In the ORIGINAL

Supreme Court of the United States

AMERICAN TOBACCO COMPANY ET AL.,

Petitioners,

v. No. 80-1199

JOHN PATTERSON ET AL.

Washington, D. C.

January 19, 1982

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:04 o'clock p.m.

APPEARANCES:

HENRY T. WICKHAM, ESQ., Richmond, Virginia; on behalf of the Petitioners American Tobacco Co. et al.

RONALD ROSENBERG, ESQ., Washington, D. C.; on behalf of the Petitioner Unions.

HENRY L. MARSH, III, ESQ., Richmond, Virginia; on behalf of the Respondents Patterson et al.

DAVID A. STRAUSS, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of Respondent EEOC, pro hac vice.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in American Tobacco Company against Patterson.

Mr. Wickham, you may proceed whenever you are ready.

ORAL ARGUMENT OF HENRY T. WICKHAM, ESQ.,
ON BEHALF OF THE PETITIONERS AMERICAN
TOBACCO CO., ET AL.

MR. WICKHAM: Chief Justice Burger, and may it please the Court, these cases were consolidated for trial and remain so. The Patterson case is a class action case brought by private litigants under Title 7 as well as under 1981, alleging race discrimination only. The EEOC case was brought alleging both race and sex discrimination.

The issue before this Court is whether the Fourth Circuit below in holding that 703(h) of Title 7 did not apply to seniority systems established or revised after the effective date of the Act. In other words, the issue is, as a practical matter, whether post-Act seniority systems must be analyzed under the impact test of Griggs with the defense of business necessity, or should it be analyzed under 703(h), which provides for intent.

If the Fourth Circuit is right, seniority systems are no longer provided with the special treatment that the Congress very clearly gave them in enacting 703(h) of Title 7.

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Our position simply is that the plain language of 703(h), its legislative history, the labor policy, and the leading decisions of this Court all dictate that 703(h) was intended to apply to all seniority systems, whether enacted pre-Act or post-Act.

The particular seniority system at issue here are lines of progression that are in effect at two plants in Richmond, Virginia, one a Virginia branch that manufactures cigarettes; the other is a Richmond branch that manufactures pipe tobacco. These branches are under separate management and are located approximately eight blocks apart. There are six lines of progression at these two plants. Two of these lines were in the prefabrication department, and involved jobs which prior to 1963 were all black. Two other lines involved in this case involve jobs which were traditionally all female prior to 1965, and the remaining two jobs were traditionally white male jobs prior to 1963.

At the trial of these cases in 1974, all aspects of the seniority system were declared invalid under Title 7 on the grounds particularly that it continued the present effects of past discrimination. The district court ruled that it was fair, that the seniority system was fair on its face, but for the static conditions of the industry and the fact that American had not hired for ten years, from 1955 to 1965. It may not even need any implementation. But because

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of those facts, he required certain relief, and for American to do certain things.

On appeal, the Fourth Circuit, the panel of the Fourth Circuit in what we call Patterson One affirmed the court's ruling concerning the seniority system. This Court denied cert in that case. On remand, during back pay proceedings, this Court handed down its decision in Teamsters, which, as we all know, really dramatically altered the previously prevailing rule concerning impact and the defense of business necessity.

Upon moving for relief, the district court summarily dismissed our contentions, holding that the seniority system was not bona fide and on appeal of this decision in Patterson Two a panel of the Fourth Circuit remanded the case as to one aspect of the seniority system, which was what we have called the no-transfer rule. This system did not permit a transfer from one branch or one plant to the other branch or plant without a loss of competitive seniority.

The panel of the Fourth Circuit held that that aspect should be remanded to the district court for determination under 703(h). But it held on its own motion, so to speak, that the lines of progression were not a seniority system.

On rehearing en banc, the Fourth Circuit also

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remanded a case concerning the no-transfer rule, but it held also for the first time that since the lines of progression were established or substantially revised in January of 1968, they were not covered by 703(h). They went on to hold that there was not sufficient evidence in the record to determine the bona fides of the no-transfer rule, and that they did not have to reach the question of whether or not the lines of progression were a part of a seniority system.

We believe that the Fourth Circuit's holding is plainly wrong, when we read the language of the statute and the legislative history which all point to the fact that all seniority systems are to be given special treatment, two memorandums to the contrary, one being the Justice Department memorandum and another the case memorandum, which were both published to answer the specific question of whether or not vested seniority rights would be denied under Title 7, and those two memorandums answered the question presented and nothing more, and said that existing seniority rights, of course, would not be affected.

All the other legislative history, including statements by Senator Humphrey, Senator Williams, other questions submitted by Senator Dirksen all point to the fact that all seniority systems are to be included within the cloak of 703(h).

To hold otherwise really does away with the special

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treatment that this Court has said must be afforded to seniority systems, because of our national labor policy concerning collective bargaining, and of course seniority is a very major part of collective bargaining.

QUESTION: Well, these systems could still be attacked on the grounds they were bona fide, couldn't they?

MR. WICKHAM: Absolutely. Absolutely. It is just a question of whether or not these systems should be attacked under the intent analysis of 703(h) or under the impact test of Griggs, and we say that that is the big difference. That is what we are here for, and we say that new systems do not lose that immunity. Indeed, employers and unions would be reluctant to change any system for fear that they would lose the intent analysis of 703(h), and therefore it does not further -- our labor policy of collective bargaining.

The petitioner's interpretation seems to say that in some instances a new system might be protected by 703(h), but of course our system should not be protected, and the bottom line seems to be that while our system shouldn't be protected because it is a discriminatory system, and it continues the present effects of past discrimination. It seems to me that Patterson and EEOC always come back to the fact that we have got a bad system, but that is not what is before this Court.

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All we are asking here is that we be tried under the proper statute. We are not asking this Court to set us free, but we should be tried in the court below under Section 703(h).

I think that Teamsters and Evans and Hardison all point the way to the interpretation being urged in this Court. Again, to hold otherwise would be to take away the special treatment that has been afforded seniority systems.

In conclusion, I would like to state that the Fourth Circuit judgment should be vacated, and the district court should be directed on remand to decide the issues here of our seniority system under 703(h).

CHIEF JUSTICE BURGER: Mr. Rosenberg.

ORAL ARGUMENT OF RONALD ROSENBERG, ESQ.,

ON BEHALF OF THE PETITIONER UNIONS

MR. ROSENBERG: Mr. Chief Justice, may it please the Court, the issue in this case and the problem that this Court must address is to reconstitute the values that existed as the Congress decided this controversial and critical piece of legislation in 1964, and the question is how to apply the traditional mechanisms of statutory interpretation to this situation and to recreate 1964, a troubled time in American history.

In 1964, this bill was before the Congress. It was controversial. The debates on it were protracted. The

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alliances in support of the bill were under constant attack, and they were under particular attack in the area that this Court must now address, and that is to what extent were the beneficial provisions of Title 7 to deal with the difficult questions of seniority that were repeatedly used as a method for challenging the passage of Title 7 by its opponents who acted vigorously indeed.

And thus, the proponents of the bill, considering the charge that this bill would attack seniority, that this bill would affect seniority rights, were called upon repeatedly to lay to rest what they considered to be a canard, that the bill would affect seniority rights. And ultimately, as that debate continued, not only did the various proponents of the bill speak broadly and without qualification that the bill would not affect seniority rights at all, ultimately they found it necessary in order to obtain final passage of this critical bill to add to the statute Section 703(h), which confirmed as a part of the actual statute rather than its legislative history the acknowledgement that they had made that seniority, the seniority principle was a preferred value that was to be maintained so long as seniority was not used as a subterfuge, compressed within the phrase, the provision that ultimately became 703(h), the phrase "bona fide" and the provision that there is to be -- seniority systems would be

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protected if they were bona fide, and not themselves a demonstration of intentional discrimination. The Congress had compressed in 703(h) its strong desire to deal with these conflicting policies, policy that could have separated the alliance that had created Title 7.

And so, against that legislative context, we must look to the development of this statute as it worked its way through. As Justice Rehnquist has pointed out, and as Mr. Wickham responded, the impact of the decision here in our favor would mean that we would go through a determination as to whether or not the seniority systems here involved were in fact bona fide or the product of intention to discriminate. A reversal of the court of appeals would not end this case. It would merely give us the opportunity on the remand to show what we have consistently maintained, that these systems are indeed bona fide.

But let us look for the moment to the legislative history as it developed through the Congress in 1964, looking at that legislative history from the view of the proponents.

QUESTION: Mr. Rosenberg, could I interrupt with one question before you get into the legislative history?

MR. ROSENBERG: Yes.

QUESTION: With respect to a pre-Act seniority system, it is safe to assume that it would have had impact

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that might have raised Title 7 problems if you didn't apply an intent test, so that you can understand why an impact test would not be sufficient for a pre-Act system. When you look at a post-Act system, one that is brand-new, I wonder if there is really that much difference between an intent test and an impact test, because isn't it almost necessary that when the system is designed, the people are going to predict how it will operate, and aren't they going to know whether or not it is going to have an adverse impact?

In this case, for example, wouldn't you know what the probable consequences of this line of progression would do and what it would not do?

MR. ROSENBERG: Yes, there might well be -- there might be well the impact, but we would not, Your Honor, be adopting --

QUESTION: Well, if you know what the consequences are, then doesn't that satisfy the intent requirement?

MR. ROSENBERG: No, because the seniority principle is a broader principle. We might well be operating in order to enhance the seniority principle. Our intent might be a bona fide intent, an intent not to discriminate. When one views the entirety of the situation, there could be situations where by reason of technological change or the like, there is a need to adopt what could be referred to as a new system. One would know --

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QUESTION: Well, but as applied to this particular case, and these lines of progression, it really seems to me that whatever happened, and I am not suggesting what the proper answer is, but it must have been quite predictable, and I am just wondering if there is really that much practical difference that you are asking to have the trial judge face up to on retrial.

MR. ROSENBERG: I think there would be a substantial practical difference, Your Honor. We could introduce evidence that would show -- of our intention, show corrective measures that we had taken in the past, and show that we were intent upon preserving the seniority principle, not upon discriminating, and that adverse impact will follow in almost every instance from the seniority principle. There is a tension between seniority and the potentiality of the perpetuation of past discrimination, but yet we can adopt the seniority principle without an intent to discriminate, because we are adhering to the seniority principle, which is --

QUESTION: So even with full knowledge of the inevitability of discriminatory impact, that is what it amounts to.

MR. ROSENBERG: That is correct, Your Honor.

QUESTION: So that if in one division all of the employees are white, and you enforce seniority, that doesn't

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discriminate?

MR. ROSENBERG: Not intentionally, Your Honor. It may have the impact --

QUESTION: I didn't use the word "intentional". It is awful hard to find a difference as to whether somebody stops you from eating intentionally or unintentionally.

MR. ROSENBERG: But that is the difference, Your Honor, that the Congress has mandated the courts to follow by its adoption of 703(h). Congress was concerned at the difference, and if we have a difficult task of proof at trial, we are prepared to undertake that task of proof, but we should not be subjected to a test that Congress had indicated was not to apply, which is the disparate impact test. We are entitled to a determination based upon whether there is a finding of intention to discriminate.

QUESTION: Well, isn't one of the groups in this case in the category I said, which is all of one race?

MR. ROSENBERG: Yes, there was division in the respective departments, but as Mr. Wickham pointed --

QUESTION: And somebody had to show intent on that?

MR. ROSENBERG: Not standing alone.

QUESTION: I wouldn't think so.

MR. ROSENBERG: There would be a need for more.

QUESTION: I wouldn't think so.

MR. ROSENBERG: Well, that may well be, Your Honor,

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but that would not determine the decision in this case. The issue would be, did the trial court on the basis of all available evidence conclude that the adoption --

QUESTION: Well, do you want me to ignore it?

MR. ROSENBERG: I am not suggesting you ignore it, Your Honor. I am suggesting that what we do is apply the standard that Congress had intended to be applied. We might win or we might lose, but we are entitled to a determination under the standard adopted by the Congress of the United States.

QUESTION: Mr. Rosenberg, I gather you say that standard is an intention to discriminate, do you?

MR. ROSENBERG: Yes.

QUESTION: Whether its adoption or application of the seniority system?

MR. ROSENBERG: Your Honor is, I take it, addressing the argument made by the EEOC --

QUESTION: By the EEOC.

MR. ROSENBERG: -- to which I would like to direct my attention.

QUESTION: Yes.

MR. ROSENBERG: I think it very significant that the EEOC has adopted a position quite different than that of the court of appeals. That position indicates an acknowledgement that as regards the implementation of

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post-Act systems, our conduct would be judged under 703(h) and the discriminatory standard, so that the EEOC has said at least as far as implementation, which is the far more predominant instance where charges could be made, post-Act systems are entitled to protection under 703(h), and in doing so they are taking a position contradictory to the court of appeals, and to the position advanced by the private respondents.

QUESTION: And to their former position.

MR. ROSENBERG: And to their former position. Very important, Your Honor, that the reading that they now advance is advanced for the first time between the time of their opposition to certiorari and their brief in this Court, and yet it is based upon a reading that they claim follows from the statute. Certainly it took them a very, very long time to find that reading, a reading that is not supported by the statutory language, a reading that is not supported by the legislative history. There is not an iota, not a trace in the legislative history of any intention to draw the distinction between adoption and implementation that the EEOC now urges.

QUESTION: Of course, 703(h) speaks in terms of application, not adoption, doesn't it?

MR. ROSENBERG: It uses that language. There is a conceivable reading, Your Honor, but it is a reading that is

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at war with the essence of 703(h), which is intended to apply and makes clear to bona fide systems, seniority systems, and there is no support whatsoever in the legislative history for the reading that the EEOC has now at the eleventh hour concluded is the appropriate reading.

QUESTION: Tell me, Mr. Rosenberg, is there a question of the date when the new system was made effective at all important in this case? I see there is a debate whether it was January, '68, or in fact shortly before 1969 when the complaint was filed.

MR. ROSENBERG: It is of consequence, Your Honor, only to the extent that it demonstrates that even factually the EEOC position is immeritorious, that the EEOC -- the charges that were before the EEOC would have been out of time, but in terms of the central parts of this case, that argument I don't think is particularly relevant. It merely points up, as the company's brief did, the lack of merit in the newly advanced EEOC position.

QUESTION: Counsel, would you address yourself to the question of whether the lines of progression are part of the seniority system at all?

MR. ROSENBERG: They clearly are, and were so determined to be so, Your Honor, by the court of appeals. We have in this Court a case in which the lines of progression are acknowledged to be part of a seniority

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system, and the --

QUESTION: But the court of appeals didn't say they were.

MR. ROSENBERG: The court of appeals --

QUESTION: They passed it. Even if they are, the Act -- the seniority systems post-Act are not?

MR. ROSENBERG: That's correct, Your Honor. They treated them as a part of the seniority system because of their conclusion on the statutory language.

QUESTION: I see. But they didn't decide that they were.

MR. ROSENBERG: No, that presumably could be a --

QUESTION: That would be an open issue on remand, wouldn't it?

MR. ROSENBERG: Yes, it would, Your Honor. Now, clearly, under California Brewers, we believe that the lines of progression can easily be shown under California Brewers and Teamsters to be part of a seniority system.

QUESTION: Could you explain a little bit how it works? Are the lower jobs in the line of progression -- is entry related in any way to seniority, into those lower jobs?

MR. ROSENBERG: Yes, entry at the lowest level is by plant seniority, the broadest measure of seniority. In order to get to the first step in the line of progression, there is the use of plantwide seniority, and at that point,

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as we describe in our reply brief, the first of the two elements of seniority applies. You determine who is to be in the competition, the unit of competition that is to be used in applying the next part of a seniority mechanism, which is the measure of -- the measure to be applied in determining advancement from the entry level job up to the next job on the line of progression.

QUESTION: Mr. Rosenberg, if you prevail, I take it we will have to address, will we not, the EEOC adoption versus application argument? Won't the district court have to have some guidance as to how to handle that?

MR. ROSENBERG: I would think, Your Honor --

QUESTION: Belated, belated as the argument may be, as you suggest.

MR. ROSENBERG: Yes, I think Your Honors would have -- will have to deal with the EEOC argument. I think that is clear. It is made, however late and however immeritorious.

QUESTION: Particularly since I gather the argument is that in respect of adoption, there may be a violation without proof of intention.

MR. ROSENBERG: Yes --

QUESTION: It is only in respect of application that you need proof --

MR. ROSENBERG: A distinction, Your Honor, that is

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meaningless in the real world, because if one is to attack adoption in order for there to be a meaningful remedy, there must be impact on the application of the rule, so that the EEOC rule simply can't be squared in the real world. It has no practical significance, and must be -- and we certainly could not ascribe to the Congress the intention to have set forth a standard that is itself so meaningless.

I would like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Marsh.

ORAL ARGUMENT OF HENRY L. MARSH, III, ESQ.,

ON BEHALF OF RESPONDENTS PATTERSON ET AL.

MR. MARSH: Chief Justice Burger, and may it please the Court, the class of black employees before this Court is represented by five men who at the August, 1974, trial date had a total of 122 years of service with the American Tobacco Company. Two of these men were among the small number of black employees who in November of 1968 had overcome some of the barriers which this company and union had erected to prevent black employees from moving into the higher paying white jobs.

The plantwide posting and bidding system which had become effective on January 15, 1968, had at least on paper opened the door to black employee movement into jobs in the previously white departments, but this door which had been

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opened in January was slammed shut in November of 1968, when this company and union adopted the lines of progression, which for all practical purposes prevented black employees from securing these higher paying white jobs.

Now, a question has been raised about the date the lines were adopted. The Fourth Circuit did say January, but the Fourth Circuit was focusing on whether they were pre-Act --

QUESTION: January, 1968.

MR. MARSH: January of '68, but the circuit court was focusing on whether they were pre-Act or post-Act. The specific date was not important. Mr. Wickham, on Page 520 of the Fourth Circuit appendix, asked the company's director of manufacturing, when were the lines of progression adopted? He said, November of 1968. In his opening statement, on Page 34 of the trial transcript, Line 22, Mr. Wickham said, the lines of progression were adopted in November of 1968, and on Pages 244 and 247 of the transcript, it is clear that the lines were adopted by a group of people in November of 1968 and ratified by the union in March of 1969.

Now, these lines of progression --

QUESTION: And the complaint was filed in January of '69, was it?

MR. MARSH: January of '68 was the lines of

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progression.

QUESTION: No, when was the complaint filed?

MR. MARSH: The complaint was filed in January of '69.

QUESTION: 1969.

QUESTION: Within the 90-day period.

MR. MARSH: It was 45 days or so after the lines of progression had --

QUESTION: The dates of adoption are November and December of '68, then this was within the 90-day period.

MR. MARSH: Yes, there is no problem about that. They stipulate that they were within the time.

Now, these lines of progression placed the highest paying hourly paid jobs completely beyond the reach of the black employees. This was true because the black employees had been previously kept away from these jobs, and they had been kept away from the lower jobs in the lines of progression by such practices as the overt departmental segregation which Mr. Wickham alluded to, which had been in effect until 1963, and then the subjective supervisory determinations by a white supervisory work force from 1963 until 1968.

So, when the lines of progression were adopted, in 1968, only one black held a position in these top jobs in the seven white lines of progression.

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Now, five years after these lines were adopted, whites still held all but one of the top 121 jobs in those lines. Now, it is this practice, instituted well after the passage of Title 7, after the effective date of Title 7, for which this company and union seek to invoke the protection of 703(h) of Title 7.

There are two basic questions before this Court. First, whether the Fourth Circuit panel was correct in holding that the lines of progression are not a part of a seniority system, and therefore are not entitled to the protection of 703(h), and second, whether the lines of progression system instituted by an employer and a union after the effective date of Title 7 is protected by 703(h) where the system perpetuates the employer's and the union's own intentional, prior intentional discrimination.

In our judgment, it is not necessary for the Court to address the case presented by the outer limits of the rule announced by the Fourth Circuit, that no post-Act seniority system is protected by 703(h). The case actually in issue before the Fourth Circuit and actually decided by the Fourth Circuit was decided correctly.

Now, we believe the Fourth Circuit panel was correct in concluding that the lines of progression are not a part of a seniority system. In the lines in question here, neither the length of time served in the line nor the

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length of time served in a lower job is a factor in determining which employees can bid on the top jobs. Only the fact of prior service in a lower job is of any importance. Just touching that base for any period of time would be sufficient to qualify you for the next job. So, what we have here is clearly an eligibility requirement which must be met before an employee can exercise his seniority. It is something that runs counter to seniority rather than something that is implementing a seniority system.

We think this question is controlled by both the Teamsters case and the California Brewers case, where this Court apparently anticipated this very question. The lines of progression here distort the seniority system. They do not focus on length of service and employment.

QUESTION: Is it true that you have to have seniority to enter the lowest job in the line of progression? Is that how the entry level jobs are determined?

MR. MARSH: That is how you get access to the entry level jobs in the line, but once you get in the entry level jobs in the line, once you serve in one of the entry level jobs, the fact that you have served there means that then you are eligible for the next line. The other employees in the company cannot move in those lines. You only have to be

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-- just like a residency requirement or like a high school diploma. It is a requirement that you have to complete before you are eligible to use your seniority.

QUESTION: And you can't get started in the line of progression without seniority? I mean, that is the basis for getting into it in the first place?

MR. MARSH: Well, you can get into a lower job in the line by seniority, but once you get in the lower line, you cannot get -- the lower jobs are not really in question. It is the top jobs we are concerned about, and you can't get to one of those top jobs, I don't care how much seniority you have, unless you have served in the lower lines, and that is what makes this not a part of a seniority system. This is something that distorts the seniority system, because the employees with long years of seniority can't get at these jobs because of this eligibility requirement.

Remember, the blacks had been kept away from these jobs, so they have not had a chance to get into these jobs. The whites are already in these lines of progression. So, in order to be in there, you have to have been in the lower job. That is the question that makes this different.

QUESTION: Mr. Marsh, if we should not agree with you, and should agree that the lines of progression are part of a seniority system --

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MR. MARSH: That is my second argument, sir.

QUESTION: -- then do you go along with the EEOC that there is a distinction between adoption of that system and is application? In the former case, it may be a violation without proof of intent, but not in the latter?

MR. MARSH: We do not oppose the government's interpretation. That is not our interpretation. We think the application of the government's interpretation to this case would require the affirmance of the judgment below, because here a timely objection was made to the adoption of the system, and the adoption of the system here --

QUESTION: Timely, that has to do with the complaint filed in January of '69.

MR. MARSH: Right.

QUESTION: Right.

MR. MARSH: And the adoption of the system here established a new qualification for the top jobs. So no matter how much seniority an employee had, he had to have served in a bottom job in order to get to the top job, and because the bottom jobs in the most desirable lines of progression had been deliberately reserved for whites over the years, the decision to adopt the lines of progression operated to freeze the status quo of the prior discriminatory employment practice, so this Court could affirm on that ground without reaching the interpretation

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that we urge.

However, we believe that our reading of 703(h) is more consistent with the legislative history, which I will get to in a minute, and with the underlying purposes of Title 7. If you have to adopt a plain meaning, which is what the union and company observe, or ask you to do, we think the government's plain meaning is certainly more reasonable than the company's plain meaning.

We submit the second question assumes that the lines of progression are part of a seniority system. We submit that in enacting 703(h), Congress did not intend to protect this system here, because the actual overt and departmental segregation which has confined blacks to these prefab department jobs until 1963 was modified. The racially motivated discrimination continued. Until 1968 black employees were excluded from white jobs by intentional discriminatory policies.

As I indicated, the white work force continued to restrict black employees to the black jobs by subjective, unwritten standards, selection procedures, and it was against this background that the company and union in November instituted the lines of progression. Clearly, a post-Act system. And it was these lines, a brand new system, which created new rights for white employees, after the Act, and prevented senior black employees from securing

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the higher paying white jobs. It is these lines for which immunity under 703(h) is sought.

Now, what the union attorney urges is that in deciding whether 703(h) applies to this system, the Court can make that determination by focusing exclusively on the literal language of the statute, but the government has a different plain meaning, so it shows that there is an ambiguity in the statute, and it demonstrates why, as this Court held in Franks, and Teamsters. 703(h) must be read against the legislative history, against the background of its history and the prior decisions of this Court, and the context in which Title 7 arose.

The three documents introduced into the Congressional record by Senator Clark which were hailing Teamsters as the authority of indicators of 703(h)'s purpose, point out that 703(h) was referring to the rights existing at the time it takes effect, or vested, or established seniority rights, or existing systems. The Clark case memo states that Title 7 would have no effect on established seniority rights. In fact, it makes this statement. "Its effect is prospective and not retrospective."

Now, Senators Clark and Case were the bipartisan co-captains of Title 7, and their statements should be given a lot of weight rather than statements made by other

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Senators in response to other questions. These statements indicate that the purpose of Title 7 was to assure the bill's opponents that Title 7 would not require preferential treatment of minorities at the expense of rights existing at the time Title 7 took effect, and Franks and Teamsters, after very careful study, the entire court seemed to agree that the thrust of 703(h) was the validation of seniority systems in existence on the effective date of the Act.

It certainly appears that Congress did not intend to immunize post-Act seniority systems, and even if it did, it was not the intent of Congress in passing 703(h) to protect a system like this, a post-Act system which perpetuated the effects of prior intentional discrimination by the very company and union which were involved in perpetuating that discrimination.

Now, on this business about the national policy of collective bargaining, there are circumstances where there may be a conflict between the national policy supporting collective bargaining and the Congressional priority to eliminate discrimination. When those situations exist, this Court has said that the resolution depends on the facts involved, but that conflict cannot exist in this case, where the industry involved, the company, and the union involved have a long history of actively operating and maintaining a caste-like system of confining black employees to the lowest

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paying and the most menial jobs.

That conflict can't exist here, where such system was perpetuated up until the very day of trial, three years after the effective date of the Act.

QUESTION: If you can show that, Mr. Marsh, won't you win under the test promulgated by the company and the union?

MR. MARSH: We should not have to go back to the district court, Your Honor, on that question, because we have been litigating this case since -- the charges were filed in 1969, and why should every time a new theory comes up -- my plaintiffs have not yet gotten any relief. Some of them are dead. And we have won every round of this case, and no one has gotten -- they have not gotten a single bit of back pay or any injunctive relief. Why should we have to go back when Congress didn't intend to protect this kind of system?

QUESTION: Well, if Congress didn't, but if the Fourth Circuit is wrong, and it did, subject only to a bona fide challenge, it seems if the evidence is what you say it is, you should win on that.

MR. MARSH: Well, the point is, Your Honor, we should not have to go back. We have been litigating this case for years, and if the company and union intended to avail themselves of the protection of 703(h), it was their

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responsibility. That is an exception to the general statute. To show that they were entitled to that protection. They didn't show that.

There is no confusion in this record. They say it for five times, that this was -- that this was plantwide seniority, and then after the dissenting opinion came out by Judge Widener, then they changed their position, when he pointed out they could possibly win the case if the seniority was determined by within the lines. They changed their position. It is their burden of proof to show that they were entitled to the protection of 703(h). They did not do that. So we think the Fourth Circuit was correct in deciding the case on that basis.

QUESTION: Well, Mr. Marsh, I take it the en banc court didn't decide whether the lines of progression were part of a seniority system.

MR. MARSH: That's correct. They said they --

QUESTION: They just said, even if it was, the Act doesn't protect it.

MR. MARSH: That's correct. They say we believe very strongly that it wasn't, and by the way, that question was litigated below.

QUESTION: Yes, I know.

MR. MARSH: It was suggested earlier that it wasn't. It was litigated by all the parties. It was

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decided by --

QUESTION: Yes, it was. The only thing is, the court of appeals didn't decide it.

MR. MARSH: Well, the panel did decide it.

QUESTION: Well, the panel, but --

MR. MARSH: They wrote an opinion on it.

QUESTION: But that was set aside. It was vacated. That opinion doesn't stand for anything any more.

MR. MARSH: Well, in the en banc opinion, the Justices still -- the court still indicated that, the Justices on the panel, to reaffirm their position.

QUESTION: Well, that may be, but the en banc court didn't decide the issue.

MR. MARSH: That's true.

QUESTION: Now, you urge us to decide that, though, now, that the seniority system -- that the lines of progression were not part of a seniority system. You submit that issue to us.

MR. MARSH: Yes, sir.

QUESTION: Now, if we agreed with you, would you be satisfied? Is that the end of the case?

MR. MARSH: It is not the end of the case, because we have to go back for back pay and other things, but if you agreed --

QUESTION: Yes, I know, but that is all you are

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trying to win here?

MR. MARSH: Well, if you agree that it is not a part of the seniority system, then that would end this issue, and we think you can under the --

QUESTION: But then we would not be --

MR. MARSH: You would not have to reach the question of whether 703(h) protects this particular seniority system, or --

QUESTION: That's right. So they are mutually exclusive questions.

MR. MARSH: They are not, and under the Yuakim versus Miller case, we think that this is not such a case, because the issues were briefed by all the parties below, it was briefed and discussed and resolved in the Fourth Circuit, and simply because the en banc court didn't reach it, we think under Yuakim versus Miller you can decide the question on that basis, but if you don't, we submit that the Congressional policy favoring equal employment opportunity should outweigh any policy that would be served by authorizing employees and unions to adopt post-Act systems which have no business justification, and which perpetuate their own intentional discrimination.

CHIEF JUSTICE BURGER: Mr. Strauss?

ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.,

ON BEHALF OF RESPONDENT EEOC, PRO HAC VICE

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MR. STRAUSS: Mr. Chief Justice, and may it please the Court, it is our position that Section 703(h) does not protect an employer's decision to adopt an aspect of the seniority system, although it may afford some protection to subsequent employment decisions made pursuant to or in the course of implementing that system.

This is not a belated position, really, Justice Blackmun. The court of appeals decided this matter on its own before both the panel and the en banc court. No party addressed this general issue of whether 703(h) applied in these circumstances. The first time we ever had occasion to consider this matter was when the case came to this Court.

The reason we take this position is that no other interpretation of Section 703(h) is suggested by the language of that provision, and the interpretation for which petitioners contend would defeat the basic antidiscrimination policies of Title 7 without furthering any of the purposes of the Section 703(h) exemption.

Section 703(h) provides that it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms or conditions of employment pursuant to a bona fide seniority system. Now, whatever else might be said about the decision to adopt a new aspect of the seniority system, that decision is not made pursuant to a seniority system, and indeed, the

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petitioners, who place a great deal of emphasis on the language of Section 703(h) and describe it as a carefully crafted section, when they are attacking the court of appeals decision, have not shown any way in which that language can be read to immunize the decision to adopt an aspect of the seniority system.

In a similar fashion, the legislative history shows that Section 703(h) was designed to protect what its drafters called seniority rights, that is, the accumulated expectations of employees who had worked under a system and relied on its rules. The debate over seniority in Congress at the time Title 7 was enacted as part of the Civil Rights Act in 1964, was conducted almost entirely in terms of seniority rights. As this Court said in Teamsters, critics of the bill charged that it would destroy existing seniority rights. The consistent response of Title 7's Congressional proponents was that seniority rights would not be affected.

QUESTION: Well, tell me, Mr. Strauss, if we agree with your distinction that adoption is not pursuant to and therefore the immunity does not apply, what do you want us to do, affirm on that ground?

MR. STRAUSS: Yes, that's an alternative ground for affirmance.

QUESTION: And I take it you can ask us to do this if you raised that ground below. Did you?

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MR. STRAUSS: We did not raise the ground below. As I say, this entire issue was not addressed below, but as respondents, we are offering it as an alternative ground for affirmance.

QUESTION: Do you know some cases where we have affirmed on a ground that wasn't ventillated below at all, wasn't raised, or --

MR. STRAUSS: There are several cases establishing that that can be raised, Dandridge and Williams, North Carolina against Hankerson.

QUESTION: Well, I know there are a lot of cases where we -- you can affirm on a ground that wasn't decided below, but do you have a case specifically where the ground used was never raised or presented to anybody below?

MR. STRAUSS: Well, this is an instance in which the court of appeals -- no party addressed the issue on which the court of appeals decided the case.

QUESTION: Do you know of a case in this Court where we affirmed on a ground that was never raised in any of the courts below by any of the parties?

MR. STRAUSS: I don't know one offhand, but when the court of appeals addresses an issue that was never -- decides the case on the basis of an issue that was never addressed, necessarily the Court must deal with that issue.

QUESTION: Well, we deal with that, but your

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ground, the ground you are presenting now.

MR. STRAUSS: Well, it is certainly comprised in the court of appeals decision. It is not a wholly separate and distinct ground from the court of appeals, ground on which the court of appeals decided the case.

QUESTION: Well, I don't quite understand that. Your position is that adoption is simply not pursuant to and therefore the immunity, statutory immunity can't apply to this.

MR. STRAUSS: That's right.

QUESTION: Well, what did the court of appeals say that even remotely suggests that basis of the inapplicability of the immunity here?

MR. STRAUSS: Well, the court of appeals also said that Section 703(h) does not apply to the decision challenged here. It cast its net wider, and assumed that even if applications as well as adoptions were legitimately challenged, that its rule would apply. In fact, the court of appeals did not need to go that far, since the adoption was challenged in a timely fashion here. That is a sufficient basis for -- that would have been a sufficient basis for the court of appeals decision.

As I said, the concern of the drafters of the Act, of its opponents, indeed, the language used in this Court's opinions, and even in the arguments of my brothers

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representing petitioners, has been that of seniority rights. And a challenge, a timely challenge to the adoption of a new aspect of a seniority system simply occurs before those rights develop, and does not interfere with or affect those rights.

Indeed, typically, as in this case, a challenge to the adoption of an aspect of a seniority system will serve to vindicate seniority rights. Here, employees who thought their seniority would entitle them to certain jobs discovered when the lines of progression policy was instituted that suddenly seniority was not enough, that they would also have to have served in the bottom jobs in the lines of progression. Their challenge therefore served to uphold seniority rights, not to interfere with them or affect them, and to bar that challenge would not promote any of the purposes of Section 703(h).

There are a couple of points that petitioners raise in opposition to this argument. One is that it would somehow be meaningless to draw this distinction, because the remedy for an unlawful adoption of the seniority system would necessarily affect the application. There are a variety of answers to this. The most straightforward answer is the one the Court gave in Franks against Bowman, which is that the fact that a remedy might affect seniority rights is immaterial to Section 703(h). Section 703(h) is simply not

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addressed to remedial adjustments of seniority rights.

In addition, as we say in our brief, under the National Labor Relations Act, which was the model for much of Title 7, this distinction between adoption and application of unlawful features of collective bargaining agreements is established. Justice Harlan, when he wrote that opinion, Machinists Local 1424, saw no difficulty with outlawing the adoption of a collective bargaining agreement, although not its application, even though obviously the remedy would have to run to application as well.

Finally, I think what is at stake here is that the --

QUESTION: Mr. Strauss, may I ask you a question to be sure I understand the thrust of your argument? Are you in essence arguing that the adoption of a new seniority system or a new aspect of a seniority system should be judged by the same standard as the adoption of any other employment practice after the Act?

MR. STRAUSS: That's right. That's exactly right.

QUESTION: That there's nothing in the history of the Act that says adoption of these kinds of rules are different from the adoption of any other kind of rule?

MR. STRAUSS: That's exactly right.

QUESTION: And then it follows under your argument -- I just want to be sure I am stating it right -- that if

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that is true, and if under the impact test the lines of progressions are illegal, whether you call it a seniority system or what, whatever, then it is not "bona fide." Is that it?

MR. STRAUSS: No, then it is simply not within Section -- then it -- since Section 703(h) is --

QUESTION: Well, but the reason it is not within Section 703(h) is because it is not bona fide, isn't it?

MR. STRAUSS: No, it's not within Section 703(h) because it is not a decision made pursuant to a seniority system, and it is not an application of a standard of compensation. It is the establishment of an aspect of a seniority system, so Section 703(h) does not apply for that reason. It is then illegal, because it violates the substantive prohibition, 703(a)(2). It limits and classifies employees.

QUESTION: Well, the decision to adopt, but supposing they implemented the -- what do you call this again, the --

QUESTION: Progression.

QUESTION: -- progression system, later on, by promoting some people, promoting some whites and not some blacks. Then they are implementing, if you concede it is a seniority system, then they would be making implementing decisions, but would it not follow, if your analysis is

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correct, that they would be implementing a seniority system which was illegal at the time of its adoption, and therefore was not bona fide? So wouldn't your argument necessarily carry with it the implication of this particular system adopted after the Act if it fails to meet the impact?

MR. STRAUSS: No, it would not.

QUESTION: Why not?

MR. STRAUSS: The adoption of a seniority system is to be judged, as you say, in the same way as, say, a decision whether an employee has sufficient aptitude to fill a job.

QUESTION: I understand that.

MR. STRAUSS: That is to say, 7034(h) simply does not apply to that.

QUESTION: But what applies, then, to implementing decisions under this progression, this rule of progression that has been adopted, whether illegally or not?

MR. STRAUSS: Well --

QUESTION: If you call it a seniority system, does 703(h) apply then to the implementing decision?

MR. STRAUSS: Yes, 703(h), it is our view that 703(h) would apply.

QUESTION: Even though it would be illegal.

MR. STRAUSS: The adoption would be illegal.

QUESTION: Well, if the adoption is illegal, how

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could it be a bona fide system?

MR. STRAUSS: Well, the test for what is a bona fide system differs for the test of what is an illegal employment practice under other provisions of the Act.

QUESTION: Does it after the Act -- what in the legislative history says that there is a different standard for judging the adoption of a seniority system as opposed to the adoption of an eligibility or promotion rule?

MR. STRAUSS: Well, we say there is nothing to distinguish the adoption of a seniority system from the adoption of some other rule. Section 703(h) has something to say about decisions made pursuant to a seniority system.

QUESTION: Pursuant to a bona fide system.

MR. STRAUSS: That's right. Pursuant to a bona fide system.

QUESTION: It doesn't seem to me that you carry your argument to its logical extreme.

MR. STRAUSS: Well, the test for what is a bona fide system differs from the test for what is an unlawful employment practice.

QUESTION: But you would say that even if the system were an unlawful system it could nevertheless be a bona fide system within the meaning of the Act.

MR. STRAUSS: That's right. That's right. Even -- in fact, that is what, in a sense, Teamsters itself said.

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QUESTION: No, no. Teamsters dealt with a system adopted before the Act was passed, and by hypothesis could not have been unlawful.

MR. STRAUSS: No, Teamsters says that were it not for 703(h), this system would violate the Act as interpreted in Griggs.

QUESTION: Yes, but not when adopted, certainly.

MR. STRAUSS: Not when adopted. That's right.

QUESTION: Well, Mr. Strauss, we don't have to go that far.

MR. STRAUSS: That certainly is right, Justice Marshal. All we have here is a simple straightforward challenge to the adoption, which we say should be judged, as Justice Stevens said, in the same way as any other --

QUESTION: Doesn't your position apply to the adoption of the seniority system whenever it was adopted, pre-Act or post-Act?

MR. STRAUSS: Well, if the decision to adopt was made pre-Act, it was not illegal when it was made.

QUESTION: Well, I know, but it nevertheless isn't protected.

MR. STRAUSS: Well, it isn't protected but it wasn't illegal, so there is nothing to be protected from.

QUESTION: But it would. Your position is that it wouldn't make any difference when it was adopted.

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MR. STRAUSS: Well, if the Act was not effective, then actions taken were not illegal under the Act.

QUESTION: Yes, that is what Teamsters says.

MR. STRAUSS: Well, the adoption -- that is what Teamsters says, and that is what is clear from the fact that the Act is not retroactive. The unlawful decision in our view is the decision to adopt, not the subsequent decisions to promote or not to promote, and --

QUESTION: What if there is a pre-Act seniority system that is implemented afterwards. That implementation is protected?

MR. STRAUSS: Yes, that is our view.

QUESTION: If the seniority system was bona fide?

MR. STRAUSS: Yes, of course. This is always assuming the seniority system is bona fide. If a seniority system is not bona fide, then necessarily 703(h) does not apply.

QUESTION: You would say that -- don't you have to answer the question about whether the seniority system was adopted bona fide?

MR. STRAUSS: Oh, if the system -- this -- we are proceeding on the assumption, although we do think otherwise, that this system is bona fide. We are assuming that arguendo.

QUESTION: I would think your theory would mean

that the seniority system could never be bona fide at its adoption.

MR. STRAUSS: No, a system can be bona fide at its adoption and still run afoul of Griggs. That has been established since Griggs.

QUESTION: Do you have a position on whether the lines of progression are part of a seniority system?

MR. STRAUSS: Yes, we do, Justice O'Connor. We spell that out in a long footnote in our brief. We think it is clear they are not. There is some confusion about how the system works, because the employers have changed their explanation of it. They explain five times that it worked one way, and then when the court of appeals panel said that was not a seniority system, they changed their explanation. But the system, it is not -- the lines of progression don't afford a basis for calculating seniority. They simply act as a prerequisite or qualification. If you haven't served in a bottom job, you don't get a top job, no matter what your seniority, and in our view that is no more an aspect of the seniority system than --

QUESTION: You agree that the Court could resolve the case on that basis then?

MR. STRAUSS: Yes, certainly, if this is not a seniority system.

QUESTION: This Court.

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MR. STRAUSS: Yes. We do, and we present that argument, as I said, in our brief.

Thank you.

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

ORAL ARGUMENT OF RONALD ROSENBERG, ESQ.,

ON BEHALF OF PETITIONER UNIONS

MR. ROSENBERG: Yes, Your Honor.

CHIEF JUSTICE BURGER: You have about four minutes remaining.

MR. ROSENBERG: Crucial to the EEOC's position is the repeated statement that my opponent made that the references to seniority in the Congressional debates were always seniority rights. That is clearly incorrect. Senator Clark, one of the proponents of the bill, in introducing the very memorandum that constitutes the whole of the legislative history advanced by respondent, stated that seniority -- it is clear that the bill would not affect seniority at all. No use of the word "rights."

Senator Humphrey, another proponent of the bill, Title 7 does not --

QUESTION: Taking that literally, that is clearly inaccurate. You can't say the bill had no impact on seniority, can you? Is that your position, that the statute has no application ever to seniority? That is what he said.

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MR. ROSENBERG: It has application only in the Franks sense in terms of remedy.

QUESTION: Well, then, it has some application to seniority.

MR. ROSENBERG: But that is not the attack on the operation and the method --

QUESTION: I am just suggesting that isolated statement isn't a response to the argument, really.

MR. ROSENBERG: I submit, Your Honor, that the statement is not isolated. There were many such statements by the sponsors intending to lay to rest the charge that seniority would be adversely affected by the statute. As I started to say, Senator Humphrey also --

QUESTION: May I ask one other question? Is there anything in the legislative history to suggest that Congress intended that the adoption of subsequent seniority plans should be judged by any different standard than the adoption of other eligibility rules or work practices, whatever it might be?

MR. ROSENBERG: Yes, the repeated Congressional concerns that seniority not be affected, and the adoption itself of 703(h) as a method of assuring that the repeated statements by the proponents regarding the sanctity of the seniority principle would be preserved. Indeed, when 703(h) was before the Senate, Senator Dirksen said, seniority

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rights are in no way affected by the bill, and throughout --

QUESTION: Seniority rights.

QUESTION: I gather this is just an argument that adoption, application, pre or post-Act, it didn't matter, 703(h) immunized it.

MR. ROSENBERG: Except -- to the extent that they are bona fide, and 703(h) leaves, as Justice Rehnquist points out, and as Justice Stevens' questions point out, and a determination as to the bona fide nature. Congress stated broadly, unqualifiedly, and repeatedly, they always were doing so in the context of a system that was bona fide, and 703(h) crystallized those views in an attempt to deal with the --

QUESTION: Without regard to when the seniority system was adopted, pre or post-Act.

MR. ROSENBERG: That's correct. There is not a word to indicate any distinction between when the seniority system was adopted, and certainly not a word to deal with the difference between adoption and implementation. The essence of the EEOC position is that a post-Act system, the implementations of that post-Act system are protected under 703(h), so that 703(h) has application to post-Act systems, and that is why it is so fundamentally at war with what the court of appeals held.

QUESTION: Well, that doesn't really follow. It

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has application, there is no question about it, to post-Act systems. But it has application to the application of post-Act systems. That is what it says.

MR. ROSENBERG: But it creates a different standard, Your Honor. They are prepared to concede that the implementation of a post-Act system, they would be required to show --

QUESTION: A bona fide post-Act system.

MR. ROSENBERG: -- intention to discriminate, but they say -- and that is a post-Act system -- but they say the adoption of that very system, all they had to do would be to show the Griggs standard.

QUESTION: There is no language in the statute that says the adoption of a post-Act system shall be judged by any different standard than the adoption of any other work practice.

MR. ROSENBERG: But 703(h) indicates a clear Congressional desire --

QUESTION: You said it didn't use any word -- it uses the word "apply", as Mr. Justice Blackmun pointed out. It doesn't use the word "adopt." There is a very big difference between the two.

MR. ROSENBERG: That is not a reading of the statute that bears any support in the legislative history, and it is a strained, an illusory reading, as we showed.

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QUESTION: Well, you emphasized the earlier, the existing seniority system, but in effect you might read the statute to say that all existing systems are bona fide because they were lawful when they were adopted. There was nothing to prevent adoption. And the application of those is hereby protected. And the application of future adopted systems that are lawful is also protected. That is a fairly simple reading.

MR. ROSENBERG: But it is not one that is supported by the full context of the legislative consideration, Your Honor. It is not a reading that had ever occurred to the EEOC before, nor to any court. That is not a fair reading of this statute.

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

(Whereupon, at 2:08 o'clock p.m., the case in the above-entitled matter was submitted.)

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80-1199

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BY Sharon Ryan Connelly

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