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In the Supreme Court of the United States

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N. 73-235

MARCO DE FUNIS, ET AL., PETITIONERS

v.

CHARLES E. ODEGAARD, PRESIDENT, UNIVERSITY OF WASHINGTON, ET AL., RESPONDENT

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

MOTION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE

For the reasons set forth below, the Equal Employment Opportunity Commission respectfully requests the Court for leave to file the accompanying memorandum as *amicus curiae* in the above-styled case.

The Commission is the agency of the United States empowered by Congress with the administration and enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., (Supp. II, 1972), which prohibits employment discrimination.

This case presents an issue which may have a sig-

nificant impact on the enforcement of rights under Title VII. In eliminating employment discrimination, the Commission and private parties have strongly relied on affirmative action remedies. The decision of the Washington Supreme Court, which in effect upholds the constitutionality of an affirmative action program in the area of education, may therefore have important ramifications on future affirmative action programs in the employment field.

In the employment field, affirmative action plans have been constitutionally tested and upheld in two contexts. In situations arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5(g), courts have ordered remedial action for past discrimination. *Carter v. Gallagher,* 452 F. 2d 315 (8th Cir.), *certiorari denied* 406 U.S. 950, *United States v. Wood, Wire, and Metal Lathers International Union, Local No. 46,* 471 F. 2d 408 (2d Cir.), *certiorari denied* 412 U.S. 939. Courts have also upheld federal affirmative action programs against challenges under the Equal Protection Clause or under the alleged anti-preference provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(j). *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor,* 311 F. Supp. 1002 (E.D. Pa.), *aff'd* 442 F. 2d 159 (3d Cir.), *certiorari denied* 404 U.S. 854, *Weiner v. Cuhahoga Community College District,* 19 Ohio St. 2d 35, 249 N.E. 2d 907, 908, *certiorari denied* 396 U.S. 1004. This Court's decision on the constitutional issue in this case may bear on the validity of these affirmative action plans and may well influence future actions in this field.

Therefore, we respectfully request this Court to accept this brief which expresses our views on the constitutional issues presented.

Respectfully submitted.

WILLIAM A. CAREY,
General Counsel.

JANUARY 28, 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DE FUNIS, ET AL., PETITIONERS

v.

CHARLES E. ODEGAARD, PRESIDENT, UNIVERSITY OF WASHINGTON, ET AL., RESPONDENT

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

MEMORANDUM OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

OPINION BELOW

The opinion of the Supreme Court of the State of Washington is reported at 82 Wash. 2d 11, 507 P. 2d 1169 (Pet. for Cert., App. A).

JURISDICTION

The judgment of the Supreme Court of the State of Washington was entered on March 8, 1973. The petition for writ of certiorari was filed on July 31, 1973, and was granted on November 19, 1973. This Court's jurisdiction rests on 28 U.S.C. § 1257(3).

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QUESTION PRESENTED

Whether a state law school's minority admissions policy, under which a white student has been denied admission while blacks with lower numerical qualifications are accepted, violates the equal protection clause of the Fourteenth Amendment.

STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution (U.S. Const. amend. XIV, § 1) provides in pertinent part:

> . . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

The Petitioner, Marco DeFunis, Jr., (hereinafter referred to as Petitioner) applied for admission to the law school at the University of Washington for the class commencing September 1971. When he was denied admission, he commenced an action in the Superior Court of King County, Washington in August, 1971 alleging that the University of Washington (hereinafter referred to as Respondent) had wrongfully denied him admission in (1) that no preference was given to residents of the State of Washington in the admission process and (2) that persons were admitted to the law school with lower qualifications. The complaint asked that the court either order the Respondent to admit and enroll the Petitioner in the law school in the fall of 1971, or in the alternative, that the Petitioner recover damages of an amount not less than $50,000.

The Superior Court held that the failure to admit Petitioner constituted a denial of his right to equal protection of the laws under the Fourteenth Amendment, since pursuant to a minority admissions policy, minority students with lower numerical qualifications were admitted. The trial court ordered that Petitioner be admitted to the law school. On appeal, the Supreme Court of Washington overruled the trial court, holding that the minority admissions policy was based on a compelling state interest, and therefore, was constitutional.

SUMMARY OF ARGUMENT

The adoption of the minority admissions policy by the University of Washington was a valid exercise of the discretionary power granted educational institutions to make determinations pursuant to the public interest. Moreover, assuming arguendo that the petitioner has been discriminated by this policy, it can be justified as being reasonably related to a permissible state objective.

ARGUMENT

I

WHERE THE PURPOSE OF A STATE POLICY IS TO FURTHER A LEGITIMATE STATE OBJECTIVE, RATHER THAN TO STIGMATIZE A MINORITY GROUP, THE CLASSIFICATION IS SUBJECT TO THE RATIONAL BASIS TEST.

Any individual suffers a detriment when he is denied a position which another is granted.[1] This case

[1] Of those accepted, 74 had lower numerical qualifications than De Funis; only 36 of these were minority applicants, 22 were returning from military service and were granted veterans preference, and 16 were applicants accepted on the basis of information other than numerical qualifications.

concerns what factors a state university may consider in selecting students from a group all of whom are qualified for admission. Equal protection decisions recognize that a state cannot function without classifying its citizens for various purposes and treating some differently from others. *Truax v. Corrigan,* 257 U.S. 312. When any of these classifications are challenged under the equal protection clause, there are two standards against which a challenged classification may be measured. One test, employed when the classification is deemed suspect or the interest is considered fundamental, places the burden on the state to show that the practice is "necessary to the accomplishment of some permissible state objective, independent of the . . . discrimination which it was the object of the Fourteenth Amendment to eliminate." *Loving v. Virginia,* 388 U.S. 1, 11; *Korematsu* v. *United States,* 323 U.S. 214, 216. The other, less stringent test, is whether the classification is reasonably related to the object of the state policy and treats all persons alike who are similarly situated. *Royster Guano Co. v. Va.,* 253 U.S. 412, 415.

We contend that the proper standard of review here should be the rational basis test since the purpose of the state's policy is to further integration and not to stigmatize a minority.

The desegregation cases relied on by Petitioner, which applied the strict test, involved racial classifications which, throughout this country's history, have

been used to discriminate against a minority group which had been politically subordinate and subject to private prejudice and discrimination.[2] Racial classifications are usually perceived as a stigma of inferiority and a badge of opprobrium.[3]

Consequently, strict review is ordinarily required on the theory that race is a suspect classification, because that classification is likely to stigmatize. Such strict review is not appropriate when the classification is a means of benefiting a class which has previously been stigmatized. Therefore, strict review is inappropriate here where white applicants are not members of a class previously stigmatized.

Brown v. Board of Education, 347 U.S. 483, the primary case on which Petitioner supports his argument that the classification involved here is suspect, held that invidious *de jure* segregation on the basis of race violated the equal protection clause. Essential to the court's finding, however, were two elements—racial classification by law and harm to a minority

[2] *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Cf. *Hobson v. Hansen*, 269 F. Supp. 401, 507–08 & n. 198, (D.D.C.).

[3] Cf. Black, "The Lawfulness of the Segregation Decisions" 69 Yale L.J. 421, 424 (1960) [the social meaning of segregation is inequality, a stamping of one race with a mark of inferiority].

race. The constitutionality of benevolent discrimination was not before the court and not meaningfully illumined by it. The major premise on which *Brown* rests is that classifications by race which stigmatize a race with inferiority are unconstitutional.

Where the state's purpose and the effect of its action are not invidiously discriminatory and the group normally subject to discrimination is being benefited, the standard is different. Voluntary measures to end *de facto* school segregation have been upheld consistently by both federal and state courts, even though racial classifications are involved.[4] The language in some of these cases indicates that only a test of reasonableness has been applied. For example in *Tometz v. Board of Education,* 39 Ill. 2d 293, 237 N.E. 2d 498, the Illinois Supreme Court upheld state legislation which required local school boards to take steps to end de facto segregation. The court held that the applicable test was "one of reasonableness", and the court could not "say that the legislature acted arbitrarily and without a reasonable basis in so directing the school boards of this State." 237 N.E. 2d at 502.

This Court's decision in *Katzenbach v. Morgan,* 384 U.S. 641 also suggests that normally suspect classifica-

[4] *Offerman v. Nitkowski*, 378 F. 2d 22 (2nd Cir.); *Tometz v. Board of Educ.*, 39 Ill. 2d 593, 237 N.E. 2d 498; *School Comm. v. Board of Educ.*, 352 Mass. 693, 227 N.E. 2d 729; *appeal dismissed*, 389 U.S. 572; *Booker v. Board of Educ.*, 45 N.J. 161, 212 A. 2d 1; *Balaban v. Rubin*, 14 NY 2d 193, 199 N.E. 2d 375, *certiorari denied*, 379 U.S. 881.

tions may be judged by a rational basis standard of review. The Court upheld section 4(e) of the Voting Rights Act of 1965, 42 USC § 1973 b(e) (Supp. III, 1968) even though the statute creates a distinction based on national origin. The decision to apply the permissive standard was based on the dual judgment that the measure extended benefits to a particular class and that the legislative purpose in doing so was remedial.

This Court recognized, in *McDaniel v. Barresi,* 402 U.S. 39, 41 that a school which voluntarily adopts a desegregation plan may take into account the race of the students. As stated therein, ". . . to have done otherwise would have severely hampered the [school] board's ability to deal effectively with the task at hand. . . . In this remedial process, steps will almost invariably require that students be assigned differently because of their race. Any other approach would freeze the status quo that is the very target of all desegregation processes." 402 U.S. at 41.

To require that all attempts to integrate a school be free of racial classification where there exist effects of past racial discrimination would defeat the very purpose of integration. In order to eliminate those effects, a plan cannot be "color blind" as urged by Petitioner. That requirement would render illusory the promise of *Brown v. Board of Education,* 347 U.S. *supra.*

The interest being advanced by the Respondents here is the integration of the law school and the legal

profession. Integration and increased enrollment of blacks in predominantly white schools ~~has~~ have been the announced policy of this Court. *Brown v. Board of Education,* 347 U.S. *supra, Green v. County School Board,* 391 U.S. 430, 439. Specifically, this Court has been committed to the integration of state law schools in order to achieve quality education and legal representation for minorities since *Sweatt v. Painter,* 339 U.S. 629. In order to achieve this goal, educational institutions have an affirmative duty to eliminate the present effects of past discrimination. *Swann v. Board of Education,* 402 U.S. 1, 26; *U.S. v. Jefferson County Board of Education,* 380 F. 2d 385 (5th Cir. *certiorari denied, sub nom Caddo Parish School Board v. U.S.,* 389 U.S. 840).[5]

Because of past and continuing racial discrimination, race is the only realistic criterion that would satisfactorily correlate with the Respondent's goal of a racially integrated law school. The court below recognized that the consideration of numerical qualifications alone would disproportionately prevent minorities from attending law school. Consequently, the relation between public interest being served, i.e. integration, and the classification utilized by the Respondent is obvious, and the consideration of race in the present context is not an invidious or suspect classification.

[5] In several analogous cases in the employment field, the validity of hiring practices, which have a racially discriminatory effect, has been challenged under the equal protection clause. However, rather than applying the compelling state interest standard to the racial classification, the courts emphasized the benevolent nature of the classification and adopted the less stringent standard. *Carter v. Gallagher,* 452 F. 2d 314 (8th Cir.); *Castro v. Beecher,* 459 F. 2d 725 (1st Cir.) *Cf. Griggs v. Duke Power,* 401 U.S. 424.

ARGUMENT

II

SINCE THE MINORITY ADMISSIONS POLICY IS REASONABLY RELATED TO A LEGITIMATE STATE INTEREST, IT IS CONSTITUTIONALLY PERMISSIBLE UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The rational basis test is peculiarly applicable in the present case since regulation of educational institutions is a matter peculiarly affected with public interest. The state legislature (and by delegation the governing body of the university) may properly regulate the conditions by which students may be admitted to a university maintained by the state. *Waugh v. Miss. Univ.* 237 U.S. 589. In cases challenging the constitutionality of admissions classifications under the equal protection clause of the Fourteenth Amendment, Courts have held that any "classification by a state which is not palpably arbitrary and is reasonably based on a substantial difference or distinction is not a violation of the equal protection clause so long as the classification is rationally related to a legitimate state object or purpose". *Clark v. Redeker,* 25 F. Supp. 117, 122 (S.D. Iowa) *affirmed* 406 F. 2d 883 (8th Cir.) *certiorari denied* 396 U.S. 862.

This standard for determining constitutionality requires the court to determine the purpose of the admissions policy being challenged and consider that particular purpose in light of the state interests involved. After the purpose has been ascertained, the policy will be set aside as violative of the equal protection clause only if it is based on reasons totally

unrelated to a legitimate goal. *McLaughlin* v. *Florida* 379 U.S. 184, 191. *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802. Under this test, the party challenging the constitutionality of the policy has the burden of proving that the statute is not reasonably related to some permissible legislative or administrative purpose. *McGowan v. Maryland,* 309 U.S. 83, 88; *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61.

Admissions decisions have never derived from simple mathematical projections about the academic or intellectual ability of applicants. A variety of other criteria have always received consideration and the weight given these criteria has varied considerably among individual applicants.

For example, at many state universities geography is often the basis for preferential admissions. Several courts have held that special considerations given to state residents are within the state's discretionary power, e.g. *American Commuters Ass'n v. Levitt,* 405 F. 2d 1148 (2d Cir.); *Arizona Board of Regents v. Harper,* 108 Ariz. 223, 495 P. 2d 453. This consideration has been upheld in numerous cases which have challenged the constitutionality of higher nonresident

tuition. The courts held that the additional tuition charge to nonresident students was reasonably related to a legitimate state purpose and did not constitute an unreasonable and arbitrary classification violative of the equal protection clause. *Clarke v. Redeker*, 259 F. Supp. at 123 *supra; Johns v. Redeker,* 406 F. 2d 878 (8th Cir.); *Bryan v. Regents of Univ. of California,* 188 Cal. 559, 205 P. 1071; *Land Wehr v. Regents of Univ. of Colorado*, 156 Col. 1, 396 P. 2d 451; *Starns v. Walkerson*, 326 F. Supp. 234 (D. Minn.) *affirmed,* 401 U.S. 985; In accord: *Spatt v. State of New York,* 361 F. Supp. 1048, 1054 (E.D. N.Y.); *Kirk v. Bd of Regents,* 733 Cal. App. 2d 430, 78 Cal. Rptr. *appeal dismissed* 396 U.S. 554.

The reasoning applied in the cases above was also adopted in employment cases challenging the constitutionality of the veterans' preference in state and federal civil service examinations. *Feinerman v. Jones,* 356 F. Supp. 252 (M.D. Pa.); *Koelfgen v. Jackson*, 355 F. Supp 243 (D. Minn. *affirmed* 410 U.S. 976. Plaintiffs, alleging sex discrimination in violation of the equal protection clause, argued that the preference given veterans could not be justified by a compelling state interest and was therefore unconsti-

tutional. However, both courts applied the "rational basis" test, and found the preference reasonably related to a permissible administrative purpose.[6] Furthermore, the court in *Feinerman,* 356 F. Supp at 261, *supra,* stated that great latitude should be allowed legislatures in making classifications if the policy being followed is designed to help a class which needs assistance.

The preference given minorities in the instant case is not unlike that given state residents and veterans in the cases cited above. Under delegated authority from the state the law school indeed had the right, and (perhaps some would say) the duty, to make classifications among applicants for admission, which are within the public interest of the state and the law school. In fact, this court has looked at the conduct of admissions committees in such a way as to say that universities do have power to remedy past effects of present discrimination by preferential admissions policies.

[6] The courts of several states have ruled on the general question of the constitutionality of veterans' preference and without exception have all ruled it to be constitutional: *Ricks v. Department of State Civil Service*, 200 La. 241, 8 So. 2d 49; *Swantush v. Detroit*, 257 Mich. 389, 241 N.W. 265; *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568, 3 A. 2d 701. Additionally, the veterans' preference given in federal civil service examinations has been held constitutional. *White v. Gates*, 253 F. 2d 868, *certiorari denied*, 356 U.S. 973.

The law school here has determined that there had been exclusion of certain minorities from the legal profession, and that inclusion of these minorities would benefit the general public. Therefore, the school established an admissions policy designed to increase the minority student enrollment. This policy would deny the petitioner equal protection of the laws only if "it is without any reasonable basis, and therefore is purely arbitrary." *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. at 78 *supra, Dandridge v. Williams,* 397 U.S. 471, 485. Clearly it is not.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted.

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JANUARY 28, 1974.

AFFIDAVIT OF SERVICE

I hereby certify that on January 28, 1974, three copies of the foregoing Motion of the Equal Employment Opportunity Commission for Leave to File a Memorandum as Amicus Curiae and accompany Memorandum were mailed, postage prepaid and special delivery, to the following counsel of record:

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U.S. GOVERNMENT PRINTING OFFICE: 1974