In the

Supreme Court of the United States

GENERAL BUILDING CONTRACTORS ASSOCIATION INC. Petitioner	)	
v.	)	No. 81-280
PENNSYLVANIA ET AL.;	)	
UNITED ENGINEERS & CONTRACTORS, INC. Petitioner	)	
v.	)	No. 81-330
PENNSYLVANIA ET AL;	)	
CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA AND UNITED CONTRACTORS ASSOCIATION, Petitioners,	)	
v.	)	No. 81-331
PENNSYLVANIA ET AL.;	)	
GLASGOW, INC., Petitioner	)	
v.	)	No. 81-332
PENNSYLVANIA ET AL.; and	)	
BECHTEL POWER CORPORATION, Petitioner	)	
v.	)	No. 81-333
PENNSYLVANIA ET AL.	)	

Washington, D. C.

March 3, 1982

Pages 1 thru 70

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Wednesday, March 3, 1982

The above entitled matter came on for oral argument before the Supreme Court of the United States at 1:43 o'clock p.m.

APPEARANCES:

JOHN J. MC ALEESE, JR., ESQ., Bala Cynwyd, Pennsylvania; on behalf of Petitioners in 81-330 et al.

JOHN G. KESTER, ESQ., Washington, D. C.; on behalf of Petitioners in 81-280 et al.

HAROLD I., GOODMAN, ESQ., Philadelphia, Pennsylvania; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in General Building Contractors Association against Pennsylvania.

I think you may proceed whenever you are ready.

You may raise that lectern if it is any more convenient for you. No, no, the lectern, by the crank. The other way.

ORAL ARGUMENT OF JOHN J. MC ALEESE, ESQ.,
ON BEHALF OF PETITIONERS IN CASE NO. 81-330 ET AL.

MR. MC ALEESE: That's all right.

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

In this case the courts below stretched the reach of the contract portion of Section 1981 of Title 42 to impose liability for racial discrimination on a private business organization and three private trade associations who themselves did not practice discrimination, did not have any intent to discriminate, did not conspire to discriminate, and neither knew nor had reason to know that the discrimination for which they were held liable was being practiced. Thus, the general question presented hereby is whether Section

1981 does indeed reach so far.

The case began in the Eastern District of Pennsylvania in 1971 when 12 blacks in the Commonwealth of Pennsylvania sued, among others, a construction union, a construction contractor, and three contractor associations for racial discrimination under, among other statutes, Section 1981. The focus of the complaint was the union's exclusive referral system which was found by the trial court and not challenged, was facially neutral.

The action was certified as a class action on both the Plaintiff and the Defendant's sides,tThe construction contractor, Glasgow, being the class representative for approximately 1500 other contractors, and the associations being the class representatives for other associations.

This afternoon I will argue on behalf of Glasgow, and Mr. Kester on behalf of the associations.

The case was bifurcated for trial into a liability phase and a damage phase. The former has been completed. The latter essentially has not started.

Following trial, the trial court imposed liability under Section 1981 on the union, on Glasgow, and on the three associations, and thus on the members of the defendant classes that these defendants

represented. It issued an extensive injunction against all defendants and class members, which included hiring quotas and training programs.

Stated in a somewhat simplified fashion, the trial court's decision under Section 1981 respecting Glasgow was that the union, defendant union intentionally discriminated against minorities in the operation of its referral system, and solely because Glasgow, acting pursuant to a lawful contractual duty, notified the union of its need for workmen, and thereafter hired persons referred by the union, it, too, was enveloped within the Section 1981 net.

I might again add that the trial court found -- and those findings are unchallenged -- that Glasgow itself did not discriminate, did not intend to discriminate, did not conspire to discriminate, and neither knew nor had reason to know that the union was practicing discrimination.

The Third Circuit en banc divided equally, thereby affirming, and did not seek -- and did not issue any opinion. The union did not seek review by this Court.

Some background facts are helpful. In 1961 Glasgow, a Philadelphia unionized excavating contractor, had a collective bargaining agreement with the Operating

Engineers Local Union which represented operating engineers employed by Glasgow. Operating engineers run heavy construction equipment, cranes, bulldozers and the like. Up until then, Glasgow was free to obtain operating engineers from any available source. He could hire off the street.

Glasgow's labor agreement with the engineers was scheduled to expire around mid-1961. In the negotiations that year for a new labor agreement Glasgow was represented by one of the contractor associations which is a petitioner here. Glasgow was participating in these negotiations pursuant to its legal duty under federal law to bargain in good faith with the Engineers Union. Glasgow was faced in these negotiations with a demand by the union for an agreement to obtain operating engineers for employment from no other source except the union's referral system. As presented by the union in the negotiations and as found by the courts below and unchallenged here, the union's referral system was racially neutral.

Glasgow and the other employers who were involved in that particular negotiation wanted no part of this provision, and accordingly gave an outright rejection to this union demand. An impasse in bargaining ensued, and because the demand was and is a

mandatory subject of collective bargaining under federal law, the union, with impunity, struck Glasgow and the other employers to force their agreement to the union's referral system.

After a ten week strike which the trial court called destructive, Glasgow and the others capitulated to the union and thereupon agreed to notify the union of the need for workmen so that referrals could be made by the union to them.

In 1963 an attempt was made by Glasgow and other contractors to rid themselves of the referral provision but a strike, another strike, lengthy strike rendered this unsuccessful.

The duty to notify the union of a need for workmen and to consider referrals for employment has been a part of all labor agreements between Glasgow and the Engineers Union since then. The union's referral system places engineers in groups upon length of service and aligns and refers them on a first in-first out basis.

Throughout the entire period covered by this case, the registration, the grouping within this referral system, the aligning within the groups, and indeed, the referrals were performed solely and exclusively by employees of the union.

As contractually and indeed legally obligated to do, Glasgow used the system by notifying the union of its need and then hiring referrals therefrom.

The District Court specifically determined that the employees of the union who, without the knowledge or any reason to know by Glasgow that these employees who registered, grouped, aligned and referred engineers, failed to do so in accordance with the rules governing the system. In the words of the trial court, the union procedures in general constituteds a motley fabric of arbitrary departure from the rules.

Instead, and in breach of the collective bargaining agreement with Glasgow, those employees of the union registered, grouped, aligned and/or referred engineers in an intentionally racially discriminatory fashion.

QUESTION: Why do you say it was a breach of the collective bargaining agreement?

MR. MC ALEESE: The collective bargaining agreement, Justice Rehnquist, contains an outline of how the system is constructed, the union's referral system, and specifies, as it were, the rules for the running of that system, and when the union, instead of complying with those rules, but instead engaging in this conduct, as it were, outside the agreement, engaged in a breach

of the agreement.

QUESTION: It was not only outside of the agreement; it was contrary to the agreement's provisions then.

MR. MC ALEESE: Contrary. It was a direct breach of the agreement.

QUESTION: Well, did the agreement, you mean, have an express provision that in the operation of the hiring hall there should be no discrimination on account of race?

MR. MC ALEESE: Yes, it did, Your Honor.

QUESTION: In terms.

MR. MC ALEESE: It did commencing in 1971. That was incorporated into the agreement.

QUESTION: Counsel, I suppose respondents rely in part on a theory that 1981 imposes a non-delegable duty on the employers, and secondly, that the employers had an obligation to enforce the terms of the collective bargaining agreement as to hiring in a nondiscriminatory fashion.

Would you address those theories?

MR. MC ALEESE: Yes, Justice O'Connor.

With respect to the second question that you asked, treating that first, they do intend -- indeed contend that we had an obligation to enforce, but keep

in mind that there are unchallenged findings that Glasgow, and indeed, other contractors, neither knew nor had reason to know that the union was practicing discrimination, was, as Justice Rehnquist said, its conduct was contrary to the agreement.

Now, with respect to your first question, there is a contention indeed that 1981 imposes a non-delegable duty. I think that question can be approached analytically in two ways. I think first, going directly to the issue, does it contain a non-delegable duty, I think that in turn depends upon the construction of Section 1981. The non-delegable duty spoken of by the trial court in its lengthy opinion was a duty stemming from 1981 imposed on Glasgow under these circumstances to prevent the discrimination being practiced by the union. In a sense, it was a strict liability standard that was imposed on Glasgow --

QUESTION: It certainly didn't, and so construed wouldn't involve or depend on any kind of intent to discriminate.

MR. MC ALEESE: It would not indeed It would not indeed. As a matter of fact, Justice White --

QUESTION: Well, though, is that to suggest that if we were to hold that there was a non-delegable duty under 1981, that is still not the end of the case?

MR. MC ALEESE: That -- the answer to that is yes, that is not --

QUESTION: Because --

MR. MC ALEESE: -- the end of the case --

QUESTION: Because there has to be affirmative proof of intention?

MR. MC ALEESE: Indeed, Justice Brennan --

QUESTION: They are just inconsistent, aren't they? You -- intent would be irrelevant if there is a non-delegable duty.

QUESTION: Well, that isn't what he said.

MR. MC ALEESE: No, it wouldn't, no, it wouldn't, Justice White. I would say that the answer to that is that if the non-delegable duty is duty to prevent discrimination, as the trial court said in its opinion, then it seems that if you were to rule in this case that intent is a part of 1981, that there would have to be proof that the failure, the failure to prevent discrimination was itself racially motivated.

QUESTION: Well, then it is not a non-delegable duty.

QUESTION: That's what I would think.

QUESTION: But you go ahead and argue the way you --

MR. MC ALEESE: What I was saying, in response

to, in connection with the matter of the non-delegable duty, you can approach this case the other way.

QUESTION: Certainly.

MR. MC ALEESE: Looking at an interpretation of the statute, not unlike Justice Stevens did in the case last term, the City of Memphis v. Green where you can analyze the specific conduct that is challenged here. And what is that conduct?

The conduct by Glasgow that has been -- that liability was based upon is that Glasgow, pursuant to a contractual obligation it had, notified the union of its need for workmen and then considered and indeed did employ the persons referred by the union. That is the challenged conduct.

Now the question is, looking at 1981, the language of the statute and its legislative history, is that the kind of conduct which is violative of 1981? That is another way to analyze the matter of what are the duties stemming from 1981, and that is to say that whatever the duties are that 1981 imposes, duties separate and apart from the question of whether or not there is need for a discriminatory motive, that whatever they are, this challenged conduct did not fall within the ambit of coverage of Section 1981.

QUESTION: Mr. McAleese, I think I'm having

the same difficulty Justice White was. I understand the concept of non-delegable duty to be basically borrowed from tort law --

MR. MC ALEESE: Mm-hmm.

QUESTION: Where, as I had understood it, it relieves the plaintiff from having to show negligence on the part of one defendant because you say he didn't have to be negligence. If another defendant was, then his conduct was a non-delegable duty.

MR. MC ALEESE: I think that the notion of non-delegable duty is the sense that there are some activities beyond the physical conduct engaged in by the defendant which liability is imposed on the defendant for that conduct, and the reason why it is is not on any vicarious theory but instead that the defendant owes a direct duty to the plaintiff, and it would seem that using the non-delegable duty type theory in the context of 1981 that this Court would have to interpret, construe Section 1981 as imposing an obligation on Glasgow under these circumstances to prevent the discrimination which was practiced by the union employees.

QUESTION: But --

MR. MC ALEESE: And if such a construction is not given to the statute, then under those

circumstances, the statute does not reach the Glasgow conduct.

QUESTION: Yes, it wouldn't be a non-delegable duty.

QUESTION: But if you, if you say that you have to have an intent to discriminate, why you would just, anytime there is not an intent to discriminate, non-delegable duty or not, there is no liability.

MR. MC ALEESE: I mean, this case -- you are entirely correct, Justice White. I think this case can be looked at in two ways. Number one, you can look at the statute and say does the statute prohibit the conduct, the specific conduct that Glasgow engaged in here, and you can interpret the statute to say --

QUESTION: Which is -- which in one sense is a failure to enforce.

MR. MC ALEESE: Well --

QUESTION: Well, you didn't enforce, now, but your position --

MR. MC ALEESE: Didn't enforce the agreement?

QUESTION: Yes, exactly.

MR. MC ALEESE: Well, but we had no knowledge or reason to know --

QUESTION: I don't care whether you had knowledge or not. You didn't enforce it. Now --

MR. MC ALEESE: That's true, Your Honor.

QUESTION: Now, your position is that that just is not a basis for liability.

MR. MC ALEESE: That's correct, and as I say, it can be approached in one of two ways. You can do the statutory construction matter and see if you catch the conduct, or you can approach the case on the sole ground that if 1981 requires a proof of intent, then the unchallenged finding by the trial court --

QUESTION: Mr. McAleese --

MR. MC ALEESE: -- that there was no intent is sufficient to decide the case.

QUESTION: Not that it's in this case, but what would your idea be of how it could be proved that a company did something with an intent to discriminate?

MR. MC ALEESE: I think that the cases are legion, Justice Marshall.

QUESTION: Well, then, what is it that you do that shows you have an intent to discriminate?

MR. MC ALEESE: Well, I would think that --

QUESTION: I mean, you don't file an affidavit saying that, you don't write a letter saying it.

MR. MC ALEESE: I would think that one way woul be if the respondents in this case brought an action against a single employer, let's take for example

Glasgow, and they proved that an operating engineer presented himself for employment by Glasgow and Glasgow said I refuse to hire you on the grounds that you are a minority.

QUESTION: He doesn't have to make an affidavit. He just has to -- I mean, I am wondering how you show intent --

MR. MC ALEESE: Well, I mean --

QUESTION: -- because in this day and age you don't have people going around saying such things, do you?

MR. MC ALEESE: That may be correct, Your Honor but --

QUESTION: May be?

MR. MC ALEESE: But to show intentional discrimination, there are a variety of evidential tools.

QUESTION: Well, one is that you say it.

How is it another way?

MR. MC ALEESE: Well, I think certainly the courts have sanctioned the use of statistical evidence to form the basis for inferences of intentional discrimination under some circumstances.

QUESTION: That would show it.

Anything else?

I mean, for example, if this company, in your

case, the Glasgow case, if the union periodically, without exception, referred Hottentots to you, would you suspect that there was something wrong?

MR. MC ALEESE: Would I suspect?

QUESTION: Yes.

MR. MC ALEESE: Not necessarily, Your Honor.

QUESTION: Well, suppose they were all American Indians in East Pennsylvania, would that --

MR. MC ALEESE: And just in the context of this --

QUESTION: Would that look to you like something was going on?

MR. MC ALEESE: Not necessarily because you must keep in mind that not only was Glasgow using this particular referral system, but there were 1500 or more other contractors that were using it, and it could happen, with a given contractor or contractors where --

QUESTION: You wouldn't even look into it?

MR. MC ALEESE: Well, of course, in this particular case, following 18 months of trial and evidence on these various questions, the trial court found that there was not only no knowledge, but indeed, also no reason to know, which is I think the area that you are suggesting.

QUESTION: This was a hypothetical. It wasn't

this case because I don't think you have any Hottentots in this case.

MR. MC ALEESE: Just briefly, in closing here, it is our position that we suggest to this Court that it rule that intent is necessary for a violation of Section 1981, and the very brief basis of that is the close relationship between Section 1981 and the 14th Amendment and its requirements as this Court has spelled out in the case of Washington v. Davis. With respect to the decision by the lower court, going away specifically from what we might call a direct violation of Section 1981 and going to the matter of respondeat superior, I think that is very, very easily disposed of. There certainly is a substantial question as to whether respondeat superior can be used with 1981, and even if so, what the extent of that would be because of the personalized nature o the statute, 1981.

But beyond that, it doesn't seem in this case that a decision has to be made on that simply because it is so clear that there was no right to control, right to supervise the union employees who practiced the discrimination in this case.

QUESTION: Well, you had the -- I don't quite understand that. You had the -- you had a contratual right to prevent the union from racially discriminating.

MR. MC ALEESE: Well, if you mean that --

QUESTION: You just said that --

MR. MC ALEESE: -- there was an antidiscrimination clause in their agreement --

QUESTION: Well, they promised not to discriminate. They promised you not to discriminate.

MR. MC ALEESE: But that is not enough under the law governing respondeat superior -- and I refer the Court to --

QUESTION: Well, I know, but don't make the generality that you had no right to oversee their -- you certainly had a right to look around and if you thought they were breaching the contract you could have sued them.

MR. MC ALEESE: Without question, file a grievance under the --

QUESTION: Under 301, under 301. So you had a right to do something to them.

MR. MC ALEESE: A right in that sense, but when I speak of a right to control or a right to supervise, I speak of that as it is within the doctrine of respondeat superior --

QUESTION: Yes.

MR. MC ALEESE: -- as this Court has spoken to in the Loeb case and the Orleans case in '73 and '76.

QUESTION: Most of those rights do rest in contract, by the way.

MR. MC ALEESE: Now, you -- is --

QUESTION: Like employer and employee, they usually rest in contract.

MR. MC ALEESE: And if the Court were to review the collewctive bargaining agreements which were operative throughout the period, it would find that nowhere in those agreements is there any right to control.

QUESTION: After all, the -- yes. Well, of course, the union's representing the employer's employees.

MR. MC ALEESE: And stands as an autonomous entity with a fiduciary duty to those employees and no duty whatever, as it were, to the employer.

QUESTION: But a unit that has made a promise to the employer that it now is claimed is being broken, or was broken, and it has been -- was found that it was broken.

MR. MC ALEESE: That's correct, but it is not that nature of fact pattern which satisfies the right to control that is necessary to trigger effectively the doctrine of respondeat superior. It's a right physically to supervise the union employees in this case

who practiced the discrimation in violation of Section 1981.

I would like to reserve any time that I have for rebuttal.

CHIEF JUSTICE BURGER: Mr. Kester?

ORAL ARGUMENT OF JOHN G. KESTER, ESQ.,
ON BEHALF OF THE PETITIONERS IN CASE NO. 81-280 ET AL.

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

I'm coming before you this afternoon to speak on behalf of the forgotten persons in this case, the three trade associations who were held liable, along with the employers, along with the Apprenticeship Committee and along with the union for discrimination which was practiced by the union.

This case comes before the Court with a very sharp and very clear legal issue, and that issue is not whether the victims of racial discrimination may recover under 1981 against the discriminator. The issue before the Court is how far that liability under Section 1981 is to be extended. The issue is, in that respect, not whether 1981 reaches private action, but whether it also extends to reach private inaction, and the issue is very sharp because the case comes up with the benefit of some unusually candid, clear and conscientious findings by

the district judge who tried the case.

The district judge found, as Mr. McAleese said, that the associations did not discriminate, they didn't know the discrimination was going on, and they didn't even have reason to know that the discrimination was goin on. And I think, Mr. Justice Marshall, that is at least a partial answer to the question you raised to Mr. McAleese before.

We have in this case a clear, specific finding that they didn't have knowledge or notice, and I think that this Court, unlike the NAACP case that was before you a little while ago, where there is some contention among the parties as to what is a finding of fact and what is a conclusion, we don't have any of that in this case. It's clear findings of fact what we are dealing with here. There was no appeal from those findings of fact, and we all take it on that basis.

Now, what this court has to wrestle with are the legal conclusions of the district court, and the district court was equally candid about what his legal conclusions were, too. He was persuaded on the authority mainly of a case called Davis against Los Angeles, which the Court will remember, which this Court subsequently vacated, he was persuaded that 1981 liability should be greatly extended beyond the

discriminators, beyond the people who dealt with the discriminators to my client, the General Building Contractors Association of Philadelphia, which did nothing more than negotiate the collective bargaining agreement which the union later violated.

Now, to reach that conclusion -- and unfortunately the legal reasoning in this case is a little bit murkier than the findings of fact -- to reach that conclusion he first concluded that 1981 does not require any proof of intent to discriminate. He said that even though they had no knowledge and notice of the discrimination, the associations were liable even though they weren't employers, because not one operating engineer has ever been employed by one of my clients. My clients wouldn't know what to do if an operating engineer came in the door. They are an office. They are people sitting at desks, and all they do is administer administrative matters for the members of the association.

I'd like to just touch briefly, before we go any further, on this question of non-delegable duty. I think, Mr. Justice White, that, and Mr. Justice Brennan, that you two have framed essentially two alternative ways of deciding the case, but I don't think you can have it both ways. I think non-delegable duty is a word

that, in essence it begs the question. There is a lot of jargon floating around in this case. Non-delegable duty is one of the bits of jargon that's there.

But a duty not to discriminate does not exist in a void. Duties are something that somebody owes to somebody else, and the question before the Court is, with respect to my client, what kind of duty did my client owe to the people who were discriminated against by the union, like Local 542.

QUESTION: Mr. Kester, did you say that your clients were or were not signatories to the collective bargaining agreement?

MR. KESTER: They were siognatories to the collective bargaining agreement, Mr. Justice Brennan, as agents of the employers whom they represented. In other words, they were -- what the district court was doing I think was --

QUESTION: Well, but the associations, they undertook no obligations?

MR. KESTER: No. They were simply, they were simply the agents.

QUESTION: For the employer, members of the associations?

MR. KESTER: For the employers, for the members of the associations, and then other employers

who followed the contract.

QUESTION: Did they negotiate the contract?

MR. KESTER: They negotiated the contract. They negotiated the contract, Mr. Justice Marshall, a contract which the district court found --

QUESTION: That's what I thought.

MR. KESTER: -- was absolutely legal, valid, and non-discriminatory.

QUESTION: That's what I thought.

MR. KESTER: And towards the end it included a specific nondiscrimination clause in it. And they were responsible for that. That's their responsibility. They negotiated a contract which was perfectly legal.

Now, if you believe that Section 1981 requires intent to discriminate -- and I would urge the Court that it does based on authority of Washington v. Davis, one could even argue that that was decided in Washington v. Davis although not discussed very much because 1981 was involved in Washington v. Davis, but 1981 certainly does require intent to discriminate. That's what this Court has held with respect to practically all the civil rights legislation that has come up before it.

QUESTION: But you could abandon all of the -- all of the members of the association and still win. You could say that are entitled to be free of this

judgment, or to be free of any judgment even if the membes of the association, each of them is liable, I suppose, because you -- they may have owed a duty, but you didn't.

MR. KESTER: I wouldn't even say they owed a duty, of course.

QUESTION: Well, I know you wouldn't, but you could --

MR. KESTER: But certainly, yes, we are one step removed. I mean, if you think of the union's discrimination as the sun, the employers are --

QUESTION: So you don't say that if they lose, you lose.

MR. KESTER: No, I would never say that, Mr. Justice White. And it is certainly not true. If you think of the union as the sun of discrimination, the employers are maybe sitting out there like the planet Pluto, and we are some distant start. We have nothing to do with it. There wasn't anything that my clients could have done about the discrimination that took place. It is --

QUESTION: Once again, once the contract is signed, you and the employer don't have anything to do with each other until the next contract?

MR. KESTER: That's right, except, except

there may be administrative matters that come along, paperwork kinds of things, but the employees are referred by the union to the employers.

QUESTION: And you don't have anything to do with grievance procedures or anything. That's the individual employer, isn't it?

MR. KESTER: The grievance procedures, Mr. Jutice White, are brought against individual employers by --

QUESTION: That's what I mean. So you have nothing to do with it.

MR. KESTER: That's right.

QUESTION: You don't represent the employers in that respect.

MR. KESTER: Right. By employees and through the union against employers. That's right. We aren't involved in it.

QUESTION: That's all you needed to say. You don't need to -- okay.

MR. KESTER: That's all I --

Now, one confusion that has entered into this case, I think, as it came up to this Court is a discussion I notice in the respondent's brief of the hiring hall, and it's almost written in capital letters as if the hiring hall is some kind of a separate entity

here that involves both the employers and the union, although again I have to point out that we aren't even the employers. I'm representing the associations.

Now --

QUESTION: Mr. Kester, what about the apprentice program, the JTAC, do you call it?

MR. KESTER: The JATC, Joint Apprenticeship and Training Program, right.

QUESTION: Do the associations have anything to do with that by way of appointing the trustees or anything?

MR. KESTER: The Joint Apprenticeship and Training Program has six trustees, and three of those are from the associations and three of them are from the union. Now, those trustees are acting on their own. They come from that source, but they are -- the JATC is a totally separate entity. There's nothing in the district court's opinion that ever suggested that liability could be rested on the associations because they appointed three of the members of the JATC.

QUESTION: What about the employers?

MR. KESTER: The appointment is from the associations, not the employers in that respect.

QUESTION: So you would completely draw a barrier between both the associations and the employers

on the one side, and whatever the apprentice program may have practiced by way of discrimination on the other.

MR. KESTER: Right, and I should say --

QUESTION: And who would be liable for discrimination there, the trustees?

MR. KESTER: The trustees and the program itself. It is sued as a separate entity, and it has been found in some of the cases we cite in our briefs in similar situations, that apprenticeship programs are separate entities. They're treated as such. Indeed, the liability of the JATC, I should point out --

QUESTION: Well, it certainly is a joint enterprise with the union, isn't it?

MR. KESTER: The hiring hall?

QUESTION: Yes -- no, the apprentice program.

MR. KESTER: The apprentice program is a separate entity. It does stem from both the unions and the employers in that sense, certainly, but the liability of the JATC, Mr. Justice Blackmun, itself is very unclear in the opinion, and it seems as if it is almost derivative from the union's discrimination itself.

Now, I started to say with respect to the hiring hall -- and that is the only basis on which discrimination was charged against my client -- Judge

Higginbotham in the district court referred on the very first page of his opinion to discrimination in what he called Local 542's exclusive hiring hall. On page 2 he says Local 542's function as an exclusive hiring hall, and he goes on throughout the opinion. The notion that the hiring hall is anything other than the union itself is something that's just crept into this case at a very, very late stage.

The hiring hall is the union. If you read the collective bargaining agreements, if you look at the Joint Appendix at page 231, 141, 255, the words hiring hall never appear in the collective bargaining agreements. The collective bargaining agreements say the union shall provide the work force, and that's exactly what happened here.

On the question of control which came up a little while ago, I'd like to say a couple things on that, too. In the first place, this Court has several decisions under Section 1983 -- and this of course is Serction 1981 -- under 1983 which have said that even the right to control is not a sufficient basis for liability, in the Monell case and the Rizzo case, for examples, and what the district court said in its opinin really, was not, Justice O'Connor, that there was a right to control. The pertinent language is at page 163

of the appendix to No. 280, in footnote 61, and at that point what the district court did was it equated the right to oppose with the right to control, and I think those are two different things. He said if something was -- it's like saying if you now somebody's doing something wrong and you may have a cause of action to sue them, therefore you control them.

Well, there's many a slip 'twixt the cup and the lip in lawsuits and any other kind of quasi-lawsuit activity. So there really was no finding of control here.

But I would say even if there were a finding of a right to control, that still wouldn't be a sufficient basis for liability under 1981. I cannot believe that this Court would say that the obligations of distantly related private individuals under Section 1981 are greater than the obligations of government officials under Section 1983.

Now, we may want to think about what is the effect of this decision, whether it goes one way or the other. This Court has had a number of cases before it, going back to Jones against Myers Company in 1968 involving the post-Civil Rights -- or the post-Civil War legislation, and I would say first of all the country's basic antidiscrimination law is not Section 1981; it's

Title 7. And Title 7 has a very carefully thought out set of remedies, set of procedures, and set of protections for persons who might be held liable under it. Jones against Myers Company was decided four yeas after Title 7 was on the books.

Now, 1981, which dates back to 1866 and 1870, is a law guaranteeing equal rights generally, an equal right to testify, to enter contracts, equal punishments, taxes, and licenses, and if there is in its legislative history, which goes on for hundreds of pages, there's not one hint of a kind of vicarious liability such as proposed in this case.

If this case involves an exception, if you would regard this as some kind of a loophole in civil rights liability, I'd have to say any requirement of intent, then, would be a loophole, and yet this Court habitually requires intent in all of these statutes. And this Court in Monell and other cases has consistently rejected thoughts of vicarious liability.

The respondents in this case are proposing a rather extravagant position that anyone who is in any way involved with a discriminator or, in the case of my client, anyone who even contracts with a discriminator becomes liable regardless of knowledge for any kind of discrimination that occurs. I don't know what kind of

principle limit there would be to that kind of liability. It's as if you hire somebody to paint your house and it turns out that the house painter was discriminating, and you're held liable for his discrimination. That's not what was intended by 1981.

I dont think that the draftsmen in 1981 thought about this at all. I don't think any of this is what they had in mind. And several members of the Court have already expressed reservations about drifting steadily into more and more extravagant interpretations of the post-Civil War legislation.

I think perhaps the most pertinent citation for this case really is not any of the 1981 cases or the common law cases or the scholars that we cite or the extensive legislative history. I think perhaps the most pertinent citation for this case is what this Court said at the conclusion of the little snail darter case, Tennessee Valley against Hill. In that case the Court quoted from Sir Thomas More as he is thought to have said and expressed in the play "A Man for All Seasons," and one of Sir Thomas More's friends expresses impatience with the law. The law doesn't do everything he wants it to do, and as quoted by this Court, Sir Thomas More said, what would you do, cut a great road through the law to get after the Devil? And when the

last law was down and the Devil turned around on you, where would you hide, Gofrey, the laws all being flat?

This is a case where impatience could lead to some very bad results. There's certainly nothing attractive for victimized minorities in this country if limits on liability are ignored. There would be nothing hopeful for the NAACP, which was the petitioner in the previous case, in a legal system where vicarious absolute liability could be imposed without regard to knowledge or intent. That's not consistent with the law of a century ago, and it's not consistent with the prevailing sense of justice today.

At page 420 of the Joint Appendix, the respondents said in the Court of Appeals, and I quote their position, "The notion of agency and control are smokescreens. Our theory of the case in the beginning, and it is the one found by Judge Higginbotham, is one of strict liability."

I would say to the Court, I don't think you can find strict liability in Section 1981. I think it requires intent. I think it requires causation. I don't think there is any imaginable way under that statute on which my client could be found liable.

Thank you. I'll reserve my time.

CHIEF JUSTICE BURGER: Mr. Goodman?

ORAL ARGUMENT OF HAROLD I. GOODMAN, ESQ.,

ON BEHALF OF RESPONDENTS

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

Few cases I think have reached this Court with the intensity and magnitude of racial discrimination that this one does. Blacks and other minorities did not work for the contractors as a class solely because of intentional racial discrimination. That is clear and it is undisputed. It is also clear that the sole reason that that happened was that General Building Contractors Association and all the other associations on behalf of their members and an entire industry created by contract an exclusive hiring hall with Local 542. Under that hiring hall, each employer had to rely on the union for workers. It had no choice. Not one of my clients could walk up to Glasgow and say I am skilled. I've operated bulldozers. I want to work for you. My clients had to go through the union.

But it is a mistake to assume that the union, as such, is somehow distinct from the employers in this respect because the hiring hall is separate. It was set up by the associations. The hiring hall was administered by the union, and that is clear. But the hiring hall was a separate entity. And what that entity

did was as follows.

QUESTION: Separate from the union?

MR. GOODMAN: It was administered by the union, but it is separate from the union. That is to say, Justice Rehnquist, in setting up a hiring hall as such, the associations by collective bargaining agreement sat across from Local 542 and decided voluntarily to create an entity, a hiring hall, as the mechanism for the entry --

QUESTION: Well, voluntarily after a couple of strikes, I gather.

MR. GOODMAN: Well, the evidence on the strikes is less than clear. Certainly there's no evidence in this record, none whatsoever, that there was any strike since 1963, some 18 years ago, and certainly no one has ever suggested and no one has cited to any cases that would suggest that coersion or duress is the basis for racial discrimination. The Fourth Circuit has made that clear when it said in the Robinson case the rights guaranteed by Section 1981 cannot be bargained away, cannot be bargained away by employers or by unions.

QUESTION: Well, I didn't mean to get you off the track of answering the question about the union being separate from the hiring hall.

MR. GOODMAN: I think it is a critical point,

though, because it is certainly true that the union runs the hiring hall, no doubt about it, by a set of rules by --

QUESTION: The hiring hall isn't a separate juridical entity, is it, like a corporation or something like that?

MR. GOODMAN: It is in this instance, yes, sir.

QUESTION: It is incorporated?

MR. GOODMAN: It isn't a corporate entity. It isn't a corporate entity. But it didn't exist and couldn't exist without collective bargaining agreement.

QUESTION: Well, isn't it just a system of job referral that's operated by the union?

MR. GOODMAN: It is a system of job referral, but it's also a system of entry because the only way you can enter the union is if the union made the decision to admit people, and the employers, Justice Rehnquist, are the ones who gave the union that right. In the end they could have chosen to use a foreman or their own personnel office, but they did choose and continued to do so over the last 20 years to rely on this particular unit, and here are the consequences of that.

QUESTION: Well, wait a minute. That was negotiated, wasn't it? Did the management just tell the union, look, you take over, or was it negotiated?

MR. GOODMAN: Well, I think that in this particular case, when we examine this particular record and examine each collective bargaining agreement, Justice Marshall, which was negotiated every single year, I think it was negotiated.

It is certainly true at the outset, in 1961, shortly after Landrum-Griffin made hiring halls legal, that the employers took a strike. We don't deny that, and we don't deny the fact that two years later in '63 they took a strike.

QUESTION: Who pays for the union hall?

MR. GOODMAN: The union hall is paid for, to the extent that -- is actually funded --

QUESTION: Not to the extent. Who pays the bills?

MR. GOODMAN: Well, the bills are paid for by the union to the extent that it's its employees, but the employers check off dues, check off funds into a health and welfare program.

QUESTION: Well, how much cash, green money does the employer put into the union hall?

MR. GOODMAN: Well, the employers don't put any money into the union.

QUESTION: I thought so. The union does.

MR. GOODMAN: Yes, sir.

QUESTION: Well, why don't you admit it, that the union controls the union hall?

MR. GOODMAN: Well, we do.

QUESTION: The hiring hall.

MR. GOODMAN: We do, we do concede that.

QUESTION: You do, now?

MR. GOODMAN: Absolutely.

QUESTION: Thank you.

MR. GOODMAN: Absolutely.

The question in this case, though, is the magnitude of the discrimination as it affected the employers. Now, in that particular instance it is clear that 1500 employers relied on Local 542, not on their foremen, not on employment agencies, and the result of that were that hundreds of minorities, solely because of their race, were denied jobs with the employers and were precluded from earning a living. It is clear that 1036 employers out of 1500 never employed a minority operating engineer. Why? Because they chose to rely on Local 542.

It is equally clear that the financial cost to minorities approximately 1 million hours a year in lost work, multiplied by the wages over a 15 year limitation period, that would be in excess of $100 million solely because of a persons race.

Now, the hiring hall as such is not the only entity in this matter, and it is not the only area in which our opponents agree that there was racial discrimination. They set up, as Justice Blackmun pointed out, an apprenticeship program which is called the Joint Apprenticeship Program. Three trustees were chosen by the associations and three by the union. It is Exhibit P-254. It says the entrustees for the employers shall represent the employers and their interests, and the same for the union trustees.

The Joint Apprenticeship Program engaged in intentional discrimination, denying entry and jobs to minorities. And again, that is undisputed, it is intentional, and it is unchallenged.

But more than any other fact in this case, there is one other joint one that has not been mentioned, and that is the history of the Philadelphia Plan. Judge Higginbotham devoted a considerable amount of his findings to that issue. Now, Mr. Kester called his client the forgotten party. I don't think Judge Higginbotham forgot about them. He described his clients, Mr. Kester's, and he said it in these words: The conduct of the associations, particularly with respect to the affirmative action program which substituted for the Philadelphia Plan, demonstrated a

reckless disregard for equal employment opportunity for minorities. The Federal Government, after years of experience, and I must say as the Court took judicial notice in Weber of the historical discrimination against minorities in the construction industry, the Federal Government decided on a common sense approach, namely, the employers pay the wages, the employers put people to work. And so as a result they put the operating engineers as a craft, not the union, the craft, the employers, under the coverage of the Philadelphia Plan.

All the employers had to do in the associations was comply with Federal law. But as Judge Higginbotham --

QUESTION: Well, Mr. Goodman, I understand what you're saying, but I'm -- you would think you were going to end up saying you didn't have to find that there was any vicarious liability here at all.

MR. GOODMAN: No, no we're not, and I only --

QUESTION: Well, the district judge thought he had to to reach that issue, didn't he?

MR. GOODMAN: He did, sir.

QUESTION: And don't you have to defend that?

MR. GOODMAN: Yes, sir, and we do.

QUESTION: Well --

MR. GOODMAN: I think first of all, just

preliminarily --

QUESTION: I'm not sure what you've said is very relevant to that, do you?

MR. GOODMAN: Preliminarily, Justice Powell, on the issue, on the issue of vicarious liability, I think it's important to point out that Judge Higginbotham, I think consistent with the Court's decision in Teamsters, bifurcated this case, and the trial took a year and a half to complete. So at stage one he dealt just with liability and with issues related to injunctive relief. He did not make any individualized findings against Glasgow. He didn't make any individualized findings in favor of, against or in favor of any individual member of the plaintiff class. What he found was that most if not all of the employers did know about the discrimination, but as a class, viewed only as a class, they did not.

He then concluded that 1981 does in fact have a vicarious liability component. In doing that he drew on essentially two theories, one, the non-delegable duty, and two, essentially one of agency or joint enterprise.

Now, with respect to the first, the non-delegable duty, it is clear, and it is here undisputed, that 1981 was violated, and it was violated

by the employers. By its clear terms it says all persons within the jurisdiction of the United States shall have the same right to make and enforce contracts as is enjoyed by white citizens.

QUESTION: You say it was, it's undisputed it was violated by the employers?

MR. GOODMAN: Yes, sir, because they did not provide work as operating engineers to minorities.

QUESTION: But that requires some discussion of the intent element, doesn't it, unless you say there is no intent element.

MR. GOODMAN: No. Judge Higenbothem found, Justice Rehnquist, that the union engaged in intentional racial discrimination. He also found that the apprenticeship program engaged in intentional racial discrimination.

He then posed this question: can that intentional discrimination be imputed to the employers and the associations? He answered that question affirmatively.

QUESTION: Well, you made the statement just a moment ago that it is undisputed that the employers violated Section 1981, and I thought it was disputed here.

MR. GOODMAN: I don't believe so. First of

all, when I made that statement I meant --

QUESTION: Well, the case is over then. We don't have to sit here arguing it.

MR. GOODMAN: We would be glad to submit if that were the case.

QUESTION: I thought the judge had -- he had to find vicarious liability because he couldn't find that the employers were violating it themselves.

MR. GOODMAN: As a -- yes, sir.

QUESTION: That he had to impute somebody else's liability to them.

MR. GOODMAN: That's correct. He did do that. My point in response to Justice Rehnquist's question was that it is undisputed that minorities as a class did not have the same right to make and enforce contracts with the employers as did whites, and the result of that was a substantial loss of work and a substantial loss of wages.

QUESTION: But that's a different thing than saying it's undisputed that the employers violated 1981, which is the way you put it a moment ago.

MR. GOODMAN: What I meant -- that is correct. What I meant was in that respect, that the finding in that respect was vicarious, and it's to that point that I would like to address myself now.

Section 1981, in our judgment, does create non-delegable duties. It must in the employment context. It seems to me, as Justice Cardoza said in the Sheffield case, that an employer in the end must be responsible for his own work force, regardless of who he delegates things to, whether or not it is an independent agency, whether or not it's a foreman, it is the employer in the end which has a duty to make sure that its work force isn't plagued with, as was the case here, intentional racial discrimination.

If, for example, an exemption was found under 1981 because instead of relying on a foreman an employer chose to rely on a union or an employment agency or any independent contractor, it would be a massive loophole in 1981.

Faced with virtually this question in Radio Officers, a case under the National Labor Relations Act in 1954, the Court imputed intentional discrimination under Section 8(b)(2) of the National Labor Relations Act to employers, and that's all that we are saying here, and it is vicarious. There's no doubt about that.

But in the end, can any employer function in this day and age except vicariously? After all, if we phrase this in terms of a foreman and posed it in terms

of Glasgow, not knowing whether or not its foreman engaged in racial discrimination, I would submit that the Court would conclude that whether Glasgow knew what its foreman was doing would be irrelevant. In fact, that was virtually the facts in the Furnco case with Henry Dacies.

The issue here then must become whether or not employers have an exemption because they have a right --

QUESTION: Is that really a fair argument? I mean, if you talk about the foreman, don't you assume that the employer knows what its -- I mean, that the knowledge of the agent is imputed as a principle.

MR. GOODMAN: That is correct, Justice Stevens, and we are drawing the same principle here.

Let me refer as an example to the instance where in a 14th Amendment case, and I don't cite it to state action purposes, Coke versus the City of Atlanta, Justice Marshall argued that case. In Coke, the black plaintiff was denied access to eating facilities in the Atlanta Airport which had been segregated. The City of Atlanta had no control over the restaurant. It didn't know there was any discrimination. As a matter of fact, the restaurant was a franchise, and the main corporate office had no knowledge that discrimination was taking place. They had no control over it.

In an injunction that was issued against Atlanta and against the corporate defendants, largely relying upon cases following Burton v. Wilmington Parking Authority, the Court found that that discrimination could be imputed.

Now, again I go back to this fact, minorities did not have the same right to --

QUESTION: Let me try you on another point.

I'm worried about this association that did nothing but help draw up this contract, mediation, the agreement, a labor agreement.

MR. GOODMAN: Yes, sir.

QUESTION: They were held vicariously liable?

MR. GOODMAN: They were held vicariously liable by Judge Higginbotham.

QUESTION: I'm interested in my own profession. Are the lawyers that negotiate also liable?

MR. GOODMAN: No, sir.

QUESTION: And the difference is?

MR. GOODMAN: The difference is the Association, acting as an agent for its members and ultimately for an entire industry, required every employer to rely on a racially discriminatory union. In the end the employers --

QUESTION: I thought that the story was that they put into the contract that there should be no discrimination.

MR. GOODMAN: They did finally, in 1971, and that was breached. And that was breached.

It seems to me that in the instance of Section 1981 the statute must perforce require employers to make sure that minorities have the same rights as whites to work. And it is clear, and it is undisputed, that minorities did not have that right. I think the question --

QUESTION: Counsel, have you answered Justice

Marshall's question? Does that argument respond to his concern about the lawyer or the collective bargaining agent?

MR. GOODMAN: I'm sorry, Justice Stevens. The lawyer who negotiated that contract in my judgment would not be liable.

QUESTION: And why is the Association?

MR. GOODMAN: The Associations are liable because, acting as agents --

QUESTION: But the lawyer is an agent of his client.

MR. GOODMAN: But the lawyers weren't necessarily agents for the employers. You see, the Associations --

QUESTION: Well, say they had hired a lawyer instead of a trade association to negotiate their contract.

MR. GOODMAN: I think that if they hired a lawyer to negotiate it the lawyer would not have any personal liability. But I think in this --

QUESTION: Then why -- I don't understand. Why is that different?

MR. GOODMAN: The Associations here did enter into collective bargaining, and they did two things --

QUESTION: So do lawyers, too.

MR. GOODMAN: If a lawyer created himself or herself as the entity, as an association would be the entity, negotiated the agreement, compelled its members to rely on what was a racially discriminatory union, and signed --

QUESTION: Well, say they put in the contract, instead of in '71 they put it in in '61 and '63, there should be no discrimination on account of race. Your case is still the same as I understand.

MR. GOODMAN: It would be the same under that example, yes, sir. But we are saying with respect to the Associations that here they created an industrywide system, a system which compelled their members, and as a matter of fact non-members, to rely on a union which practiced intentional racial discrimination.

Now, the fact that they're an association and not an employer doesn't advance the argument much further, because in the end of course associations don't employ people. Employers often for purposes of collective bargaining will create associations to bargain on their behalf. They also created them in this instance to set up the joint apprenticeship program, and the associations appoint trustees, and the apprenticeship program engaged in intentional racial discrimination, all of which is undisputed.

Now, in our judgment, faced with those facts, Judge Higginbotham correctly held the associations liable. As a matter of fact, in a subsequent proceeding in assessing the remedial costs of the injuction Judge Bechtel assessed more liability against the associations because of their high degree of culpability.

I read before from Judge Higginbothem's opinion that he found they engaged in reckless acts, denying my clients equal employment opportunities. And I think in this instance an agent for an employer who compels the employer to rely on a hiring hall, and that hiring hall then engages in discrimination, must be held accountable.

There is no exemption in 1981 for that, and it seems to me that the statute must create a responsibility in the end on an employer. It seems to me every labor law that we have creates generally obligations on employers and rights on employees.

The only thing different about this case is the active discriminator was Local 542. The victims were the same, minorities. The parties suffering the discrimination, that is feeling it in their work force, were the same, the employers. The result couldn't be clearer. Employers in this particular instance didn't have minority operating engineers because of racial

discrimination. 1,036 employers never hired a minority operating engineer because of their reliance on the union.

Judge Higginbothem alternatively found that the hiring haul was a joint venture, as was the apprenticeship program. We believe that that finding should not be subject to reversal under the clearly erroneous rule. In the end, these were joint undertakings. They inured to the benefit of the employers. They had a ready source of labor by relying on the union and relying on --

QUESTION: Mr. Goodman, does that suggest that even, for example, if the employers, if we were to say they can't be held liable, that is as being liable for discrimination generally -- they are involved in the AJCT program, aren't they?

MR. GOODMAN: Yes, sir.

QUESTION: Could they be held liable, even though not otherwise, for discrimination in that program as to training?

MR. GOODMAN: Yes, sir. Now, in that respect --

QUESTION: Was there any segregation of the two in the findings below?

MR. GOODMAN: Yes. Judge Higginbothem found,

as a matter of fact, that the apprenticeship program was used as a device to steer minorities to it, while unskilled whites who had absolutely no background were steered into other mechanisms. The result was three types of discrimination: One, minorities kept out of the joint apprenticeship program; for the few minorities who did get in, they were discriminated against in work and wages; and finally, there was discrimination, found Judge Higginbothem, in preventing minorities from completing the program.

So there were three types of discrimination found, all of which were intentional, all of which was joint, and none of which has been challenged here.

QUESTION: Were there any separate determinations of damages?

MR. GOODMAN: No. Stage one of this year and a half trial focused on liability and injunction questions only. Stage two, dealing with back pay, has yet to commence.

QUESTION: But they did allocate the liability for costs up to date, didn't they?

MR. GOODMAN: Yes, sir.

QUESTION: And they did allocate a separate part to the training program?

MR. GOODMAN: Yes, sir, that's correct.

That's unchallenged.

QUESTION: What was it?

MR. GOODMAN: 25 percent of the remedial costs.

QUESTION: And the union's?

MR. GOODMAN: 40 percent.

QUESTION: And the --

MR. GOODMAN: The three associations, 10 percent each, Glasgow 5 percent, giving Glasgow, if it chose -- and it has not chose -- a right of contribution against other class members.

QUESTION: Was the training program considered a separate entity in this allocation of costs?

MR. GOODMAN: Yes, sir. Yes, sir, it was.

There were important, critically important, reasons why the employers were necessary for the decree, and I'd like to cover that now.

QUESTION: Mr. Goodman, excuse me. If you prevail, there's still the matter of damages to be determined?

MR. GOODMAN: Yes, sir. Stage two, which I prefer to call a back pay stage, has yet to commence. It largely will depend, of course, upon the result reached here. But Judge Bechtel, the present District Judge assigned to the case, has begun recently to

commence the process of identifying the victims of that discrimination.

But that's a separate part of the case and Judge Higginbothem bifurcated the case. I hate to think how long it would have lasted in addition to the year and a half it did if the damage phase was tried conjunctively with the liability phase.

I was saying earlier that Judge Higginbothem concluded that there were critically important reasons why the employers were necessary to the injunctive relief, and I'd like to touch on those now.

QUESTION: Well, just on this. I'm not sure that I understand all of your position. Let's assume for the moment we disagreed with the District Court and with you with respect to non-delegable duty, intent, and that we just held that the employer -- let's say we said 1981 requires an intentional discrimination, the employers had no intentional discrimination, therefore they're not liable under 1981.

Could you still reach them as part of the remedy?

MR. GOODMAN: Yes, sir, even under the --

QUESTION: You have a completely independent ground for saying the injunctive part of the decision below would nevertheless run against the employers, even

if they weren't liable for back pay?

MR. GOODMAN: Yes, sir, that's absolutely correct. Let me say first, though, on the issue of intent, before I directly address that question, that the intentional discrimination here that we are trying to assess against the employers and the associations is inputing it.

QUESTION: I understand. I understand that.

MR. GOODMAN: And we think the cases support that clearly.

But going beyond that, the answer to your question is yes, there are independent grounds. They are premised on the All Writs Act for one, and they are also premised --

QUESTION: That wasn't the rationale of the District Court?

MR. GOODMAN: No, it was not. It was not the rationale of the District Court.

QUESTION: So wouldn't we have to remand before we could ever -- wouldn't we have to have the District Court do his remedy over if we didn't agree with his theory of liability?

MR. GOODMAN: The Court might do that. I don't think it in this instance would be compelled to.

But let me say that, beyond the All Writs Act,

as a matter of the broad discretion vested in the District Court to correct intentional discrimination, Judge Higginbothem had the power and exercised it, Justice White, apart from the All Writs Act, to include the employers.

Now, as a preface, just last week in Zipes versus Trans-World Airlines, this Court over objections by a union who had not been found guilty of any violation of Title VII or 1981 held that it should be included in the remedy for reasons of making whole the victims of discrimination, regardless of their alleged nonculpability. Justice White, you authored that opinion and focused upon those precise arguments, and you called them meritless.

In this particular instance, the employers were critically necessary for the following reasons: The first is self-evident: They're the only ones who provided the work. They're the only ones who provided the wages. They were necessary because the only way minorities could get a nondiscriminatory share of the work in the next five years is to include them in the decree. And I say nondiscriminatory because it's a gradual remedy over five years, and it's not until the fourth or fifth year that nondiscrimination as measured by the population of minorities in the labor force will

be reached. So that's the first reason.

The second reason, and the critical reason, is that the District Court was in this instance more than just familiar with the history of the Philadelphia plan and the history of discrimination in this industry. He knew, as the Federal Government knew, that a Philadelphia type plan remedy was absolutely necessary, or else equal employment opportunity could never be achieved.

QUESTION: Well, given the District Court's finding that there was no intent on the part of the contractors and no reason to know, on your theory that they could be held in the case by reason of the necessity for formulating a remedy, would it be proper to assess the costs of the remedy in part against the contractors?

MR. GOODMAN: I think it was within the discretion of the District Court, in order to implement the injunctive relief in this case. I think, phrased another way, the question is can the District Court as an exercise of its discretion assess remedial, as opposed to damage or back pay, relief against parties whom it found to be critically necessary to achieving the injunctive relief we achieved here?

And I think the answer is that the District

Court did have the discretion to do so and just as in Kuran, for example, in the Eleventh Amendment case, where the state could not be sued in damages because of the bar of the Eleventh Amendment, this Court has held, despite that bar, District Courts have the discretion to award costs against the state.

QUESTION: Do you think the District Court would have exercised its discretion in this manner had it decided that 1981 required intent and that its theory of vicarious liability or non-delegable duty was wrong?

MR. GOODMAN: I's hard to speculate in respect to that, Your Honor. But I would say this, that Judge Bechtel, who succeeded Judge Higginbothem in the case, in large measure assessed the 10 percent liability against General Building Contractors Association because of the factual finding that they recklessly disregarded the rights to equal employment opportunity of my clients. So that was triggered into a factual finding of Judge Higginbothem.

But again, it is hard to speculate. But I do not believe it would have been an abuse of discretion.

QUESTION: Well, Mr. Goodman, I didn't know that you could just -- say you brought a suit against your employer and say, you have not been hiring minorities in suitable numbers. And the employer says,

well, I guess that's right; and the judge says, yeah, that's right, so I'm going to order you to hire them. And the employer says, well, don't you have to find I've violated the Act first? And the judge says, well, I guess not, no; I'm just going to order you to hire them.

Don't you have to have -- isn't a predicate for this kind of relief some violation of a statute?

MR. GOODMAN: I think that in answer to Justice Rehnquist's question, which was assume that there was no violation, could a District Court exercise its discretion or did it have the power to exercise its discretion to assess portions of remedial costs against a non-wrongdoer --

QUESTION: I'm talking about the remedy. How can you order the employer to restructure his work force by hiring quotas without finding some violation of the Act by the employer, not somebody else?

MR. GOODMAN: Well, of course we believe very strongly that Judge Higginbothem correctly found vicarious liability against the employers.

QUESTION: Yes.

MR. GOODMAN: So the Court doesn't have to reach that question. However, if the Court reaches that separate question, just as Zipes last week held that a

union which was not culpable, had no claims to anything other than wrongdoer status, was being compelled to reorder its seniority lists in order to make whole as a matter of an injunction the victims of discrimination, Judge Higginbothem in this case I think had that same discretion to exercise. And I think he correctly exercised it.

As a matter of fact, it has been obscured but ought to be pointed out here that in this particular case the employers themselves suggested the very remedy which Judge Higginbothem imposed. They recognized in the end that the duty not to discriminate, the duty to comply with Section 1981, was on them. So they asked the District Court to set goals in order to provide nondiscrimination, and they said, we should be permitted to hire outside of the union if we have to in order -- and I quote them -- "to ensure equal employment opportunity."

QUESTION: Do you suppose they were influenced in that request by the fact that that relieved them of trying to persuade the union to do something?

MR. GOODMAN: Well, obviously the court order permitted them to overcome any opposition they had from the union. As a matter of fact --

QUESTION: It would take the pistol, the

union's pistol away from their heads, would it not, the hiring hall?

MR. GOODMAN: The injunction very well might have done that, and that request for relief very well might have done that, that's correct. As a matter of fact, and I think it ought to be pointed out, shortly after the liability opinion was filed GBCA and CAEP filed a grievance under the contract.

So in answer to Justice White's question, the Associations not only do have the power to file grievances, but in this instance exercised it to seek an arbitration award that relieved them of any responsibility for Local 542. They secured that. The arbitrator gave them that.

But Judge Higginbothem found that that order would have denied minorities the equitable relief against the employers that they were entitled to, and for that reason denied it, denied the motion to uphold that arbitration award.

But I think as well, Chief Justice Burger, the notion that Local 542 held a pistol to the heads of 1500 companies and associations and compelled it to rely on it and compelled it to engage in collective racial discrimination that was intentional, misstates the facts here. Again, Your Honor, for the last 18 years there's

never been any evidence of any strike or coercion.

But even if there was a strike and a coercion, suppose a union compelled in some sort of way an employer to rely on it. The question becomes, if the employer's work force is then found to be the product of intentional racial discrimination, must it be free? Is it free to be able not to give minorities the rights they're entitled to? We think not.

In the end, the employers do the employing. In the end my clients, minorities, were the victims. In the end, they weren't just denied fraternal rights in Local 542, they weren't denied the rights of participation in some Blue Cross-Blue Shield program; they were denied the right to work.

Dwayne Johnson, who is symbolic, operates heavy equipment in Vietnam. He operates heavy equipment in Korea. He comes back to Philadelphia. He wants work. He goes to an employer. He cannot go to the employer. They can't hire him. He is told to go to Local 542. They won't let him in because of the color of his skin.

He goes to Greenland to work for a non-union employer. He comes back to 542: I want work, I want wages. He's kept out because of his race.

Now what he wants -- and Dwayne Johnson is

symbolic of 500 or more minorities -- is the right guaranteed to him under Section 1981 to work for the employers on the same basis as whites. He was denied it, and all the other Dwayne Johnsons have been denied it. They have a right, in our judgment, to work on the same basis as whites. People who've given their lives to this country it seems to me have that right, and it's been guaranteed since 1966.

And I think ultimately the question here is, what if we sued just Glasgow and did not sue Local 542. What if we showed the same set of facts, that Glasgow had zero minorities and all whites, and that that work force was the product of intentional racial discrimination? Could there be any doubt that for purposes of injunctive relief, simply to get prospective nondiscrimination, that minorities with respect to Glasgow, under those sets of facts, would have a right to work equally? Not quotas, not something special, but nondiscrimination.

That's all paragraph 12 of this decree provides, nondiscrimination, to prevent the reoccurrence of discrimination. In this particular instance, in our judgment the employers have recognized what we have contended, that the duty is on them. They have recognized, I think, what Justice Cardoza said, and that

is the duty under labor laws must be non-delegable, because if they were not non-delegable there would be enormous loopholes in the law.

In the Sheffield case, which I think is interesting only because it doesn't deal in the race area, there was a New York statute which said that employers could not employ anyone under the age of 14. And the bus company had one of its bus drivers, as a matter of helping him, hire a boy who was 12 years old. The company knew nothing about it. It had no knowledge. It didn't know what was going on.

Justice Cardoza said, in upholding criminal liability under a New York labor statute, that it is not an example of respondeat superior; it is an example of non-delegable duty, a duty the employer owed in that case not to employ children. In this case, after Alexander versus Gardner-Denver Company, this Court has said that the ban against employment discrimination and the need to protect the right of minorities in that respect is of the highest priority.

It seems to me in the end that the employers in this case must have that obligation. If it were just left up to Local 542, my clients could not get a remedy. It would be impossible.

In the end, Judge Higginbothem in our

judgment, A, properly imputed intentional discrimination of the union and the apprenticeship program to the employers; secondly, he properly exercised his discretion to give the Plaintiffs a make-whole remedy that would ensure nothing more nor less than nondiscrimination over the next five years. After years of intentional discrimination, proof of which is undisputed in this case -- examples of people could be told and told again, but Judge Higginbothem has done that far more eloquently than I can -- it is our submission that minorities do have the same right to work as whites. They did not have. They are entitled to a remedy. It is long overdue.

We ask the Court respectfully to affirm the judgment of the Third Circuit. Thank you very much.

CHIEF JUSTICE BURGER: Anything further, counsel?

REBUTTAL ARGUMENT OF JOHN J. McALEESE, ESQ.,
ON BEHALF OF PETITIONER,
GENERAL BUILDING CONTRACTORS ASSOCIATION

MR. McALEESE: May it please the Court:

We don't dispute that minorities have the same right to work as whites. The question is whether my clients should be required to pay money because the union discriminated.

There was reference made in the argument --

QUESTION: Well, what about the injunctive remedy?

MR. McALEESE: The injunctive remedy is -- well, let's talk about the Zipes case, which is --

QUESTION: Let's talk about the injunctive remedy.

MR. McALEESE: Okay. Well, the Zipes case was an injunctive remedy.

QUESTION: Well, let's talk about the injunctive remedy in this case. Do you say that the injunction should not have run against the employers or not?

MR. McALEESE: I'm saying that the nature of the injunction certainly shouldn't have run against the Associations, because all my client is required to do in that injunction is pay money.

QUESTION: Well, what about the members? Is anybody going to speak for the contractors? How about the injunction against the contractors?

MR. McALEESE: I think the injunction against the contractors went far beyond what it should too, Mr. Justice White.

QUESTION: Well, should there have been any injunctive relief against the contractors?

MR. McALEESE: I don't think there should have been, on the basis that there was no showing of wrongdoing on the part of the contractors. You could have gotten complete relief by an injunction against the union in this case, as near as I can tell.

It's not the Zipes case, because in the Zipes case, as the Court knows, it was necessary to interfere with the union's seniority system in order to grant the relief.

QUESTION: We know about the Zipes case.

MR. McALEESE: I beg your pardon?

QUESTION: We know about the Zipes case.

MR. McALEESE: I know you know about the Zipes case.

With respect to the Philadelphia plan, that involved a different part of the case that isn't on appeal before this Court. It was a claim under 1985(3). The only basis for liability in this case was signing the collective bargaining agreement, and that's clear in the record at pages 102 -- 106, rather, and 142 of the opinion.

With respect to the JATC, there were no findings at all in the court below that that had anything to do with the basis for liability. The basis for liability is clear, and I don't think you can get

there under 1981.

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

(Whereupon, at 3:03 p.m., the case in the above-entitled matter was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

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BY Reene Hammond

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