ORIGINAL

In the

Supreme Court of the United States

COUNTY OF LOS ANGELES, ET AL.,	)	
	)	
PETITIONER	)	
	)	
V.	)	
	)	
VAN DAVIS, ET AL.,	)	No. 77-1553
	)	
RESPONDENTS.	)	
	)	

Washington, D. C.
December 5, 1978

Pages 1 thru 51

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IN THE SUPREME COURT OF THE UNITED STATES

COUNTY OF LOS ANGELES, ET AL.,	:	
Petitioners,	:	
v.	:	No. 77-1553
VAN DAVIS, ET AL.,	:	
Respondents.	:	

Washington, D. C.

Tuesday, December 5, 1978

The above-entitled matter came on for argument at 1:10 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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 F. STEWART, ESQ., Chief, Labor Relations Division, County of Los Angeles, 648 Hall of Administration, Los Angeles, California 90012; on behalf of the Petitioners.

A. THOMAS HUNT, ESQ., Center for Law in the Public Interest, 10203 Santa Monica Boulevard, Los Angeles, California 90067; on behalf of the respondents.

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 1553, County of Los Angeles against Van Davis.

Mr. Stewart, I think you may proceed when you're ready.

ORAL ARGUMENT OF WILLIAM F. STEWART, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This is an employment discrimination case in which the fire department of the County of Los Angeles was found liable in order to make future hire in accordance with a quota for blacks and Mexican-Americans until the fire department achieved racial parity with the surrounding county population.

The case raises the issue of whether 42 U.S.C. Section 1981 embodies constitutional equal protection standards. It requires a showing of discriminatory intent to establish a violation of that statute; or whether Title VII standards, in which intent is irrelevant, are applicable.

Since the discriminatory hiring took place prior to the March, 1972, effective date of Title VII as to public agencies, the case raises the issue of whether through 1981, Title VII standards can be applied retroactively as to public agencies.

The other fundamental issue is whether the quota hiring order mandating 40 percent minority hires until racial

parity is achieved, is within the remedial authority of the trial court under the facts and the findings of the case.

This employment case is different from others of recent vintage in that it comes before the Court with an express finding by the trial judge that the County of Los Angeles had not engaged in any intention discrimination.

The county has long administered a traditional civil service aptitude test for firefighters as well as other applicants for county jobs, similar to those utilized by the District of Columbia in Washington v. Davis.

Other testing criteria for this particular job were a rated oral interview, 5'7" minimum height standard, and physical and mental tests -- medical tests.

This action was brought in January of 1973 by plaintiffs, none of whom were prior unsuccessful applicants for the position. And they challenged only two exam criteria.

Two written exams -- one given in 1969 and one given in 1972 -- and the height standards, and these were the only exam criteria shown to have a disproportionate impact on minorities.

Now, the administration of the 1972 case was somewhat unique. Because after the 1969 exam, the County of Los Angeles, in an attempt to increase minority representation in the fire department, and to reduce any disparate impact of their tests, decided to go to a random selection method.

In that regard, they administered the written tests in January of '72, graded it; 97 percent of the applicants passed.

The County's intention, then, was to draw by random selection applicants from those that passed -- the 97 percent that passed -- and then proceed with them through the regular process, the oral interviews and other portions of the exam which had not been shown to have any adverse impact.

Unfortunately, the random selection method was enjoined by another lawsuit on the basis that it violated the civil service provisions. Consequently, there was no hiring by the County during the two years of the pendency of this litigation.

Finally, in desperate straits because of the shortfall of firefighter personnel, the County proposed to interview the top 540 applicants on the written exam for the purpose of filling the immediate requirements of the Fire Department.

There was no hiring, however, for approximately two years prior to the effective date of Title VII as to public agencies, until after the judgment in this case.

The law -- the threat of the lawsuit intervened, and there was -- consequently the County never did effectuate the intent to interview the top 544 applicants, but proceeded with them all through the remaining stages of the examination process, and no adverse impact, nor was there any discrimination

in the compiling of the subsequent eligibility list.

During the trial, the court found no intentional discrimination on behalf of the County, but in reliance on Title VII standards, held the County liable because of the written exams in 1969 and 1972 had a disproportionate impact on minorities and had not been validated.

The court upheld the height standard.

The court went on to propose a remedy for the purpose of eliminating -- or remedying alleged past discrimination, a remedy of 20 percent blacks and 20 percent Mexican-Americans hired until complete racial parity was achieved between the County Fire Department and the community of the County of Los Angeles.

The Ninth Circuit, on re-hearing, raised -- on re-hearing after the County raised the intent issue in the wake of this Court's decision in Washington v. Davis, reversed the trial court's Hite finding, upheld the quota order, and upheld the finding of discrimination in the use of the tests on Title VII grounds, notwithstanding the lack of discriminatory intent, expressing the holding that intent was irrelevant under Section 1981, as it is under Title VII, and that there was no operational distinction between Title VII liability and liability based on Section 1981.

We believe that the circuit court seriously erred in holding that Title VII liability principles apply to Section

1981, and that no intent to discriminate need be established.

This Court in Griggs v. Duke Power, articulated judicially the disproportionate impact standard, based on this Court's interpretation of Title VII of the Civil Rights Act of 1964.

This issue -- the issue in this case, then, really revolves around the intent of the 39th Congress in the original enactment of a statute that we now know as Section 1981; and the effect, if any, of Congress' enactment of Title VII in 1964.

QUESTION: Mr. Stewart, you've undoubtedly seenthe Solicitor General's amicus brief in this case suggesting that the case boils down to a lot less than it seemed to after the revised opinion of the Ninth Circuit.

Are you going to discuss that at some point in your argument?

MR. STEWART: Yes, I will, Mr. Justice Rehnquist. I did also discuss it in my reply brief.

Perhaps I could address it now. I'd just simply state that I think the government's position was wrong on that point; the quota hiring order in this case was designed to -- was clearly designed to remedy past discrimination, and it was clearly predicated upon a finding of violation of Section 1981.

That clearly raises the issue of the standards of liability under Section 1981, which we feel have to be resolved.

If the Court determines that constitutional equal protection standards apply to Section 1981, then under the trial court's finding in this case that there has been no deliberate discrimination, then we believe that the quota hiring order must fall in its entirety.

The quota hiring order is still in effect. The County has been obeying that quota hiring order since judgment was entered in this case.

The Ninth Circuit Court of Appeals did not disapprove of the hiring order. It expressly approved of the quota hiring order, stating, we do not necessarily believe that the one:one:three hiring ratio is incorrect.

QUESTION: But am I right in thinking that you concede that you were governed by Title VII from March, 1972, on?

MR. STEWART: We do.

QUESTION: And that the Court of Appeals concedes that the only gap in this period was between January and March of '72; that is, that the last time there was any effort to administer the test was in January, '72?

MR. STEWART: The test was given in 19 -- January of 1972. It lay fallow while they attempted to resolve the question of the random selection method.

The test was never implemented in a disproportionate manner in that there were hirings made basedon rankings in the test.

The County never did go ahead and interview any of the top 544 applicants on the test. They went and interviewed the entire 97 percent that passed. They interviewed them in January of -- in January and February of 1973, and then compiled an eligibility list at that time, and an eligibility list which was conceded by the plaintiffs in this case not to have been done in a discriminatory manner.

QUESTION: Well, wouldn't it be possible for this Court to vacate the decree of the Court of Appeals and on a standing basis, and simply send it back to the district court or the Court of Appeals for re-framing of an appropriate remedy, considering what a small tail is left of the case?

MR. STEWART: Well, there is still the question of the appropriateness of a remedy under any presumed Titlve VII violation that may have occurred.

The plaintiffs have claimed that our uneffectuated attempt to interview the top 544 rose to the level of a Title VII violation.

I do not believe, however, that they contend that that's justified --

QUESTION: Well, the Court of Appeals didn't hold that.

MR. STEWART: No, they did not.

QUESTION: They haven't dealt with Title VII.

MR. STEWART: Well -- the Court of Appeals, quite frankly, Mr. Justice White, is quite confusing. They've

intermixed the standing questions with 1981 and Title VII and so forth.

I read that case as holding us to a violated Section 1981, notwithstanding the lack of intent, and that -- uphold the quota hiring order for the purpose of remedying past discrimination which could only have occurred under Section 1981.

QUESTION: Well, I wouldn't think -- I would think that you would suggest that if there were a Title II -- if there's some claim on the other side about Title VII, the Court of Appeals should first address Title VII.

MR. STEWART: Well, the Court of Appeals did address that subject.

QUESTION: Yes, but it rested its final holding on 1981, you just said, is the way you read it.

MR. STEWART: As I read it. But the Title VII question was also before them, and I implied that they found no Title VII violations.

QUESTION: May I ask what you understand the 1981 violations to have been, and when it occurred, and who it affected?

MR. STEWART: I understood, from the reading of the Ninth Circuit appeal -- Court of Appeals decision that the 1981 violation consisted of the utilization of the 1969 written exam and presumably the height standard that had an adverse or disproportionate affect on minorities, without

showing that it was validated.

QUESTION: Now with respect to the 1969 test, it's correct, is it not, that there are no plaintiffs who were affected by that test?

MR. STEWART: That is correct.

QUESTION: Then how can that be before us?

MR. STEWART: Pardon, sir?

QUESTIO:N Then how can we have a 1981 issue arising out of the 1969 test?

MR. STEWART: We have the 1981 issue because the quota order, which the court approved, is predicated on the 1981 violation, since the --

QUESTION: Do you argue that the order should be set aside because there is no plaintiff entitled to that relief before the Court?

MR. STEWART: I think the quota hiring order could be -- could be vacated on the basis that it was accepted and that it seeks to remedy alleged discrimination for which plaintiffs have no standing to represent the parties.

QUESTION: Then we don't have to reach this 1981 issue, do we?

MR. STEWART: Well, I think it's a significant -- perhaps on a technical basis.

QUESTION: Maybe we should write a law review article about it.

MR. STEWART: There have been many written about it. But I think it's a critical issue that is really before the Court, because the quota hiring order is predicated upon the -- upon the finding of the 1981 violation.

And as I will note in a moment, I think there is significant problems with finding no intents standard under Section 1981. The adverse consequences under the unfortunate procedures of Title I and VII. The one, the effect on cases that are currently pending with other governmental agencies that have been sued around 1971 and 1972 before Title VII became effective as to their discriminatory acts in which the Court said that intent was not required.

And it implies the question of the applicability retroactively of Title VII to public agencies whodo not become subject to Title VII until 1972.

But we believe that Congress in 19 -- or the 39th Congress, when they enacted Section 1981, could not have had the Title VII adverse impact validation standards that arose through the Court's Griggs decision in mind.

The purpose of Section 1981 was to remove the legal disabilities of blacks, and to provide them with equal protection of the laws.

There are certainly many civil service tests that are administered by the federal government subsequent to enactment of Section 1981 that probably had disparate impact

on minorities, and Congress could not have intended to outlaw those tests simply by showing that they had disparate impact.

The impact on the enactment of Title VII in 1964 on 1981, I submit, was very little if any. Congress considered 1981 to be a separate and independent statute. There appears to be no indication that they intended to change that statute or to remove that remedy.

This Court, in Johnson v. Railway Express, held that the statutes certainly were overlapping and related, but not necessarily that they employed the same standards of liability.

Certainly, they're related to the same end of eliminating discrimination. They apply to racial discrimination. They both apply to employment discrimination. And they both apply to intention discrimination.

But that is not to say that they both apply to the Title VII standard of liability predicated upon a showing of disparate impact.

The constitution itself overlaps to those ends as well. The Court held in Washington v. Davis that the constitutional standards for discrimination were not the same as those for Title VII.

The argument is raised that they should construe Title VII in paria materiae with the Civil Rights Act -- the old Civil Rights Act, now in Section 1981. This strikes a rather discordant note, because the 1964 Civil Rights Act expressly excluded public agencies such agencies such as the

County of Los Angeles, for its coverage.

So you cannot graft onto Section 1981 Title VII standards, by leaning on the rather weak stem of the Court -- of the Congress' enactment of Title VII in 1964, because they obviously intended not to extend that coverage to public agencies until 1972.

To hold that the intent is irrelevant under Section 1981 I think would have adverse conseqsequences. It would permit circumvention of Title VII procedures that were laboriously debated in Congress. It would extend Title VII liability standards to employers that Congress intended to excluded.

Cases have come up recently in the lowere courts, Johnson v. Alexander, where the government argued that the Army was not subject to Title VII. But if suit could be brought under 1981, and apply Title VII standards that way, then the distiction -- or the exclusion of the military from the doverage of Section -- of Title VII in 1964 is relatively meaningless.

Similarly, in Johnson v. Ryder, the claim was made that a bonafide seniority system was illegal by attempting to apply Title VII standards through Section 1981, despite this Court's ruling in the Teamsters case.

The -- recognizing an intent standard for Section 1981

will not adversely impact upon the enforcement of equal employment opportunities, because Title VII is now applicable to public and private agencies.

The plaintiff still has the benefit of Section 1981 in private and public cases where they can show, we believe, deliberate discriminatory nintent.

It does not mean that the statistics are not probative on such a 1981 action, as this Court indicated in Arlington Heights. But they can be probative for proving the question of intent.

But that is a far cry from saying that the Title VII standards of having to show job relatedness applies.

Now I would like to address the quota issue. As I stated in response to an earlier question, the quota was predicated upon a violation of Section 1981. It would follow that if there has been no violation of Section 1981, because there had been no showing of intent, the quota would fall.

Now, we're mindful of the decisions of the lower court, including the observations of this Court in Bakke, that a quota hiring order may be appropriate as a remedy in cases of proven discrimination.

The issue in bar, however, in regards to the quota, is not the appropriateness of quotas in general, but whether the one entered in this was was overbroad, not properly tailored to the extent of the proven wrong. There was an

excess of the Court's remedial jurisdiction.

There's a clear distinction that has to be made between liability and remedy. The quota is a remedy; it's not a device to achieve racial parity. But it must be related to the proven wrong.

The proven wrong in this particular case was the 1969 test, which had a disparate impact on Mexican-Americans; and the height standard.

The quota as a remedy should be applied with caution, because it impacts on innocent third parties, not like applying a remedy of back pay, where it's a question between the employer and the employee.

But the quota remedy obviously adversely impacts on innocent third parties who would be denied a job if they weren't a member of the -- or beneficiaries of the quota themselves.

So we must balance the rights of the victims as against the rights of innocent third parties.

Judging the quota order in this case, we feel that it is clearly excessive. It wasimposed to remedy past discrimination and not to assist the plaintiffs, none of whom had been prior applicants.

It was not limited to the actual ascertainable victims of any discriminatory practices. It was designed to cure presumed discrimination, no matter how remote in time

it may have occurred.

The County fire department was composed of individuals who had been hired over a 25 to 30 year period. It's one of those positions like law enforcement where there's concern where for long term retirements and so forth. And so there's little turnover in that department.

So the quota order in this case presumes a pattern of discrimination extending far back beyond the 1969 test; even beyond Title VII's enactment in 1964. Discrimination that was totally unproven.

An anomaly of the case is that individuals who may have been victimized by any discrimination would have their claims time-barred, as they have not filed in time. But minorities who have not actually suffered discrimination would get a preference under this quota at the expense of non-minor -- of whites and other minorities, not blacks and Mexican-Americans, who are not the beneficiaries of the order.

Thus, we feel that the quota in this particular case has now achieved the character of a device to achieve racial balance, and not a remedy for proven discrimination.

In fact, the findings say that it's designed to cure past discrimination, as indicated by the racial imbalance of the department.

Now, of course, as has been mentioned from questions from your Honors, the fact that the plaintiffs have no standing to represent past applicants indicates that the quota order

was not designed to remedy any discrimination as far as they were concerned, but was designed to remedy presumed past discrimination, discrimination that apparently the court felt would have resulted in the County department then being at racial parity.

There is no evidence as to what the racial composition of the County fire department would have been, even had no discriminatory practices been utilized in past years; no consideration of the racial characteristics of the demography of the County of Los Angeles, whether there's been an increase or decrease in blacks or Mexican-Americans over the years.

The quota order --

QUESTION: This exam was given in 1972, it was given in 1969, and had been given periodically back over the years, had it not?

MR. STEWART: That's right, Your Honor.

QUESTION: Was it an identical exam, or just the same type of exam.

MR. STEWART: It was the same type of exam. There had been some changes over the years. There was no evidence we could ascertain as to the effects of the 1968 exam, which was the one immediately preceding the 1969 exam, or no records as to previous exams.

The only evidence in the trial was -- as to the exam content itself I think was the 1972 exam, and the statistics

relating to the impact of the 1969 exam.

QUESTION: And no evidence in years prior to 1969 as to even who had taken the exam in terms of affect?

MR. STEWART: That's correct. But there was a slight bit of evidence as far as 1968 was concerned. The percentage of minority applicants for the '68 exam was extremely low. I would say -- it's in the pre-trial order, and it's in the appendix, but I would say it was somewhere in the vicinity of about 3 percent or 4 percent minority applicants for the 1968 exam.

QUESTION: And only applicants would have taken the examination?

MR. STEWART: That's correct, Your Honor. But that's contrasted with the 25 minorities who took the 1972 exam, which was the result of an active recruiting effort the County had entered into in the intervening years.

QUESTION: Because part of the claim, the original claim, in this case, was that the discrimination led to very few applicants because of the practice of present members of the fire department to tell their friends and cousins and brothers about it, and to let them into the firehouse to give them some practical experience and to prepare for the exam and so forth; that there was no such recruiting or even availability of the knowledge of the availability in -- among Negro and Spanish-American groups; isn't that correct?

MR. STEWART: That was one of the allegations, but it

was unproven. And there was --

QUESTION: And the fate of that allegation was -- the district court did not rely on it, nor did the court of appeals?

MR. STEWART: That's correct. And there was no finding that they had engaged in discrimination.

And to the extent that there was any intent involved, I think that was dissolved by the Court's express finding that the County had not -- had not engaged in deliberate discrimination. And to the contrary, the court's finding was that the county had made efforts to recruit more minorities for the fire department.

QUESTION: While you're interrupted, perhaps you could explain to me if you can what the basis was for the Court of Appeals stating in footnote 6, right after it had held that the 1969 test was irrelevant in this case because the applicant list had been exhausted before any of these present were applicants.

They had not been effected by the 1969 test. But that second paragraph, footnote 6, it is equally clear that defendant's decision to employ the 1972 written test as a selection device was an unemploy-- was an unlawful employment practice, which had adverse impact on the racial class of plaintiffs.

Now, you're insistence is that although the 1972 test was given, the only time that any -- any time after that

when you hired people, you claim it was conceded that there was non-discriminatory hiring.

MR. STEWART: Yes, but it's been conceded there has been no discriminatory hiring.

QUESTION: So your claim is -- your claim is that the 1972 test has not had an adverse effect on any of these plaintiffs?

MR. STEWART: That's correct. And I think they conceded that in their answer.

QUESTION: So what is the basis -- so what is the basis for this second paragraph of footnote 6?

MR. STEWART: I believe it's an indication that the Court felt -- or the Ninth Circuit felt that the mere threat to utilize the test by interviewing the top 544 rose to the level of a Title VII violation.

QUESTION: Is there some finding one way or another with respect to the 1972 test, in the district court's opinion?

MR. STEWART: Yes, the district court found that the 1972 test violated 1981 and Title VII.

QUESTION: Well, I know, just looking at it as a test. But it -- did it find that these particular plaintiffs had been adversely affected by the test?

MR. STEWART: No, it did not find that they had been adversely effected by the test. In fact, the plaintiff --

QUESTION: Well, did it find they hadn't?

MR. STEWART: Well, I think that it was unnecessary for the court to do that, because the plaintiffs themselves in their second amended complaint, alleged that we had stopped using discriminatory hiring practices, and conceded that they --

QUESTION: Well, again --

MR. STEWART: -- were not adversely affected.

QUESTION: Because if the Court of Appeals is wrong in what they say in the -- in this second paragraph, isn't the case over?

MR. STEWART: Well --

QUESTION: Because they've already said that the 1969 test didn't involve any illegality because it hasn't affected anybody?

MR. STEWART: Well, the case, the Ninth Circuit decision, Mr. Justice White, is, in my opinion, in explicable. But the case is not over because they approved a quota hiring order --

QUESTION: Well, I know, but I don't mean -- what I mean is, that shouldn't you win if they're wrong in that statement?

MR. STEWART: Yes, I think we should win, sir, and that is exactly my position --

QUESTION: -- without going to 1981.

MR. STEWART: Pardon?

QUESTION: Without going to 1981.

MR. STEWART: Or 19 -- or Title VII or anything else.

QUESTION: Just standing.

MR. STEWART: Just standing alone I think could win the case for me.

QUESTION: Well, your suggestion is that there's no basis in the district court's finding for that statement?

MR. STEWART: The district court did find that the county had violated sections 1981 and Title VII.

QUESTION: But they didn't find that these plaintiffs had been affected by the test?

MR. STEWART: No, they did not. There's no question that these plaintiffs had not been affected by the, you know, by the '72 exam.

QUESTION: You see, the Court of Appeals not only said the 1972 test was an unlawful employment practice, but it said it had an adverse impact on these plaintiffs.

MR. STEWART: Is that footnote 6?

QUESTION: Second paragraph of footnote 6.

It said it was an unlawful --

MR. STEWART: Well, the court must have been implying that the threat to utilize the 1972 test in a method that would have had an adverse impact if implemented, adversely affected, and it gave them standing to challenge the 1972 test.

QUESTION: But in any event, you don't know of anything in the district court's findings that support that part of this statement?

MR. STEWART: Not at the moment, sir.

I will reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Hunt.

ORAL ARGUMENT OF A. THOMAS HUNT, ESQ.,

On BEHALF OF THE RESPONDENTS

MR. HUNT: Thank you, Mr. Chief Justice, and may it please the Court:

On the standing point, it is important we believe to note that the holding of the Ninth Circuit that these plaintiffs did not have standing is based entirely upon the fact that the scope of the class was defined as present and future applicant.

The Court of Appeals, at page 1334, specifically stated, in light of the fact that plaintiffs' class did not include any prior unsuccessful applicants, it follows that plaintiffs neither suffered nor were threatened with any injury in fact from the use of the '69 examination.

QUESTION: You've lost me, counsel. I can't find a page 1334.

MR. HUNT: I was reading from the Fed 2nd cite, your Honor.

QUESTION: That's the first opinion, isn't it?

MR. HUNT: No, that's the second opinion.

QUESTION: The second opinion comes before the first one.

QUESTION: Can you give us the page in the appendix? If you had the page in the appendix?

MR. HUNT: The second opinion begins on page 79, and it's at the second sentence on page 83, Your Honor.

QUESTION: Well, now, I'm looking at the appendix for the petition for certiorari.

MR. HUNT: That's what I was looking at originally.

QUESTION: And it's not 1334 in there.

QUESTION: There is no 1334. It goes from the first page of the opinion -- page 1337.

QUESTION: Correct.

MR. HUNT: Your Honor, I meant to say 1337; yes.

QUESTION: 1337 in the lower righthand corner.

QUESTION: Right.

MR. HUNT: And on page 83 of the appendix.

QUESTION: Okay. Beginning, defendants have challenged?

MR. HUNT: Yes, the next sentence after that sentence.

In light of the fact that plaintiffs' class did not include any prior unsuccessful applicants, it follows that plaintiffs neither suffered nor were threatened with any injury in fact from the use of the '69 examination.

Now, we must concede that the scope of the class in this case did not include past applicants. The record is

perfectly clear.

And logically, we must concede that it does follow that past discrimination cannot be attacked, and logically from that I'm afraid we must concede that the kind of relief that was obtained in this case is hard to justify.

Because the fact is --

QUESTION: Don't get to the relief yet; don't get to the relief.

What about standing?

MR. HUNT: That's what I'm just talking about.

I believe -- our position is that the plaintiffs in this case -- the case was litigated as if the plaintiffs in this case had represented past applicants.

The original complaint was pled on behalf of past applicants. The law is clear, they could have represented past applicants.

The cases, Mr. Justice White, are cited on pages 43 and 44 of --

QUESTION: Well, this case went -- the Court of Appeals wrote twice on the case.

MR. HUNT: Yes.

QUESTION: And you're suggesting they misunderstood the case.

MR. HUNT: Your Honor, in the original --

QUESTION: Let's assume they were right, though. Let's

just assume for the moment that they were absolutely correct in everything they said in the text where you read. What about the case then? What are we supposed to do about --

MR. HUNT: The case would be remanded to the district court in order to correct the oversight of the fact that the scope of the class did not include past applicants.

QUESTION: Well, let me go one step farther.

Now what about the -- let's assume they're right that the '69 test cannot be -- is not implicated here because these people just weren't affected by the '69 test.

MR. HUNT: Or the class.

QUESTION: Or the class.

Now how about the '72 test?

MR. HUNT: They were, Your Honor.

QUESTION: How were they?

MR. HUNT: They were -- the defendant was about to take an all-white class excluding the plaintiffs and the present class. We brought the lawsuit, and the defendant stopped.

So they were threatened with discrimination.

QUESTION: Well, I know, but they -- I take it you don't claim that this class -- that any of them were ever rejected on the basis of this test?

MR. HUNT: That's correct, Your Honor.

QUESTION: Then what is the basis for the Court of Appeals statement in the footnote that the '72 test had an

adverse impact on the racial class of plaintiffs?

MR. HUNT: My interpretation is the same as my opponents, that the defendants were about to discriminate, and we brought the lawsuit, and that they --

QUESTION: You think that's enough to get some relief if you concede that none of your class members was ever rejected because of his performance on this test?

MR. HUNT: We do not think that, Your Honor, and that's why we think that this case should be remanded to the district court to correct the oversight.

QUESTION: Well, is it true that none of them was ever rejected based on his performance onthis test?

MR. HUNT: That's correct.

QUESTION: And counsel, if your -- if you disagree with the Court of Appeals in this language that we've been going over and over, in light of the fact that the plaintiffs class did not include any prior unsuccessful applicants, it follows plaintiffs neither suffered nor were threatened with any injury.

If you want to upset that conclusion, you would have to cross-petition for certiorari, wouldn't you?

MR. HUNT: Your Honor, we decided not to cross-petition because the record is clear to us that it was a mere oversight by the district court that past applicants were not included.

The case was tried as if past applicants had been represented. The evidence all went into trial as past applicants.

QUESTION: But the Court of Appeals just turned that around.

MR. HUNT: They turned it around, Your Honor. And it was our intention to correct it on a remand, and we're suggesting that this court should -- as the government does -- vacate the granting of certiorari and correct this mere oversight.

QUESTION: Did you go to the Court of Appeals on that theory after the decision on --

MR. HUNT: Yes.

QUESTION: -- on that precise ground?

MR. HUNT: Yes, we did, Your Honor. We --

QUESTION: Mr. Hunt, are there any named plaintiffs who took the 1969 test?

MR. HUNT: No, there aren't, Your Honor.

QUESTION: Well then who can represent the class of those people?

MR. HUNT: The cases cited in our brief at pages 43 and 44 establish that plaintiffs can represent rpresent applicants, for example, can represent past applicants; and vice versa.

QUESTION: But that wasn't the definition of the

class?

MR. HUNT: That's correct, Your Honor. And that's why we believe it should be remanded to the district court for a correction of the oversight.

QUESTION: Well, maybe you should find some new clients and start a new lawsuit?

MR. HUNT: Your Honor, the record in this case shows beyond question that it was a mere oversight, and the oversight should be corrected.

And I'd like to reiterate the reason the record is clear.

First of all, the original complaint was pled on behalf of past applicants; page 4 of the record shows that.

Secondly, at the trial, evidence came in as to past applicants. And I would like to emphasize to the Court that it was not just limited to the 1969 past. We put on a great deal of evidence --

QUESTION: But Mr. Hunt, before you get to the evidence, what did the order certifying the class provide? There was such an order, I take it?

MR. HUNT: The order certifying a class provides --

QUESTION: Where is that order?

MR HUNT: Excuse me, there was no formal order. The order wasincluded in the judgment. This case went to trial very quickly --

QUESTION: Does that comply with the federal rules?

MR. HUNT: Your Honor, I'm not sure whether that's the case. This case went to trial almost immediately after the granting of the motion for class certification, and we included the order in the judgment.

QUESTION: Is that why the government suggests we just get rid of it?

MR. HUNT: I think that's the basic ground, and we agree with them.

QUESTION: But you don't you think that's good for them? You don't know what's going on.

MR. HUNT: We don't know what's going to happen. Our opinion is that in view of the fact that a mere oversight occurred --

QUESTION: For one thing, we could make some very bad law, couldn't we?

MR. HUNT: Your Honor, I feel very strongly that it is important to realize that this case was tried on behalf of past applicants.

Our basic case was not as suggested by either the Ninth Circuit's opinion or my opponent, that it was just written tests; but our basic case was a prima facie case based on workforce statistics.

This employer had one-half of one percent black in a very large black general population area.

QUESTION: Mr. Hunt --

MR. HUNT: That was our basic case.

QUESTION: Let's stick to first of all who the litigants are before we can talk about the merits.

Now I just read pages four of your complaint. And there's nothing in there about anybody taking the 1969 test.

MR. HUNT: Your Honor, I would refer you to the cases cited on pages 43 and 44 of our brief that --

QUESTION: No, I don't want to get to the law. I want to get to what in the record shows that the 1969 test was ever put in issue on behalf of someone who took the test?

MR. HUNT: It was put in issue on behalf of the class of past applicants.

QUESTION: Well, yes, but how was that class defined? Back to 1868, or -- when is the date on which application became significant?

MR. HUNT: The class -- we believed we were litigating the case. The court believed we were litigating the case. It's my impression everybody believed we were litigating the case on behalf of past applicants --

QUESTION: Well, when you say past applicants? But how do I know that includes '69 applicants, people who took the test in '69? What in the record shows that?

MR. HUNT: Your Honor, none of the named plaintiffs --

QUESTION: I understand that. What in the record shows

that anybody thought they were litigating on behalf of someone who took the test in 1969? Certainly your complaint doesn't.

MR. HUNT: Your Honor, the stipulations in the pre-trial order have great detail as to the 1969 test, and the findings of the court included the '69 test.

I would point out that my opponent stated that the district court did not make findings as to the '69 test. The findings are that the --

QUESTION: Where is the class certification order?

MR. HUNT: It's in the judgment, Your Honor.

QUESTION: It's on page 45 of the appendix, isn't it?

MR. HUNT: And you drafted -- you drafted and submitted the judgment?

QUESTION: The judgment was jointly drafted by both counsel, Your Honor.

QUESTION: Well, when it says all present and future applicants.

MR. HUNT: Yes, Your Honor, and that was an oversight.

QUESTION: You mean you wanted to have added something to it or what?

MR. HUNT: On remand we would want to show to the district court that this case -- that that was a mere oversight, and that --

QUESTION: Well, I know, but how do you want to change it?

MR. HUNT: Past, present and future.

QUESTION: Past, present; add the word past?

MR. HUNT: that's correct, Your Honor.

QUESTION: An oversight on whose part?

MR. HUNT: It was an oversight, in our opinion, on all counsel and the court.

The evidence came in in this case as to past applicants, without objection. I would -- the fact that it is so clearly an oversight, Your Honor, I think is exemplified by the fact that in the very first sentence of the court of appeals' original decision, they mistakenly stated that the class included past applicants.

Everyone just assumed that past applicants were represented in this case.

QUESTION: But you said a minute ago in response to my question, which I asked you in a very leading form, the Court of Appeals just turned it around, then? You said yes.

But when you read the class certification in the judgment, the Court of Appeals didn't turn it around. It was just following what the district court had done.

MR. HUNT: It followed the oversight, and that's why we believe it should be remanded, to correct the oversight.

QUESTION: Well, here's a case involving a fire department in about the third or fourth most populous in the United States; very significant issues in it; and you're talking

about an oversight.

MR. HUNT: That's correct, Your Honor.

I can only say that this judgment, that the judgment includes the order of class certification. The issue was not tried, the issue was not argued in the Court of Appeals. The Court of Appeals fastened on it on its own motion.

The first time I realized that --

QUESTION: Well, how can you --

MR. HUNT: -- past applicants were not represented, Your Honor, was when I read the second opinion of the Court of Appeals.

QUESTION: Well, how can you have an oversight when on your side you've got 12 lawyers?

MR. HUNT: Your HOnor --

QUESTION: That's what it says here on page 20, you had 12 lawyers. And then you have an ove[illegible] How many lawyers do you need not to have an oversight?

MR. HUNT: Your Honor, there are not 12 lawyers in this case.

QUESTION: Well, what's that on page 51?

Page 51 of the appendix. Or maybe I counted a little wrong.

MR. HUNT: Your Honor, that includes counsel besides the plaintiffs' attorneys. Those are all of the attorneys --

QUESTION: I said on your side. Weren't

the intervenors on the other side?

MR. HUNT: Your Honor, two lawyers tried this case for the plaintiff.

QUESTION: We really don't know what we're doing, do we?

MR. HUNT: Your HOnor, I could not agree more with that.

QUESTION: Well, how can we dismiss this as improperly granted, and let stand a judgment which you say that everybody agrees is in error?

MR. HUNT: I think the --

QUESTION: Am I right?

MR. HUNT: -- district court should be given the opportunity to correct the oversight?

QUESTION: Well, didn't you ask them to?

MR. HUNT: I asked the Court of Appeals to instruct the -- on a petition for re-hearing when this oversight first came to my attention, I asked the Court of Appeals to instruct the district court to investigate whether it was an oversight --

QUESTION: It didn't come to your hearing until after the appeal?

MR. HUNT: That's correct, Your Honor?

QUESTION: Well, where were you all the time?

MR. HUNT: Your Honor, all I can say is that --

QUESTION: Oversight.

MR. HUNT: -- that it's an oversight. Past, present and future applicants -- the case was fully tried.

QUESTION: Well, do you know anything in the statutes or the constitution or the rules of this court that require us to correct your oversight?

MR. HUNT: Your Honor, I think the district court should be given the opportunity to correct the oversight, and that's why it should be remanded.

QUESTION: Well, why didn't -- you asked the Court of Appeals to do that for you and it refused apparently.

MR. HUNT: I have no explanation for that. They denied my petition for re-hearing without explanation.

QUESTION: But they did remand it.

MR. HUNT: They remanded --

QUESTION: They did remand it because they disagreed with the district court on the height requirement.

MR. HUNT: And because of their finding on the scope of the claim.

QUESTION: So they weren't sympathetic with your position. It doesn't seem to me if you read the -- and yet they refused to correct your oversight.

MR. HUNT: Your Honor, I really don't consider it to be my mistake; this order was jointly prepared by all parties and by the court. And we all are guilty of the oversight.

QUESTION: Well, Mr. Hunt, if it's an oversight --

QUESTION: They could have asked you to submit a

judgment, I suppose.

MR. HUNT: Yes, the court asked both parties --

QUESTION: And the winners usually start off with it, don't they?

MR. HUNT: In this case, Your Honor, the courtasked both parties to prepare the judgment.

QUESTION: And who drafted it? Who submitted the initial draft?

MR. HUNT: We drafted it together, Your Honor.

QUESTION: Mr. Hunt, did you ask for monetary relief on behalf of the past applicants?

MR. HUNT: We did not, Your Honor, because in this case they were beyond the statute of limitations period as far as monetary relief under Section 1981. They were not beyond -- they were not beyond the statute of limitations period for equitable relief, because --

QUESTION: Well, but if they're beyond the statute of limitations for monetary relief, what possible advantage can there be to sending it back and asking thatthe judgment be equitably for the benefit of past applicants?

MR. HUNT: So that those past applicants will have the opportunity to be hired prospectively. In order to give them the best relief we can under the circumstances of this case.

QUESTION: If the judgment stays word for word exactly

as it is, does it make a bit of difference whether a past applicant is a party to the case or not? They just all apply in the same way, don't they?

MR. HUNT: Yes, Your Honor. The difference it makes is that if that case -- the hiring order, 40 percent hiring order based on past discrimination is appropriate.

I agree with Mr. Justice Marshall's point that he has made at least twice here in questions to me that this is a very confused situation. And I have attempted as best I can to get the matter back to the district court in order to correct the oversight; in order to determine what the hiring order actually is going to be. And I suggest that that is what should be done.

The point I must reiterate is that it is not true that the liability in this case was only based on two tests. The liability on this case basically was an unrebutted prima facie case, which this Court in the Teamsters case recognized as being an appropriate way to establish liability in cases such as this.

QUESTION: The Teamsters case was a government pattern-of-practice case, wasn't it?

MR. HUNT: Yes.

QUESTION: Under Title VII.

MR. HUNT: Yes.

QUESTION: And I suppose that the opinion should be

read in the realization that that's what the case was.

MR. HUNT: Yes. And this case was a class action which we all believed was brought on behalf of past, present and future applicants, and we were attempting to establish the prima facie case by the same way as the government did in that case.

And our statistics did so. The district court specifically recognized those statistics.

The problem that we face here is not only the confusion on everyone's part as to whether past, present and future, or just present and future applicants, were represented, but in addition we have the problem that there was been a remand on -- assuming there is to be a hiring order, how much the hiring order should be.

And again, it's difficult to deal with a case where we don't have a concrete situation. And for that second reason we agree with the government as we did in the opposition to the petition for certiorari, that the remand should be carried out. We should -- this Court and the parties before it should have a concrete situation before us.

The -- perhaps the most important point on standing is -- and I would reiterate coming back to a questionby Mr. Justice Stevens -- that these plaintiffs did have standing to represent past applicants. We've cited a long line of cases at pages 43 and 44 of our brief, Your Honors, which show that

past -- present applicants can represent past applicants and vice versa. Employees can represent applicants.

QUESTION: Are there cases from this Court?

MR. HUNT: Your Honor, those cases are all -- the answer to your question is no. They are all cases following this Court's decision in other areas of the law.

This Court has never ruled on the specific issue in the employment discrimination area. It has ruled on it in other areas, such as shareholders' derivative suits, and other types of class actions that you don't need a plaintiff for each and every minor part of the class.

For example, it's important to note in this case that the test used by the county that was in the process of being applied to the current applicants were also used in earlier years.

My opponent indicated there are modifications. There are minor modifications -- were very minor. Those tests were put into evidence as Plaintiffs' Exhibits 3 and 4, the past tests as well as the present test. And under those circumstances it's clear to us that if these plaintiffs did have standing to challenge and bring a lawsuit on behalf of past applicants as well as present and future applicants.

The 1981 issue comes before this Court assuming that past applicants can be and were represented. The -- it was interesting to me to read the argument made by the county in

their reply brief, which was just filed last week. And I would direct the Court's attention to the argument made by my opposing counsel that the Court of Appeals did affirm a hiring order, and almost an assumption that the oversight will be corrected on the remand.

And it's at that point that we get to the 1981 issue.

QUESTION: About the oversight issue that you just mentioned: I noticed in the appendix at page 3 and paragraph 5 of your complaint, that you asked for relief on behalf of a class composed of all persons who are either black or Mexican-American, and who presently are or will become employed as firemen.

MR. HUNT: Your Honor, in the original complaint which is not part of the appendix, at page 4 of the record, has -- the case is pled on behalf of past applicants. That is not part of the appendix in this case.

QUESTION: Well, on what complaint was the case tried? This one or the original one?

MR. HUNT: No, Your Honor, the complaint was tried on the basis of the pre-trial order, which is part of the appendix, and the -- if you take even a cursory look at the appendix, it shows a great deal of evidence stipulated to in the pre-trial order as to past discrimination.

QUESTION: You have a complaint here, you have a

district court opinion, and you have a Court of Appeals opinion. And they are all unanimous that the effect that past applicants are not represented.

Now in my days of practicing law, that would have about ended it, and you wouldn't say that an intervening trial where evidence to a different effect was introduced could have possibly changed those three things all coming down the same way.

MR. HUNT: Your Honor, there are a great many other things, such as that the past -- evidence was admitted without objection as to the past discriminatees. It was stipulated to in the pre-trial order.

My recollection is that the pre-trial order specifically provides that it is to govern the proceedings in the case.

QUESTION: Wasn't that a time for a motion to amend the pleading to conform with the facts and the evidence?

MR. HUNT: Yes, Your HOnor, I would agree with that, except that it was brought to no one's attention until the second opinion of --

QUESTION: And nowadays, we don't do such things.

Are you telling us --

MR. HUNT: I agree, Your Honor --

QUESTION: -- are you telling us that the complaint is out of this case?

MR. HUNT: Your Honor, I agree with --

QUESTION: Are you telling us that the complaint is out of this case?

MR. HUNT: The pre-trial order provides that it is to govern the future proceedings, in the case, Your Honor.

QUESTION: And the answer to my question is, yes or no?

MR. HUNT: The answer to your question is yes. The pre-trial order is to govern.

QUESTION: The complaint's out.

MR. HUNT: Your Honor, I'm not asking this Court --

QUESTION: I'm with my brother Rehnquist. I just don't understand the way things go now.

MR. HUNT: Your HOnor, I agree that this case -- that this Court should not correct the oversight. I agree that the case should be remanded to the district court.

QUESTION: Well, isn't the reason for the oversight part of the way that you don't pay any attention to complaints or any other things that would set bounds?

MR. HUNT: The pre-trial order --

QUESTION: Does that fall under the --

MR. HUNT: Your Honor, the pre-trial order specifically -- my recollection is, the pre-trial order specifically states that it is to set the meets and bounds. And the pre-trial order includes all stipulations as to

past discrimination.

And the case was tried -- the district court specifically based its findings on past discrimination.

Of course, if past applicants were not included in the representative class, the district court would not have based its decision on past discrimination.

The -- perhaps the most important thing that I should say to this Court on the point is that --

QUESTION: The pre-trial order, is there an express provision that they shall replace or supersede the pleadings?

MR. HUNT: Your Honor, I --

QUESTION: I don't think that's uncommon in pre-trial orders, but is there one here?

MR. HUNT: Your Honor, on page 18, there is a statement of the issues to be tried.

QUESTION: I appreciate that. But what I asked is: Is there any express provision that the pre-trial order shall replace the pleadings?

MR. HUNT: As far as I can say right now, Your Honor, no, except that I would interpret the joint statement of the issues to be tried to supersede the pleading.

QUESTION: I see.

MR. HUNT: And I would note the very first sentence is, whether or not as a question of fact and law defendants have engaged -- that's past tense.

QUESTION: Mr. Hunt, while you've been interrupted -- you and we, echoing you, have used the phrase, quote, the oversight, unquote, I don't know how many times during the course of this argument.

What do you understand the coverage of that phrase to be? The oversight?

MR. HUNT: Merely that the word, past, was left out of the definition of the scope of the class.

QUESTION: Where, in the complaint or in the class certification?

MR. HUNT: In the class certification order that is found in the judgment.

QUESTION: And are we to assume when we call it an oversight that this is something -- you said your brother on the other side and you worked this out together; that he would freely and willingly do -- quite willingly do, and say, oh yes, this was just an oversight, and that the court -- the district court would freely and quite willingly do, saying, oh yes, it's just an oversight?

MR. HUNT: I think it should be remanded to the district court to determine that.

Did Justice White have a question?

QUESTION: To say nothing of the court of appeals.

QUESTION: I didn't understand the answer to mine so far.

MR. HUNT: I think, Your Honor, that the question should be remanded to the district court to determine whether it was an oversight, and to straighten out this difficult situation.

QUESTION: Well, I notice in paragraph 1 of page 18 -- you didn't read all the way to his conclusion -- whether or not as a question of fact and law defendants have engaged in employment practices violative and so forth as concerns past and present black and Mexican-American applicants.

MR. HUNT: Yes, that's true. That's correct.

QUESTION: Is it not also true that in paragraph 10 on page 31 that defendants reserved their position that evidence of discrimination before the effective date of Title VII was inadmissible?

MR. HUNT: Yes, they were arguing the 1981 point.

QUESTION: So they were apparently not agreeing that past discrimination was relevant.

MR. HUNT: The --

QUESTION: Or even past applicants.

MR. HUNT: They were arguing the 1981 point at that point, and that's -- that is what we've all perceived to be the substantive issue before this Court.

QUESTION: I notice also that you talked about monetary relief earlier, there is an agreement that monetary claims, the claim of back pay, would not be tried, and that it

would not prejudice the right of those -- any of those who had a back pay claim, to assert it elsewhere.

MR. HUNT: Yes. We were afraid --

QUESTION: It hardly sounds like the back pay claims were being included in the class.

MR. HUNT: Your Honor, we had determined as best we could that there were statute of limitations problems, not with the equitable relief, but with the back monetary relief under 1981.

QUESTION: But apparently there were -- but you were careful to preserve the rights ob ack applicants who might have such claims to litigate the statute of limitations question.

MR. HUNT: That's correct, Your Honor. We did that because we didn't want to prejudice somebody if we were wrong in our view.

QUESTION: Because apparently none of the named plaintiffs were in that position, I suppose.

MR. HUNT: Not -- we were --

QUESTION: That rather dramatically demonstrates how there can be a conflict of interest between a named plaintiff who is a current applicant, and members of the class who are past applicants who might have a damage claim.

MR. HUNT: Your Honor, we were doing our best we could for the past applicants. We determined that their monetary claims were of no value.

We sought injunctive relief on their behalf. And we based the relief we sought on the discrimination against them.

I would submit there was no conflict. If they had had valid monetary claims, we would have pursued them.

I think it's important to come back to the point that -- and emphasize the point that Mr. Justice Brennan has pointed out, that the statement of issues to be tried does concern past applicants.

It's unfortunate -- I've been able to reach the 1981 point. I would say only that we believe Johnson v. Railway Express, the thrust of that case, is that the plaintiffs should succeed in that point.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Stewart?

MR. STEWART: Yes, Your HOnor.

REBUTTAL ARGUMENT OF WILLIAM F. STEWART, ESQ.,

ON BEHALF OF THE PETITIONER

MR. STEWART: The plaintiff has suggested that we're jointly responsible for the oversight. To that I would like to plead not guilty before the United States Supreme Court.

Actually, counsel prepared it; I approved.

But the point is -- and I'm not attempting to mislead counsel at any time during the course of the trial. But I raised the standing issue in my answer, which is in the appendix.

I raised the standing issue in a motion in opposition to certification of the class. I raised the standing issue and reserved it in the joint pre-trial statement at page A19.

QUESTION: But did you agree with that paragraph one of the pre-trial order?

QUESTION: You say you reserved your position with respect -- at that time? Is that what you said?

MR. STEWART: Yes. In the pre-trial order, on page 19, I stated defendants are in no way prejudiced as to their assertion that this action may not be maintained as a class action.

QUESTION: I agree. But what about the paragraph one. Did you agree --

MR. STEWART: Paragraph one was merely a statement as to what they represented.

QUESTION: Was it -- not -- it says a joint statement ofissues to be tried. A joint statement.

MR. STEWART: Yes, I agree to everything that's in the pre-trial order.

QUESTION: So you agreed to that part of paragraph one which said that there shall be a trial as concerns past and present black and Mexican-American applicants.

MR. STEWART: Reserving my objection --

QUESTION: Reserving or not.

MR. STEWART: -- that they had no standing to

represent those past applicants.

QUESTION: But I did agree to that?

MR. STEWART: Yes, I did agree to that. But I continued throughout this trial, including briefs filed with the Ninth Circuit both times, objecting to the standing of the plaintiffs to represent the class. And it's not merely a question of pleading, because there are no past applicants that are named defendants in the case.

QUESTION: Of course the court didn't live up to the rules -- the court didn't live up to the rules in waiting until judgment to certify a class, did it?

MR. STEWART: No, that's right too, sir.

But we have raised these points continuously, and we have continuously lost on all of these points: the 1981 issue, the application of Title VII, the standing issue. And everything through the Ninth Circuit.

We hope that we will not lose the case before this Court. But I think the issues on Section 1981 and the intent are important.

Counsel indicates that he'd like the matter remanded. And that would bring, of course, the 1981 intent issues to the fore again.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:11 o'clock, p.m., the case in the above-entitled matter was submitted.