ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
EVELYN MARINO, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 86-1415
	)	
JUAN U. ORTIZ, et al.	)	

Pages: 1 through 41

Place: Washington, D.C.

Date: November 30, 1987

Heritage Reporting Corporation

Official Reporters
1220 L Street, N.W.
Washington, D.C. 20005
(202) 628-4888

IN THE SUPREME COURT OF THE UNITED STATES

EVELYN MARINO, ET AL., :

Petitioners, :

v. : No. 86-1415

JUAN U. ORTIZ, ET AL. :

Washington, D.C.

Monday, November 30, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

RONALD PODOLSKY, ESQ., New York, New York; on behalf of the Petitioners.

GLEN D. NAGER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, in support of Petitioners.

LEONARD J. KOERNER, ESQ., Chief Assistant Corporate Counsel for City of New York, New York, New York; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

12:59 p.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 86-1415, Evelyn Marino v. Juan Ortiz.

Mr. Podolsky, you may proceed whenever you're ready.

ORAL ARGUMENT OF RONALD PODOLSKY, ESQ.

ON BEHALF OF THE PETITIONERS

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

This case deals with the rights of a party to seek redress of grievances for an alleged violation of the Fourteenth Amendment, Equal Protection Under The Laws, under 42 USC 1983, and whether that right is in any way delimited or in any way proscribed by the fact that somebody else started an action relating to a related condition.

The Evelyn Marino Petitioners are police officers who took the 1983 New York City Police Department promotion exam to sergeant.

QUESTION: The calendar year 1983 and not the code number 1983.

MR. PODOLSKY: No. I'm sorry. Yes, Your Honor.

The pass mark for that examination was set at the first thousand candidates plus ties and yielded a list of 1,040 candidates. There is an affidavit by the personnel director at the fairness hearing held in the Hispanic case that the pass

mark did not define minimum competency to do the job and this was in response to an objection by certain intervenors who represented ethnic societies that the -- to promote the minority officers would somehow lead to promoting unqualified people.

So, the issue of whether or not the minority beneficiaries of the settlement are qualified has been decided and is not in issue here.

The Marino Petitioners have a mark equivalent to or higher than the minority beneficiaries of the settlement but below the first thousand cut-off. When the racial remedy was employed, after the Hispanic suit was instituted and settled, it turned out that everyone on the list, that's the 1,040 original passers, plus all minority members who would make up the disparate impact perceived to have generated the lawsuit in the first place were promoted, there were still 400 vacancies in the rank.

The Marino Petitioners take the position that as long as there were 400 vacancies in the rank, their exclusion by the employment of the racial remedy was not narrowly tailored to prevent unnecessary trammeling of rights, and that is the issue that brought Marino into court in the first place.

QUESTION: Well, Mr. Podolsky, why didn't the Petitioners intervene in a Title VII litigation?

MR. PODOLSKY: The Petitioners did not intervene in

the Title VII litigation, Your Honor, because Congress has provided a remedy of 42 USC 1983 to deal with alleged violation of equal protection.

QUESTION: Well, certainly the point that you argue on the merits could have been raised in that litigation.

MR. PODOLSKY: It was an alternate remedy and not a required remedy. Not a required remedy.

Now, if we looked at, Your Honor, --

QUESTION: So, why didn't you?

MR. PODOLSKY: What?

QUESTION: Why did the Petitioners not intervene in the Title VII litigation?

MR. PODOLSKY: They did not intervene because they chose as their remedy a plenary action under 42 USC 1983 which is a remedy provided for Congress specifically addressed to enforcing the equal protection component of the Fourteenth Amendment.

QUESTION: I think Justice O'Connor is trying to find out why. She knows that they chose this instead of the other. She is asking why they chose this instead of the other. Is there some reason?

MR. PODOLSKY: Yes, indeed, there are a number of reasons cataloged in my reply brief, Your Honor.

The most important one, of course, is that the remedy existed in 1983. The second, if a party chooses to intervene

in somebody else's lawsuit, their burden of proof is different on some -- in many respects from the 1983 action.

The 2nd Circuit, for example, sometimes limits intervenors to just whether or not there's a fairness in the proposed settlement.

Now, in 1983, you don't have to go into whether or not the racial remedy was or was not appropriate. One of the most important considerations, Your Honor, in answer to your question is that the intervention provision, Federal Rule of Civil Procedure 24, I believe, and I think the 11th Circuit bears me out, is for people that have no other remedy.

Now, for example, the Schneider intervenors, they represented the ethnic societies, were they attempting to get a passing grade here? No. Were they attempting to get promoted? No. Their objection was we are police officers, and if you lower the mark for the beneficiaries of the settlement, we are going to be supervised by unqualified people.

They did not have a Fourteenth Amendment provision, and FRCP 24 provides for a person without a remedy to seek redress of an objection that they have. No remedy, no specific statute giving rise to a plenary action.

Now, the Marino people, they brought their action and it was dismissed as an impermissible collateral attack on a proposed settlement, not a judgment, a proposed settlement. Where did the 2nd Circuit get the idea of impermissible

collateral attack leading to inconsistent results? That's the verbiage of the Rule 19.

Rule 19 makes it the duty of the people who feel they're going to be subjected to duplication of effort to inconsistent results. It puts the burden on them when somebody asserts a claim, not has a claim, Rule 19 says a person who claims an interest in an action, which may lead to inconsistent results, the people who are at risk, the parties who may be subjected to inconsistent results, have a duty, not the people who brought the 1983 action, but the people of the lawsuit have a duty to plead, to join, and let's see how strong that requirement is.

Rule 19. Persons to be joined if feasible. Now, the fact was that they were subject to the jurisdiction of the Court and we're not involved with the jurisdiction over the person. The person claims, not has a claim that he doesn't assert, he must claim an interest, let the folks know I have an interest I am pursuing, he claims an interest relating to the subject of the action, his 1983 action is authorized by Congress, enforcement of your equal protection rights, and is so situated that the disposition of the action may in the person's absence -- now here's where we're talking, Subdivision 2, leave any of the persons already parties subject to --

QUESTION: Mr. Podolsky, where are you reading from?

MR. PODOLSKY: Excuse me, Your Honor. I'll use the

Sergeant's Benevolent Association brief, page 3. I intend to use their brief because they have more sections cited.

QUESTION: Page 3 of that brief?

MR. PODOLSKY: Yes, indeed. The Sergeant Benevolent Association, page 3. Middle of the page, Your Honor, (ii).

Leave any of the persons already parties, these are the Hispanic litigants, subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligation by reasons of the claimed interest.

Now, look how strong this is. If the person has not been so joined, the court shall order the person to be made a party. They go even further. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant or in a proper case an involuntary plaintiff.

Now, Justice Scalia, one of the other reasons is Marino was not attacking the promotions. They took the position that the minority beneficiaries were qualified to hold the position and this was confirmed by the personnel director. Do we go in as a plaintiff? Do we go in supporting the settlement but saying we also must be included because we're qualified and there are vacancies and the remedy is not tailored? Are we pulled in as a defendant or do we pursue the right to go in 1983 as Congress says and let them make the determination to bring us in?

No defendant wants to be -- no person wants to be

made a party to a litigation against his will, but Congress gave the Hispanic litigants the power and opportunity to do that, like they would any other defendant.

Now, a consent decree is only binding on people who consent.

QUESTION: May I ask one question?

MR. PODOLSKY: Yes, indeed.

QUESTION: Are you telling me that -- you say that you didn't know whether you would support or attack the settlement if you did go in. Does that mean you do not attack the settlement?

MR. PODOLSKY: I do not attack the settlement, except that it is not narrowly construed to prevent unnecessary exclusion. There were 400 vacancies in the rank after the remedy was employed. This is not a situation where a medical school, Your Honor, has fifty seats and 500 applicants where you must exclude people.

QUESTION: Are you saying --

MR. PODOLSKY: Qualified people.

QUESTION: -- there are 400 vacancies after the consent decree was entered?

MR. PODOLSKY: Not only after it was entered, but after it was employed and put into effect. Yes, indeed.

QUESTION: So that the --

MR. PODOLSKY: This is an unusual case.

QUESTION: So, the consent decree does not -- you're not claiming the consent decree harmed your clients in any way then.

MR. PODOLSKY: They benefitted the clients, my clients, and I'm the first to say it.

QUESTION: I must confess I'm a little puzzled about what's going on.

MR. PODOLSKY: It's a puzzling case, Your Honor.

QUESTION: But, then, we start from the proposition that you're perfectly happy with the settlement?

MR. PODOLSKY: We are perfectly happy with the --

QUESTION: The consent decree.

MR. PODOLSKY: -- finding that the minority beneficiaries of the settlement were qualified to fill the rank of sergeant and that there are sufficient vacancies beyond that where people who outscored them can also be accommodated, and if you don't accommodate them, they are being unnecessarily excluded.

See, my clients were out --

QUESTION: What are you complaining about? What's your complaint?

MR. PODOLSKY: Unnecessary exclusion from the 400 vacancies, Your Honor.

QUESTION: By the consent decree?

MR. PODOLSKY: By the implementation of the consent

decree.

QUESTION: Well, then, you are attacking part of the consent decree.

MR. PODOLSKY: I am -- we sought modification, Your Honor.

QUESTION: Well, sure, yeah.

MR. PODOLSKY: It is not an attack.

QUESTION: So, you're attacking it.

MR. PODOLSKY: By the way, Your Honor, it was not a consent decree when we started our litigation.

QUESTION: It seems to me you said one thing to Justice Stevens a moment ago and now another thing to Justice White.

MR. PODOLSKY: Yes.

QUESTION: Is it your considered answer that you are attacking at least a part of the consent decree?

MR. PODOLSKY: Yes. But an attack on the consent decree is permissible. Justice O'Connor has suggested that in her opinion.

QUESTION: Mr. Podolsky, I thought your explanation for not intervening was that you didn't want to attack the settlement.

MR. PODOLSKY: No, no, no. The explanation --

QUESTION: You did want to attack the settlement, then why didn't you intervene and attack the settlement in that

proceeding?

MR. PODOLSKY: I did not attack -- I did not intervene in the action because I made an election of the remedies that Congress gave me for vindicating the unequal protection of the laws where people of similar qualifications were excluded unnecessarily.

QUESTION: But you just told me a minute ago they weren't excluded because there were 400 extra vacancies that your clients could have filled.

MR. PODOLSKY: That's right.

QUESTION: So, how were they excluded?

MR. PODOLSKY: They were excluded from equal protection of the laws. New York State, Your Honor, defines equal protection in the competitive exams and say insofar as practicable, -- I'm sorry. Insofar as practicable, promotions in the civil service shall be made based on merit and fitness to be determined insofar as practicable by a competitive examination.

That is the definition of equal protection of the laws in New York State as far as civil promotions are concerned.

QUESTION: Well, but, now, Mr. Podolsky, Section 1983 action that you've said you brought, you chose to bring, isn't there for invoking New York's definition of equal protection law, it's to vindicate a federal constitutional

claim?

MR. PODOLSKY: That's right. And the federal constitutional claim is that citizens be accorded equal protection of the law.

QUESTION: Yes, that's fine. But why the long discourse about what New York -- how New York interprets equal protection of the law?

MR. PODOLSKY: They define it for the purposes of, and so does the Court, so does the Federal Court, in defining what equal protection is in a state. They rely on the state's statutes and highest tribunal decisions, and it has been held that that can be binding on this Court.

Justice O'Connor has suggested in her concurring opinion, of course, in the Cleveland Firefighters case, that consent decrees are subject to collateral -- to attack if they violate the Fourteenth Amendment equal protection component.

The -- what happened during the litigation was the Marino suit was instituted before the consent decree was even scheduled for a fairness hearing. Now, in order for something to be inconsistent with something else, there must be a constant against which it is measured. For example, the Constitution of the United States is a constant.

If a statute violates it, it's inconsistent and is declared unconstitutional. A statute, which is violated by inconsistent action, is illegal. A judgment under certain

circumstances is entitled to a certain amount of stability and if it's undermined a judgment. Now, a final judgment, under certain circumstances, where due process is had, is entitled to a certain degree of stability as well.

What we had here, what they say was being attacked was a proposal subject to a fairness hearing. Now, was this fairness hearing a charade, a stroking exercise? Was it a foregone conclusion? Suppose the District Court had rejected it? Suppose they said, Podolsky, you're right, they can't exclude your people from those 400 vacancies, this would be not a narrow tailoring. That was a proposal. It was not a judgment. It was not a consent decree, and when the District Court dismissed the Marino case, it took the court awhile to decide to dismiss it, the motion was made before the fairness hearing and dismissed after, the court relied on Prate v. Freedman.

Prate v. Freedman is a case where there was an attack on a consent decree a year after it was entered. In our situation, all we had was an informal --

QUESTION: Is that --

MR. PODOLSKY: I'm sorry.

QUESTION: Is Prate v. Freedman --

MR. PODOLSKY: The 2nd Circuit, Your Honor.

QUESTION: Well, I don't think we're interested in distinctions among 2nd Circuit cases.

MR. PODOLSKY: Well, I'm saying the judge below, Your Honor, the District Court judge cited only one case in showing why he is dismissing the Marino case. He cited Prate v. Freedman. That was his sole basis. It was a memorandum endorsement, Your Honor.

Case dismissed, Prate v. Freedman, 2nd Circuit. Prate v. Freedman, you pull down the book and what do you find, it was a consent decree a year old where people came in a year later and tried to undo what was done. Certainly, that's an attack, a collateral attack. I don't even think it's impermissible, but it's a collateral attack on a consent decree, entitled to some sort of stability here.

QUESTION: Mr. Podolsky, you know your light is on.

MR. PODOLSKY: Yes. The five minute light, indeed.

QUESTION: I just didn't want you to be surprised.

MR. PODOLSKY: Well, it's been on for awhile. Now, I'm really in trouble.

In any event, six months after the final decree is entered, the state Supreme Court comes down with a decision giving me eleven changes on the merits of whether the questions were job-related or not, and I wrote in my brief what Judge Blin said about the case.

As a result of these changes, some of the very minorities perceived to have failed and made sergeants under the decree now had a passing grade on their own merit. They're

walking around trying to explain to people why they shouldn't be stigmatized. I made sergeant on my own. You see. Everybody's referring to them as "sergeants".

The stigma attached here can be eliminated by treating everyone who passed this exam equally and giving the minority beneficiaries a time preference if, in fact, there is a racial remedy required. Time preference is less onerous than outright exclusion of equally-qualified people. That's our point.

There was no impermissible collateral attack on an existing judgment or consent decree. When the Marino case was instituted, it was merely an agreement between an employer and the employee with some of his people, and as I stated in the beginning, a consent decree by definition is not binding on the people who did not consent to it.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Podolsky.

We'll hear now from you, Mr. Nager.

ORAL ARGUMENT OF GLEN D. NAGER

AS AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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

Justice O'Connor has asked a question that probably occurred to all of us, why didn't the Petitioners in this case intervene.

The fact that that question occurs to all of us,

though, is a question that we would like to suggest is not a question that the District Court should be asking of litigants who bring subsequent lawsuits, challenging actions that existed in prior lawsuits, and our reason for that is it would be both unfair and would produce an inefficient allocation of society's and judicial resources in the subsequent lawsuits.

It is certainly the case that it's in the interest of fairness and in the interest of judicial economy for everyone who has a sufficient interest in a piece of litigation to be made party of that litigation and be bound by that litigation. But it's also true that the same fairness concerns and those same economy concerns counsel that when a person doesn't have a sufficient interest in a piece of litigation, that he not be made party and that he not participate in it because his participation would confuse and complicate the litigation needlessly.

The problem comes -- and it's easy to say those two generalities in the abstract, what's more difficult is analyzing the question as to whether or not you have a sufficient interest to justify being a party in that litigation, and until a court answers that question for you, you won't know, and the problem is that there is a risk of error of mistake, and the question should be who can best bear the burden of those mistakes of thinking I didn't have a sufficient interest to intervene, so I didn't, or I had other

reasons for not intervening, and I didn't want to, and the Federal Rules of Civil Procedure wisely, we think, --

QUESTION: May I interrupt? Is it conceivable that you would have a sufficient interest to mount a collateral attack on a judgment in a case and yet not have a sufficient interest to intervene in the case?

MR. NAGER: Probably not, Justice Stevens.

QUESTION: Thank you.

MR. NAGER: The question, though, is should that question be asked of someone who doesn't intervene, and we would suggest that it would be inefficient to create a rule of law of that sort. The reason being is that many people don't have counsel on an on-going basis and aren't in the position of monitoring on-going litigation.

If that litigation may be effecting their interests and the fact that they haven't intervened may mean that they didn't have counsel at the time who told them. They may know about the litigation. They may not understand the litigation.

The Rules of Federal Procedure say put the burden on the parties to the litigation. If they want to bind those people who haven't intervened, then join them. That's the burden the Rule 19 places, and we think it's a wise one because it would be inefficient for all of us to have to continually retain counsel to evaluate litigation to know whether or not we should intervene.

QUESTION: But they had to do that to decide whether to file the lawsuit.

MR. NAGER: Well, they did, but the question is when. Here, after they learned about the lawsuit, --

QUESTION: Well, normally, you start the time clock running when you get notice of whatever it is that hurts you, and presumably as soon as they found out about this settlement, they realized that it adversely affected their interest, and they must have been intimately acquainted with what was going on. They all took the exam. It's not like they're some strangers from a foreign country.

MR. NAGER: That's true, Justice Stevens. They aren't strangers from a foreign country, and they were aware of the litigation, and when you look at the -- and they had counsel. A lot of people don't have counsel. Yet, they may still know that the litigation is going on and they may not know that they have to intervene, and they shouldn't have to intervene.

If they don't intervene, what you have is you have these kinds of cases where we're looking back in retrospect asking whether or not they had sufficient notice, whether or not at the time they had that notice the court had jurisdiction over them, and whether or not their interest was sufficiently implicated in retrospect to have required them to have intervened to protect their rights.

The parties to the litigation, however, are more

familiar with the complaints, more familiar with the pleadings, more familiar with the relief that they expect to ask the court to award or in the case of the consent decree to approve, and they're in the best position of bearing the burden of not having made someone a party to the litigation.

It will expend judicial resources, we think, more in the long run to engage in these inquiry, retrospective inquiries as to whether or not someone has sufficient notice to have required them to have intervened and thus they're precluded from not having intervened.

Now, from just placing the burden on the existing parties to the lawsuit to file a Rule 19(c) which says that they should list everyone who may have an interest and is affected by the litigation so that the court can evaluate whether or not those litigants should be joined.

QUESTION: When did it become clear that the interests of -- these interests would be threatened?

MR. NAGER: Well, when the complaint was filed, the city defendants clearly understood that it would affect the interests of individuals who were already on the eligibility list because they pled and asked that the case be dismissed for failure to enjoin.

We believe that the first time at which it would have been clear, probably clear, that the Petitioners' interests were affected would have been at the time that the court

approved, I believe it was in November of 1985, a race-conscious implementation of provisional promotions.

At that time, --

QUESTION: When was the consent decree?

MR. NAGER: Well, the consent decree itself was not entered until June of '86, but there were provisional promotions entered pursuant to interim orders of the court, and that was the first instance at which race-conscious relief was entered, and that would have been at the first time at which the equal protection rights of Mr. Podolsky's clients could have been implicated.

QUESTION: Couldn't the consent decree as finally entered been implemented in a way that wouldn't have hurt his clients?

MR. NAGER: This particular consent decree had already hurt his clients because they had already been not given a promotion that other individuals were given a promotion, only because of their race. These -- all of his clients were equal to or higher than one or more of the minorities who were given the promotion on the eligibility list.

QUESTION: When was this action brought, the 1983 action brought?

MR. NAGER: The initial 1983 action was filed, I believe, in December of 1985.

QUESTION: That's before the final consent decree was entered?

MR. NAGER: Right. Because, as I said, in November of 1985, there were provisional promotions given.

QUESTION: It became clear in November and they sued in December?

MR. NAGER: Yes.

QUESTION: Well, Mr. Nager, assuming not this case, but in an ordinary case and I'm not worried about lawyers, they have lawyers, the parties have met and they decide to ride along on a class case and ride along until something happens, and the consent decree comes on board, do you take the position that they could intervene at that stage?

MR. NAGER: Yes.

QUESTION: But rather than start a new lawsuit so they could consider more problems.

MR. NAGER: We take the position --

QUESTION: Do you think that's what Congress meant?

MR. NAGER: We think that --

QUESTION: Do you think that's what Congress meant?

MR. NAGER: We think that's what the federal rules allow, but the federal rules also require --

QUESTION: I didn't say allow. I said meant.

MR. NAGER: I'm sorry, Justice Marshall?

QUESTION: I didn't say allow. I said meant. Did

they mean to give you --

MR. NAGER: When Congress created two separate rights, --

QUESTION: -- two bites at the cherry?

MR. NAGER: Not two bites at the cherry. Two different litigants raising two different kinds of claims. It's two bites of the city defendant and that's why the city defendant should have joined all employees would have been affected by their actions.

QUESTION: Wouldn't that have been accomplished by intervening?

MR. NAGER: Yes, they could have intervened.

QUESTION: Wouldn't they have gotten everything by intervening that you would get by filing a separate lawsuit?

MR. NAGER: I believe so, yes, they could have.

QUESTION: Then why file a separate lawsuit?

MR. NAGER: Because if you create that rule, you will be creating a system in which people have to continually monitor litigation and intervene at the first instance that they have any reason to believe that it may affect their interests because if they by-pass that opportunity --

QUESTION: Are we supposed to give assistance to anybody for anything they might believe might possibly happen under any circumstance in the future?

MR. NAGER: No. It's just in our view a question of

who the burden should be put on for getting them into that litigation so that it can all be done economically, and we're suggesting that the most efficient way and --

QUESTION: I think one suit is more economical than two. Am I wrong?

MR. NAGER: You are absolutely right, and we agree with that. Our only point is that the burden of deciding who -- those occasions on which one suit is better than two is to the court who's handling the first case and to the parties who have filed the complaint and filed the answer in the first complaint.

QUESTION: What do you think the answer would be if you asked me would I rather try one suit or two?

MR. NAGER: You'd rather try one.

QUESTION: I thought you'd say that.

QUESTION: Mr. Nager, is your response about when these people should have known that they should get in accurate? As I understand the claim, it's not that -- what they're complaining about is not simply that other people were promoted in preference to them on a racial basis, but it's rather that even allowing that, there are spaces still left and you didn't have to impose this degree of racial discrimination. That's what the claim asserted here is.

Now, when did they know that there were going to be 400 places left after imposition of the race-conscious remedy?

MR. NAGER: That occurred some time after, I believe, some time after the implementation of the provisional promotions, which would have been some time after November of 1985.

But as we read their complaint, Justice Scalia, they have challenged the fact that they were at a certain point on the eligibility list and they were not given promotions at the same time that people who were lower than they were on the promotion list were promoted and that the distinguishing factor between them was solely and exclusively race.

QUESTION: And they would have made the same claim if there had not been these extra 400 slots?

MR. NAGER: Yes. Yes.

QUESTION: No, they wouldn't have made that claim. I mean, what maybe rankles with these people, even though they might have had a lawsuit, they wouldn't have brought the lawsuit except the fact that there were 400 places left.

MR. NAGER: As I say, as we read the complaint, I can only tell you what I think they're claiming from their complaint, and Mr. Podolsky is their lawyer, he may take a different view now than he did then or he may have had a different view all along, I can just tell you what we read from the complaint.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nager.

We'll hear now from you, Mr. Koerner.

ORAL ARGUMENT OF LEONARD J. KOERNER, ESQ.

ON BEHALF OF RESPONDENTS

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

Every circuit in the country, with the exception of one, has upheld the principle against collateral attacks, and the reason for that, as Justice Marshall indicated, is in the interest of judicial economy, to avoid inconsistent results, and also to put a case to rest.

The absence of finality would be most devastating to Title VII litigation. If you review the Birmingham, Alabama, --

QUESTION: But, Mr. Koerner, you could get finality once the rules are established just as surely by using the procedures of Rule 19 as by using the rules of procedure 24, couldn't you?

MR. KOERNER: Your Honor is quite correct, and what we are urging is that there are policy considerations in this type of litigation that make the literal application of Rule 19 inappropriate, in that we believe Rule 19 is not to be read in isolation, that it must be considered along with other rules, including the rules of intervention.

With respect to inconsistent judgments, as Justices here questioned the Petitioners, in this case, the two judgments could not co-exist. The Petitioners are asking for

additional appointments to their clientele which would consist of primarily non-minorities.

QUESTION: How do we know when they decided that they really wanted that? Let's assume that I'm one of the members of this class who's typical of the whole class, and I've been watching this proceeding go on, and I see that race-conscious relief is being given, but I say, you know, well, these people have been discriminated against for years, that's fine, you know, they're going to let them promote eight even though I had a higher grade, that's okay.

But, then, one day, I found out that there are 400 vacancies still left, and, doggone it, the city is not being required to even use those 400 vacancies to promote me. It's only at that point that I'm mad enough to want to bring a lawsuit.

Why do you want to compel me to get in at the moment that I see that there's any legal interest of mine that can at all be affected? Why do you want to make me do that for? To promote litigation or what?

MR. KOERNER: No. Because, Your Honor, any relief that we granted that class would have affected the consent decree, because assuming there were vacancies, there were two considerations.

First, would the city have consented to this consent decree if it understood that it would have to make all these

additional appointments and foreclose opportunities for people taking the next sergeant's exam?

Second, with respect to this group, if we did appoint this group and the vast majority of which were non-minorities, based on the quota, we would then have to appoint additional minorities to preserve the very quota that we established.

QUESTION: Why have to intervene when there is any interest --

MR. KOERNER: In any case?

QUESTION: In any case, what is the test? If I have any interest affected or only if I have an interest affected that I care enough about that I'm willing to bring a lawsuit?

MR. KOERNER: In this particular case, we would say in answer to your question that you have to intervene from that moment in time when you believe that a consent decree could be entered in that case and when your cause of action arises solely from the consent decree.

If it's the W.R. Grace issue, where you're asserting an independent contractual right, we would not argue you have to intervene. But I think if I could, Your Honor, to address your issue, although I wanted to deal with the bigger issue, I would like to go over the chronology here, so you understand this is not a case of someone who was surprised and sought to bring a new action because they felt they were being treated unfairly.

This is a case of someone who sat on a sideline, participated in a limited way in the consent decree litigation, and then brought a separate action which had no other effect than to sow confusion on the issue.

In 1984, when the Title VII litigation was commenced, at the same time this same attorney had been retained by the same Petitioners to bring a state court proceeding to challenge the answers selected by the Department of Personnel. If he succeeded and showed that his answers were as good as or better than the answers selected by the Department of Personnel, it was quite likely that a significant number of people that he represents would be on the very eligible list that was already involved in the consent decree litigation.

As the discovery phase was proceeding, the Petitioners had every obligation to monitor it closely because they knew part of their group would always be affected. Indeed, in the end of November, when the interim order was entered establishing a quota for the first time, the Petitioners were aware of it. Then, they knew it would affect them because to the extent a quota was granted -- was effected, it would have affect their individuals because they had scored equal to or better than all the people who were the recipients of the quota.

But, instead of intervening, they brought a federal 1983 action, alleging the same operative facts and the same

cause of action as was involved in the consent decree action.

QUESTION: Well, Mr. Koerner, that action was brought before the consent decree was filed, and --

MR. KOERNER: Your Honor, that is correct.

QUESTION: -- it seems to me that given the mandatory language of Title 19, it's difficult for me to see at that point why the burden shouldn't fall on the parties in the Title VII litigation to force a mandatory intervention if they wanted it.

I just fail to see why the burden should be on these people to intervene.

MR. KOERNER: Your Honor, in answer --

QUESTION: You had notice.

MR. KOERNER: We had notice.

QUESTION: So, why didn't you force them to join?

MR. KOERNER: Because we believed that all the people that had a substantial interest in the litigation were already there. There had been three separate interventions by representatives of non-minorities who were on the eligible list in addition to the Plaintiffs and the City Defendants.

In addition, when they filed their federal complaint, we moved to dismiss telling them that the law of the 2nd Circuit at that time was you could not collaterally attack and that since your complaint was filed after the first interim order and since the object of the complaint would be to render

a judgment which would be inconsistent with any judgment rendered in the consent decree litigation, we suggested to them that they intervene.

What was --

QUESTION: Yes, but you had under Title 19 language, the duty, to get them to intervene and get that settled if that was your concern.

MR. KOERNER: That is correct. If it was feasible and if we believed they had a substantial enough interest to warrant their compulsory participation in the case. What was their interest? They were not on the eligible list. They had no expectancy of employment appointments.

All they were -- they were in the exact same position before the consent decree was entered as after. Their only injury was the same injury as any other non-minority in effectuating a quota. What makes this quota even more limited is that it was given only to the victims of discrimination.

QUESTION: You are just saying that their interest is not a valid one, but Rule 19 says that you should join if feasible a party if the party claims an interest relating to the subject of the action.

Now, you knew as soon as that other suit was filed that these parties claimed an interest. Whether the interest was valid or not doesn't make any difference as far as Rule 19 is concerned. You're just telling us it wasn't a valid one.

MR. KOERNER: We're also telling you that in cases like this, it ought to be up to the participants in the collateral attack to determine where to go.

May I just finish, Your Honor?

In addition, they did participate. After we told them to intervene, Justice O'Connor, this also applies to your question, after we told them to intervene, they filed both written and oral objections to the consent decree. They did everything but formally file a motion.

So, the question is whether the state of mind of all the parties, which included the intervenors as such, that they would have thought that all of this participation and the contestation of the objections was not enough, and I submit to you that we did act reasonably. We thought they had participated. Indeed, after this case was concluded, they filed a notice of appeal and argued they were a party to the litigation.

Based on what we should have expected and what they did, I think the participants here acted quite reasonably. Did we treat him fairly? I believe so. We told him what the law was in the 2nd Circuit. He knew he couldn't collaterally attack. It was up to him, it would appear to us, to determine whether he wanted --

QUESTION: Mr. Koerner, you've used the term "collateral attack" several times. I suppose all of these

terms may have a certain pejorative connotation, but ordinarily collateral attacks suggest that you're attacking something that you're a party to, doesn't it?

MR. KOERNER: No. Our position would be, Your Honor, if you have an obligation to intervene, because of the circumstances of the case, and you fail to exercise that obligation, you can be precluded in another litigation from litigating the issues that arise --

QUESTION: And what case from this Court most closely supports that --

MR. KOERNER: Provident Bank and the PennCentral Merger and Inclusion cases, and that philosophy was upheld by three circuits.

QUESTION: I asked you about cases from this Court.

MR. KOERNER: Both cases. They suggested that because of the nature of the transactions, the complexity of the litigation, there can come to be a point where it is reasonable to believe that people who have tenuous interests at most should have an obligation to intervene, and we believe in this situation, when we called to his attention the law of the circuit and told him that this was an indirect impermissible attack, I won't use the word "collateral", and when he did, in fact, participate through the objection process and when his cause of action arose directly out of the consent decree, --

QUESTION: Doesn't part of your answer depend on the

correctness of the 2nd Circuit's rule in Prate?

MR. KOERNER: No, no. It just -- it tells -- no. We're not arguing that Prate was decided correctly, although we believe it was. We are just pointing out that having retained an attorney who was familiar with the process and having participated to some limited degree in our consent decree litigation, there was no reason for him not to intervene, except to create confusion, when he had every reason to suspect that his indirect attack would not be successful.

QUESTION: Would the rule you're urging here be different if the 2nd Circuit had come out exactly the opposite in the Prate case? I mean, it seems to me part of your answer is based on the correctness of the 2nd Circuit's ruling.

MR. KOERNER: No. In effect, if the 2nd Circuit had said collateral attacks would be okay under the circumstances, we would still argue that under the facts of this case, that it would have been inappropriate for him to participate as an objector and then bring another proceeding without attacking head-on the consent decree litigation.

But if the 2nd Circuit had issued a different opinion in Prate, it might jeopardize the general rule, which is thought to be an issue before this Court now, and that is whether a collateral attack will ever be permissible in Title VII litigation because it contravenes the policy of Title VII, the finality and consent.

If I might, I'd like to address the broader issue because the Solicitor General did address it.

With respect to the nature of the process, in all of these hiring cases, the people who are grieved are usually very numerous. They are people who are injured no differently than anybody else as a result of quotas, and the question is under Rule 19, who should have the burden. Ought to it be the parties and require these people to intervene?

In this case, in theory from the outside, if you carry Petitioner's argument forward, we would have had to been required to intervene at least ten thousand non-minority officers to assure ourselves that we would have claimed preclusion.

QUESTION: That's because courts don't write statutes; they decide controversies between two people. I mean, I don't find that remarkable at all. If you want to bind people by a court judgment, you get those people between the court and adjudge their rights. I don't know why you find that such a remarkable proposition.

MR. KOERNER: It's only remarkable in the context of the facts of Title VII litigation and the public policy which supports consent decrees. Indeed, this Court on at least two --

QUESTION: But public policy can't say that courts are going to write statutes.

MR. KOERNER: No, but public policy has caused courts to construe procedural statutes in a way as not to do an injustice to the policies set forth in the statute you're trying to interpret.

If, by removing finality from the cause of action, you so undermine consent decree litigation that you frustrate Title VII, then it would appear to me you should consider not just Rule 19 but the other rules. Indeed, that's precisely what was done in Provident Bank and PennCentral, and, in addition, in other cases involving Title VII, this Court has held that certain aspects of remedies might be more appropriate, as Your Honor is familiar with, in consensual litigation than would be appropriate in litigating litigation.

In addition, --

QUESTION: But, Mr. Koerner, you don't know a lot of times during the course of litigation that it's going to end up in a consent decree, do you?

MR. KOERNER: No.

QUESTION: So, what judgments do you make before you know how the suit is finally going to be disposed of?

MR. KOERNER: Our argument, Your Honor, presumes that the parties who are aggrieved have actual notice of the litigation and the consent decree problem and had an opportunity to intervene.

QUESTION: So, does this mean that their lawsuit must

have been filed after the consent decree?

MR. NAGER: In this case?

QUESTION: No. What if a person half-way through litigation like this files an independent 1983 action and you object to it, you say he ought to have intervened, and he says I have no idea whether there's going to be a consent decree or not in the main case?

MR. KOERNER: Yes. That would be a tougher case and would not as clearly fall within collateral attack, but in this case, the only differentiation between filing it after the final judgment and the facts here is that he filed it after the interim order. He knew the consent decree was an issue.

More importantly, after his case was dismissed in April, he still had two months to move to intervene and ask for an adjournment on the consent decree and present his arguments on the merits.

We do not believe that once you get wind that you are negotiating consent decree that merely by the filing of a complaint you can interrupt the consent decree judgment and effect all the policy reasons why you want consent decrees in the first place.

QUESTION: Well, it doesn't interrupt the consent decree judgment, but the consent decree doesn't bind people who are not parties to the suit.

MR. KOERNER: Your Honor, I understand your position,

and in private litigation, that is the case, and in public litigation, that could be the case, but there are circumstances under which, because of the nature of the interests and because the parties are so numerous, that it could be the understanding of all the parties and the court that if people believe they had a sufficient interest in the controversy, they would intervene under the circumstances.

Indeed, if you'll look at the survey of cases throughout the country, the reason why collateral attacks have been uniformly rejected, except for one Circuit that I'll discuss in a minute, is because of the protracted process of Title VII litigation, and the fact that all interested people do participate, that because the numbers of people affected are so numerous, they do not have any trouble retaining an attorney and this case is an example.

He sued in state court. He brought a 1983 action. He certainly was retained for all purposes and he could have every easily participated in the litigation.

The 11th Circuit in Jefferson County, where they have recognized collateral attacks, the result has been a quota that has been under attack for over ten years. Despite the fact that the people who are now attacking the quota stand in no different position than the people who were aggrieved at the inception of the quota. They're affected by the quota the way everybody else is affected, that when you hire minorities, you

exclude non-minorities.

But that has been upheld. It's a rational exercise of the power of the lower court, and there is no reason to permit the constant challenges when you do have a reasonable alternative and that is intervention.

I want to deal with the second issue because although it was not certified, it was raised in part by the Justice Department, and that has to do with Mr. Podolsky's appeal from the consent decree litigation.

After the objections and an order was entered approving the consent decree, two appeals were filed. One from the dismissal of the federal 1983 action and one from the dismissal of the consent decree.

The Circuit Court, and we believe correctly, that since Mr. Podolsky never chose to become a party through his Petitioners to the litigation, he cannot appeal, and that is well established in this Court.

It emphasizes, however, the point we've been trying to make. He obviously was alert to the loss of his rights in the consent decree litigation because he filed the notice. What makes his practices more incomprehensible is that a notice of appeal was also filed by the one intervenor that did not support the quotas, the Schneider group. He had constantly from day one opposed the quota.

He withdrew that appeal. So, Mr. Podolsky knew that

the only other non-minority party on appeal had withdrawn. Despite that, he still did not move to intervene in the Appellate Court and ask for permission, and we believe that what he has done here has placed himself in the middle of nowhere and that there was an easy avenue of approach which he chose not to use, and for all those reasons, we ask that the orders be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Koerner.

Mr. Podolsky, how much time -- does he have any time?

MR. PODOLSKY: I don't believe I have the time, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you.

MR. PODOLSKY: I'll take it if you give it to me.

CHIEF JUSTICE REHNQUIST: No, no. I'll take your word on that.

The case is submitted.

(Whereupon, at 1:49 p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1415

CASE TITLE: Evelyn Marino v. Juan U. Ortiz

HEARING DATE: November 30, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States, and that this is a true and accurate transcript of the case.

Date: November 30, 1987

Margaret Daly

Official Reporter

HERITAGE REPORTING CORPORATION
1220 L Street, N.W.
Washington, D.C. 20005