INDEX.

PAGE

I. Interest of the Amicus Curiae 2

II. Argument 2

III. Conclusion 7

TABLE OF AUTHORITIES

Cases

Carter v. *Gallagher,* 452 F. 2d 315 (8th Cir. 1971), *cert. den.* 406 U. S. 950 (1972) 4, 6

Contractors Assn. of Eastern Pennsylvania v. *Secretary of Labor,* 442 F. 2d 159 (3rd Cir. 1971), *cert. den.* 404 U. S. 854 (1971) 4

Griggs v. *Duke Power Co.,* 401 U. S. 424 (1971) 2, 3, 5

McDonnell Douglas Corp. v. *Green,* 411 U. S. 792 ..... 3, 5

McLaughlin v. *Florida,* 379 U. S. 184 (1964) 2, 3

Oyama v. *California,* 332 U. S. 633 (1948) 3

Shelley v. *Kraemer,* 334 U. S. 1 (1948) 4

Vulcan Society v. *Civil Service Commission,* 360 F. Supp. 1265 (S. D. N. Y. 1973), *aff'd.,* ..... F. 2d ....., 6 FEP Cases 1045 (2nd Cir. 1973) 5

Statutes and Regulations

Title VII, Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-2, *et seq.* 6

41 C. F. R. Sec. 60-2.2 4

Miscellaneous

Comment, *Carter* v. *Gallagher: From Benign Classification to Reverse Discrimination*, 34 U. Pitt. L. Rev. 130 (1972) 3

Department of Justice, *Memorandum and Permissible Goals and Timetables* 4

Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971) 4, 5

Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—the Problem of Special Treatment*, 61 Nw. U. L. Rev. 363 (1966) 3, 5, 6

Note, *Constitutionality of Remedial Minority Preferences in Employment*, 56 Minn. L. Rev. 842 (1972) 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS AND BETTY DEFUNIS, HIS WIFE; MARCO DEFUNIS, JR., AND LUCIA DEFUNIS, HIS WIFE,

Petitioners,

vs.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON; RICHARD L. RODDIS, DEAN OF THE UNIVERSITY OF WASHINGTON LAW SCHOOL; RICHARD KUMMERT, ROBERT T. HUNT AND RICHARD L. RODDIS, ADMISSIONS COMMITTEE OF THE UNIVERSITY OF WASHINGTON LAW SCHOOL; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JAMES G. NEWPERT, ROBERT F. PHILIP AND GEORGE B. POWELL, REGENTS OF THE UNIVERSITY OF WASHINGTON; AND HAROLD GARDINER, REGISTRAR OF THE UNIVERSITY OF WASHINGTON,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Manufacturers of the United States of America (NAM) respectfully moves for leave to file the attached brief *amicus curiae*. In support thereof the NAM states:

1. The NAM is a nonprofit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing and related concerns of all sizes located throughout the United States and represents a substantial proportion of the nation's industrial employment. A substantial number of its members are subject to the requirements of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000 *et seq.*, and Executive Order 11246, 30 C. F. R. 12319, as amended, regulating equal employment opportunity for private employers. The principles promulgated by this Court in the instant case will necessarily affect the rights and obligations of all such NAM members. See the motion of the Equal Employment Opportunity Commission for leave to file a memorandum *amicus curiae*, pp. 1-2; the briefs *amicus curiae* of the NAACP Legal Defense and Educational Fund, Inc., p. 3, and the AFL-CIO, pp. 1-12; and the proposed brief *amicus curiae* of The Chamber of Commerce of the United States of America, pp. 2-3 and n. 2.

2. The subject matter of the instant case—whether, consistent with the Constitution, state-supported educational institutions may give preference to minority applicants—is a matter of significant concern to employers. The decision in the instant case will necessarily influence both the power of the judiciary to order an employer to affirmatively grant similar preferences to remedy past general employment discrimination as well as the right of employers to voluntarily grant such special considerations. It is more than mere happenstance that the court below, in reaching its decision, relied on the opinions of lower federal courts in the employment area, i.e., *Porcelli* v. *Titus*, 431 F. 2d 1254 (3rd Cir. 1970), *cert. den.* 402 U. S. 944 (1971); *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971), *cert. den.* 406 U. S. 950 (1972); and *Contractors Assn. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971), *cert. den.* 404 U. S. 854 (1971). 507 P. 2d at 1181. The interest of the NAM, accordingly, in seeking to

present its views, is predicated upon the substantial and far-reaching consequences that the result of this case will have for American industry.

3. The NAM determined to submit the instant motion when, upon reviewing the briefs of other *amici,* it ascertained that no business representatives had expounded the particular arguments which the NAM desired to present. Since the NAM's views are representative of those held by a substantial segment of industry, the NAM is desirous that they be before the Court. The acceptance of the NAM's proposed arguments, moreover, will not result in any delay in the decision of this case, nor prejudice to any of the parties hereto, since these arguments are not inconsistent with the contentions that have already been made by the Petitioner and supporting *amici.* The NAM's proposed brief will be short and relevant so that the Court's time will not be misspent.

The NAM urges, therefore, that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of the National Association of Manufacturers of the United States of America (NAM) in this case is set forth in the foregoing motion for leave to file a brief as *amicus curiae.*

ARGUMENT

1. The crux of this case is whether benign racial classifications, or reverse discrimination, is constitutionally permissible. The NAM submits that the controlling equal protection test—that racial classifications are permissible only where there is an "overriding statutory purpose" and "compelling [state] interest" (see, e.g., *McLaughlin* v. *Florida,* 379 U. S. 184, 192 (1964))—has not been met here.

The University of Washington Law School is necessarily required, in determining its entering class, to select only a limited number from many potentially qualified individuals. Employers, in their day-to-day employment decisions, must also choose among many potentially eligible employees. The crucial consideration, as a result, is the standard to be utilized for the selection process. An answer, at least in part, was provided by *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971). There, this Court declared that the law was not intended "to guarantee a job to every person . . . [there is no] command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." Rather, what is forbidden is the "discriminatory preference for any group, *minority or majority* . . . Congress has made [job] qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant." *Id.* at 430-431, 436 (emphasis added). This principle was recently reiterated in *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 801 (1973), where this Court again stressed that the objective is "fair and racially neutral employment . . . decisions."

This case, with its necessary chain-reaction in the employment field, will materially determine whether, in enunciating a principle of racial neutrality in *Griggs* and *McDonnell Douglas,* this Court meant what it said. If there is here an "overriding statutory purpose" and "compelling [state] interest", sufficient to meet the constitutional equal protection test,[1] then employers, either by court or agency compulsion or through their own voluntary efforts, will similarly be able to establish racial, religious or sex preferences. The criteria for employment decisions will no longer be merit, neutrality and the qualifications of the job. It is immaterial that the purpose of this proposed new standard is benign rather than invidious. Even legitimate ends are subject to equal protection limitations (see *Oyama* v. *California,* 332 U. S. 633, 646-647 (1948)) and must take into account the "proper weight [to be] given the other values in our society."[2] Employment rights may, of course, be granted to particular persons where there is a specific finding that they have *individually* suffered from past discrimination. In such a case, there is no deprivation on anyone. No one has been granted a "preference" or deprived of any rights. Where, however, special treatment is granted to a class of unidentified persons, predicated solely on a claim of past *general* racial discrimination, it is subject to the same constitutional infirmity as would be granting such a preference to a white. "Equal protection of the law", as this Court has recognized, "is not achieved

1. Veterans' preferences, or other preferences which are not based on race, are exempt from the same "rigid scrutiny" and constitutional suspicion. See *McLaughlin* v. *Florida,* 379 U. S. 184, 191, 192 (1964). They are, therefore, of a different order and must be evaluated by a different constitutional standard. See Note, *Constitutionality of Remedial Minority Preferences in Employment,* 56 Minn. L. Rev. 842, 846 n. 23 (1972).

2. Kaplan, *Equal Justice In An Unequal World: Equality For the Negro—The Problem Of Special Treatment,* 61 Nw. U. L. Rev. 363, 382 (1966); Comment, *Carter* v. *Gallagher: From Benign Classification to Reverse Discrimination,* 34 U. Pitt. L. Rev. 130, 139 (1972). See also the authorities discussed in the *amicus* brief of the B'nai B'rith Anti-Defamation League, pp. 23-24.

through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948).

2. Remedial measures which provide for reverse discrimination to cure past general discrimination, whether embodied in a court order[3] or resulting from administrative coercion,[4] are simply another form of race discrimination. A benign quota is still a quota; it still constitutes, as the B'nai B'rith Anti-Defamation League observed in its *amicus* brief (p. 17), "a device for establishing a status, a caste, determining superiority or inferiority for a class measured by race without regard to individual merit." A racial classification, even if instituted for a laudatory objective, is still denigrating and stigmatizing. It still raises serious questions of counter-productiveness and deleterious consequences which may diminish overall the total job opportunities available to minority employees as well as interject devisive consequences in the employment area.[5] And it still establishes principles that have previously been considered an anathema: that the key to employment is not individual merit

3. See, e.g., *Carter* v. *Gallagher*, 452 F. 2d 327 (8th Cir. 1971) (*en banc*), *cert. den.* 406 U. S. 950 (1972).

4. See, e.g., 41 C. F. R. § 60-2.2; and *Contractors Assn. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971), *cert. den.* 404 U. S. 854 (1971). It matters little, it is submitted, whether a racial preference is labelled a "quota" or a "goal" or a "timetable" as long as there is an erosion of the merit basis for an employment decision. If failure to meet a numerical commitment constitutes at least *some* level of evidence of unlawful discrimination (see, e.g., the Department of Justice's *Memorandum on Permissible Goals and Timetables*, pp. 3-5), then there has been improper government discrimination. See *Developments In The Law—Employment Discrimination And Title VII Of The Civil Rights Act Of 1964*, 84 Harv. L. Rev. 1109, 1301-1303 (1971). By the same token, the alleged accommodation (452 F. 2d at 330-31) reached by the Eighth Circuit's *en banc* decision in *Carter*—adopting a formula approach while rejecting any absolute preference —similarly is open to constitutional objection. Cf. Note, 56 Minn. L. Rev., *supra* n. 1 at 854-57.

5. See, e.g., *Vulcan Society* v. *Civil Service Commission*, 360 F. Supp. 1265, 1277-78 (S. D. N. Y. 1973), *aff'd.*, ... F. 2d ...., 6 FEP Cases 1045 (2nd Cir. 1973); and Kaplan *supra*, n. 2 at 370-384.

alone; that race is a relevant consideration in the employment field; and that the government can constitutionally employ racially discriminatory preferences or, preusmably, similar preferences in other areas where the law was previously considered color-blind. See, e.g., the dissent below at 507 P. 2d 1189. Preferential treatment of one group "necessarily results in 'discrimination' against another; the two patterns of behavior are simply obverse sides of the same coin." *Developments In The Law—Employment Discrimination And Title VII of The Civil Rights Act Of 1964,* 84 Harv. L. Rev. 1109, 1300 (1971). Such discrimination is diametrically at odds with the principles of neutrality enunciated in *Griggs* and *McDonnel Douglas, supra,* where unrelated to specific findings of individual past discrimination.

A court or agency should, of course, adopt all available constitutional measures to eradicate any vestiges of past general discrimination. Remedial provisions to inform the minority community that employment will thereafter be available on a non-discriminatory basis, to establish an active recruitment and promotional program aimed at minorities or to eliminate any employment qualifications which are not reasonably related to job performance or otherwise discriminate against minorities should all be utilized wherever needed. What is and should be forbidden is where the state seeks not only to equalize *availability* of employment opportunities but, instead, actually discriminates against non-minorities by granting a preferred employment status on the basis of a constitutionally impermissible classification.

3. Voluntary private racial preferences, while perhaps reducing the devisiveness and other adverse consequences of state-imposed preferences, are nevertheless similarly premised on the "overt acknowledgement that preference for Negroes is not to be treated the same way as preference for non-Negroes . . . [T]here would be a difference in the position of the government with respect to the non-Negro worker—but it is the difference between hitting someone and holding him while some-

one else does the hitting." Kaplan, *supra* n. 2, at 385. Since such private preferences would require an exception to the anti-discrimination and anti-preference requirements of state and federal equal employment laws, and in particular the provisions of Sections 703(a) and (j) of Title VII, they would be unconstitutional. The situation would, in effect, be no different than a case where an employer voluntarily chose to discharge white employees in order to create employment opportunities for Black applicants. In both instances, since the employment decision was premised upon racial considerations, it is violative of both anti-discrimination laws and the Constitution.

4. The crucial issue presented by this case is whether the prevailing view of our society that a person should be selected on the basis of ability and merit is still operative. May a state act on the premise that, regardless of merit, a person is to be entitled to special treatment because of his race *and for no other reason?* The thesis of this brief has been that, both with respect to state-supported educational institutions and in the employment area, the Constitution requires neutrality as to race regardless of any good faith intent. Whether the object is benign or invidious, and regardless of the particular race that may be benefited or disadvantaged, selecting persons on the basis of their race, rather than their individual merit, causes irreparable damage. Surely, if *some* special treatment is to be deemed constitutionally permissible, there is no reason to believe that it will stop at the level of law school admissions. It could be argued with equal force that educational grading systems, bar admissions or a host of other public and private selection measures should also have two tiers. Preferences can also be urged to rectify an almost endless array of alleged victims of past general discrimination. None of these past asserted wrongs, however, can justify present deprivations of equal protection guarantees. The test, to repeat, must be racial neutrality.

CONCLUSION

For all the foregoing reasons, in addition to those presented by the Petitioner and supporting *amici,* the decision below should be reversed.

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