In the

Supreme Court of the United States

WAYNE MINNICK ET AL.,	)	
	)	
PETITIONERS,	)	
	)	
V.	)	No. 79-1213
	)	
CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL.,	)	
	)	
RESPONDENTS.	)	

Washington, D. C.
December 2, 1980

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

WAYNE MINNICK ET AL., Petitioners,	:	
v.	:	No. 79-1213
CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL., Respondents.	:	

Washington, D. C.

Tuesday, December 3, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 o'clock a.m.

APPEARANCES:

RONALD YANK, ESQ., Carroll, Burdick & McDonough, One Ecker Building, Suite 400, Ecker & Stevenson Streets, San Francisco, California 94105; on behalf of the Petitioners.

STUART R. POLLAK, ESQ., Howard, Prim, Rice, Nemerovski, Canady & Pollak, P.C., 650 California Street, Suite 2900, San Francisco, California 94108; on behalf of the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in Minnick v. California Department of Corrections. Mr. Yank, you may proceed whenever you're ready.

ORAL ARGUMENT OF RONALD YANK, ESQ.,

ON BEHALF OF THE PETITIONERS

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

Thirty years ago was the last time this Court had the opportunity in a constitutional contest to consider the issue of reverse discrimination in employment. At that time this Court and the California Supreme Court agreed that a group could not force upon an employer the premise that that employer had to have a particular racial composition of that employer's work force which would match the service population. Then too the Court was looking at a case from California. The case was Hughes v. Superior Court of California, 339 U.S. 460. And at that time the employer was Lucky Stores, and it was an attempt to have Lucky's have its store in Richmond, California, have its work force mirror the racial composition of the people who shop there, in Richmond, California.

And this Court, and the California Supreme Court, sustained a permanent injunction declaring at that time that such a goal of requiring such mirroring was an unlawful

purpose as articulated under California law. Why, then, 30 years later are we back?

The reason that we are back obviously has to do with the intervening events of the past decades, intervening struggles that counsel on both sides of the case here agree with, and support. What has come out of the struggles of the intervening years, of these intervening decades, has been a strategy of how to indeed achieve the results we all want to see, which is to see people judged without regard to their race or color but simply with regard to their abilities.

Before you is a strategy of how to get there which petitioners feel in fact is a step away from the society, from the goals that we all want to see. What we have before you is the result of a strategy of social engineering wherein the California Department of Corrections has attempted to have its work force mirror racially the inmate population or service population of the Department.

Justice Skelly Wright in a recent Law Review article in the University of Chicago Law Review has challenged those of us who oppose reverse discrimination saying that we talk in only abstract principles, but we don't get down to talking about social realities and, indeed, the facts. I want to take on that challenge and speak of the facts of this case.

The case before you is not about remedying prior discrimination. That is not this case. In 1974 when the

Department adopted its affirmative action program and then started to carry it out as we had described, in fact, black persons were over-represented in the work force of the Department of Corrections, as were orientals and as were people who would be called "others." This was not a lily-white work force. This was indeed an integrated work force.

There has never been the slightest hint in the record that there was not already sufficient minorities and women throughout the Department to handle any sorts of peculiar or specialized assignments that the Department somehow requires.

The program here was carried out not by low-level people who somehow misunderstood the goals and objectives of the Department. It was carried out at the direction, and indeed the energetic behest of top management. Top management said that the goals would be met "or else." It's the Director of the Department talking. The Director stated that if the goals were not met, "their own positions might be on the line."

On this record any distinction between supposed goals and quotas is an illusory distinction.

QUESTION: Mr. Yank, may I ask you, this case involves only promotion or transfer, does not involve new hirings, does it?

MR. YANK: Absolutely wrong, Your Honor. It definitely involves new hires.

QUESTION: Well, in the cases of Minnick and Darden?

MR. YANK: They were promotional people.

QUESTION: And it's only their cases that we have?

MR. YANK: No, because in fact this action was brought on behalf, as a class action, of all people similarly situated by both Minnick, Darden, and by the Association. And indeed, the evidence was voluminous that the policies being implemented went also to the question of hiring.

For example, people who applied for jobs had their races secretly coded on their application forms at the behest of the Department. People who were not minorities or in the favored group literally were not considered for certain positions.

QUESTION: Well, now, as to Minnick and Darden, I note in the Court of Appeals opinion -- this is at page A6 -- this statement: "Proof was presented by respondents Minnick and Darden in support of the inference that each had been denied promotion in deference to a female or minority candidate, and it was shown that each had pursued a grievance to the State Personnel Board without success." And this next sentence: "It was also established, however, that neither had been eligible for promotion under conventional civil service rules which applied irrespective of the AAP" -- this program -- "or its implementation."

If that's true, at least as to Minnick and Darden,

what standing have they here?

MR. YANK: Standing, first of all, with regard to eligibility. They indeed met the requirements of people seeking the job.

QUESTION: Oh, it says here, it says here -- are you quarreling with this statement by the Court of Appeal that neither had been eligible for promotion?

MR. YANK: They were not in the top three bands, and I do quarrel --

QUESTION: I'm not asking that.

MR. YANK: I do quarrel with the notion, "eligible."

QUESTION: Well, are we to take this -- this is what your state court said. Are we to go behind that?

MR. YANK: They were not reachable within the rule-of-three at the time. However, moving on to what I gather to be the thrust of your question, the program that was described here was one that was going on statewide and was going on and will continue to go on in the future. Minnick and Darden will be seeking other promotions, as will Caucasians and males throughout the rest of the Department.

This case was brought, not dealing with just those two promotions, but there was evidence dealing with promotions on a statewide basis at all kinds of levels, and not only -- . And the findings of fact in the trial court specifically state that Minnick and Darden as to future promotions will be

disadvantaged, and that Caucasians and males in general throughout the Department will be disadvantaged with regard to future promotions.

Furthermore, the organization, CCOA itself, clearly has standing to bring this action on behalf of any of its members threatened with future or prospective injury as the result of the actions of the Department.

This suit, really, Your Honor, was one seeking prospective injunctive relief. We never sought to void a past appointment of any person, figuring that they in one way were innocent victims of the Department's policies as well as Caucasians. We were seeking prospective injunctive relief. Minnick, Darden, and the Association clearly had that standing. We also had, I think, five plaintiffs --

QUESTION: They had that standing even if they had no -- were, in any event, not eligible for promotion?

MR. YANK: The trial court found that they --

QUESTION: I don't care what the trial court found. The appellate -- it's its decision we have before us, isn't it?

MR. YANK: As to any future promotions, I don't believe that the appellate court denies that they might be seeking future promotion. The specific findings of fact to the trial court, which had plenty of substantial evidence to support them, should have been binding upon the Court of Appeal and any appellate court. And it's those findings, I think,

to which we must look.

QUESTION: Well, Mr. Yank, you're not suggesting that for federal case or controversy purposes in this Court that we have jurisdiction to accord standing, or we ordinarily accord standing to an association qua an association simply because some of its unnamed members may have been injured by a particular act?

MR. YANK: Why, I am suggesting that this Court in the past has imbued, articulated precisely that rule. In Ward v. Sullivan for example, this Court stated that an employee organization or an association may bring an action if it can show that any one of its members suffered damage, or any one of its members himself or herself would have standing before the Court to bring the action. If there's anything that's clear from this record it's that this is indeed a case in controversy. We could have had correctional officers taking numbers and standing up in line outside the courtroom, to come in and testify. We had five people who testified who said that they were willing to have the complaint be amended to name them specifically as plaintiffs.

I do believe that CCOA alone, had it brought the case, would meet the standards of case or controvery as articulated by this Court in Ward v. Sullivan and also Ali v. Medrano.

QUESTION: How about NAACP v. Alabama? It goes back

to that, doesn't it?

MR. YANK: I would think it is.

QUESTION: Perhaps you're right, Mr. Yank, but the Court of Appeal in California left open that question, didn't it, when it remanded the case? Is that correct? The last paragraph of the opinion it says that you couldn't confer standing by stipulation, and that was a question to be opened on remand, so we really don't know the facts yet.

MR. YANK: Well, I think the Court does know the facts. The findings of fact by the trial court are very clear in this regard. First of all, the matter was not briefed at all in the court below. It wasn't discussed in oral argument. I don't think --

QUESTION: Well, what are we to make of the last sentence? "These problems require examination if the case is to be retried"?

MR. YANK: Well, that says, if the case is to be retried. Again the matter -- literally, the cases that we have cited to the Court, plus the California cases, the Professional Firefighters and IAFF, were never brought to the attention of the Court of Appeal. That is dicta, it wasn't briefed at all, and of course it is for this Court on the facts and the findings of fact as presented by the trial court, to determine whether indeed Caucasians and males were being threatened by the action of the department, whether they had suffered in the past.

QUESTION: No, but we have to decide a lawsuit. And as I understand it, there is no class action certified here.

MR. YANK: That's correct.

QUESTION: We only have two individuals and an association, and the individuals have not been harmed according to what Mr. Justice Brennan read, and the association's standing is in doubt, based on the last sentence of the opinion.

MR. YANK: Well, again, I think that it's a matter for this Court to determine whether, under your standards, there is indeed a justiciable issue here.

QUESTION: Even if it's justiciable in a federal sense, would it necessarily be justiciable in the state courts? And this is a state proceeding.

MR. YANK: I think again, it's clear under the California case --

QUESTION: We have to decide that though, don't we? The California question of whether their standing is a matter of state law.

MR. YANK: I don't --

QUESTION: It's rather unusual for us to decide that kind of state law issue.

MR. YANK: No, again, we're here under the 14th Amendment. We could be -- I believe the standards that apply here are not the state court's standards concerning standing which --

QUESTION: Well, but if you don't rely on a state court, you can never get here, and they've said, we don't know whether you belong in a state court.

MR. YANK: Well, that is what the Court of Appeal said without briefing, but I do think that the cases, the California cases that we cited --

QUESTION: Well, but, assuming you're right, we have to decide that question of California law under your view of the case.

MR. YANK: Could be, but it does not require any remand, because the facts concerning the standing are there. So you may indeed want to review the California cases that we've brought to the Court's attention.

QUESTION: Isn't it possible that the trial court when this case goes back, if it goes back, would decide there is no standing, or would decide that there is no jurisdiction?

MR. YANK: I don't see how that could be possible. One, again, I --

QUESTION: Well, they're free to do it, are they not?

MR. YANK: CCOA would have it. But, number two, if necessary, we could have brought in dozens of people beyond the five witnesses who were not named claimants who said --

QUESTION: The difficulty is you --

MR. YANK: -- in the record that they were willing to become.

QUESTION: The difficulty is you didn't bring them in. You brought in two people, apparently, who are not eligible for promotion in any event.

MR. YANK: They are eligible for future promotions as was found by the trial court.

QUESTION: Mr. Yank, I'm bothered by something else. Your attack here is on the 1974 affirmative action plan, isn't it?

MR. YANK: It really is not an attack on the --

QUESTION: Let me ask this.

MR. YANK: Yes.

QUESTION: Can you answer that question, really, first of all? And my second one is, is that affirmative action plan any longer in effect?

MR. YANK: It was amended once in '75 and then again in '79, and indeed has been lodged by the court. There is no indication whatsoever that the strategy and tactics, if you will, of the Department has changed. And indeed, the Department, subsequent, for example, to the preliminary injunction in the case, went out and violated the order of the court. And, of course, as you know, there was literally a hearing as to whether the Department and its top officials should be held in contempt. The text of the program is not on its face unconstitutional. It is that program as amended in '75 and again in '79, as implemented, that we are attacking here.

QUESTION: Well, is the '79 plan, or amended in '79, is that in the record?

MR. YANK: It's lodged with this Court.

QUESTION: Is it in the record?

MR. YANK: No, because the trial occurred prior thereto. I would agree that this Court has before it a particular set of actions by a department. The situation might be a little bit like Washington v. Davis, where this Court, even though it knew that other tests were being considered by the District of Columbia, refused to remand even though the District of Columbia and the Civil Service Commission who won the case were urging a remand back to the trial court for a review of how the test and its procedures were working. This Court said it had before it a test and certain facts and it was going to decide that case. I suggest that you have before you a certain plan and certain facts and that it's appropriate to --

QUESTION: Well, let me ask one other question then. Does the plan as amended in '75 and '79 differ in any material respects from the '74 plan originally under attack?

MR. YANK: Not a bit. And indeed, they reaffirm, they reaffirm explicitly that even though LEAA changed its regs. so as to not set as goals the "service population," nonetheless the California Department of Corrections reaffirmed that it was having as its goals the inmate population.

So, if anything, it's more emphatic as to what the social engineering goals of this plan are as we stand and sit here today.

In the record in this case, obviously the Court is familiar with the explicit set-aside, and the fact that out of the mouths of the Department's only witnesses, the Department acknowledged that it was hiring, was promoting lesser qualified people. That is to say, if people were somehow within a reasonable range of qualifications, no matter whether the Caucasian was more qualified, the minority would get the job. I suggest that that situation is similar to the one described by Justice Powell in the decision in Arlington Heights. Justice Powell did not use the term, "but for causation," although we have used it in our brief. But in Arlington Heights, Justice Powell and the opinion of the Court made it clear that if without the tainted or improper motivation the decision would have been different, then the act of the public entity should be illegal. As a matter of fact, there the Court said that if the plaintiff could show any improper aspects of the decision-making process -- here it would be consideration of race -- the burden shifted tc the defendants. The burden shifted to the defendants to prove that without the improper motive the decision would have been the same. Here by testimony of the Department's own top management, the Department acknowledges that the improper motive,

the consideration of race, is the changing factor, the "but-for" factor that puts a woman or a minority ahead of the Caucasian or the male.

QUESTION: Mr. Yank, supposing that the case of NAACP v. Button, which Mr. Justice Stewart asked you about a moment ago, had come up in a state court rather than federal court, as I believe it did, and the state court had simply said, we don't accord standing to associations to represent their members. Do you think we would have had jurisdiction to revise that judgment, assuming there had been no individual plaintiffs who -- ?

MR. YANK: I think not. I think that would be a matter of purely local state law as to who had access to their courts.

QUESTION: Actually, however, if it had come up through the courts of Virginia -- I have some difficulty remembering whether that was the case for illegal practice of law or not -- then, if we held it had standing, it would be a federal holding.

MR. YANK: Actually, I think I'm incorrect on that. I believe that, indeed, this Court in examining federal statutes has mandated that state courts indeed provide a cause of action under federal statutes, and indeed, in a brief of the Solicitor General, the Michigan Law Review -- I think it's '75, not '76, Michigan Law Review, indeed sets forth those

cases. So I would say that indeed this Court could reverse a dismissal of a state court saying there was no standing, if this Court found that the federal standards had been met. And of course we were dealing with, as we are here, a constitutional claim.

Given the facts of the set-asides and, really, the "but-for" causation involving use of race leading to promotions and hiring, what one also sees in this record is that it is possible the benefit here is a multi-edged sword, that it is not operating necessarily to the benefit of the classes that supposedly are to benefit. There's evidence in this record that not every correctional officer or minority correctional officer wishes to consider himself or herself a specialist in dealing with members of his own race. There's evidence of this record that one minority group and a member thereof, a high-ranking management person, was using his power and influence to cut back on the promotions of another minority group, feeling that his minority group wasn't getting enough of the promotions in question.

QUESTION: Mr. Yank, you haven't told us yet on what provision of statutory or constitutional law you're relying to argue that this is all illegal.

MR. YANK: Okay. We are here both under the Fourteenth --

QUESTION: The case that you opened with involved

a private employer. This involves a governmental employer. A private employer, so far as the Constitution goes, can hire all negroes or all white people or all males or all females and do whatever he wants, so far as the Constitution goes. Government, on the other hand, is limited by the Equal Protection Clause of the Fourteenth Amendment.

MR. YANK: Our primary cause of action here is indeed under the Fourteenth Amendment, having --

QUESTION: Under the Equal Protection Clause?

MR. YANK: Absolutely. We are here under the Equal Protection Clause of the Fourteenth Amendment arguing that we have here a suspect classification. It requires strict scrutiny and that the defendants in this case in no way come close to meeting the standards of strict scrutiny. And that is the primary thrust of our case. We have also brought the action as a Title VII action, but we recognize we are swimming upstream against Weber, although we did invite the Court's attention --

QUESTION: No, this is government.

MR. YANK: Which is also bound --

QUESTION: This is governmental action, isn't it?

MR. YANK: Absolutely. Absolutely. And what we --

QUESTION: That was not true in Weber and it was not true in the Hughes case with which you began your argument.

MR. YANK: What we are looking at here is a question

of whether a government, be it a state or a city or county can tell its citizens, even though -- sir, madam -- you were the most qualified person for the job, you didn't get it because of your race or sex. And to do that in the face of our Constitution requires strong, strong compulsion indeed, and all of this Court's cases and other courts' cases about prior discrimination and remedying same are inapplicable because this plan, in its text, in '74, '75, it never mentioned such a thing. It never mentioned, for that matter, the so-called "operational necessity of defense."

What has happened is that the defendants have scurried around making arguments for the very first time at appellate levels, including for the very first time in this Court, that their action is somehow justified or valid. They cite, for example, recently, in materials that were lodged with the Court, supposed legislative statutes or findings that somehow required this action. And yet, if you read those legislative materials and committee hearings rather closely, you will see no mention or requirement that the states or their agencies were to somehow be granting preferential treatment to anybody. Those materials talked of equality and equal employment opportunity, not preferential treatment.

QUESTION: Could I ask -- I ask you before your time runs out what your answer is to the final judgment argument?

MR. YANK: Certainly.

QUESTION: Do you think on the merits of the case that you have put in all the facts that you can possibly put in, so that the possibility of a new trial is -- what? -- fruitless, or groundless or what?

MR. YANK: Absolutely. We have made our best case. We have been told that on the, I think, fairly skimpy facts before the Court of Appeal, that nonetheless there is an operational necessity justification under strict scrutiny already presented, and we lose, and we have lost on that issue. Anything that comes in about supposed past discrimination is only frosting on the cake of the defendants. They have won this case.

QUESTION: But is it true that a reversal is always for a new trial under California practice?

MR. YANK: Not always. But in this particular case the judgment just saying "reversed" and indeed mentioning the fact --

QUESTION: Because this is a purely legal question, do you think? It's been decided, is that what you -- or is it a factual?

MR. YANK: It is a factual question, and here's why. That is, Court of Appeal had before it the operational necessity defense facts brought forward. It said, that's enough, right there. Not, incidentally, just under the Fourteenth Amendment, but under Title VII. They said, Weber is

dispositive and that's it.

If we went back to trial, there's nothing I could possibly present that --

QUESTION: Except maybe they could make it a class action?

MR. YANK: Well --

QUESTION: Couldn't you?

MR. YANK: But that wouldn't add anything with regard to the merits. I believe we've got standing enough. I suppose we could bring in another couple hundred correctional officers, but the point is, is that on the merits we've lost on Title VII. What we have here is -- in California and I'm sure elsewhere -- the law of the case. And we have already lost. An operational necessity defense has been factually made out and found to exist by the Court of Appeal.

QUESTION: Regardless of any facts that you have, though, there's a claimed justification; it's been sustained?

MR. YANK: And it's sustained. It's the law of the case. What more can we do? It would be utterly fruitless --

QUESTION: Under California practice, if two parties come in and stipulate that there is standing on the part of the plaintiff, may the trial judge reexamine that and reject the stipulation?

MR. YANK: Yes; absolutely. And, as can any court, the parties may not confer jurisdiction upon a court by --

QUESTION: I'm just talking about standing, now, not jurisdiction. Obviously they can't confer jurisdiction, but this trial court, if the case goes back, could decide that there is no standing, could it not? Is it free to do so?

MR. YANK: I don't believe under California law that that would be an appropriate decision by the trial court.

QUESTION: Perhaps not an appropriate one, but it has the power to decide that, hasn't it?

MR. YANK: Yes, the court could have rejected that stipulation and, for example, asked us to go through the motions of amending the complaint naming the other five persons who were reachable and were willing to become a plaintiff. We could have done that rather socially wasteful, I think, activity. The trial court sat there and heard all the witnesses and had heard people say they were willing to be plaintiff, and indeed, frankly, the trial court had admonished counsel to try and compact the case because, as you know, the evidence that we did bring in was rather lengthy and voluminous. I'd like to reserve whatever time I do have left.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Pollak.

ORAL ARGUMENT OF STUART R. POLLAK, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

This case was tried in the Superior Court in San Francisco before this Court had rendered its decision in Bakke; indeed, before this Court had rendered its decision in the United Jewish Organization v. Carey case. The sole issue on which the parties focused when this case was tried in Superior Court was a question open at the time as to whether or not it was permissible for the Department of Corrections under any circumstances to give any consideration to the question of race or sex in hiring and promotional practice.

The petitioners before the Superior Court argued that it was not, that absolutely no consideration could be given under any circumstances, that race and sex were absolutely impermissible considerations, and the Superior Court accepted that view. That it did so is clear from the record but it is made very simply clear by looking at the notice of intended decision of the Superior Court, which is in Appendix D to the petition, the Court framed the issues. The Department at that time defended its policy on the ground that race and sex were not the only factors, and then quoting, said, "Plaintiffs on the other hand assert that the hiring or promotion of a person based in whole or in part on sex or racial background or ancestry is unconstitutional and void. The Court agrees with plaintiffs."

And the court went on, then, to enter an injunction, which is Appendix G to the petition, which prohibited the

Department from giving any preference, advantage, or benefit based on race, color, sex, or national origin in hiring or promotion. And it is that judgment in that injunction which the petitioners are asking this Court to reinstate. That is their request, if you look at the conclusion of both the briefs they filed in this Court.

The Court of Appeal in California, of course, reversed that decision. It held that race or sex may be considered if necessary to serve a compelling state interest which the Court of Appeal held the orderly administration of prisons to be. The Court of Appeal's reversal of that decision had the effect of remanding the case to the Superior Court for a new trial necessarily, I believe, raising the question asked by Justice White a few moments ago, whether or not we even have a final decision here in this case. And I submit that most clearly the Court does not have a final decision here and there is no jurisdiction to go on and to consider this case.

While the Court of Appeal quite properly, I submit, applied this Court's decisions in Bakke and Weber and now Fullilove to reverse a Superior Court decision --

QUESTION: What does Weber have to do with this case? This is a governmental action. Weber was not at all. That was a private employer and a labor union.

MR. POLLAK: Well, Your Honor, I think there is --

I think it's probably an issue not to be reached, but there is potentially a question of whether Title VII would prohibit the plan which has been adopted by the Department, and I submit, Your Honor, that the ruling in Weber is applicable and the plan --

QUESTION: Why? Why? Why is the ruling in Weber applicable? That did not involve the Constitution at all.

MR. POLLAK: Well, Your Honor, I submit we have an additional question in this case not present in Weber and that is whether the plan is permissible under the Equal Protection Clause.

QUESTION: Right. This is a government.

MR. POLLAK: That issue is here, Your Honor. I'm not suggesting it is not, so --

QUESTION: So what does Weber have to do with this case?

MR. POLLAK: I think Weber has to do with the case only to the extent that the petitioners are also relying upon Title VII for their claim --

QUESTION: But you claim they can't because the federal courts have exclusive jurisdiction of Title VII actions. Correct?

MR. POLLAK: We assert that, and then we assert that if in fact we are incorrect in that respect, that the program is permissible under Title VII.

QUESTION: All right. But even if so, you'd then run to the protection of the Equal Protection Clause.

MR. POLLAK: We then come to the Equal Protection Clause; absolutely.

QUESTION: All right.

MR. POLLAK: We're not suggesting that we don't have that ultimately here, if the case is a final judgment and properly before the Court. And the point that I'd like to stress at the outset is that although the Court of Appeal properly held that the Superior Court was wrong in saying you can never consider race or sex, the decision is not a final decision, a final judgment within the meaning of Section 1257, because there remain on remand many issues to be considered which go to the heart of the petitioners' federal claims which he has asserted, which they were asserting in this Court.

And until those questions to which I'll come in a moment -- until those questions are resolved, neither this Court nor anyone else will know whether the state courts will or will not grant Petitioners the relief they seek on their federal grounds. And I think that is the important point which I'd like to stress insofar as the law is concerned.

It is true, of course, that this Court in recent years has expanded somewhat on earlier definitions of what constitutes a final judgment. There are, for example, decisions of this Court indicating that a decision may be final where a

federal issue has been conclusively resolved in the state court, but further proceedings remain to be had on other issues. But no case -- and I stress that neither our research nor the research of the several amicus briefs which address this point, nor indeed petitioners themselves, found any case where you have a final decision in a situation where further state court proceedings remained on the very federal issues that are involved, and which the petitioners are seeking to have reviewed in this Court.

QUESTION: Well, I take it the response of your colleague to that argument is that there's nothing that can happen in the state court proceedings, if there are further proceedings, that can overcome the judgment that there has been a compelling state interest shown that would override any claims of discrimination.

MR. POLLAK: Justice White, that is where I part from my colleague.

QUESTION: And you have to depart from him, don't you? If he's right, what about finality?

MR. POLLAK: Well, if in fact there was nothing further that could be done, then you would have a final --

QUESTION: But if there's nothing further to be done on that particular issue, there would be finality.

MR. POLLAK: If I may, let me attempt to define the issues which I think are resolved and those which remain to

be considered.

QUESTION: When will you get around to answering my question, rather than stating what you want to state now?

MR. POLLAK: Well, Your Honor, I believe, if I understand your question --

QUESTION: If you don't, I'd like to make it clear. Your colleague says that the court below ruled that compelling state interests had been shown, and that justifies the program, regardless of what is shown with respect to discrimination. That's what he says, and that that makes -- that there's nothing they can do about that in the trial court. Now is that so or not?

MR. POLLAK: It is not so, Your Honor. I believe -- two things --

QUESTION: All right. You said it isn't so. Suppose it is so?

MR. POLLAK: If it were so, you'd have a final judgment.

QUESTION: All right.

MR. POLLAK: But it is not so, and let me address myself to why that is the case. I believe the effect of the reversal by the Court of Appeal is to remand the case to the Superior Court for a new trial on all issues. The only thing that is determined by the ruling of the Court of Appeal is a strict question of law, leaving open for consideration

questions of fact and mixed questions of fact and law.

QUESTION: What question of law do you say was decided by the Court of Appeal?

MR. POLLAK: The question of law, Justice Rehnquist, that I say was resolved, is that the correctional objectives of the Department of Corrections constitute a compelling state interest in that a compelling state interest can justify consitutionally and under Title VII employment practices which are race-conscious, if they are properly limited to accomplish that objective. What has not been decided, and what remains to be further explored on remand, is (a) the facts with respect to the program the Department is carrying out and implementing, and (secondly) the mixed question of fact and law as to whether or not the Department's program is sufficiently limited to accomplish only the compelling state interest which they are designed to serve, on the other hand.

QUESTION: You don't think the Court of Appeal decided that question?

MR. POLLAK: I believe that the Court of Appeal decided that question on the basis of the record before it, but I also believe that by remand the Court of Appeal has furnished the parties with the opportunity to submit additional evidence to expand upon those issues. The Court of Appeal has not determined -- if I could bring this into the concrete with respect to specific challenges to the Department's program that

the petitioners are making --. The focal point of the petitioners' attack on our claim is their contention that the Department is setting aside positions for minority members excluding nonminorities from any consideration for promotion. Now, on the basis of the record before it, the Court of Appeal has held that the Department is not doing that, that all the Department is doing in connection with promotions is taking race into account as one consideration which under appropriate circumstances can act as a plus factor in an individual's favor.

QUESTION: And in that respect the Court of Appeal said the trial court was wrong, did it not? Because the trial court in Appendix D-2, as you pointed out to us, said that, "Plaintiffs assert that the hiring or promotion by a governmental employer of a person based in whole or in part on sex or racial background or ancestry is unconstitutional and void." And the Court of Appeal in that respect said the trial court was wrong, didn't it, as a matter of federal constitutional law?

MR. POLLAK: It did, Your Honor, with respect to that legal conclusion as to whether or not it could be considered. I think the court, the Superior --

QUESTION: So if this Court should agree with the trial court, then there's no question but what the Court of Appeal should be reversed, is there? And to that extent it's

final under Cox v. Louisiana, isn't it?

MR. POLLAK: No, Your Honor, I submit it is not.

QUESTION: I mean, if the trial court is right, there's nothing more to be decided?

MR. POLLAK: If the trial court is right with respect to the narrow issue --

QUESTION: Right.

MR. POLLAK: -- are there any circumstances under which race could be considered?

QUESTION: Right.

MR. POLLAK: Then it may be that there was a decision for the --

QUESTION: Right; by government.

MR. POLLAK: That's right. Brought by a governmental agency.

QUESTION: Entirely by government and its employees.

MR. POLLAK: If there are any circumstances --

QUESTION: Correct. Right.

MR. POLLACK: That is correct, Your Honor, but --

QUESTION: Isn't it also true that at page A22 and A23 the Court of Appeal upheld the trial court's ruling in refusing to allow reopening of the record when the Respondents here sought to prove past practice of discrimination, saying that it was way out of time, and the trial court was acting properly in refusing to hear that testimony?

MR. POLLAK: Your Honor, I suppose it is correct that the Court of Appeal said that the Superior Court would have been justified if it had excluded that evidence on that ground, which it did not do. That wasn't the Superior Court's reason. But I think the important point is that the Court of Appeal did explicitly say that all of that evidence with respect to prior discrimination can be considered when the case is remanded to the Superior Court. So that even if the Superior Court was correct initially in excluding the evidence the fact of the matter is that when this case goes back to the Superior Court that evidence will be admissible and will be considered. And I think that is the important point with respect to this limited aspect of the finality question.

QUESTION: Yes, Mr. Pollak, but isn't there another problem, and that is that, as I read the Court of Appeal, they said, "We accept Finding 8 and Finding 19." And they said that Finding 8 does establish that there was a -- the affirmative action used race as a plus factor, not a fact. Finding 19 says that that is a permissible form of discrimination because of the State's interest in the management of the correctional officer system. And they have held as a matter of law, as I understand it, that Finding 19 is a complete defense.

And you don't need to put in your remedy of past discrimination evidence in order to sustain the judgment if they're right about that. Or, do you defend that position,

that Finding 19 is a complete defense?

MR. POLLAK: We assert, Your Honor, that -- we -- the Court of Appeal has held that as long as race is only taken into account as a plus factor, that it may be taken into account in connection with hiring and promotion.

QUESTION: Without regard to the history of past discrimination?

MR. POLLAK: Yes. Without reserve.

QUESTION: That's right.

MR. POLLAK: Yes, Your Honor. And that future --

QUESTION: Now, isn't that issue squarely presented by the --

MR. POLLAK: I submit, Your Honor, it is not squarely presented for this reason, that on remand one of the questions that remains to be determined is whether or not the Department's program is sufficiently tailored to meet that objective. That's the second half of the constitutional test. And on remand --

QUESTION: You mean, the objective of having a balance in the correction officers more or less corresponding to the balance in the inmate population.

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

QUESTION: Well, but the Court of Appeal has held you won on that issue.

MR. POLLAK: Your Honor, with respect to the

sufficiency of the plan and the goals, is it permissible to have a goal which seeks to attain a parity with the inmate population rather than the labor force? I submit --

QUESTION: That was with respect to the racial action, so-called?

MR. POLLAK: Yes, Your Honor, it was with respect to race.

QUESTION: The gender affirmative action, so-called, was based upon the labor pool, was it not?

MR. POLLAK: Correct, Your Honor.

QUESTION: It was statewide?

MR. POLLAK: Yes. On this question of race and the permissibility of the goals with respect to race, that question has never been considered at any stage in either the Superior Court or the Court of Appeal. At no point in the proceedings -- you could comb the record --

QUESTION: Well, why did they make Finding 19 then? Why did they enter Finding 19?

MR. POLLAK: The court did not address itself in Finding 19, Your Honor, to the question of whether the goals of the program are sufficiently limited or whether they go too far. That was not a question that was briefed or addressed in the Superior Court. Finding 19 is not addressed to that question, and it was not considered in the Court of Appeal.

QUESTION: Well, I read the Court of Appeal as

relying on that finding as the justification for a use of a plus factor. Maybe I misread the Court of Appeal's opinion but that's what I thought they held.

MR. POLLAK: Your Honor, the Finding 19 -- it's on page F6 of the --

QUESTION: At A15; yes. "In its Finding 19 the trial court effectively determined that the practice -- " The bottom of A15 and the top of A16. The finding is supported by the evidence and that disposed of the case.

QUESTION: Let me try it out in this way. Is the trial court free in the light of the Court of Appeal's holding to decide that race and these other factors may not be used at all, may not be used as a plus factor or may not enter into the decision?

MR. POLLAK: No, Your Honor, only with respect to that limited question has there been a determination that is conclusive by the Court of Appeal. The question that remains for further consideration under the Court of Appeal's opinion is whether or not the Department's plan is sufficiently tailored to accomplish that objective in a permissible manner. And on remand, it will be free to the petitioners to offer evidence and to squarely address this issue which, I repeat, has never been addressed in the state courts, of whether or not the goals go beyond what is necessary to achieve the state interest in orderly prison administration.

And at the same time the Department will have the opportunity to offer evidence addressed to that very question.

QUESTION: Well, Mr. Pollak, you wouldn't suggest that your chances of losing this case are very high after the Court of Appeal's opinion, would you?

MR. POLLAK: Your Honor, I submit -- perhaps I'm not making myself clear -- I acknowledge --

QUESTION: Of course, if I'm right, it just means that you would rather be here maybe next term than this term?

MR. POLLAK: No, Your Honor, that is not the point, and I don't think that's the case.

QUESTION: Let me read you this sentence from Finding 19 which Justice Stevens has referred to, and you've cited as being at F6, where the court says, "Because of the conditions and circumstances within California prisons and throughout the Department of Corrections in making job assignments and in determining employment responsibilities, it is necessary for the Department to consider among other factors the composition of existing work force and of the inmate population, and race and sex of employees in order to serve the compelling state interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management."

Now, certainly that much has been decided, has

it not?

MR. POLLAK: Yes, Your Honor, that it is permissible to consider these factors. What has not been decided and what will be the subject of evidence and litigation on remand is whether or not the Department is giving too much consideration, consideration which exceeds what would be permissible under the Equal Protection Clause.

QUESTION: Well, why did the Court of Appeal reverse the Superior Court?

MR. POLLAK: I confess, Your Honor, that it's not -- why they reversed it was because the Superior Court had reached a decision which had said you can't consider race or sex at all.

QUESTION: Right.

QUESTION: But what about Finding 19? There they say you can consider it.

MR. POLLAK: No, they said it could be considered in making job assignments. And what the court was, what the Superior Court was doing was distinguishing job assignments from promotions, and hiring.

QUESTION: You mean by that that they could assign women to the women's ward or the women's institution?

MR. POLLAK: That's correct, Your Honor. Or that from a group of sergeants, for example, a particular sergeant could be given a particular work assignment because of his

race. That is what the Superior Court, I believe, was sanctioning. But what the Superior Court was saying is that in determining whether to promote this particular individual from sergeant to lieutenant, you couldn't give any consideration whatsoever to that person's race or sex.

QUESTION: I'm still somewhat unclear on why you're dissatisfied with the Court of Appeal's opinion, because it seems to me they read Finding No. 8 as saying, in effect, that the plaintiff has proved that race has been used as a plus factor, and not more. They haven't proved quotas and goals as matching and all that. And they say, if all they prove is that it's a plus factor, then Finding 19 is an adequate defense. I understand you can read it narrowly as applying only to transfers. And they say, in words, on A70, "We conclude that they are permitted by the Equal Protection Clause." In other words, they're saying, as I read it, on this record that which the plaintiff proved has been adequately defended and the plaintiff stands here in court today and tells us he doesn't want to prove any more. On that reason, why do we have to have another trial? I mean, don't we just have to decide whether that Finding 19 is a sufficient defense? And I know the Solicitor General seems to be a little concerned about that, but maybe you want to try and defend that.

MR. POLLAK: The reason is --

QUESTION: And you might win, 100 percent, just on

that very simple theory.

MR. POLLAK: Your Honor, the point is this, that has surfaced as this case, both as a law has developed and as this case has risen, is that, all of a sudden in this Court, really for the first time, the question is in focus, on the question of whether or not -- not the first question of permissibility of the goal, but focus on the second question as to whether or not the Department's program goes further than necessary to accomplish that goal. And that isn't --

QUESTION: There's no finding that it did, is there? There's no finding that it did. He doesn't want to improve on the affirmative findings, as I understand it. Why do we have to wrestle with that question?

MR. POLLAK: Because, Your Honor, when --

QUESTION: Theoretically, it will remand and he might amend his complaint and seek to prove that. But he says he doesn't want to prove anything more than he's already --

MR. POLLAK: But, Your Honor, the petitioners do wish to argue, and are arguing to this Court, that the Department's program does go further than is necessary to accomplish this objective. They do argue that the program is excessive because the goals are mor excessive than necessary. That is an issue (a) which has never been considered in the state courts, and (b) which will be open to the presentation of evidence when this case is remanded.

QUESTION: But they have also said they're perfectly content with the record they have made and all they -- they did not persuade the trial court to enter any such finding.

MR. POLLAK: Your Honor, if the petitioners were --

QUESTION: You're trying to defend the right of the plaintiff to make a better case which is a funny thing for the defendant to be doing.

MR. POLLAK: I am trying to prevent the defendant from arguing to this Court, and inducing this Court to consider the question of whether the program is excessive in a respect as to which no evidence has been introduced. If the petitioners were willing to withdraw from this Court's consideration the question of whether or not this program is sufficiently tailored to accomplish its objectives, that would be fine. And that issue, I submit is inextricably part of the federal constitutional question which this Court has to consider. And the petitioners are urging this Court that the program is excessive in a particular which has never been considered in the state courts and as to which none of the parties, including the Department, had any opportunity to present evidence.

QUESTIONS: Well, for all those reasons, if I were plaintiff's counsel, I might want to argue the right to put in more evidence to sustain that theory. But he stood here before us a few minutes ago and said he doesn't want to put any more

evidence in. He's proved his case. Then he should also be stuck with the findings he got out of the trial court, it seems to me. And he didn't get such a finding.

MR. POLLAK: He did not get any finding that the --

QUESTION: He got -- he had won on the theory that it was per se illegal. And he got some additional findings that show that race was a plus factor and he also was confronted with some findings that say, well, if that's all you've got, there's a reason for the plus factor, namely, there's a state interest in having the inmate population correspond to some extent with the correctional officer population. I don't know why that isn't the issue right here, whether that's an adequate justification.

MR. POLLAK: Because -- I believe what is included in the issue that the petitioners are trying to have this Court decide is whether in order to achieve the compelling state interest of furthering orderly prison administration, it is necessary to go so far as to have goals which seek to achieve an approximate parity with the inmate population. And that is something that we have not considered below, and as to which we have never offered any evidence.

QUESTION: Mr. Pollak, your time is about over. Are you going to address the question of standing at all or aren't you concerned about it?

MR. POLLAK: Your Honor, we are -- with respect to

standing, we of course stipulated in the Superior Court that standing existed and I am somewhat --

QUESTION: Well, you were told by the Court of Appeal, as I read this last sentence, you couldn't do that, weren't you?

MR. POLLAK: Well, we were told that our stipulation does not -- was not sufficient, and correctly so, to confer jurisdiction upon the Superior Court.

QUESTION: Yes.

MR. POLLAK: I believe, Your Honor, that the issue is briefed in one of the amicus briefs filed by the --

QUESTION: Well, what's your position? Your time's about over.

MR. POLLAK: Our position, Your Honor, is, first of all, that the existence of this standing question, which will definitely have to be explored on remand, goes very much to the finality of the judgment. We do not know whether we have a final --

QUESTION: What is the significance, if any, of the Court of Appeal's statement that in any event they would not have qualified, would not have been eligible for promotion. That is, Minnick and Darden would not?

MR. POLLAK: I believe that is a very significant event in determining --

QUESTION: Well, significant to what extent?

MR. POLLAK: My reservation, Your Honor, is the fact that we have stipulated, due to the fact --

QUESTION: I don't see that that has a thing to do with it. What is it for our purposes?

MR. POLLAK: For federal purposes --

QUESTION: Are you familiar with Doremus?

MR. POLLAK: I am, Your Honor.

QUESTION: The fact that the New Jersey Supreme Court said there was standing, this Court said, is immaterial here on standing in this Court.

MR. POLLAK: Your Honor, I believe that the absence of plaintiffs who have been injured and the point I would like to emphasize is that we did not stipulate that the plaintiffs had been injured. We stipulated to standing, but we did not stipulate that they had been injured. And the fact that they had not been injured, the fact that they had not been denied a promotion may well under Doremus indicate that we have no more than an academic question --

QUESTION: Well, the Court of Appeal raised no grave doubt about the standing of the organization.

MR. POLLAK: It did, Your Honor.

QUESTION: And said that that affects the jurisdiction of the trial court.

MR. POLLAK: Absolutely.

QUESTION: You can stipulate all you want to about

standing but you can't stipulate jurisdiction.

MR. POLLAK: That is correct, Your Honor, and that is --

QUESTION: Now, suppose we said there was no standing in this case for purposes of our jurisdiction, and we just dismissed the case. I suppose that what you're saying is, what we would be saying is that there's -- as far as we're concerned, there never has been standing in this case to decide the federal constitutional question.

MR. POLLAK: There has never been standing within the federal --

QUESTION: Within the federal meaning.

MR. POLLAK: That's correct, Your Honor. And I think, on remand, it will remain to be determined, that I don't think this Court could possibly determine, whether or not there ever was standing within state court standards.

QUESTION: And you would distinguish NAACP v. Button, assuming it came on appeal from the Supreme Court of Virginia, in that there the Virginia court said there was standing for the NAACP to raise the question?

QUESTION: Because its members suffered injury?

MR. POLLAK: Absolutely; that's correct.

QUESTION: And the only two here, according to the Court of Appeal, suffered no injury because they weren't eligible for promotion.

QUESTION: And there are no allegations with respect to any other members' injury.

MR. POLLAK: All correct, Your Honor. And as I say, our stipulation certainly was never that such facts exist. We simply stipulated to standing, period.

I submit, Your Honor, in closing, that the issues which are involved in this case, those that have been decided and those that remain to be decided, are inextricably interwoven. You can't pick just one issue and review it. You have claims here that are asserted by the petitioners, federal claims, as to which additional evidence will be appropriate in the state courts. And given that fact, you do not have a conclusive determination as to whether the state courts will or will not give petitioners relief on their federal claims.

QUESTION: Well, many people would have said that before Cox, but how can you say it after Cox?

MR. POLLAK: Because Cox, Your Honor, the federal claim had been decided, and there were other issues that remained to be determined. Here it's the very federal claims, the constitutional claims and also the Title VII claims, that will be open for the presentation of additional evidence in the trial court.

QUESTION: Well, the federal claim has been decided, in this case, to the extent that the Court of Appeal said that the trial court was wrong in its constitutional understanding.

Isn't that correct?

MR. POLLAK: Yes, Your Honor. To that extent. But there are other issues that are part of that --

QUESTION: Other issues if the Court of Appeal is correct. Only if the Court of Appeal is correct. Is that right?

MR. POLLAK: That is correct.

MR. CHIEF JUSTICE BURGER: Very well. You have one minute, Mr. Yank.

ORAL ARGUMENT OF RONALD YANK, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. YANK: Okay. First of all, the trial court found that there was more than just a plus factor. They talk about discrimination, they found that members had been discriminated. Finding 3 says, "CCOA represents people who have been discriminated." Finding 10, Finding 12 -- we're not talking about two people here, we are talking about thousands of people being discriminated against. That's what the trial court --

QUESTION: Any time a plus factor is involved, there's discrimination. That's all those findings are saying.

MR. YANK: Well, the fact that it's literally put people over the top.

QUESTION: Well, that's always going to happen when you use it as a plus factor.

MR. YANK: Okay. We do not -- we are opposed to any kind of remand here. We believe that one way or another the federal issue is squarely before the Court on these facts. Counsel seems to be suggesting, as they have throughout at the appellate level, let them make out a case for past discrimination. That isn't this plan. That's never the justification. The goals aren't geared toward remedying past discrimination. As in Washington v. Davis, you have a certain plan before you and a certain set of facts. We believe that on the constitutional merits we're entitled to win.

If they want to draft a new plan, they can go back and do it, but we're entitled to win on this suit.

QUESTION: Mr. Yank, you're entitled to win on the evidence you offered, and you also contend you're entitled to win on the findings that the trial court made, is that right?

MR. YANK: Yes.

QUESTION: Okay. You're satisfied with the findings.

MR. YANK: When they say that --

QUESTION: Well, just yes or no.

MR. YANK: Yes.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:06 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1213

WAYNE MINNICK ET AL.,

V.

CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL.

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BY: [signature]