In the

Supreme Court of the United States

WASHINGTON, ET AL.,	)	
	)	
Appellants,	)	
	)	
v.	)	NO. 81-9
	)	
SEATTLE SCHOOL DISTRICT NO. 1 ET AL	)	

Washington, D. C.

March 22, 1982

Pages 1 thru 55

ALDERSON REPORTING

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WASHINGTON ET AL., :

Appellants, :

v. : No. 81-9

SEATTLE SCHOOL DISTRICT NO. 1 ET AL :

- -x

Washington, D. C.

Monday, March 22, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:57 o'clock a.m.

APPEARANCES:

KENNETH O. EIKENBERRY, ESQ., Attorney General of Washington, Olympia, Washington; on behalf of the Appellants.

MICHAEL W. HOGE, ESQ., Seattle, Washington; on behalf of the Appellees.

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in Washington against Seattle School district.

Mr. Attorney General, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF KENNETH O. EIKENBERRY, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. EIKENBERRY: Mr. Chief Justice, and may it please the Court, 65 years before this Court rejected the concept of separate but equal facilities for schools, the people of the state of Washington adopted a constitution which declared it to be the paramount duty of the state to provide for public school education without distinction based on race, color, caste, or sex.

Consistent with that constitutional mandate, no Washington school district has ever been held to have operated a de jure segregated school system, and throughout the history of the state, the policy of local school districts has been to assign students to their neighborhood schools.

In 1977, however, the Seattle School District started a massive busing program which was not required by either the state or federal Constitution. Seattle's program effectively wiped out the traditional neighborhood school assignment policy in that city. It

was in this context that the Washington voters in the following year enacted a law which was the subject of this appeal. Subject to the requirements of the Constitution, this law limits the ability of local school districts to require any public school student to attend a school other than that which is nearest or next nearest to the student place of residence.

Recognizing constitutional imperatives, then, the Washington voters gave the legitimate policy of neighborhood school assignment the higher priority than the policy of racial balancing in public schools. The question before this Court is whether the state and its voters can restrict the exercise of authority by school districts which are creatures of the state.

The Washington state law defines basic education, determines the content, provides the funding, provides average salary levels for school district staffs, provide staff-student ratios, specifies the number of hours that a teacher must spend in the classroom, makes available funding for district transportation, and prescribes a number of other matters relating to educational curriculum and staffing.

Washington law also provides for interdistrict voluntary transfer programs to improve racial balance and state planning to assist school districts in

developing programs to relief racial isolation. State administrative law conditions construction grants on a determination by the superintendent of public instruction that the proposed construction would not create or aggravate racial balance within the districts.

In short, the legislature and the state of Washington is a super school board. Local school boards simply follow state policy. The legislature and the voters, through the democratic initiative process and the ultimate source of authority for school -- are the source of authority source of authority for school districts.

The voters of our state chose to restrict the authority of school districts so as to preserve the historical practice of assigning students to nearby schools. The record in this case and previous opinions of this Court indicate the importance of neighborhood schools for children and their parents, be they of minority or non-minority race, and the district court so found.

Such benefits include, for example, increased community support of input, enhanced safety, reduced cost, and improved home-school relations, and in this respect, I cannot improve on Justice Powell's discussion in the Keyes case. In contrast, assignment and

transportation of students beyond a nearby school will minimize such benefit both to minority and non-minority students.

This policy of nearby schools was approved by a statewide electorate and enacted into law because the people believed that it was the best for all the school children in our state. It is a policy that by its own terms and by an interpretation which I have pledged the Office of Attorney General may not be used to thwart any plan to cure de jure segregation or any plan to correct a dual school system.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Attorney General.

(Whereupon, at 12:04 o'clock p.m., the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Attorney General, you may continue.

ORAL ARGUMENT OF KENNETH O. EIKENBERRY, ESQ.,
ON BEHALF OF THE APPELLANTS - CONTINUED

MR. EIKENBERRY: Mr. Chief Justice, and may it please the Court, if this Court upholds the validity of the initiative, what will not happen and what will happen? First, such a ruling will not sanction discrimination in Washington schools. It will not signify a retreat by this Court from the Constitutional prohibition against de jure segregation or a dual school system, and it will not cause the Seattle District to revert to a segregated system, because that system has never been segregated.

If this Court upholds the validity of Initiative 350, there will be at least eight school districts having five or more schools with minority enrollments in excess of the statewide average which will not change student assignments at all, and this is because these schools are already balanced on a school by school basis through application of Washington's traditional neigborhood school policy.

Further, if this Court upholds the validity of the Initiative, there will be one Appellee school

district that will not change its assignment pattern, and two school districts that must.

The Tacoma School District will continue to use a voluntary and magnet school system to achieve racial basis balancing in its schools, with no real changes in student assignments. The Pasco School District will have to stop mandatory busing of minority children only to distant parts of the Pasco school district. This will prompt a fairer approach to addressing racial balance, one that does not fall on minority children only.

The Seattle School District will have to stop the mandatory busing of wholesale numbers of children, both minority and non-minority, from one end of the district to the other unless there is a Constitutional reason to do so.

The matter of racial busing and distribution in the schools will be steadily and affirmatively affected by demographic changes in the district. I invite your review of the charts prepared by the Seattle School District which reflect the dispersal of minority student residences throughout the district. Comparing the charts of 1976 with current trends will show how the residences and minority students are becoming more and more dispersed over the entire city.

Further, the Seattle School District will be subject to state policies which will encourage the district to use all available techniques to address racial balance in student assignments.

Two judges on the court of appeals and the district court judge have concluded that the policy of nearby schools must be struck down on the theory that it amounts to an impermissible legislative classification based on racial criteria, and the court relies on Hunter against Erickson and Lee versus Nyquist. We urge this Court's critical review of the lower court holding as being unsound.

In applying Initiative 350 to actual practice, we see there is a classification as between students who qualify for mandatory assignment to a distant school for one set of reasons versus students who do not qualify. The set of reasons which qualify for mandatory distant assignment are health, safety, special education requirements, or because of unfit or inadequate conditions.

These are not imposed along racial lines. Conversely, one can readily identify reasons being asserted by the school district or that might be asserted otherwise for mandatory distant student assignments which do not qualify under the terms of the

Initiative, such as filling up classrooms at the opposite end of the disrict, accommodating teaching staff, obtaining more transportation funding from the state, balancing of classroom size, or adjusting racial balance to a declared standard.

And the fact that the initiative is silent on such asserted reasons for distant student assignments and therefore does not qualify them does not provide the basis for a court to infer there is a class which is racial in nature. As Judge Wright in the Ninth Circuit pointed out in his dissent, the Initiative is a neutral law that must be analyzed in terms of its content.

Initiative 350 is benign in its treatment of races, and is clearly distinguishable from the kind of law that was struck down in Hunter against Erickson.

QUESTION: Mr. Attorney General, aside from this one, Number 350, has a statewide initiative ever been used in the state of Washington to modify local school board decisions?

MR. EIKENBERRY: Not to modify local school board decisions, Your Honor, but the use of the initiative is so commonplace that it ranges from authorizing the coloring of oleomargerine, which I recall as a youngster, to most recently a statewide initiative to control the expenditure of funds for power

generating plants. So, hardly an election goes by without at least one or two significant initiatives being on the ballot.

In the case of Hunter against Erickson --

QUESTION: Let me ask you one more question.

MR. EIKENBERRY: Yes.

QUESTION: Am I correct, the district court here did find that the initiative was enacted for the sole purpose of preventing busing for racial desegregation? Is that correct?

MR. EIKENBERRY: The court concluded, I believe, Your Honor, that it was in response to the Seattle plan. Yes, sir.

QUESTION: Do you dispute that?

MR. EIKENBERRY: No, Your Honor. We certainly agree that the Seattle plan is what galvanized the action that sparked the initiative, but we certainly indicate that statewide there would have been other reasoning on the part of the voters and additional reasons for passing the initiative.

QUESTION: You have spoken of a racial balance. From what source does that standard derive? What is the balance that was sought to be achieved?

MR. EIKENBERRY: Your Honor, this is a varying term, and it is critical to the decision in the case,

because the racial balance that is intended by the Seattle School District when they speak is the formula that they use, which can be a moving target, depending on the demographic changes in the district from year to year. The court, the district court apparently had a slightly different thought in mind in its findings when it talked about racial balance.

QUESTION: Well, in your answer to Justice Blackmun, I had the feeling that you, well, at least you didn't answer that opposition to racial balance is not equivalent to a discriminatory racial purpose. It isn't, is it?

MR. EIKENBERRY: Oh, I am sorry, Your Honor. I misspoke if I -- in leaving that impression, because I do not believe and I think the evidence in the record suggests that it was not opposition to racial balance --

QUESTION: Well, even if it was opposition to racial balance, is that equivalent to a discriminatory racial purpose, if you say, I am against voluntary balancing? Is that --

MR. EIKENBERRY: Oh, no, it is not, Your Honor. I believe under the decisions of this Court, that it would not be.

QUESTION: Well, did the district court find that the initiative was animated by discriminatory

racial purpose, or only as an opposition to racial balance?

MR. EIKENBERRY: The court, the district court concluded, Your Honor, that there was -- that that was a motivating intent.

QUESTION: Which was? Which was?

MR. EIKENBERRY: That there was an intent -- As I was saying, yes, Your Honor, it was concluded that that purpose was a -- one of the factors.

QUESTION: What purpose?

MR. EIKENBERRY: All right, and that is important, Your Honor, because we are suggesting that the purpose that the court described, the district court, was not a significant factor. To hold the initiative invalid on this basis is like holding a law conscripting clerics invalid because an athiest voted for it --

QUESTION: How did he describe the purpose, though, that he --

MR. EIKENBERRY: The purpose that the district court, Your Honor, had in mind, we believe, reading the memorandum opinion and the findings there, the purpose was to contradict or rescind the Seattle plan. That is what he picks out.

QUESTION: Well, what do you make of the

district court's finding in his conclusions of law at Page A-26 of the jurisdictional statement, Conclusion 3-2, that a racially discriminatory intent or purpose was one of the factors which motivated the adoption of the initiative?

MR. EIKENBERRY: All right. Your Honor, it is true that that is certainly what the court has found. That is a conclusion recited by the court, and that -- the court had in mind nothing more than the fact that the initiative rescinded the Seattle school plan.

QUESTION: But the court of appeals didn't review that finding, did it?

MR. EIKENBERRY: No, Your Honor.

QUESTION: What effect does that have on us?

MR. EIKENBERRY: Well, Justice Marshal, it is important --

QUESTION: It isn't important?

MR. EIKENBERRY: It is important to distinguish between the kind of so-called discriminatory intent that the district court had in mind when it --

QUESTION: It had different kinds of discriminatory intents?

MR. EIKENBERRY: Well, we are suggesting that --

QUESTION: Some are good and some are bad?

MR. EIKENBERRY: No, Your Honor, I don't mean to imply that at all.

QUESTION: Well, what do you mean?

MR. EIKENBERRY: I am suggesting that the use of the term "discriminatory intent" is inappropriate, an inappropriate label here, because what the court has in mind is rescinding the Seattle plan, and it is ironic that in the --

QUESTION: Well, where do you find that?

MR. EIKENBERRY: Because there's no finding of fact to support anything beyond that, Your Honor.

QUESTION: It is a conclusion then.

MR. EIKENBERRY: It's a conclusion without any finding to support it. To the contrary, the evidence that was put into the record, which the court excluded from --

QUESTION: This case -- the judge even relied on Washington against Davis and said that had been satisfied, didn't it, on Page A-26?

MR. EIKENBERRY: That was the assertion, and the conclusion, Your Honor. However, we submit that --

QUESTION: Does that still stand?

MR. EIKENBERRY: Certainly the case law, yes, Your Honor, of Washington against Davis is applicable, but we don't believe it was applied by this district

court judge correctly.

QUESTION: We have said in several cases, have we not, that there is no Constitutional requirement to achieve any particular racial balance. Has the Court not said that?

MR. EIKENBERRY: That is certainly correct, Your Honor, and as recently as the Spangler decision, a California case, has been an instance of changing demographic circumstances where the Court found it wasn't necessary to keep adjusting and make adjustments.

QUESTION: Well, apart from keeping adjustments, is there any Constitutional requirement to achieve any particular racial balance in the first instance, once dual schools are abolished?

MR. EIKENBERRY: Your Honor, that is exactly the state of the law that this case is --

QUESTION: Is there any law that says that a state can't do it?

MR. EIKENBERRY: No, Your Honor. To the contrary --

QUESTION: Well, isn't that what happened here?

MR. EIKENBERRY: I didn't hear your first words, sir.

QUESTION: Didn't Seattle do it on its own? It wasn't forced to.

MR. EIKENBERRY: They undertook, Your Honor, to achieve a socially desirable goal of achieving racial balance in the schools, and what we are suggesting here is --

QUESTION: And don't they have a right to do that?

MR. EIKENBERRY: Yes -- They not only have a right, Your Honor, but they have a duty under the --

QUESTION: And don't they have a right to do it without the interference of the state?

MR. EIKENBERRY: Ah, that's the point, Your Honor, of the case, that they --

QUESTION: Well, if you are talking about state's rights, what do you mean --

MR. EIKENBERRY: No, sir, we are not --

QUESTION: -- the right of the state or the right of the community?

MR. EIKENBERRY: No, we're not talking about state's rights, Your Honor. We are talking about this Seattle School District being a creature of the state. We are talking about the state of Washington legislature, through its electorate, being a super school board that has been setting policy in all of the various areas of administering schools for all these years, and that this was simply a discreet choice by the

voters of the state of Washington to accommodate not only the desirable benefits of neighborhood schools or, as they said in the initiative, next nearest schools, together with the desirable benefits --

QUESTION: But that's not what the judge said. He said it was for the purpose of destroying the Seattle plan. That's what the judge found.

MR. EIKENBERRY: Correct, Your Honor, and we're saying that the voters of the state of Washington made a more discreet choice in accommodating the benefits of neighborhood schools with achieving racially diverse student bodies.

QUESTION: Well, why is the city objecting? If it is so much of a failure to the city, why is the city objecting?

MR. EIKENBERRY: Perhaps private authorship, Your Honor, but the point is that testimony from one of the Seattle superintendents, such as Dr. Moberly, indicated they were proceeding with a voluntary plan which they had started out with, and we submit, given time, using other techniques could have achieved racial balance appropriately.

QUESTION: Well, what your argument comes down to -- well, I will ask you. Does it come down to this proposition, that a school district can't have a policy

or a program which is in conflict with the overall state mandate? Is that your argument?

MR. EIKENBERRY: That's correct, Your Honor, that it is the prerogative of the state legislature to set policy in this area as it is done in so many others. The initiative we believe is benign in its treatment of races, and is clearly distinguishable from the kind of law that was struck down in Hunter against Erickson.

In that case, a city charter amendment had placed a special voting burden on any ordinance dealing with racial, religious, or ancestral discriminate ordinances in housing. The Hunter case, of course, is not a school case. Nevertheless, on its face, we submit, it does provide an example of an explicit impermissible classification and, by contrast, demonstrates why Initiative 350 is valid, and the Ninth Circuit Court effectively acknowledged that Initiative 350 does not create an explicit classification based on race, but nevertheless hold that it implicitly creates this classification. Even the brief of the Appellees --

QUESTION: Mr. Attorney General, could I ask you a question? I understand this program or this statute deals with -- it's a prohibition against mandatory busing. Supposing instead of a prohibition

against mandatory busing, it were a prohibition against voluntary busing, where -- in which the students might volunteer to go to more distant schools because they wanted to attend schools and achieve racial balance, and so forth. In other words, the students voluntarily and individually wanted to achieve the objectives that the school board sought to achieve here, and the statute was enacted saying, no, you can't do it, we'll have the same prohibition against voluntary transfers. Would that create a racial classification?

MR. EIKENBERRY: Yes, very possibly it would, Your Honor, for a couple of reasons. For one thing, we are getting very close to the Lee against Nyquist situation where we had a flat prohibition against the consideration of race in making assignments. We do not have that here. Rather, we have an affirmative statement in favor of the benefits of neighborhood or near neighborhood --

QUESTION: You have the same affirmative statement in my hypothetical statute, that we prefer neighborhood schools as a matter of state policy for the same reasons you set forth here, and therefore we will not permit --

MR. EIKENBERRY: Uh --

QUESTION: -- cross-district transfers, even

on a voluntary basis. Why would one be more of a racial classification than the other, the statute we've got as opposed to my hypothetical?

MR. EIKENBERRY: Well, let me answer Your Honor, I believe as your hypothetical applies to our case it is critical that it be voluntary, because we don't want a situation where the neighborhood population would be frozen in place. We need to have the ability for movement through magnet schools, through open enrollment programs or other techniques.

QUESTION: Well, why do you need that? It seems to me that the state interest in having the children go to the neighborhood school might well be paramount, as it is here.

MR. EIKENBERRY: Because, Your Honor, if we were frozen into place, that could be as discriminatory in prohibiting movement as ---

QUESTION: But, see, as to the question whether it is a racial classification -- that is what I am addressing myself to -- I don't see why, whether it prohibits mandatory on the one hand or voluntary on the other, why one is more of a racial classification than the other. That's what I'm asking.

MR. EIKENBERRY: Because, Your Honor, the -- if the effect were such as to make it -- lead us to

deduce that there was an animus on the part of this statute to -- against -- act against one race or another, then we would be finding that there was a discriminatory intent, perhaps a classification that would make the statute unconstitutional.

QUESTION: The difference is not then in terms of whether one is a racial classification and the other is not, but rather, whether one supports an inference of racial intent and the other does not. That is your difference.

MR. EIKENBERRY: Yes, Your Honor. That's correct, sir.

QUESTION: But you would say they should be judged equally on the question of whether they create a racial classification.

MR. EIKENBERRY: Yes. That's correct, Your Honor.

QUESTION: Mr. Attorney General, Initiative 350 doesn't purport to limit the power of any court, federal or state, to direct busing in connection with a desegregation plan, does it?

MR. EIKENBERRY: No, Your Honor, it does not.

QUESTION: The courts remain free.

MR. EIKENBERRY: Absolutely.

QUESTION: While I have interrupted you, would

it be permissible under the law in your state for all school boards to be abolished and the power they now exercise to be vested, say, in the Secretary of Education, or perhaps a state commission?

MR. EIKENBERRY: Yes, sir, that could have been a choice exercised by the legislature when it initially created a school system pursuant to the constitution to have a completely different administrative structure than it has today. Instead of being a racial classification, the legislative classification created by Initiative 350, we believe, is analogous to the classification at issue in Personnel Administrator of Massachusetts against Feeney.

In that case, this Court rejected the argument that a Massachusetts statute created -- creating an absolute lifetime employment preference to veterans, classified persons on the basis of sex. This Court noted that while the statute excluded significant numbers of women from preferred state jobs, it could not plausibly be explained only as a gender-based classification. Veteran status is not uniquely male, just as opposition to busing is not uniquely a white majority view, nor is support of busing exclusively a minority point of view.

And with regard to the case now before the

Court, it must be said that adoption of the nearby school policy cannot be explained solely on racial grounds. Preference for nearby schools is not limited to the racial majority, and preference for mandatory busing to achieve racial balance is not limited to racial minorities. To the contrary, significant numbers of both classes lie on either side of the busing controversy.

Even though there is not an explicit classification based on race contained in the initiative, it is relevant to consider the question of whether there is an intent to discriminate, as has been suggested. And that case, we believe, is controlled by the case of Washington against Davis. In short, the voters in the state of Washington have struck an accommodation. The question before this Court is whether in striking that accommodation our state may limit the authority of its local school districts, which are agents of the state itself, to require conduct which is otherwise constitutionally permissible.

In our view, it may certainly do so. In Washington, the legislature defines basic education and determines its content. The legislature then provides its funding. It also prescribes salary levels for school district employees, and even dictates the amount

of time teachers may spend in classrooms. The legislature in Washington is a super school board. Local school boards simply follow state educational policy.

The legislature in our state has made an additional policy choice in the field of education, one which by its own terms may never be used to thwart any attempt to cure de jure segregation should that occur in Washington State.

QUESTION: General Eikenberry, the Solicitor General's brief, as I read it, says that even a law which is racially neutral on its face may violate the equal protection clause if it causes a disproportionately adverse impact on a racial minority that can be traced to purposeful discrimination. We have in place here, I suppose, a factual determination by the trial court that at least there was some purposeful or intentional discrimination.

Do you agree with the Solicitor General's statement that I just read to you?

MR. EIKENBERRY: We agree, Your Honor, that it could be, but would vary from the Court's -- from Your Honor's reading of the district court's opinion and order that there were not technically findings. There was a conclusion which I believe is dependent purely on

the matter of rescinding the Seattle school plan.

QUESTION: Okay, so you would propose that there is no factual finding of an intent to discriminate.

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

QUESTION: Do you believe that there is a disproportionately adverse impact, as this Court has defined how we look at that?

MR. EIKENBERRY: No, absolutely, Your Honor, we do not.

I would reserve the rest of my time, if I may, Your Honor.

CHIEF JUSTICE BURGER: All right.

Mr. Hoge.

ORAL ARGUMENT OF MICHAEL W. HOGE, ESQ.,

ON BEHALF OF THE APPELLEES

MR. HOGE: Mr. Chief Justice, and may it please the Court, Mr. Attorney General Eikenberry has spent his time arguing from a record that doesn't exist, one he wishes he had. I will spend my time speaking to this record and the findings in this case. One need look at no more than the plain language of Initiative 350 and the context in which it arose --

QUESTION: Do you agree with the proposition that there is no constitutional requirement to achieve

any particular racial balance?

MR. HOGE: We certainly do. That is what the Court said unanimously in Swann and in several cases thereafter. The Seattle plan does not require any particular degree of racial balance either. In fact, in the year the trial was held, the racial balance could have gone anywhere from zero percent to 57 percent minority in the Seattle schools and still been within the Seattle schools' definition.

QUESTION: Do you agree with the Attorney General's proposition that the state's authority supersedes all the local authority of the local school boards?

MR. HOGE: We believe -- we agree with that proposition as a general matter. Certainly, the state is entirely free to structure its political processes in just about any way it chooses to do so, except in a way that violates the equal protection clause by establishing a racial classification or by adopting a statute at least in part because of discriminatory intent.

Both courts were correct --

QUESTION: Mr. Hoge, before you go ahead, absent de jure segregation, is there any legal duty at all to order busing?

MR. HOGE: Under the Federal Constitution, there is not a constitutional duty to require busing --

QUESTION: Right.

MR. HOGE: -- in the absence of de jure segregation. However, the record in this case shows that the Seattle school board had a good faith belief that their failure to take action to desegregate the schools in response to threats of litigation over desegregation would necessarily involve them in federal court control and running of the school system. That decision was made only after 15 years of unsuccessful efforts to desegregate the schools by all possible voluntary means.

QUESTION: Has there ever been any finding of de jure violation in the state of Washington?

MR. HOGE: As applied to a school system and its student assignment policies --

QUESTION: Yes.

MR. HOGE: -- no.

QUESTION: Yes.

MR. HOGE: Nevertheless, this statute at issue in this case establishes a racial classification, as both courts below found, that is in no material respect any different from those in Hunter versus Erickson and Lee versus Nyquist. The initiative was designed to and

does prohibit assignments beyond nearby schools only in the case of racial desegregation. It permits all the traditional assignments away from nearby schools that went on in the state of Washington before the initiative was adopted. And further, as this Court knows from its own experience, Section 3 of the initiative, which prohibits school districts indirectly from violating the nearest or next nearest school rule is simply a list of the common desegregation techniques which the federal courts of this country have ordered for 30 years.

In short, race is written all over the face of Initiative 350, even though the word "race" and the word "desegregation" never appear by design. This Court, however, need not decide whether the presumption of unconstitutional purpose which arises with a racial classification invalidates the statute in this case, because plaintiffs established at trial, the trial court found on the basis of much evidence, that a discriminatory purpose was a factor in the adoption of Initiative 350.

QUESTION: But the court of appeals didn't pass on that finding, did it?

MR. HOGE: The court of appeals found it unnecessary to reach that finding because of its ruling on the racial classification ground.

QUESTION: So if you were to rely on -- if you were to suggest that that is available to you here, might not the normal course of events be for us to remand it to the court of appeals for passing on -- reviewing that finding?

MR. HOGE: If the Court does not agree with the court of appeals that a racial classification was established, that is one course open to the Court, certainly. However, the evidence that I will review ought to satisfy the Court, I think, that a racial -- racially discriminatory purpose and in fact racial bias was among the reasons for this initiative's adoption. This Court reviews the legal validity of the court of appeals' judgment. It does not have to agree with the reasoning of the court of appeals to affirm the judgment.

QUESTION: Mr. Hoge, you have used the term, as did the court of appeals, "racial classification." Would you tell me who the members are of the respective classes that the statute differentiates between?

MR. HOGE: The statute differentiates between the majority, the white community, and the minority community in its treatment of reasons for assigning students away from their neighborhood schools. Prior to enactment of the initiative, Washington had a policy permitting and in fact encouraging the assignment of

students away from neighborhood schools for the purpose of desegregation. It regulated student assignment not at all. That was entirely within the discretion of local school districts. After the initiative, all traditional reasons for assigning students away from neighborhood schools is preserved except for the resaon of assigning --

QUESTION: Well, but is this a classification of reasons that are in a permissible and an impermissible category, or is it a classification of two classes of persons?

MR. HOGE: It's a classification of two classes of persons, as was the statute in controversy in Hunter versus Erickson, because --

QUESTION: Now, who is in the favored class and who is in the disfavored class?

MR. HOGE: The statute favors the majority, the white majority. The protected class for purposes of Fourteenth Amendment analysis is minority people who have an interest in equitable desegregated education. That political and educational interest is the only one that Initiative 350 affects.

Initiative 350 permits school districts to assign students away from their neighborhood schools for all reasons that exist and that school districts

commonly use. That was a finding of the district court. Initiative 350 does not, however, allow the minority interest in desegretated education to be satisfied through the local political process. It removes only that discretion from local school authorities.

QUESTION: Are you telling us that the Initiative 350 has resulted in a dual school system again?

MR. HOGE: Initiative 350, if applied in the state of Washington, would resegregate the schools and would therefore --

QUESTION: Has it done so in Seattle?

MR. HOGE: The initiative has not been applied in Seattle, because its operation has been enjoined pending this hearing.

QUESTION: If it is applied as it is defined, how will it produce a dual school system? Can you give us that factually?

MR. HOGE: Yes. The court below found and the court of appeals agreed that it would be impossible to achieve any significant racial desegregation in Seattle, and it would be impossible in fact to desegregate the Tacoma and Pasco school systems as well without resort to the tools of desegregation which are specifically

prohibited by Section 3 of the initiative.

In fact, the condition of segregation in Seattle after Initiative 350 would be more dramatic, more drastic segregation than has ever existed before, partly because the successful mandatory middle school program, which had been operating for six years, would be disestablished; also because, as the district court found, white parents would continue under Initiative 350 to move away from minority residential areas or transition areas, and thereby increase residential segregation and increase school segregation.

Moreover, blacks in Seattle, the testimony showed and the court found, would take the white community's repudiation of equitable desegregation as expressed in Initiative 350 as a sign that they should no longer continue their historic support for voluntary efforts, and would themselves withdraw into their neighborhood schools.

QUESTION: Supposing that the school board had adopted precisely the policy that is contained in Initiative Number 350? Would you say that the school board was guilty of making a racial classification?

MR. HOGE: If the school board continued to assign students away from their neighborhood schools for all the reasons the initiative allows, that policy, if

it was continued, would not amount to any change in Washington's -- or the Seattle School District's former history, and so it would not be an establishment of a racial classification. If the decision were made to rescind the Seattle plan, that would still be by reference to the neutral principles that are approved under Hunter versus Erickson.

The decision whether to rescind the Seattle plan and the validity of that decision would depend on whether there was a de jure segregation condition that has to be remedied or whether the decision was made with a discriminatory purpose, as the court specifically found was true with reference to Initiative 350.

QUESTION: But absent such a finding, you wouldn't say that the school board was making an independently unconstitutional racial classification simply by adhering to the policy contained in Initiative 350.

MR. HOGE: It would partly depend on whether there was a rescision of an operating desegregation plan, as this Court unanimously pointed out in Dayton One. But continuing a former policy of assigning to neighborhood schools with the exceptions of Initiative 350 wouldn't be a racial classification.

QUESTION: But it becomes a racial

classification simply because it is done at the state level rather than the school board level?

MR. HOGE: Part of the reason the statute or the ordinance in Hunter versus Erickson was invalidated and the statute in Lee versus Nyquist was invalidated was that it singled out for decision at a different level of government only that part of student assignment authority or housing matter authority which was of interest to the minority.

QUESTION: Well, Hunter simply made any ordinance pertaining to the sale of property or antidiscrimination ordinance subject to a referendum where nothing else was subject to a referendum, didn't it?

MR. HOGE: All matters under the Akron housing law were subject to ordinance. The peculiar -- or subject to local referendum. Any statute or ordinance passed by the city counsel could be subjected to referendum. Only racial housing ordinances were subjected to automatic referendum.

QUESTION: What is your analogy here to Hunter against Erickson? Is it -- It is certainly not the action of the school board, and it isn't the structure of the state's referendum statute, is it, because that is certainly neutral on its face?

MR. HOGE: The analogy to Hunter is that in Hunter, only matters dealing with racial housing laws were subjected to that unusual procedure, the automatic referendum. Here, only racial student assignments are subjected to the new state rule prohibiting assignment away from the nearest or next nearest school.

QUESTION: But is there any doubt under Washington law that if the Seattle school board had refused to adopt its policy of busing for racial balance, the proponents of that policy could have put the thing on a referendum, and if it were passed it would have the same effect as if it had been adopted by the school board?

MR. HOGE: If the statute had been enacted not to dismantle the Seattle plan, then that would be one factor in its favor. It would be not so likely to give rise to an inference of impermissible purpose, but if it was in practice a racial classification in the context of the adoption of such a statute, then that would similarly be invalid.

I would like to spend some time describing for the Court the nature of the evidence of discriminatory purpose which the district court relied on in reaching its finding that racial bias or prejudice was a factor in the adoption of Initiative 350.

QUESTION: In this regard, do you think you can identify any findings that are labeled as such by the district court?

MR. HOGE: Finding 3.7 and Finding 7.33. In Finding 3.7, the Court specifically concludes that racial bias was a factor in --

QUESTION: 7.33?

MR. HOGE: 3.7 and 7.33. The Court in Finding 3.7 concluded that racial bias --

QUESTION: Where is that?

QUESTION: A-8?

MR. HOGE: A-7 in the jurisdictional statement. Or A-8, excuse me. Yes.

QUESTION: Where is 7.33?

QUESTION: On Page A-23, where the court says it is impossible to know what the motivations were.

MR. HOGE: That's right. We established --

QUESTION: How can you both know and not know?

MR. HOGE: We established our burden under Arlington Heights of showing that a discriminatory purpose was among the factors which led to the statute's adoption. It then fell to the state to show that the statute would have been --

QUESTION: Well, I know, but the district court sait it's impossible to know, and yet --

MR. HOGE: That means --

QUESTION: -- you suggest he found that he knew.

MR. HOGE: He found that a racially discriminatory purpose was a factor in the adoption of the initiative. That satisfied our burden under Arlington Heights. He then found that he couldn't tell if the statute would have been adopted in absence of that purpose, meaning that the state failed its burden under Arlington Heights of showing that the discriminatory --

QUESTION: Well, I certainly agree, in his conclusions of law he said it pretty clearly, and then in his opinion he says, I find that a discriminatory racial purpose was among the factors leading to the adoption of the --

MR. HOGE: Yes, he found that on the basis of evidence submitted both by --

QUESTION: Which you are about to tell us about.

MR. HOGE: -- both by the state and by the school districts. There was --

QUESTION: How does the --

MR. HOGE: Excuse me.

QUESTION: How does the judge find out what

voters are thinking when they are voting, when they vote on --

MR. HOGE: Well, Judge Vorhees at the district court said that was impossible, to tell what was in the mind of the voters, and he therefore relied on expert testimony presented by both sides, polls presented by the state of Washington, and the objective indices in discriminatory intent that this Court outlined in Arlington Heights.

QUESTION: Well, do you do that regularly in Washington, take a poll after an election to see what made the people vote the way they voted?

MR. HOGE: Well, this was -- no, we don't, and that -- as plaintiffs, we acquiesced in the submission by the state of Washington of a poll which showed that a significant proportion of the whites in this nation still openly favor separation of the races.

QUESTION: Well, do you identify opposition to busing for racial balance with a discriminatory racial purpose, or do you?

MR. HOGE: Not necessarily, and this Court doesn't need to make that determination in this case.

QUESTION: But you think the judge here found not only that the motivation was to do away with racial balance by busing, but also found there was a

discriminatory racial purpose involved?

MR. HOGE: That there was racial bias or prejudice at least in part in the making of that decision. For instance, Dr. James --

QUESTION: Normally, isn't racial bias or discrimination demonstrated objectively?

MR. HOGE: Yes, the fact --

QUESTION: By what people do rather than by what they think?

MR. HOGE: Yes. One of -- of course, one of the best demonstrations of racial bias or purpose is the racial classification. There can be little better proof of a discriminatory purpose at work than a law which singles out for different and disadvantageous treatment the interests of the minority as compared with the interests of the majority, but beyond the simply racial classification, the objective indices that the Court outlined in Arlington Heights also established a discriminatory purpose at work.

Significant among those is the impact of the decision. As we know, impact alone will not establish an equal protection violation. However, the Court found that under Initiative 350, there could be no significant desegregation of the Seattle schools. It found that the burden -- that segregated schools lead to poorer

education and that the burden of segregated schools falls most heavily on minority people. That is the same conclusion this Court made in Brown, and the same conclusion that Congress and President Nixon made in enacting the Emergency School Aid Act.

The impact was a certainty, and it was known in advance, and the court concluded that that was a factor in determining whether it was intended in the adoption of Initiative 350.

Another significant objective index of intent is the sequence of events. In Arlington Heights, the Court concluded that application of the village's long-standing high-density -- low-density zoning to an application for rezone from a low-income housing project did not show anything but neutrality at work, but the Court said it would be a far different case if that zoning decision to have low-density was made after the application of the housing development authority for a low-income housing project.

This case is that different case. Prior to adoption, prior to adoption of the Seattle plan, Washington state encouraged efforts of local school districts to take action to desegregate their schools by whatever means available. It was only after adoption of the Seattle plan that the state decided to take unto

itself the authority to regulate student assignments, and even then, it only took unto itself the authority to regulate student assignments for desegregation.

Those same factors also show the substantive and procedural departures from the norm which the Court outlined in Arlington Heights as indices of discriminatory intent at work.

The drafting history and the campaign history of the initiative all show an intent on the part of the initiative's proponents to limit only desegregation busing. In the course of drafting the initiative, the proponents wrote to all 300 Washington school districts and asked for advice as to how to avoid interference with any student assignment autority of those school districts, and indeed the president of CVIC testified that Section 3 of the initiative was drafted specifically to prohibit the elements of the Seattle plan.

The campaign history was similar. CVIC, the Citizens for Voluntary Integration Committee, which was advocating for the initiative statewide, constantly campaigned on the theme that the initiative would permit maximum flexibility for school districts, that it would only affect busing for racial desegregation, and in fact they said repeatedly that 99 percent of Washington's 300

school districts would not be affected by the initiative. And we agree. One percent of Washington's 300 school districts are affected by this initiative, and it is the three school districts out of Washington's 300 school districts that have racial desegregation plans.

QUESTION: Well, I take it if there weren't any, if there weren't any school districts that had a voluntary desegregation plan, if the initiative were passed, then no school district could have one, and you would be making the same argument, wouldn't you?

MR. HOGE: Yes --

QUESTION: Suppose as of today, no school district in Washington had adopted a voluntary desegregation plan, but this initiative is now the law, and no school district could have one under the initiative. Wouldn't you be making the same argument?

MR. HOGE: I believe I would. Only if Washington were a one-race state would it be of no significance that a law giving school districts the authority to assign away from neighborhood schools for all traditional reasons but not for race be of significance.

QUESTION: Well, of course, that isn't what the 350 says, is it? It doesn't say that you may assign

for all reasons except race. It doesn't say that.

MR. HOGE: No. In fact, by design, the --

QUESTION: It says that you must adhere to a neighborhood school policy except for certain reasons.

MR. HOGE: It says assign students to nearby schools except for certain reasons, and then it lists the reasons that completely swallowed the rule, as all the testimony showed, except for racial desegregation. In fact, one of the initiative's drafters testified that the reason the initiative was not just a strict prohibition on assignments for racial reasons was the fear of the proponent group that if it was directed only at racial student assignments, some school district that wanted to desegregate might try to do so and say that we are not desegregating, we are just doing this for educational reasons, and pairing our schools or clustering our schools for that kind of reason, and it was for that reason that the techniques of the Seattle plan were specifically prohibited.

QUESTION: Well, doesn't Finding 8.3 cover the point Justice White made, that the only significant reason that is forbidden is the racial balancing reason?

MR. HOGE: Exactly. The court's findings are very explicit and often repetitive on that point.

In short, then, this case is not one like

Arlington Heights, or Washington v. Davis, or Feeney, or James, or Memphis, where the lower courts found no discriminatory purpose at work. This is a case where the lower court found discriminatory purpose on the basis of direct evidence and objective indices as outlined by this Court in the past. Many of these findings were expressly adopted by the court of appeals, and therefore, we submit, should be accepted by this Court.

QUESTION: How does an initiative get on the ballot? By signature?

MR. HOGE: That's correct. The proponents of an initiative must first acquire a significant number of signatures, I think in this case over 100,000, before the initiative is put on the election ballot. It is significant in this regard that the signature campaign for this initiative was featured by, among other things, full-page newspaper ads in major newspapers around the state, saying that the initiative was being proposed in reaction to a desegregation plan proposed by the Seattle school board. You can find that in Exhibit 38, Page 49.

So, for the reasons I have outlined, the fact that this is an undisputed racial classification which disadvantages minority interests, because there has been a showing and a finding of discriminatory purpose at

work, on the basis of all the evidence, including evidence you will find in the Joint Appendix at Pages 92, 104, 89 to 90, 78, 165 to 166, 100, Exhibit A, 133, the poll introduced by the state, and Page 104 to 105 of the Joint Appendix.

QUESTION: What is the evidence? What was the evidence before the district court on which it reached a conclusion, made a finding that if this initiative were carried out, it would then interfere with Constitutional rights?

MR. HOGE: It would interfere with Constitutional rights because it would make impossible achievement of --

QUESTION: Well, but how did he come to the conclusion that if it was applied it would do that when it had not yet been applied?

MR. HOGE: Well, there was much evidence offered by both sides which attempted to describe the effect the initiative would have if implemented. Expert witnesses for both sides testified as to the effects of the initiative if implemented, and it was clear on the basis of all that testimony, including testimony offered by the state's witnesses, that Seattle could not achieve any significant desegregation under the initiative.

It therefore disadvantages minority interests

in a desegregated education by an equitable desegregation plan, but doesn't place any similar disadvantage or restriction on school districts when the school district is seeking to serve the interests of the majority, which in all the -- all the exceptions of the initiative are simply race-neutral, common sense reasons why school districts assign away from neighborhood schools, all of which could be overcome by spending more money.

This Court has seen this country out of -- partway, now, out of our troubled racial history, and for 30 years, since the 1950's, the Court has shown moral leadership to the nation. There has been uniform resistance in school districts across the country to desegregation for school districts, but this Court's moral leadership is now starting to take hold. Seattle is the first major American city that has desegregated out of a feeling that it had a Constitutional duty to do so, and because it believes in the benefits of desegregated education for all students, but most importantly for minority students.

Certainly there is nothing in the Dayton and Columbus decisions decided two years ago that makes it look like the Seattle School District misapplied or misanalyzed the law in deciding to desegregate its

school systems in 1977.

QUESTION: Do you think -- I am not sure from your submission whether you think that the court of appeals was justified in arriving at his judgment by just finding what it thought to be a racial classification.

MR. HOGE: Yes, a racial classification which disadvantages minority interests is, as the Court said in Feeney, presumptively unconstitutional and can be sustained only--

QUESTION: So the district court didn't need to make these findings about purpose in your view.

MR. HOGE: We don't believe they did, but they certainly furnished further support for this Court upholding --

QUESTION: Well, you don't suggest that it is necessary to find a discriminatory purpose. Isn't it necessary to do that?

MR. HOGE: We think this Court's decision in Washington versus --

QUESTION: You are suggesting there is a violation of the Fourteenth Amendment here, aren't you?

MR. HOGE: That's the essence of our case, sir.

QUESTION: Well, must there not be a purpose, a purposeful racial discrimination?

MR. HOGE: Yes, and racial classification is probably the best evidence of purposeful discrimation.

QUESTION: Well, that may be the best evidence, but it isn't equivalent to a finding, is it?

MR. HOGE: No, but we have those findings, too, in this cse.

QUESTION: Well, you don't have it in the court of appeals.

MR. HOGE: Well, the court of appeals, following this Court's decision in Feeney said that a racial classification regardless of purported motivation is presumptively unconstitutional and can be upheld only upon an extraordinary showing. No compelling state interest was advanced in support of this initiative. In fact, the initiative is the virtual antithesis of what has been held to be a compelling state interest, an interest in a desegregated education.

QUESTION: Well, it certainly was explicit in Feeney, wasn't it, the classification.

MR. HOGE: The language is explicit. It was in dictum.

QUESTION: Do I understand you to tell us that Seattle is now desegregated, they have dismantled the dual school system, but that Initiative 350 will turn the clock back? Is that --

MR. HOGE: That's exactly what Initiative 350 will do. The Seattle plan has successfully desegregated schools in an educationally sound manner. It works, and it works now.

QUESTION: Thank you.

Do you have anything further, Mr. Attorney General? You have four minutes remaining.

ORAL ARGUMENT OF KENNETH O. EIKENBERRG, ESQ.,

ON BEHALF OF THE APPELLANTS - REBUTTAL

MR. EIKENBERRY: Yes, Your Honor. Thank you.

By way of rebuttal, and alluding to a comment made by counsel, the record here before the Court does have evidence to show that there was a substantial percentage of Washington minorities, probably a majority of Washington minorities who were opposed to the Seattle plan and in favor of 350. How, then, can it be said that this group of people is somehow disadvantaged by passage of a state law which they favored and its impact on a program which they opposed? 350 simply does not disadvantage minorities. Not all minorities favor busing, and not all whites are opposed to it.

I would like to leave this Court, if I may, withi what I believe are the important questions to be addressed for, especially, perhaps, in this case getting at the right questions is critical to the decision, and

the question that was raised, Your Honor, was racial animus or antipathy, a decisive or even a significant factor in the adoption of the initiative by the voters. More broadly, does the initiative embody a race-dependent decision? And we believe the answer is no.

Would it have been a race-dependent decision even if, by its terms, it had applied only to achieve busing for greater racial balance, and again we believe that answer must be no.

Perhaps this question brought up, too, by the Court: Aren't the school districts really trying to play a semantic word game by equating the terms "segregation." "racial imbalance," and "racial isolation?" We believe the answer is yes, and they have been doing so to give themselves a leg up on their argument that the Seattle plan is Constitutionally sacrosanct.

Does 350 impose any special burdens or indeed any burdens at all on minority students in Washington schools? Here again, we believe the answer is no, because everyone is accustomed to going to the legislature for major policy decisions.

Finally, if you affirm on this case, what are the implications for affirmative action programs --

QUESTION: How many Negro legislators do you have in Washington?

MR. EIKENBERRY: I have to pause for a moment, Your Honor.

QUESTION: I know you do. I mean, you say they can go to the legislature and get whatever they want. I was just wondering.

MR. EIKENBERRY: Well, I have to stop. There are several minorities in the House. I believe one of them is black. There are other minorities. And I believe there is a black Senator, Your Honor.

QUESTION: Almost as many as Mississippi.

MR. EIKENBERRY: Well, Your Honor, I have served --

QUESTION: Well, I just object to your saying that Negroes can go to the legislature and get whatever they want. Isn't that what you said?

MR. EIKENBERRY: I suggested, Your Honor, that minorities have good effect in the legislature, in the laws -- and I invite the Court's scrutiny of Chapter 28-A of the code of the state of Washington, which I believe does have laws that are beneficial to minorities, and that Washington has been in the forefront of states enacting civil rights legislation.

QUESTION: Mr. Attorney General, may I ask you

another question about racial animus and racial intent? Do you draw a distinction between an intent to create a racial classification on the one hand and racial animus on the other? What do you think Washington v. Davis requires? Does it require some kind of unfavorable attitude toward a minority, an animus, a dislike, or does it merely require a deliberate decision which results in a classification?

MR. EIKENBERRY: The animus is the intent to cause the harm in the first place, Your Honor.

QUESTION: So you read Washington v. Davis to require that kind of animus in every equal protection case?

MR. EIKENBERRY: Yes, sir, because the case held that even though there happened to be an impact on --

QUESTION: Well, I understand. Impact is something different than a deliberately created classification, though.

MR. EIKENBERRY: Yes.

QUESTION: Well, if you came to the other conclusion, all you would be proving is that people went sleepwalking when they did the thing, wouldn't you? I mean, that they did have an intent to sign the bill, yes.

MR. EIKENBERRY: Oh, yes, indeed, Your Honor.

They certainly had the reasons, and that, we believe, was to accommodate the benefits of -- the traditional benefits of near neighborhood schools with the benefits of having diverse student bodies which can be accomplished under the terms of Initiative 350.

QUESTION: May I follow up with one more question? Is it correct that if we accept Finding 8.3, the one that says there is no significant reason permitted, objective other than to prohibit racially balancing purposes, that the case really should be judged as though the initiative said in so many words, mandatory busing is permissible for any reason except racially balancing purposes

MR. EIKENBERRY: We don't believe the initiative says that, of course, Your Honor.

QUESTION: No, but wouldn't your Constitutional position be precisely the same if it did?

MR. EIKENBERRY: My answer is yes.

QUESTION: Yes, I thought so.

QUESTION: In which event you do have some problems with some prior cases, I take it.

MR. EIKENBERRY: No, I think not, Your Honor. I think that there is a distinction.

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

(Whereupon, at 1:58 o'clock 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:

WASHINGTON, ET AL., vs. SEATTLE SCHOOL DISTRICT NO. 1, ET AL
81-9

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BY Reene Hammond