IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1914

JANE MONELL, et al.,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, et al.,

Respondents.

ANSWER TO PETITION FOR CERTIORARI

W. BERNARD RICHLAND,
Corporation Counsel of
the City of New York,
Attorney for Respondents
Municipal Building
New York, N.Y. 10007
(212) 566-4339 or
566-4337

L. KEVIN SHERIDAN,
of Counsel.

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INTRODUCTION

The petition for certiorari presses upon this Court three questions for resolution:

1. Should the 1972 amendments to Title VII of the Civil Rights Act of 1964, bringing within the coverage of that act

state and local governments and educational institutions, be retroactively applied to allow an award of damages for acts of discrimination alleged to have been committed by such entities prior to enactment of the 1972 amendments?

2. Is the New York City Board of Education, which is a body politic and corporate separate from the City of New York, but funded by the City, a "person" within the meaning of 42 U.S.C. § 1983?

3. In an action brought pursuant to 42 U.S.C. § 1983 can damages for unlawful discrimination be recovered from governmental entities otherwise immune from suit under § 1983 by the device of naming as defendants governmental officials sued only in their official capacities, and the additional device of characterizing such relief as merely "equitable" in nature?

ARGUMENT

> The petition for certiorari presents interesting theoretical questions relating to possible retroactive application of the 1972 amendments to Title VII and, assuming arguendo the inapplicability here of Title VII, the reach of § 1983. However, to the extent that shortly Title VII will furnish the guide to decision in most cases of this sort, it may be questioned that this is an appropriate case for the grant of a writ of certiorari. This consideration, essentially independent of the merits of this controversy, but rather having to do only with this court's view as to the proper exercise of its certiorari jurisdiction, we believe must be mentioned. We do not presume to suggest how such discretion should be exercised. We discuss below the substantive merits of petitioners' claims of error.

(1)

With respect to petitioners' argument here for retroactive application of the 1972 amendments to Title VII to allow recovery of damages against a municipality for conduct theretofore not prohibited by Title VII, we would point out initially that re-

troactive application of these amendments would operate unjustly. Cf. Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974).

This Court has itself recognized that maternity leave regulations represent a "good faith attempt to achieve a laudable goal." Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 648 (1974). And there is no suggestion here that these mandatory maternity leave regulations were adopted for anything other than the most laudatory of motives. All that the award of damages in this case would achieve would be a wind-fall recovery against a municipality which, prior to the 1972 amendments to Title VII, and without the guidance furnished by this Court's LaFleur decision, attempted to act reasonably, without any warning being fur-nished to such municipality of its possible

liability by reason of its concern for the welfare of its employees.

In their petition, in arguing for retroactive application here of Title VII, which might allow a back pay award against the City of New York and its Board of Education (we do not concede the appropriateness of such an award here even under a retroactive application of Title VII), petitioners place primary reliance upon footnote 4 of this Court's decision in Brown v. General Services Administration, _____U.S._____, 96 S. Ct. 1961, 1964 n. 4 (1976), where this Court stated that it "ha[d] no occasion to disturb" the holding of the Court of Appeals for the Second Circuit, there acquiesced in by the parties (see, id.), that in that case Title VII could be applied retroactively to allow Title VII relief to vindicate a

pre-existing prohibition against federal employment discrimination. (They also rely upon the disposition in Place v. Weinberger, ____U.S. _____, 96 S. Ct. 2643 (1976), remanding that case, likewise involving alleged federal employment discrimination, for reconsideration in light of Brown, with a citation to footnote 4 of the Brown opinion.)

However, as the Court of Appeals noted in its decision in the instant case (see Petition, A40-A41), what was before the Court in Brown had to do merely with the availability of a judicial remedy where there was already an administrative remedy against the employer, not the creation of any new substantive rights. On this ground alone, we believe retroactive application here of Title VII would be manifestly unjust.

In addition, we would also point out, in connection with the question of the justness of such retroactive application of Title VII, that what is involved here is not a question of discriminatory purpose, but rather a problem of a "good faith attempt to achieve a laudable goal" (Cleveland Bd. of Ed. v. LaFleur, supra, 414 U.S., at 648) being revealed by later judicial analysis to operate too broadly. Under such circumstances, it can only offend ordinarily accepted standards of justice to allow retroactive application of legislation such as the 1972 amendments to Title VII, and we believe this Court has already indicated its agreement with this view. See Cleveland Bd. of Ed. v. LaFleur, supra, 414 U.S., at 638-639 n. 8; see also, Washington v. Davis, ____

U.S. _____, 96 S. Ct. 2040 (1976), pointedly declining to retroactively apply Title VII standards of review of official acts in an action brought pursuant to 42 U.S.C. § 1981, where again there was no question of discriminatory purpose, and the governmental action which was attacked was clearly taken for a laudable purpose.

In this country over the past generation there has occurred a revolution in the field of civil rights, and this has been a most welcome revolution. But at the same time this Court has indicated in construing the reconstruction era civil rights statutes a sensitivity to both "common law tradition" and considerations of "public policy" (see, e.g., Wood v. Strickland, 420 U.S. 308, 318 ([1975]), and, in considering retroactive application of later civil rights statutes, it has considered the justness of such ap-

plication (see Bradley v. School District of Richmond, supra, 416 U.S., at 711), all of which, we believe, counsels against retroactive application in a case such as this of the 1972 amendments to Title VII. Compare Schaefer, Precedent and Policy, 34 U. of Chi. L. Rev. 3, 14-18 (1966).

There is not the slightest hint here that these maternity leave regulations were promulgated in anything other than a good faith effort to protect women employees and their unborn children, and, however unreasonable or arbitrary they might seem by today's rapidly evolving standards, the enforcement of such regulations in an era prior to both the 1972 amendments to Title VII and this Court's LaFleur decision should not be held sufficient to allow awards of damages against hard-pressed municipal treasuries.

With respect to the issues here presented of whether an entity such as the New York City Board of Education is a "person" within the meaning of § 1983 and whether entities immune from suit under that section can be cast in damages by the device of seeking "equitable" relief against officials sued only in their official capacities, we would only note that, while the law in the different circuits on these issues does seem to be in a state of serious disarray, we believe Judge Gurfein's analysis of these issues for the court below in this case is entirely sound. Any other result than that reached here on these issues would render virtually meaningless this Court's decisions in Monroe v. Pape, 365 U.S. 167 (1961); Moor v. County of Alameda, 411 U.S. 693 (1973); and City of Kenosha v.

Bruno, 412 U.S. 507 (1973).

While we are aware that such disagreement between the various Courts of Appeals argues for the grant of certiorari in this case, we would urge that, unless this Court is of the view that the result here reached by the Court of Appeals for the Second Circuit was incorrect, this Court should not grant certiorari in this case; but, rather, if it is of the view that certiorari should be granted to consider these issues, the writ should be granted in a case where it has been sought by an aggrieved governmental agency or the officers thereof. In addition, as an additional reason for here denying issuance of a writ of certiorari, we would also note that, despite the fact that there is at present a dispute between the circuits on these issues, within the next few years, as Title VII comes increasingly to occupy

this field, these issues should rapidly decrease in importance, thus perhaps rendering unwarranted here the exercise of this Court's certiorari jurisdiction.

CONCLUSION

The writ of certiorari should be denied.

November 28, 1976

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Respondents.

L. KEVIN SHERIDAN,
of Counsel.