by briefly discussing these --

QUESTION: Well, suppose we disagree with you and agree with your adversary that there was no finding of purposeful discrimination in this case? Do you lose?

MR. WALLACE: Oh, no, I think that it would still be open for such a finding to be made in the case, if you're not satisfied --

QUESTION: We would stop and remand, then; is that it?

MR. WALLACE: -- if the Court was left in doubt about that. But I don't see any room for doubt about that.

QUESTION: I understand.

MR. WALLACE: And then beyond that there is the question whether the other type of suit would be applied here. But I don't see any basis for conceiving of the Court of Appeals decision here as being based on the rationale of Griggs, that unintentional effects from the application of standards or of tests have to be justified as a business necessity, because the case never even got to the point of showing what standard was disqualifying a disproportionate number of blacks, in statistical showing, to even raise the question of whether that's a justifiable standard to have that effect.

The case, as it's decided here, on the face of it, involves a conclusion by the Court of Appeals that a prima facie showing has been made here; that no explanation other than race accounts for the showing of the disparate effect.

QUESTION: Is that a question of law or a question of fact, in the sense, could the Court of Appeals have said to the District Court, you said there was no prima facie showing; we think there is one; therefore, we think your finding was clearly erroneous?

MR. WALLACE: Well, it's -- I think it's fundamentally a question of law -- of course it's mixed with questions of fact -- but it's fundamentally a question of law, whether we made a prima facie showing of discrimination that stands unrebutted.

Now, let me -- this anticipates a little bit the analysis that I was intending to give here on page 8B of the Appendix of the petition of the four-pronged -- of the showing that we did make in this case.

The first, a history of discriminatory practices prior to the extension of Title VII to state and local governments. And that started off -- and I have to differ with opposing counsel on that point -- with a de jure discriminatory hiring practice that was in effect and required by Missouri law, and in effect in the Hazelwood District prior to this Court's decision in Brown against Board of Education. It's true, there was no segregation of students or teachers in Hazelwood. But Missouri law required every school district, including Hazelwood, to hire only white teachers to teach white students, and only black teachers to teach black students. And they had nothing but white students at Hazelwood.

QUESTION: Mr. Wallace, do you -- you rely on that, I take it, in part, to support a constitutional violation. But is that relevant to the question of whether there was a statutory violation?

MR. WALLACE: Well, it is; it's part of the background here to the period in which the statute was in effect. There was an enormous momentum of hiring practices built up here, a system that was based on the hiring of only white teachers

QUESTION: Well, let me -- let me --

MR. WALLACE: -- every year, right up to the statute's enactment, and then during the years after the statute's enactment.

QUESTION: Are we being asked to decide a constitutional question here?

MR. WALLACE: I don't believe so.

QUESTION: I don't think so. That's the reason -- it seems to me you go back and forth, and your brief does the same thing, between a constitutional problem and a statutory problem. And I frankly have some difficulty keeping the two separate.

MR. WALLACE: Well, part of the obligation arises out of the situation in which the District found itself. Because part of what the statute is aimed at is the perpetuation of past discriminatory practices. And when you have had a system set up so that all your feeder teachers institutions which you've been recruiting and hiring over the years are geared to providing predominantly white faculty, some effort has to be made to change that pattern of hiring into a non-discriminatory pattern; yes, there is that obligation at the outset of the statutory period.

QUESTION: You think the statute imposes an affirmative obligation to employ more blacks than whites during the period, in order to equalize the total --

MR. WALLACE: No, not to equalize or employ more blacks than whites, but to revise the hiring practices in to a non-discriminatory pattern of hiring, so that if we came forward with a prima facie showing of discrimination in the results, both as to particular individuals and in the overall pattern of hiring, the State could show that its practices are not discriminatory, which they didn't do here.

QUESTION: Well, to sharpen the point, because I think it relates to the statistical showing: supposing two months after the statute went into effect, you brought a suit a nd you put in evidence that at that particular moment in time, 99 percent of the teachers were white. Would that tend to prove anything?

MR. WALLACE: Maybe not in itself, without some indication which this record shows of the quantity of teachers being hired year by year.

QUESTION: Well, could we focus on the hiring rate? Your opponent seems to argue that we should look at the rate of hire, and then on the rate of hire, the proportion is about equal.

MR. WALLACE: Well, the rate of hire what? I mean, he's saying the rate of hired applicants. We don't know the race of the applicants, and there are serious problems with looking only at the applicants, when you have a situation in which the applicant group may well be distorted.

QUESTION: But whose burden was it to identify the race of the applicant?

MR. WALLACE: We had a burden of presenting a prima facie case, and we presented a prima facie case that was partly statistical in nature, but that has nothing to do with the statistics that opposing counsel is talking about. Our statistical showing had nothing to do with the treatment of applicants. And their contention is based on an interpolation from bits and pieces of the record that were not designed to make a statistical case for either the plaintiffs or the defendants.

QUESTION: Well, I'm just wondering how your statistical case differs fromthe hypothetical I gave you, the two or three months after the Act was passed, there was evidence that 99 percent of the teachers were white? Did you show anything more than that statistically?

MR. WALLACE: Yes, we went way beyond two or three months after the Act was passed.

QUESTION: Way back?

MR. WALLACE: We went back and forward.

QUESTION: The period before 1954?

MR. WALLACE: Well, this is all part of the background. I mean, if one considers some of that excessive, it doesn't detract from what we've showed during the '72-'73, and the '73-'74 period. This suit was brought early on in the

history of the Act's extension to state and local governments because there was reason to move in this particular area, where you had a history of a number of all white faculties in suburban school districts. And this was the largest one.

QUESTION: In other words, you're submitting that the Hazelwood School District, or some other school district, could be in violation of the Act the moment it was passed.

MR. WALLACE: Well, not the moment it was passed. And that really isn't presented here. That's been presented hypothetically in questioning. The suit was brought some time after that, and the evidence had to do with their hiring practices. Every one of the sixteen individuals the Court of Appeals found had been discriminated against in hiring, those occurrences were during the statutory period, not during the pre-statutory period.

And the other fifty -- the others of the fifty-some odd we presented evidence with respect to, all occurred during the statutory period.

QUESTION: You said, then, 32 people hired during the period that these 16 were discriminated against, you say, 32 hired, there've been 16 whites and 16 blacks hired. Would you -- and the 16 blacks that weren't hired are the ones that were discriminated against, you say.

MR. WALLACE: Well, it would depend on what your evidence showed. I mean, part of the point of having the --

QUESTION: Well, you say they were equally competent, they were at least as competent as the ones who were hired, and the ones who were hired were white. And that's your discriminatory showing.

MR. WALLACE: Well, it's not just equally competent. If you look at the findings that are involved here, there are a number of instances in which whites who had been on academic probation and had other -- on the face of it --

QUESTION: These are findings by the Court of Appeals --

MR. WALLACE: That is correct.

QUESTION: -- of fact.

MR. WALLACE: Of fact presented in the record here, and not contradicted by anything found by the District Court in its treatment of these individuals. The District Court simply didn't make as detailed a finding with respect to each of these individuals. But you'll notice, we've summarized some of them in the Appendix to our brief, in which there is instance after instance of an individual who was black, who applied, who didn't get the job, and then persons who had been on probation, suspended, dismissed from college, on academic probation, had very low grades, et cetera, who were white, were hired for the same job opportunity.

These are not mild instances. On the face of it,

they indicated discrimination. And part of what opposing counsel has been contending here, what petitioners have been contending, is that their practices themselves are non-discriminatory. And as to that, the evidence of pre-Act discrimination in result is very probative. Because they're following the same practice that for years resulted in, first, an all-white, then a virtually all-white faculty, at a time when they were under a Fourteenth Amendment obligation not to discriminate in their hiring practices.

QUESTION: Well, let me just get it straight, what your position is, following up on your colloquy with Justice Stevens. If two years after the Act was passed, and your suit was filed, it is shown that since the Act was passed they've hired twice as many Negroes as whites. Now that wouldn't -- I take it you would say that would not be an adequate answer.

MR. WALLACE: Well, that would -- that showing certainly would not be a prima facie statistical showing of discrimination against blacks.

QUESTION: Well, I know.

MR. WALLACE: It might be individuals who were discriminated against. There might be evidence of that.

QUESTION: Well, let's say that at the time the Act was passed 90 percent of the employees were white,as a result of Fourteenth Amendment type discrimination prior to

the passage of the Act. As soon as the Act is passed, the company starts hiring twice as many blacks as whites.

MR. WALLACE: Well, that hypothetical is very different from this case. Yes -- we'll go ahead.

QUESTION: Well, would you say that the showing -- the actual hirings would be an answer to --

MR. WALLACE: Well, they might very well.

QUESTION: It might be.

MR. WALLACE: On the face of it, of course. You'd have to know something more about the case, but on the face of it, they might well be an answer. Here there wasn't any answer offered to any of the prima facie case. That was part of the difficulty here. The -- after we introduced our evidence -- our statistical evidence, historical evidence, the evidence of the standard lists -- procedures being used, and the evidence of the individual instances of discrimination, the rebuttal other than simple cross-examination of our witnesses was summarized by the Court of Appeals at the bottom of page 7B of the Appendix to the petition quite accurately as follows: the school district presented one witness and several exhibits. The witness testified to the total number of teachers who applied and were hired during the '71-'72 and '73-'74 school years, and you can see the figures there at the bottom of page 7B, which indicated hiring in excess of 200 teachers per year during the statutory period. And the

exhibits consist of the policy manual, policy book, staff handbook and historical summary of the formation of the Hazelwood School District.

And then, at the top of page 8B, Hazelwood argued that no discrimination could be proved because equal employment opportunity was its official policy, and because of the small number of black teachers was comparable to the small number of black students enrolled in Hazelwood schools.

And beyond that, the only defense offered was an attempt by Hazelwood to contend that it was following a policy of hiring the best qualified and the vast majority of the best-qualified applicants were white. And for that reason, there was a very small number of blacks, ten up to the time that Hazelwood was notified that our investigation was under way , with that information as footnote 10 on page 7 of our record. For that reason, there was a very small number of blacks hired.

And because that was the defense, our evidence focussed on showing who was hired in place of the unsuccessful black applicants, introduced extensive evidence with respect to which of these people hired had poorer academic records, had been on academic probation, and that sort of thing.

IN buttressing our statistical case, and the rest of our showing, we did try to isolate some examples of individuals who were discriminated against. But we nowhere

purported to do an exhaustive study of the application lists to the extent they were even available in an effort to ascertain what total number of what percentage of applicants had been black or had been white. In fact, the United States expressly, at the beginning of its case on trial, and this is set out in full, this explanation of our introduction of any of this material, on page 11 of the brief filed in our support by the NAACP Legal Defense Fund. And there, we said at the outset of the case, in view of the District's action severely restricting the pool of available qualified black applicants, and its practice of destroying application files after one year, it has not been possible to obtain facts on all or probably most black applicants to the District.

And we've collected in our brief, in footnote 93 on page 26, a number of examples of black applicants whose applications could not be found by the District, even though they were during the period when supposedly that the applications had not yet been destroyed.

QUESTION: I hope that you know that these were black applicants, that their files --

MR. WALLACE: These individuals testified that they --

QUESTION: At the trial?

MR. WALLACE: Yes, yes, or were deposed. Now, what -- as this statement went on to say, however we have been able

to locate and identify at least fifty or sixty black applicants for 1972 and1973 and 1973 and 1974 who, the evidence will show, applied for positions for which there were vacancies, and that Hazelwood consistently hired white applicants, either less or no better qualified for the vacancies.

But the record is actually very sketchy on how we identified these fifty or sixty, because no defense was ever made that black applicants were being treated better than white applicants; the whole defense was the other way around, that the whites hired were better qualified than the blacks, and that's why so few blacks were being hired. And it wasn't part of our statistical showing to try to compare how the applicant pool was being treated.

So the record doesn't really show what happened here in any detail. But all that did happen was that a search was made through the records to pull out some examples of black applicants based on knowledge of predominantly black high schools or colleges that they might have attended, or some other indication on the face of the application whether that individual was black. This wasn't part of an effort to build a statistical case. It was an effort to identify some particular victims of discrimination, for that's part of our prima facie showing, and then interview those people and in the course of those interviews they'd be asked, do you know anyone else who was an unsuccessful applicant.

QUESTION: You say, Mr. Wallace, you say that wasn't part of your statistical case. Your statistical case was, one, the comparison of the percentage of black teachers in Hazelwood with the percentage of black applicants or potential applicants in St. Louis metropolitan area. What else did it consist of?

MR. WALLACE: Yes, the disparity --

QUESTION: Well, what else did it consist of?

MR. WALLACE: That was the statistical case.

QUESTION: You mean, that, you say, met your prima facie burden?

MR. WALLACE: That was one of the four parts of our prima facie case, that in comparison with the other employers drawing from that employment area, there was a gross statistical disparity in the number of -- in the percentage of blacks.

QUESTION: Well, Mr. Wallace, is it not correct that if we put to one side for the moment the fourth part of the test, the 16 specific acts of discrimination, each of the other three parts of the test would apply equally to my hypothetical example two months after the Act was in effect, when 99 percent would be white; you would have then proved a prima facie case.

MR. WALLACE: Well, if there had been findings of 16 individual instances --

QUESTION: No, no, I'm saying if you put that to one side.

MR. WALLACE: Yes.

QUESTION: I'm just saying that your case really depends on the 16, doesn't it?

MR. WALLACE: Well, it's an important part of the case in the delimited period. But the period is not as limited as your hypothetical.

QUESTION: But is there any difference in --

MR. WALLACE: And the statistics have greater probative value than they would under your hypothetical.

QUESTION: Well, how is it different in probative value if you have the same -- precisely the same kind of statistical evidence? I mean, it's the number of people employed as compared with the total number -- the percentage in the labor market. And there's a perfectly logical explanation, which may be an unhappy one and uan undesirable one, but it's a non-statutory explanation for the predominant number of whites in the labor force at the time.

MR. WALLACE: The statistics do show that the rate of hiring is, in itself, under the percentage in the labor market.

QUESTION: But the question that this keeps raising in my mind is, who had the burden of showing --

MR. WALLACE: The statutory period --

QUESTION: -- the make-up of the hiring rate and the failure to hire more blacks during the period after the statute was passed.

MR. WALLACE: But we showed that in these statistics. They show, when 284 are being hired altogether, and only 7 or 9, whatever it was, were black, that is way under the 15 percent. You don't have to compare it only with the total work force. The statistics also show that the rate of hiring in itself is way under that percentage. So it's all part of the prima facie showing that was made here.

The point is that the other attempt to interpolate from statistics raises evidentiary questions that were not explored below, not only about how incomplete those statistics were, but we never introduced any evidence on discriminatory reputation to show that the applicant flow to Hazelwood was being distorted, because there was never any reason to have to introduce that. The defense wasn't that black applicants were being treated better than white applicants; it wasn't put in issue in this case.

There is something very similar to what the Court was referring to in Castaneda v. Partida in this case, an attempt to put forward a new array of a different statistical case based on untested assumptions that were not explored below, because the whole theory of the defense was different below. And it seems to us that this kind of attempt to rebut

our prima facie showing comes too late, when it's based on evidentiary questions. And the evidence isn't there.

My time is expired, unless there are further questions.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Wallace.

You have one minute, Mr. Allen.

REBUTTAL ARGUMENT OF WILLIAM H. ALLEN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. ALLEN: May it please the Court:

In its brief in the T.I.N.E.-DC case here this term the government has said that a pattern case requires more than isolated rejections of qualified individuals. I submit that that is why the government has not argued that the cases of the 16 establish its prima facie case here. And if I was -- if in answer to Mr. Justice Brennan's question I said that we acknowledged that the test of McDonnel Douglas was met in the case of those applicants, I did not mean to say so. We have assumed that arguendo in some points in arguing the case. As for --

QUESTION: Excuse me.

MR. ALLEN: Yes -- no, go ahead.

QUESTION: Isn't it true that some 500 -- since the Act was passed, some 500 whites were hired, and 16 Negroes.

MR. ALLEN: Sixteen blacks have been hired.

QUESTION: And 500 whites.

MR. ALLEN: And somewhere on that order of -- and that was --

QUESTION: Since the Act was passed?

MR. ALLEN: Since the Act was passed, your Honor. And that is a function of the relative number of applications. Because if one takes the number of applications and compares the number of blacks hired and the number of non-blacks hired, the blacks fared better; and I earnestly -- I earnestly -- solicit your attention to pages 3 to 8 of our reply brief, and addenda A and B to that reply brief, for a demonstration of the near completeness of the showing of the number of black applicants in the period that's in question.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:04 o'clock, p.m., the case in the above-entitled matter was submitted.]

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