No. 85-2169

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ST. FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH, and DAVID MCMAHON, individually and in their official capacities,

Petitioners,

v.

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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The Equal Employment Advisory Council ("EEAC"), with the written consent of all parties, respectfully submits this brief amicus curiae.[1] The

[1] The parties' consent letters have been filed with the Clerk of the Court.

brief contends that the court of appeals overextended the reach of 42 U.S.C. § 1981, and thus supports the position of the petitioner before this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations which themselves have hundreds of members interested in the foregoing purposes. Its governing body is a Board of Directors composed of experts and specialists in the field of equal employment opportunity (EEO). Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to various federal nondiscrimination laws, including both 42 U.S.C. § 1981 (herein "Section 1981") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended. Thus, EEAC has a direct interest one of the issues presented for the Court's consideration in this case—that is, whether the court of appeals erred in extending the scope of Section 1981 to reach all discrimination based on a person's membership in

any "group that is ethnically and physiognomically distinctive." (784 F.2d at 517).

Because of its interest in such issues, EEAC has filed amicus curiae briefs in this Court in numerous other cases involving the scope and proper interpretation of the nation's laws concerning nondiscrimination in employment. *E.g.*, *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982) (Section 1981); *Great American Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979) (Section 1985(3)); *Ansonia Bd. of Educ. v. Philbrook*, 55 U.S.L.W. 4019 (U.S., November 17, 1986) (Title VII); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

The facts relevant to the issue addressed in this brief may be summarized as follows. Dr. Magid G. Al-Khazraji, a United States citizen born in Iraq, was denied tenure by St. Francis College after several years of employment on its faculty. He brought this suit in federal district court, alleging *inter alia* that the College and members of its Committee on Tenure had violated both Title VII and 42 U.S.C. § 1981 by discriminating against him because he is an Arab Muslim of Iraqi origin.

The district court dismissed the Title VII claim as time-barred. It also dismissed the Section 1981 claim, on the ground that the complaint in essence alleged discrimination on the basis of national origin and religion, not on the basis of race or alienage. In so construing the complaint, the court noted that Al-Khazraji had testified that he is a Caucasian, but of

a "different branch of the Caucasian race." (Pet. App. 37a-39a). Thus, the alleged discrimination against him was presumably carried out in favor of persons who were also Caucasians, but not Muslims or persons of Arab or Iraqi origin. The district court concluded that such alleged discrimination fell outside the Congressionally intended scope of Section 1981.

The court of appeals reversed as to the Section 1981 claim, holding that "ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against them," even when the alleged discrimination is presumably in favor of "other Caucasians or whites." (784 F.2d at 514). Although the court acknowledged that Section 1981 is addressed to racial discrimination and that "other types of discrimination . . . may not be cognizable" under that statute, it construed the concept of "race" broadly to encompass membership in any "group that is ethnically and physiognomically distinctive." (784 F.2d at 517).

Judge Adams concurred in the court of appeals' decision, but expressed concern that the panel majority's broad interpretation of the coverage of Section 1981 "constitutes a dramatic expansion in the number of plaintiffs who may now proceed under the statute," since "virtually any nationality can be seen as ethnically and physiognomically distinctive." (784 F.2d at 520). He warned that this expansive definition of "race" would extend the statute "well beyond what Congress intended when it passed the law. [Footnote omitted]. In effect, a statute aimed at racial discrimination is being converted into one also focused on national origin discrimination." (*Id.*). Judge Adams felt "constrained to join the result

reached by the panel," however, because of his reading of this Court's decision in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

SUMMARY OF ARGUMENT

Section 1981 is not a comprehensive nondiscrimination law, but a limited statute dealing specifically with racial discrimination. *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409, 413 (1968); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). While it protects persons of all races against discrimination based on their race, as such (*McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)), it was not intended, and should not be interpreted, to cover allegations of discrimination based on factors other than race, as that term is commonly understood.

The standard suggested by the court below for determining the applicability of Section 1981 in any given case is unworkable. It would enmesh the district courts in the unseemly exercise of trying to determine as a threshold matter whether or not particular groups of people are "ethnically and physiognomically distinctive." As a practical matter, it would be almost impossible for a court to exclude any claim on this basis, for as Judge Adams observed in his concurring opinion, virtually every nationality can be seen as distinctive under such a test. Thus, the Third Circuit's approach would effectively bring practically every claim of discrimination based on national origin within the ambit of Section 1981.

Such was not the intent of the 1866 Congress that originally enacted Section 1981. Indeed, it was not until 1964, when it enacted Title VII, that Congress showed any concern about employment decisions

made along lines of national origin or religion. But in doing so, Congress also established specific procedures for investigation and conciliation of charges—procedures that remain unavailable under Section 1981. Thus, for the courts now to expand the scope of Section 1981 to encompass charges of discrimination that are fundamentally based on national origin would undermine the procedural scheme Congress established when it legislated against the specific type of discrimination alleged in this case. Such a judicial departure from the legislature's intent would not only be improper, but would serve no useful purpose, because Title VII provides a full and adequate remedy for discrimination based on any of the grounds alleged, without requiring the courts to draw nice lines between race, color, and national origin.

ARGUMENT

THE COURT OF APPEALS ERRED IN EXTENDING THE SCOPE OF SECTION 1981 TO REACH ALL EMPLOYMENT DISCRIMINATION BASED ON A PERSON'S MEMBERSHIP IN ANY "GROUP THAT IS ETHNICALLY AND PHYSIOGNOMICALLY DISTINCTIVE."

A. Introduction

The issue before the Court in this case is not whether "ethnic Arabs", or Muslims, or Iraqi-born Americans who have suffered discrimination in the workplace on account of these characteristics can obtain a remedy under federal law. They clearly have such a remedy under Title VII of the Civil Rights Act of 1964, which broadly prohibits discrimination based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-3(a). Thus, the plaintiff in this case had only to file a timely charge under

Title VII to be able to maintain an action against his employer for discriminating against him on any or all of the grounds he has alleged.

Nor is the issue here whether Arabs or other nationalities can ever have access to the more extensive remedies and more liberal procedures available to plaintiffs under 42 U.S.C. § 1981,[2] which provides in relevant part that:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . .

It is now settled that Section 1981 applies to private contracts of employment, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), and that it protects whites as well as non-whites against discrimination on the basis of "race." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). Thus, if Dr. Al-Khazraji believed that his employer had discriminated against him in favor of a member of some different race because of an acknowledged or indisputable racial difference, he clearly could sue under Section 1981. In this regard, he stands on the same footing as any other person within the jurisdiction of the United States, white or non-white.

Instead, the question at the heart of this case is whether the scope of Section 1981's ban against racial discrimination is to be defined in terms of

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[2] Unlike Title VII claimants, plaintiffs suing under Section 1981 have generally been held to be entitled to trial by jury and to the full panoply of remedies usually available in civil suits, including punitive and compensatory damages. *Johnson v. Railway Express Agency*, 421 U.S. at 460-61.

real or perceived differences in physiognomy and ethnicity so minute and subtle that persons of virtually every nationality can invoke its protection whenever they believe an employer has favored a person of any other national or ethnic background.

Carried to its logical conclusion, the rationale of the court below raises the spectre, for example, of a plaintiff of Scandinavian descent suing under Section 1981 and demanding trial by jury and compensatory and punitive damages because his employer allegedly favored a person of Irish ancestry. In short, because practically everyone can claim identification with some nationality and because, as Judge Adams recognized in his concurring opinion, "virtually any nationality can be seen as ethnically and physiognomically distinctive" (784 F.2d at 520), the court of appeals' approach would effectively bring essentially all claims of discrimination based on national origin within the scope of Section 1981.

We submit that such an expansive interpretation of Section 1981 is unsupported by either the language or the legislative history of the 1866 Civil Rights Act, from which Section 1981 is derived. Nor is such an approach warranted by practical policy considerations, particularly because an adequate federal remedy is available under Title VII of the 1964 Civil Rights Act for claims, such as that of the plaintiff herein, which rest essentially on differences in national origin or religion rather than race or color.

B. Neither The Language Nor The Legislative History Of Section 1981 Supports Its Extension To Claims Of Discrimination Resting Essentially On Differences In National Origin Or Religion Rather Than On Differences In Race Or Color.

This Court has recognized that the statutory language defining the rights protected by Section 1981 by reference to the rights "enjoyed by white citizens" limits the scope of that section's coverage to discrimination based on race or alienage. Thus, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), in construing the identical phraseology of 42 U.S.C. § 1982, which guarantees all citizens the same right to own and convey property "as is enjoyed by white citizens," the Court declared flatly:

> [T]he statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.

In this respect, the Court in *Jones* observed, the language of Section 1982 contrasts sharply with that of the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, and makes clear that the former "is not a comprehensive open housing law." *Id.* By like token, the presence of the same language in Section 1981 makes clear that it, unlike Title VII, is not a comprehensive equal employment opportunity law, but rather a law aimed only at discrimination on specific grounds.

The Court has repeatedly recognized, moreover, that any doubt on this score is removed by reference to the legislative history of Section 1981. Thus, in *Georgia v. Rachel*, 384 U.S. 780, 791 (1966), the Court reviewed the legislative history of the 1866 Civil Rights Act, from which both Sections 1981 and

1982 are derived, and concluded that it "clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." The Court noted that the phrase "as is enjoyed by white citizens" was added to the legislation by amendment "to emphasize the racial character of the rights being protected." *Id.*, quoted in *McDonald v. Santa Fe Transportation Co., supra,* 427 U.S. at 294.

Accordingly, this Court's decisions have consistently defined Section 1981's coverage exclusively in terms of discrimination based on race. *E.g., Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 459-60 (1975) (Section 1981 "on its face relates primarily to *racial* discrimination . . .") (emphasis added); *Runyon v. McCrary,* 427 U.S. 160, 168 (1976) (Section 1981 "prohibits *racial* discrimination in the making and enforcement of private contracts") (emphasis added); *McDonald v. Santa Fe,* 427 U.S. at 286-87 (Section 1981 "is applicable to *racial* discrimination in private employment against white persons" as well as blacks) (emphasis added).

The Court's recognition of this limit to the scope of Section 1981 is further supported by examination of the historical context in which the legislation was passed. The Civil Rights Act of 1866 was originally enacted to enforce the Thirteenth Amendment, which abolished slavery, and to nullify the Black Codes adopted in the South following the Civil War. *Jones,* 392 U.S. at 427-28. The legislative debates are replete with references to the need to prevent discrimination based on race or color, but contain no suggestion that Congress was seeking to protect all groups that might be perceived as "ethnically and physiognomically distinctive."

To the contrary, there is no evidence whatsoever in the legislative record or in contemporaneous history that the Reconstruction Era Congress was concerned about employment decisions made along lines of national or ethnic origin, except where race or color was specifically involved. Although Congress much later banned preferences based on national origin when it enacted the Civil Rights Act of 1964, history does not support ascribing comparable breadth to the 1866 statute.

To be sure, as Judge Adams noted in his concurring opinion below (784 F.2d at 519), this Court in *McDonald v. Santa Fe* saw a broader purpose underlying Section 1981 than just the prohibition of discrimination against blacks. For example, the Court cited references in the debates to the need to protect the rights of "white men as well as black men" (427 U.S. at 291, quoting Cong. Globe, 39th Cong., 1st Sess., 599 (remarks of Sen. Trumbull)). Thus, the Court concluded in *McDonald* that whites, as well as non-whites, could sue for *racial* discrimination under Section 1981. But, contrary to Judge Adams' extension of this reasoning, it does not follow that the statute also was intended to cover discrimination that is based fundamentally on factors other than race. Rather, the Court's emphasis on the extent of the legislative concern over racial discrimination merely underscores that it was that specific evil, and not other forms of discrimination, that the 39th Congress was focusing on when it enacted Section 1981.

C. Practical Policy Considerations Favor Requiring Plaintiffs Alleging Discrimination Based Essentially On National Origin Or Religion To Proceed Under Title VII Rather Than Under Section 1981.

The divided opinions of the Third Circuit panel in this case and of the Fourth Circuit panel in *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (1986), *cert. granted*, No. 85-2156, illustrate some of the practical difficulties inherent in extending the coverage of Sections 1981 and 1982 to any and all groups that a court may regard as "ethnically and physiognomically distinctive" or that a defendant may perceive as a "racially distinct group."

The approach espoused by the Third Circuit would involve the district courts in the unseemly exercise of assessing the physiognomy of groups of people at the threshold of a Section 1981 action, to see whether they had enough facial or bodily characteristics in common to be considered "distinctive", and thus separately protected by the statute. Cf. *Scre v. Bd. of Trustees of University of Illinois*, 628 F. Supp. 1543 (N.D.Ill. 1986) (Nigerian black's claim of discrimination in favor of American blacks with lighter skin pigmentation held not actionable under Section 1981). Yet the panel majority suggested no standards for making this assessment, and it is difficult to see how legal lines could be drawn based on any types or degrees of physical distinctiveness without unduly offending members of the groups involved, or of other groups.[3] Thus, as a practical matter, the Third Cir-

[3] Physiognomy is a nebulous concept at best. *Webster's New World Dictionary*, 2d Ed. 1980, defines it as "1. the practice of trying to judge character and mental qualities by observation of bodily, esp. facial, features 2. facial features and expression, esp. as supposedly indicative of character; the face 3. apparent characteristics; outward features or appearance."

cuit's approach would, as Judge Adams recognized in his concurrence, effectively bring virtually all claims of national origin discrimination within the ambit of Section 1981—a result directly in conflict with the intent of Congress and with this Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 413.

The approach considered and rejected by the majority of the Fourth Circuit panel in *Shaare Tefila* would be equally unworkable. It would make Section 1982 applicable in situations in which a plaintiff is not a member of a racially distinct group, but is merely perceived as such by the defendants. As the Fourth Circuit majority recognized, the result would be to permit the coverage of the statute to be governed by "nothing more than the subjective, irrational perceptions of defendants." 785 F.2d at 527.

As these decisions suggest, any *ad hoc* approach that expands the scope of Sections 1981 and 1982 on a case-by-case basis beyond discrimination against groups generally recognized to be distinct races will inevitably enmesh the courts in an extremely sensitive and controversial area. Not only is this result inconsistent with Congressional intent, as shown above, but it is also unnecessary. Title VII is available to assure full freedom from discrimination in the workplace to persons of all ethnic and national backgrounds. And since Title VII unquestionably applies whether the alleged discrimination is based on national origin or on race or color, it is not necessary for a court in the context of a Title VII action to attempt to draw distinctions between these different types of claims.

Title VII, moreover, establishes specific, detailed procedures for investigating charges of discrimina-

tion and conciliating in an effort to resolve charges by voluntary agreement, a result which this Court repeatedly has recognized as being preferable to litigation. *See, e.g., Ford Motor Co. v. EEOC*, 458 U.S. 219, 229 (1982); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). This is not to suggest that Title VII procedures preempt direct resort to the courts where a cause of action under Section 1981 is available. Clearly, they do not. But it is highly relevant that when Congress in 1964 decided to enact a comprehensive employment discrimination law covering claims based on national origin, religion, and sex as well as race and color, it did not simply amend Section 1981. Rather, it concluded that specific procedures for investigation and conciliation of charges were necessary, and chose not to allow direct resort to the courts unless those prerequisites were satisfied. Thus, a judicial expansion of the scope of Section 1981 that would effectively bring claims based on national origin within its ambit would undermine the scheme Congress carefully developed for dealing with such claims.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges that the decision of the court below be reversed.

Respectfully submitted,

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