No. 85-999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

PHILLIP PARADISE, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH CONGRESS, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE NATIONAL WOMEN'S LAW CENTER, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, WOMEN EMPLOYED, AND THE WOMEN'S LEGAL DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS PHILLIP PARADISE, JR., *ET AL.*

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CONSENT OF THE PARTIES

Petitioner the United States of America (the "Government") and Respondents Phillip Paradise, Jr., *et al.*, the Alabama Department of Public Safety (the "Department") and Intervenors-Respondents ("Intervenors") have consented to the filing of this brief. Their letters of consent are being filed separately herewith.

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 at the request of President Kennedy to provide legal representation to blacks who were being deprived of their civil rights. The national and local offices of the Lawyers' Committee have represented the interests of blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation. The Lawyers' Committee participated in this case as an amicus curiae below in the Court of Appeals.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the constitutional rights of all Americans. It has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs to increase opportunities for disadvantaged minorities to speed the day when all Americans may enjoy full equality without regard to race.

The Mexican American Legal Defense and Educational Fund, Inc., is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Its attorneys have represented Hispanics in numerous employment discrimination cases.

The National Association for the Advancement of Colored People is a nonprofit corporation. Its principal objectives include promoting equality of rights, eradicating racial prejudice among the citizens of the United States and securing for them increased employment opportunities according to their ability.

The National Women's Law Center is a nonprofit legal advisory organization dedicated to the advancement and protection of women's rights and to the corresponding elimination of sexual discrimination from all facets of American life. Since 1971, it has worked to secure equal employment opportunity through full enforcement of the civil rights laws and the implementation of effective remedies for racial and sexual discrimination.

The Puerto Rican Legal Defense and Education Fund, Inc., is a national organization dedicated to protecting and furthering the civil rights of Puerto Ricans and other Hispanics.

Women Employed is a national organization of working women. It assists working women facing sexual discrimination and monitors the enforcement activities and policies of the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance concerning a broad range of employment discrimination issues.

The Women's Legal Defense Fund is a nonprofit organization founded in 1971 to advance women's rights. It represents women in employment discrimination litigation, operates an employment discrimination counselling program, conducts public education and represents women's interests before the Equal Employment Opportunity Commission and other Federal agencies. A major priority for the fund is its project on Women of Color. In this pursuit of equality for both women and minorities, the Fund is committed to the use of affirmative action.

Amici conduct extensive litigation to eliminate employment discrimination, representing employees in both the governmental and the private sectors. In some of these cases, courts have entered consent decrees or adjudicated decrees that provide race- and sex-conscious hiring and promotional goals to remedy employers' past discrimination. The position argued by the Government, if adopted in full, would severely undermine the relief amici have obtained in these decrees. More importantly, such a result would straitjacket the courts and public

employers in their efforts to eradicate the lingering effects of prior discrimination. Although less drastic measures will in many cases be sufficient, some cases, including egregious cases like the instant one, have taught amici that the lingering effects of discrimination cannot always be eradicated without the very sort of race-conscious relief approved below.

STATEMENT OF THE CASE[1]

This case arises from litigation commenced in 1972 challenging the discriminatory employment practices of the Alabama Department of Public Safety (the "Department") in the state police force. In 1972, the district court found that the Department had engaged in a "blatant and continuous pattern and practice of discrimination" which had "permeated [its] employment policies". *NAACP v. Allen*, 340 F. Supp. 703, 705 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974). This finding was based in part on the "unexplained and unexplainable" fact that the Department had never employed a black state trooper in its 37-year history. 340 F. Supp. at 705. The district court (1) enjoined the Department from discriminating against blacks in the future, and (2) ordered that 50% of all entry-level troopers hired be black until 25% of the state police force was black (the "1972 order"). The race-conscious goals in the 1972 order are not the subject of this proceeding. After the 1972 order had been in effect for three years, the court found that the Department, "for the purpose of frustrating or delaying full relief to the plaintiff class, [had] artificially restricted the size of the trooper force and the number of new troopers hired". Joint Appendix ("J.A.") 34.

In 1979, the parties entered into, and the district court approved, a consent decree (the "1979 decree") in which the Department promised to develop within one year a promo-

[1] Because of the procedural and factual complexity of this case, amici summarize it here only briefly. Amici respectfully refer the Court to the Statement of the Case of Respondents Phillip Paradise, Jr., *et al.*, and the opinion of the court below (767 F.2d 1514) for a comprehensive review of the facts.

tional procedure that had "little or no adverse impact on blacks". J.A. 37-48. Shortly thereafter, the court held that the 25% incumbency provision in the 1972 order applied to promotional positions as well as to entry-level trooper positions, emphasizing that "[i]n 1972, defendants were not just found guilty of discrimination against blacks in hiring to entry-level positions" and that "past discrimination by the Department was pervasive, that its effects persist, and that they are manifest". *Paradise v. Shoemaker,* 470 F. Supp. 439, 442 (M.D. Ala. 1979).

Until 1981, more than one year later than promised in the 1979 decree, the Department did not propose a selection procedure for promotions to corporal. The parties entered into a second consent decree (the "1981 decree"), which provided that a proposed procedure would be administered and then the parties would determine if the procedure had an adverse impact. If the parties could not agree whether it did, they agreed to submit the dispute to the district court. J.A. 49-54.

The Department administered its proposed procedure in 1981, and, after the parties failed to agree, the district court found that the Department still had not complied with the 1979 decree. *Paradise v. Prescott,* 580 F. Supp. 171, 174-75 (M.D. Ala. 1983). The court ordered the Department to submit a plan without an adverse impact on blacks to promote 15 persons to corporal. *Id.*

The Department then proposed to promote eleven whites and four blacks. J.A. 125-27. The district court rejected this proposal because the Department "operated under a regime of racism" (J.A. 140), the effects of which "remain pervasive and conspicuous at all ranks above the entry-level position". *Paradise v. Prescott,* 585 F. Supp. 72, 74 (M.D. Ala. 1983), *aff'd,* 767 F.2d 1514 (11th Cir. 1985), *cert. granted,* 106 S. Ct. 3331 (1986). The court found that:

> "Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 lieutenants, *there is still not one black.* Of the 65 sergeants, *there is still*

> *not one black.* Thus, the department *still* operates an upper ranks structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future." *Id.* (emphases in original).

Pursuant to the 1981 decree, the court ordered (the "December 1983 order") that one black be promoted for every white promoted to each rank (subject to the availability of objectively qualified black applicants) until either (a) 25% of the rank is black or (b) the Department develops a lawful promotional procedure. J.A. 128-29.[2] It is the constitutionality of the December 1983 order that is at issue here. *See United States v. Paradise,* 106 S. Ct. 3331 (1986) (granting certiorari).

SUMMARY OF ARGUMENT

This case exemplifies why race-conscious promotional relief is necessary and appropriate in certain circumstances. Upon finding "blatant and continuous discrimination" in 1972, the district court ordered (1) that the Department stop discriminating against blacks in hiring and promotions, and (2) that 50% of the entry-level troopers hired be black until 25% of the trooper force was black. *NAACP v. Allen,* 340 F. Supp. at 705-06. The Department has continuously frustrated that order. As of December 1983, nearly 12 years after the 1972 order, only 4 of 197 persons above entry level were black, none of whom was higher than the rank of corporal, and all of whom were promoted pursuant to an interim agreement pending implementation of the 1979 decree. *Paradise v. Prescott,* 585 F. Supp. at 74. The district court concluded that the effects of prior discrimination "will not wither away of their own accord" (*id.* at 75), and entered the provision presently at issue

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[2] The Department finally proposed a lawful selection procedure to the rank of corporal in June 1984. The district court approved this procedure and suspended the December 1983 order as it applied to promotions to that rank. *See Paradise v. Prescott,* 767 F.2d 1514, 1534-36 (11th Cir. 1985), *cert. granted,* 106 S. Ct. 3331 (1986).

requiring a one-for-one promotional ratio. In short, it is difficult to conceive of a case in which race-conscious remedies are needed more.

The December 1983 order passes muster under any standard of scrutiny. The first prong of Equal Protection analysis is satisfied because there is a compelling governmental interest not merely in ensuring future compliance with the civil rights laws but also in eradicating the lingering effects of the Department's prior discriminatory practices. Where, as here, the employer's discriminatory policies have permeated its organization and its subsequent practices have perpetuated that discrimination by tending to limit the supervisory and policy-making positions to persons who were hired, trained and promoted under a "regime of racism" (J.A. 140), the institutional bias against blacks is an effect of discrimination that must be eradicated. The argument of the Department and of Intervenors that promotional relief requires a finding of prior discrimination in promotions, as distinguished from hiring, misconstrues the record of the Department's discriminatory promotional practices and ignores the fundamental fact that the Department's blatant and continuous discrimination in entry-level positions necessarily has precluded blacks from competing for promotions.

The second prong of Equal Protection analysis is likewise met because the means are narrowly tailored to serve this compelling governmental interest. When this interest is properly understood to include eradicating the Department's institutional bias, a one-for-one promotional provision is clearly designed to effectuate that interest. The courts have a duty "so far as possible [to] eliminate the discriminatory effects of the past as well as [to] bar like discrimination in the future" (*Louisiana v. United States,* 380 U.S. 145, 154 (1965)), and the courts must be given latitude in fashioning remedies pursuant to this duty. The choice of an appropriate ratio, like any remedy for discrimination, "necessarily involve[s] a degree of approximation and imprecision". *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 372 (1977). The

district court's choice was based on its determination, after observing the Department's recalcitrance for twelve years, that lesser measures could not adequately and expeditiously dismantle the Department's institutional bias. It is no more "extreme" than was the 50% ratio approved by this Court in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), or by lower courts facing similarly egregious circumstances. The alternatives proposed by the Government, compared with the relief ordered, are more intrusive on the Department, are more burdensome on whites and would not adequately address the need to eradicate the Department's institutional bias.

Finally, the one-for-one promotional order does not unnecessarily trammel the legitimate interests of whites. The provision for promotions is akin to the hiring goals discussed with approval in *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986), *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986) ("*Sheet Metal Workers*") and *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland,* 106 S. Ct. 3063 (1986). Affected whites lose only the incremental benefits of a promotion rather than their livelihoods altogether, and even then the loss is often temporary.

In sum, the Department's history of continued discrimination far exceeds the level necessary to justify affirmative action. Although this Court unambiguously approved the use of race-conscious relief last term, the Government's position would render such relief practically unavailable. Indeed, the Government has publicly admitted this purpose by asserting that "it is doubtful" that race-conscious relief "can any longer survive", warning employers that legal challenges from private parties "and, yes, from the Government itself" are "inevitable".[3] This Court should not permit the Government to subvert its decisions nor remove race-conscious remedies from the arsenals of the lower courts.

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[3] Remarks of Wm. Bradford Reynolds before the Committee on Employment and Labor Relations Law of the Litigation Section and the Equal Employment Opportunity Committee of the Labor and Employment Law Section of the American Bar Association 10-11 (Aug. 12, 1986).

ARGUMENT

I. THE CONTINUED EXCLUSION OF BLACKS FROM THE UPPER RANKS OF THE STATE POLICE IS AN EFFECT OF PRIOR DISCRIMINATION AGAINST BLACKS. ERADICATING SUCH LINGERING EFFECTS OF DISCRIMINATION IS A COMPELLING GOVERNMENTAL INTEREST.

It is now established beyond peradventure that a public employer is not constitutionally barred from considering race pursuant to an affirmative action plan, even though minority persons who are not identified victims of past discrimination may benefit from such consideration.[4] *See Wygant,* 106 S. Ct. at 1850 (plurality opinion); *id.* at 1852 (O'Connor, J., concurring); *id.* at 1863 (Marshall, J., dissenting); *cf. id.* at 1867-68 (Stevens, J., dissenting); *Sheet Metal Workers,* 106 S. Ct. at 3052-53 (plurality opinion); *id.* at 3054 (Powell, J., concurring). In an ideal society, race-conscious relief would be unneeded, but we have yet to achieve the ideal. Lesser relief, such as an injunction, is often adequate to remedy discrimination. Amici's experience has proven, however, that in some instances relief such as the December 1983 order must be used to move closer to the ideal. This is just such a case.

The issue presented is whether the December 1983 order violates the Equal Protection Clause. The first prong of Equal

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[4] Here, it would be impossible to grant meaningful relief if it were limited to identified victims of discrimination. Where, as here, there has been pervasive discrimination over a long period of time, it is impossible to prove who would have applied for a state trooper job but for the discrimination (*see United States v. Louisiana,* 225 F. Supp. 353, 397 (E.D. La. 1963), *aff'd,* 380 U.S. 145 (1965)), or which blacks would have received jobs but for a discriminatory examination procedure (*see Ensley Branch, NAACP v. Seibels,* 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. 1977), *aff'd in relevant part,* 616 F.2d 812 (5th Cir.), *cert. denied,* 449 U.S. 1061 (1980)). In addition, those who suffered discrimination many years ago have probably obtained employment elsewhere, moved or otherwise are no longer in a position to embark upon a new career with the Department. Nonetheless, a court that has made such findings of discrimination has the duty to ensure effective integration of the Department.

Protection analysis is an inquiry into the governmental interests being vindicated.[5] Eradicating the lingering effects of prior discrimination is a sufficiently compelling governmental interest to justify race-conscious relief. *See Wygant,* 106 S. Ct. at 1848 (plurality opinion); *id.* at 1853 (O'Connor, J., concurring); *id.* at 1861-62 (Marshall, J., dissenting); *id.* at 1867-68 (Stevens, J., dissenting); *Sheet Metal Workers,* 106 S. Ct. at 3034, 3050 (plurality opinion); *id.* at 3055 (Powell, J., concurring).

Although the Government pays lip service to the governmental interest in remedying the effects of prior discrimination (Gov't Br. at 19, 21-22, 31-33),[6] it defines this interest so narrowly as practically never to justify the race-conscious relief that this Court unambiguously held last term may be necessary. Having redefined the governmental interest, the Government argues that the December 1983 order is supported only by notions of racial balancing, an inadequate governmental interest. Gov't Br. at 30-35. The governmental interest in eradicating the lingering effects of discrimination cannot, however, be so narrowly construed. This interest at times may include altering the institutional patterns that created and have perpetuated bias against blacks.

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[5] Although a majority of the Court has not agreed upon the level of scrutiny to be applied to affirmative action cases (*see Sheet Metal Workers,* 106 S. Ct. at 3052 (plurality opinion); *Wygant,* 106 S. Ct. at 1852-53 (O'Connor, J., concurring)), the members of the Court agree that some level of heightened scrutiny (whether "strict" or "intermediate") is appropriate (*Wygant,* 106 S. Ct. at 1852). Although all amici do not concede that affirmative action should be subjected to strict scrutiny (*see Regents of the Univ. of California v. Bakke,* 438 U.S. 265, 357-63 (1978) (Brennan, J., concurring in part and dissenting in part)), this case does not raise the issue because the December 1983 order survives the strictest of scrutiny. *See, e.g., Sheet Metal Workers,* 106 S. Ct. at 3053 (plurality opinion).

[6] Citations to briefs are as follows: "Gov't Br." is to the Brief for the United States; "Dep't Br." is to the Brief of Respondents Alabama Department of Public Safety and Colonel Byron Prescott In Support of Petitioner; and "Intervenors' Br." is to the Brief of Intervenors-Respondents Supporting the Petitioner.

A. The Governmental Interest Is Not Merely in Stopping Discrimination, but Also in Eradicating the Lingering Effects of Past Discrimination.

The governmental interest here is not merely "to prevent discrimination in the future" but also "to dismantle prior patterns of employment discrimination". *Sheet Metal Workers*, 106 S. Ct. at 3049 (plurality opinion). There is a governmental interest in eradicating "the lingering effects of pervasive discrimination." *Sheet Metal Workers*, 106 S. Ct. at 3050 (plurality opinion). As the plurality in *Sheet Metal Workers* noted, "even where the employer or union formally ceases to engage in discrimination, informal mechanisms may obstruct equal employment opportunities". *Id.* at 3036.

The Constitution requires affirmative relief which goes beyond merely ensuring future compliance with the law.[7] As Justice Brennan observed in *Bakke:*

> "At least since *Green v. County School Board*, 391 U.S. 430 (1968), it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance. Three years later, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and its companion cases . . . reiterated that *racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions.*" 438 U.S. at 362 (emphasis added; citations omitted).

Accord Wygant, 106 S. Ct. at 1856 (O'Connor, J., concurring).

In cases where discrimination permeates the employer's organization, eradicating the lingering effects of discrimination

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[7] The lower courts have distinguished between, on the one hand, "compliance" and "compensatory" relief, and, on the other, "affirmative relief". *See, e.g., Guardians Ass'n of the New York City Police Dep't, Inc. v. Civil Serv. Comm.*, 630 F.2d 79, 108-09 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 280-82 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Berkman v. City of New York*, 705 F.2d 584, 595-96 (2d Cir. 1983).

extends to dismantling the barriers "which have fostered racially stratified job environments". *Sheet Metal Workers,* 106 S. Ct. at 3037 (plurality opinion) (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800 (1973)). The Department's discriminatory policies were born of persons to whom discrimination was the status quo, and those practices have been perpetuated because the supervisory and policymaking positions are still almost uniformly occupied by whites who have benefitted from—indeed, many of whom may have implemented—those policies.[8] When the discriminatory policies have so permeated the institution, the governmental interest in eradicating discrimination includes eliminating this self-perpetuating institutional bias.

The district court recognized this governmental interest when it entered the December 1983 order. The court found that the Department had "operated under a regime of racism" (J.A. 140), and it said that the order was justified because of "the department's failure after almost twelve years to eradicate the continuing effects of its own discrimination". *Paradise v. Prescott,* 585 F. Supp. at 75 n.1. The court recounted the history of the case and pointed out that the Department had stubbornly avoided hiring and promoting blacks for as long as possible, frustrating the spirit of the 1972 order and the letter of 1979 and 1981 decrees. The court found that there were virtually no blacks in the upper ranks (*id.* at 74), clearly recognizing that the "regime of racism" would not cease until supervisory and policymaking positions were in part filled with blacks and court-approved nondiscriminatory policies were in effect.[9]

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[8] The district court found that "the [D]epartment *still* operates an upper ranks structure in which almost every trooper obtained his position through procedures that totally excluded black persons." *Paradise v. Prescott,* 585 F. Supp. at 74 (emphasis in original). Moreover, absent discrimination, some blacks should have been hired and promoted instead of some whites, and all of the whites continue to benefit from the institutional bias against blacks.

[9] The district court enunciated a second interest furthered by its order: remedying the Department's failure, in violation of the consent decrees, "to develop acceptable promotion procedures". *Paradise v. Prescott,* 585 F. Supp. at 75 n.1. The Government characterizes the

B. **The Record Demonstrates That the Department Is Permeated with Discrimination.**

The evidence of discrimination in the present case is overwhelming. This Court has already recognized this as a case where the employer's organization is permeated with discrimination. In *Sheet Metal Workers,* Justice Brennan quoted *NAACP v. Allen* for the proposition that "[a]ffirmative action . . . 'provide[s] an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.' " 106 S. Ct. at 3037 (quoting 493 F.2d 614, 621 (5th Cir. 1974)).

The Government is seemingly unable to decide the extent to which this discrimination needs to be eradicated. On the one hand, it admits that "the Department's hiring discrimination for almost four decades had excluded blacks from any jobs at all, including jobs in the upper ranks" (Gov't Br. at 21), and it concedes that it argued below that the Department's continued refusal to implement lawful promotional procedures "suggests that a pattern of discrimination against blacks in the Department . . . may be continuing" (Gov't Br. at 9; *see also Paradise v. Prescott,* 767 F.2d at 1522 n.10.). On the other hand, it argues that the 1972 order is "designed to cure the effects of the Department's *prior* discrimination in *hiring*" (Gov't Br. at 22 (emphases added)), suggesting that the discrimination is over and was limited to hiring.[10] The Department and Intervenors

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means used to effectuate this interest as "*in terrorem*". *See* Gov't Br. at 23-26. As Justice Powell noted in *Sheet Metal Workers,* however, there is a "societal interest in compliance with the judgments of federal courts." 106 S. Ct. at 3055. More importantly, the alleged "*in terrorem*" effect arises only because the Department wants to avoid promoting blacks, a desire which is itself an effect of discrimination that must be eliminated. *See* p. 24, *infra.*

[10] The Government also argues that *Sheet Metal Workers* establishes that there must be "flagrant and egregious discrimination" before race-conscious relief can be ordered. *See* Gov't Br. at 28-29; *see also* Intervenors' Br. at 14. The Government completely ignores, however, that the plurality in *Sheet Metal Workers* went on to say, "[*o*]*r,* such relief may be necessary to dissipate the lingering effects of pervasive discrimination" (106 S. Ct. at 3050 (emphasis added)), which is certainly true here. Moreover, the cited portion of *Sheet Metal Workers* applies only to the lawfulness of nonconsensual race-

now adopt the latter view, simply denying that the record of discrimination demonstrates discrimination in promotions. The record of discrimination here, however, is limited neither to hiring nor to discrete employment decisions in the past.

1. **Discrimination in hiring limits the promotional opportunities of blacks, particularly when the employer promotes solely from within.** Although the Government concedes that the Department's hiring discrimination has necessarily excluded blacks from the upper ranks (Gov't Br. at 21), the Department argues (as do Intervenors) that there has never been "a judicial determination that the racial disparity among the ranks were [sic] related in any way to the findings of discrimination in *hiring* in 1972" (Dep't Br. at 25 (emphasis in original); *see also* Intervenors' Br. at 11-12). Where, as here, the employer promotes only from within, the argument that "blatant and continuous" discrimination that has "permeated the [Department's] employment policies" (*NAACP v. Allen*, 340 F. Supp. at 705) can be so compartmentalized is untenable.

This Court has previously rejected the view that findings of discrimination "can be viewed in isolation" in the context of school desegregation (*Keyes v. School Dist. No. 1*, 413 U.S. 189, 200 (1973)), and several courts have recognized that a "natural consequence of discriminating against blacks at entry-level positions . . . would be to limit their opportunities for promotion to higher levels". *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1838 (N.D. Ala. 1981) (Pointer, J.), *aff'd*, 720 F.2d 1511 (11th Cir. 1983).[11] The exclusion of blacks is reinforced by a policy of promoting only from within the Department.

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conscious relief under Title VII (*see id.* at 3050), which is not presently at issue. *Wygant* makes clear that the constitutional standard for affirmative action is not "flagrant and egregious" discrimination. 106 S. Ct. at 1848 (plurality opinion) ("sufficient evidence to justify the conclusion that there has been prior discrimination"); *see also id.* at 1856 (O'Connor, J., concurring). Finally, the blatant and continuous discrimination here would meet any standard, even "flagrant and egregious".

[11] *See also Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Williams v. Vukovich*, 720 F.2d 909, 924 (6th Cir. 1983).

2. **The record contains findings of discrimination in promotions.** This is not, however, a case in which the discrimination was limited to hiring, a fact that the Department and Intervenors conveniently overlook. First, the district court found that the Department's proposed procedure for promotions (*see* J.A. 55-57) had an adverse impact against blacks (*Paradise v. Prescott,* 580 F. Supp. at 174), which would have established a prima facie case of discrimination if the Department had used that procedure. *See Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). Second, when the district court held that the 25% provision of the 1972 order applied to the Department's upper ranks, it said that "[i]n 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions", that "[o]ne continuing effect of that discrimination is that . . . *there is still not one black*" above the rank of trooper and "that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest". *Paradise v. Shoemaker,* 470 F. Supp. at 442 (emphasis in original). Third, before entering the December 1983 order, the district court found:

> "On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 lieutenants, *there is still not one black.* Of the 65 sergeants, *there is still not one black.* And of the 66 corporals, *only four are black.* Thus, the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is still without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future." *Paradise v. Prescott,* 585 F. Supp. at 74 (emphases in original).

See also J.A. 139-40. These findings reveal that of the 197 persons above the rank of trooper, only 4 (2.0%) were black (*id.*), which itself gives rise to an inference of discrimination in promotions. *See Teamsters*, 431 U.S. at 340 n.20; *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307 (1977); *Wygant*, 106 S. Ct. at 1847 (plurality opinion); *id.* at 1856 (O'Connor, J., concurring). In short, the findings of discrimination from 1972 to the present, and the governmental interest in eradicating the effects of that discrimination, are not limited to hiring.

3. **The Department has a pervasive institutional bias against blacks.** When an employer has been found guilty of discrimination, compensatory relief and an order requiring future compliance will often sufficiently remedy past discrimination. *Sheet Metal Workers*, 106 S. Ct. at 3036 (plurality opinion). In cases where the employer's discriminatory policies have instilled an institutional bias against blacks, and the policymakers who implemented those policies continue to make decisions that perpetuate the bias, affirmative relief may be necessary. This is such a case.

Before the 1972 order, the Department did more than close its ranks to blacks; it actively sought to prevent black citizens from exercising their constitutional rights. For example, in 1965, when blacks marched in Montgomery, Alabama, to secure the right to vote, the marchers were brutally "prodded, struck, beaten and knocked down by members of the Alabama State Troopers". *Williams v. Wallace,* 240 F. Supp. 100, 105 (M.D. Ala. 1965) (Johnson, J.). The Department attacked the marchers even though they "had observed all traffic laws and regulations" and "had proceeded in an orderly and peaceful manner". *Id.* The Department's actions, which had "not been directed toward enforcing any valid law of the State of Alabama" (*id.*), were taken by troopers "acting upon specific instructions from [their] superior officers", including the Department's director. *Id.* The Department's brutality precipitated the Voting Rights Act of 1965. D. Bell, *Race, Racism*

and American Law 147-48 (2d ed. 1980); President's Remarks to Congress, 1 Weekly Comp. Pres. Doc. 52 (Aug. 6, 1965).[12]

The Department's bias against blacks continues in its employment practices. The Department completely excluded blacks before the 1972 order, and it unfairly treated those blacks it hired under that order. From 1972 through 1975, the Department hired 69 entry-level troopers, 40 of whom were black and 29 of whom were white. After the one-year probationary period, during which all of the new troopers' supervisors were white, the attrition rate for blacks was unusually high: only 27 of the 40 blacks (67.5%) remained, while all 29 whites did. *Paradise v. Prescott,* 767 F.2d at 1519. This disparity is sufficient to create a prima facie case of discrimination.[13] In addition, the Department's decision to weigh supervisors' evaluations as 20% of the promotional score (J.A. 56) would have provided a ready mechanism for racial discrimination by the white supervisors. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 432-33 (1975); *Riles v. M.N.C. Corp.,* 750 F.2d 867, 871 (11th Cir. 1985); *Rowe v. General Motors Corp.,* 457 F.2d 348, 358-59 (5th Cir. 1972).

The Department has perpetuated this atmosphere of discrimination by limiting blacks to the lower ranks. It agreed in the 1979 decree to create a nondiscriminatory promotional procedure by 1980, but it failed to do so until 1984 despite repeated court orders. By 1983, the Department had promoted only 4 blacks, and then it did so only pursuant to the court-ordered 1979 decree. *Paradise v. Prescott,* 767 F.2d at 1533 n.16; *see also* J.A. at 47. The Department's continued attempts to avoid promoting blacks led even the Government to recognize below "that a pattern of discrimination against blacks in the Department . . . may be continuing." Gov't Br. at 9;

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[12] The Department's brutality toward black citizens described above is not an isolated instance. *See, e.g., Houser v. Hill,* 278 F. Supp. 920 (M.D. Ala. 1968).

[13] The disparity in the attrition rates is, using a simple chi square analysis, significant at the .01 level, which exceeds the .05 level of significance sufficient to establish a prima facie case. *See Hazelwood,* 433 U.S. at 308-09 n.14.

Paradise v. Prescott, 767 F.2d at 1522 n.10. The Department's recalcitrance demonstrates that institutional bias against blacks perpetuates itself by limiting the upper ranks to persons to whom discrimination is the status quo. This is a case where the institutional bias will begin to crumble only by ordering affirmative relief to ensure that minority persons occupy some supervisory and policymaking positions.

C. **An Additional Effect of Discrimination Is a Less Responsive and Less Effective Police Force.**

The governmental interest in eradicating the effects of discrimination is not limited to eliminating discriminatory employment practices. A public employer's discriminatory employment policies also affect the community it serves.

It is more important for a governmental employer than for a private employer to be free from even the appearance of excluding minorities. *See e.g., Williams v. Vukovich,* 720 F.2d at 923-24. In making Title VII applicable to the states, Congress recognized that the "exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government." S. Rep. No. 415, 92nd Cong., 1st sess. 10 (1971); *see also Wygant,* 106 S. Ct. at 1855 (O'Connor, J., concurring).

This mistrust undermines the effectiveness of the police force, because "[i]n order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* 167 (1967) (*"Task Force Report"*); *see also* U.S. Commission on Civil Rights, *Who Is Guarding the Guardians?* (1981). Justice Stevens recognized in *Wygant* that an integrated police force is more likely to be publicly accepted and therefore more effective (106 S. Ct. at 1868), a proposition with which the First,

Second, Fourth, Fifth, Sixth and Seventh Circuits have agreed.[14]

II. THE DECEMBER 1983 ORDER IS A SUFFICIENTLY NARROWLY TAILORED MEANS TO EFFECTUATE THE COMPELLING GOVERNMENTAL INTEREST IN ERADICATING THE LINGERING EFFECTS OF PAST DISCRIMINATION.

The second prong of Equal Protection analysis is to determine whether the means chosen is sufficiently related to effectuating the governmental interest. *Wygant*, 106 S. Ct. at 1846 (plurality opinion). The December 1983 order is well suited to eradicating the lingering effects of past discrimination, and it therefore satisfies the heightened scrutiny—be it characterized as strict or intermediate (*see* n.5, *supra*)—applicable to affirmative action.

This Court held unambiguously last term that race-conscious means may sometimes be used to remedy past discrimination. The Government pays lip service to the Court's approval of the use of race-conscious relief, but its analysis

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[14] *See Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 977-78 (1st Cir. 1982); *Bridgeport Guard, Inc. v. Bridgeport Civil Serv. Comm.*, 482 F.2d 1333, 1341 (2d Cir. 1973); *Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *United States v. City of Chicago*, 663 F.2d 1354, 1364 (7th Cir. 1981) (en banc). For example, the Sixth Circuit said:

> "[E]ffective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions." *Detroit Police Officers' Ass'n v. Young*, 608 F.2d at 696.

Moreover, the Fourth Circuit has found "the attainment of racial diversity *in the top ranks* of the police department" to be a legitimate interest. *Talbert v. City of Richmond*, 648 F.2d at 931 (emphasis added); *accord Detroit Police Officers' Ass'n v. Young*, 608 F.2d at 695; *Williams v. Vukovich*, 720 F.2d at 923; *Task Force Report* at 172.

reveals that it seeks to so restrict the use of such relief as practically to remove it from the courts' arsenal of weapons to combat the effects of discrimination. The flaw in the Government's analysis is its overly restrictive view of the governmental interest in remedying past discrimination. Once this governmental interest is properly understood to include eradicating the lingering effects of discrimination, the means necessary to effectuate that interest can be seen to include sufficient promotional relief to eliminate the self-perpetuating bias of the institution. The December 1983 order is well suited to effectuate this interest because it ensures that blacks will finally occupy some positions in the Department's upper ranks from which the institutional bias was born. The alternative means suggested by the Government are less efficacious than the December 1983 order, would be even more intrusive on the Department and more burdensome on whites. Finally, the December 1983 order does not unnecessarily trammel the interests of whites because it does not interfere with their legitimate expectations.

A. **The December 1983 Order Is More Efficacious than a 25% Ratio in Eradicating the Effects of Past Discrimination.**

The governmental interest in remedying past discrimination, as shown above (*see* pp. 11-12, *supra*), goes beyond ensuring compliance with the law and extends to eradicating the "informal mechanisms [that] may obstruct equal employment opportunities". *Sheet Metal Workers*, 106 S. Ct. at 3036 (plurality opinion). When the governmental interest is thus understood, the means may reach beyond ensuring mere compliance with the law to include affirmative relief.

1. **The December 1983 order is aimed at eradicating the institutional bias.** Clearly, eradicating the institutional bias against blacks that permeates the Department requires more than hiring blacks into entry-level positions. It requires promoting qualified blacks into supervisory and policymaking positions. The December 1983 order accomplishes exactly this purpose.

The remaining question concerns the district court's choice of a one-for-one ratio rather than a lower ratio. The Government describes the ratio as a "catch up quota" aimed to create a racial balance for its own sake. Gov't Br. at 30-31. In fact, however, the choice of a one-for-one ratio assures that more than a token few blacks will soon be promoted into the upper ranks. The district court's choice of this ratio evinces a problem-solving approach based on its conclusion that institutional bias persists; it does not stem from an abstract, rigid conception of desired racial balance. *See* p. 12, *supra.*

The district court was faced with the Department's repeated failure to establish "acceptable procedures for advancement of black troopers into this [upper rank] structure" (*Paradise v. Prescott,* 585 F. Supp. at 74) and the Department's continued refusal to hire or promote blacks until it could avoid doing so no longer. In 1979, the district court concluded that "there is no ambiguity" that the 25% provision of the 1972 order, roughly akin to a long term incumbency goal, applied to promotional positions. *Paradise v. Shoemaker,* 470 F. Supp. at 440. Even so, although blacks had been hired to entry-level positions for seven years, none had then been promoted, and the four who were promoted subsequently were promoted only pursuant to the court-ordered 1979 decree. The court legitimately concluded that more than a token number of blacks were needed in the upper ranks to make the institution's attitudes race-neutral. As in *Sheet Metal Workers,* "in light of [the Department's] long record of resistance to official efforts to end [its] discriminatory practices, stronger measures were necessary". 106 S. Ct. at 3053 (plurality opinion).

The courts have "not merely the power but the duty to render . . . decree[s] which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future". *Louisiana v. United States,* 380 U.S. at 154; *see also Albemarle Paper Co.,* 422 U.S. at 418. To do so, they must be given wide discretion "to fashion 'the most complete relief possible' to remedy past discrimination". *Sheet Metal Workers,* 106 S. Ct. at 3036 (plurality opinion) (quoting

Franks v. Bowman Transp. Co., 424 U.S. 747, 770 (1976)). The selection of an appropriate remedy for discrimination "will necessarily involve a degree of approximation and imprecision". *Teamsters,* 431 U.S. at 372; *see also* Schwarzschild, *Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform,* 1984 Duke L. J. 887, 893 (*"Public Law By Private Bargain"*).

The district court's choice of a one-for-one ratio is within this broad remedial discretion. The alternatives of an injunction against promotional discrimination and of the 1972 order's 25% incumbency provision as applied to promotions had proven ineffective. Under similar circumstances, this Court said:

> "[I]t is doubtful, given [the employer's] history in this litigation, that the District Court had available to it any other effective remedy. That court, having had the parties before it over a period of time, was in the best position to judge whether an alternative remedy, such as a simple injunction, would have been effective in ending [the employer's] discriminatory practices." *Sheet Metal Workers,* 106 S. Ct. at 3056 (Powell, J., concurring).

Indeed, the *Sheet Metal Workers* plurality cited *NAACP v. Allen,* which involved the 50% hiring order, as an example of a case in which "alternative remedies" were unavailing because of the employer's "long record of resistance to official efforts to end [its] discriminatory practices". *Id.* at 3053.

The Government calls the one-for-one ratio "extreme", arguing that a 25% ratio "represented the extreme outer limit of any appropriate remedy". *See* Gov't Br. at 27-28. Far from extreme, however, the one-for-one ratio is comparable to the 50% provision approved in *Weber,* which Justice Blackmun described as "moderate". 443 U.S. at 216. The lower courts, faced with the difficult task of fashioning effective remedies for past discrimination in varying circumstances, have on occasion found ratios of 50% to be necessary.[15]

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[15] The plurality in *Sheet Metal Workers* cited with approval several cases that approved ratios of 50%, including the Eleventh Circuit's decision below in this case. *See* 106 S. Ct. at 3037 n.28; *see,*

Moreover, the Government's argument would restrict the courts to using the ratio which the employer would be expected to achieve if it stopped further discrimination against blacks. *See Teamsters,* 431 U.S. at 340 n.20; *Hazelwood,* 433 U.S. at 307. In short, the Government seeks to restrict courts to ensuring future compliance with the law without providing any remedy for past discrimination. The plurality in *Sheet Metal Workers* made clear, however, that some cases may require more than mere compliance relief:

> "In most cases, the court need only order the employer or union to cease engaging in discriminatory practices, and award make-whole relief to the individuals victimized by those practices. In some instances, however, it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII." 106 S. Ct. at 3036.

Similarly, lower courts have distinguished "compliance relief" from "affirmative relief", the latter of which may entail the use of higher short term goals designed to effectuate a long term goal approximating the racial composition of the available labor force. *See* n.7, *supra.*[16]

Affirmative action plans, including those embodied in consent decrees, typically contain both long term goals and higher short term goals designed to effectuate expeditiously the long term goals. *Public Law By Private Bargain,* 1984 Duke

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e.g., Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1026-28 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *Morgan v. Kerrigan,* 530 F.2d 431, 434-35 (1st Cir.), *cert. denied,* 426 U.S. 935 (1976); *United States v. N.L. Indus., Inc.,* 479 F.2d 354, 377 (8th Cir. 1973); *see also United States v. City of Buffalo,* 633 F.2d 643, 646-47 (2d Cir. 1980); *Bratton v. City of Detroit,* 704 F.2d 878, 892-98 (6th Cir. 1983), *cert. denied,* 464 U.S. 1040 (1984).

[16] Many of the cases cited with approval by the plurality in *Sheet Metal Workers* approved the use of higher short term goals to meet long term goals. *See* 106 S. Ct. at 3037 n.28; *see, e.g., Paradise v. Prescott,* 767 F.2d at 1530-33; *United States v. City of Chicago,* 549 F.2d 415, 436-37 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977), *modified on other grounds,* 663 F.2d 1354, 1362 (7th Cir. 1981) (en banc); *Carter v. Gallagher,* 452 F.2d 315, 331 (8th Cir. 1971) (en banc), *cert. denied,* 406 U.S. 950 (1972).

L. J. at 896. If short term goals could not exceed the expected racial composition of the employer's work force, then employers who had previously excluded minorities would be unable to eradicate the lingering effects of discrimination until the work force had completely turned over, a period which could take as long as 40 years. *See also* p. 26 & n.18, *infra.*

2. **The December 1983 order is properly designed to encourage the Department to implement a lawful promotional procedure.** The district court designed the December 1983 order both to eradicate the effects of discrimination and to encourage the Department to create a lawful promotional procedure. *Paradise v. Prescott,* 585 F. Supp. at 76. The Department's continued failure to develop a lawful procedure violated the spirit of the orders dating back to the 1972 order and the letter of the 1979 and 1981 decrees, whereas the December 1983 order successfully encouraged the Department to comply with the prior orders.

The Government describes the December 1983 order as an "*in terrorem*" enforcement device, suggesting that the order goes beyond the governmental interests giving rise to it. Gov't Br. at 23-26. The Government is wrong. The order resulted from the Department's repeated failure to implement a lawful promotional procedure, which in turn resulted from the Department's institutional bias. The order is narrowly tailored to eliminating this bias because it gives the Department the opportunity to begin dismantling the bias itself—by developing lawful promotional procedures—and, if the Department fails, the order reduces the bias directly by requiring the promotion of qualified blacks. The lower courts have characterized comparable orders as "modest" "interim relief".[17]

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[17] *E.g., Guardians Ass'n of New York City Police Dep't, Inc. v. Civil Serv. Comm.*, 630 F.2d at 109.

B. The December 1983 Order Is Less Intrusive on the Department and Less Burdensome on Whites than the Alternatives Proffered by the Government.

The Government asserts that the courts below did not consider "whether lawful alternative and less restrictive means could have been used" to achieve the compelling governmental interest in remedying pervasive and egregious discrimination. Gov't Br. at 23 (quoting *Wygant*, 106 S. Ct. at 1850 n.6 (plurality opinion)). The Government then proffers "plentiful alternatives" that supposedly would be "less intrusive". *Id.* at 25-26. The Government's alternatives, however, actually would be more intrusive on the Department's employment practices and would be more burdensome on whites than is the December 1983 order.

First, the Government suggests that "[t]he court could have imposed stringent contempt sanctions, including heavy fines and attorneys' fees". Gov't Br. at 25. There is no reason to believe that such sanctions would have worked because the Department had repeatedly disobeyed prior court orders. Indeed, the December 1983 order achieved in only seven months what prior court orders had failed to do after four years—to compel the Department to implement a lawful, nondiscriminatory promotional procedure. Money sanctions would harm only Alabama's taxpayers and would not address the true problem—the Department's entrenched institutional bias.

In addition, the December 1983 order more effectively accommodates the immediate interests of all interested parties than would contempt sanctions. The Department needs new corporals; black troopers are interested in being promoted and in seeing the effects of discrimination eliminated; and white troopers are interested in being promoted. Because the 1981 decree bars promotions until the Department implements a lawful selection procedure (J.A. 53), all of these interests would have been frustrated by contempt sanctions. In contrast, the December 1983 order encourages the Department to develop a lawful selection procedure and it accommodates all of these interests by allowing promotions to proceed.

Second, the Government submits that "[t]he court could have considered appointing a trustee or administrator to supervise the Department's progress or even to make the promotions himself by the proper standard". Gov't Br. at 25. However, this alternative would be even more intrusive on the Department's employment practices than the one-for-one ratio because the district court would become embroiled in the merits of each promotional decision.

Moreover, the December 1983 order is both a temporary measure and allows for waiver of its requirements if there are not enough qualified black candidates or if the Department does not need more promotions. It thus accommodates "*legitimate* explanations for the [Department's] failure to comply with the court's orders". *Sheet Metal Workers,* 106 S. Ct. at 3051 (plurality opinion) (emphasis in original); *id.* at 3055-56 (Powell, J., concurring); *id.* at 3061-62 (O'Connor, J., concurring in part and dissenting in part).

Third, the Government proposes a 25% ratio. Gov't Br. at 28. As shown above, a lower ratio would not as effectively further the compelling governmental interest. *See,* pp. 20-24, *supra.* In addition, a lower ratio would be more burdensome on whites in the sense that affirmative action plans would have to be in effect much longer to achieve the long term objective of 25%. *Cf. Sheet Metal Workers,* 106 S. Ct. at 3053 (plurality opinion) (affirmative action must be temporary); *Weber,* 443 U.S. at 208-09.[18]

Fourth, the Government suggests that "[p]rogress toward racial balance in the [Department's] upper levels" would be "substantially expedited" by (1) reducing time-in-grade eligibility requirements or (2) allowing lateral hiring of blacks and whites to upper-level positions. Gov't Br. at 35 n.17. Like the appointment of a trustee, these alternatives would be more

[18] The Department recently submitted to the district court an estimate of the number of vacancies in its upper ranks for the next decade. In the lieutenant position, for example, the Department's figures indicate that affirmative action would end in 1991 with a 50% ratio but not until 1997 with a 25% ratio.

intrusive on the Department. Moreover, because they would increase dramatically the number of candidates eligible for promotional positions, these alternatives would reduce the expectation of promotion held by present white employees (particularly Intervenors) at least as much as race-conscious promotional goals would.

C. **The December 1983 Order Does Not Unnecessarily Trammel the Legitimate Interests of Whites.**

In *Wygant* and *Sheet Metal Workers,* this Court made clear that under appropriate circumstances race-conscious hiring is permissible. *See Wygant,* 106 S. Ct. at 1851-52 (plurality opinion); *id.* at 1864 (Marshall, J., dissenting); *id.* at 1870 n.14 (Stevens, J., dissenting); *Sheet Metal Workers,* 106 S. Ct. at 3052-53 (plurality opinion); *id.* at 3057 (Powell, J., concurring). In contrast, four members of the Court in *Wygant* found that layoffs, under the circumstances presented, were unconstitutional. *Wygant,* 106 S. Ct. at 1851-52 (plurality opinion); *id.* at 1857-58 (White, J., concurring).[19] The Government tries to equate the promotional provision at issue here with the layoff provision in *Wygant* (Gov't Brief at 32-35), but the often temporary denial of a promotion is far less burdensome than the loss of employment.

In *Wygant,* the plurality found the layoffs too burdensome because (1) employees "are typically heavily dependent on wages for their day-to-day living", (2) the layoffs disrupted "settled expectations in a way that general hiring goals do not", and (3) the burdens were borne by identifiable individuals. 106 S. Ct. at 1851-52. Each of these factors distinguishes race-conscious promotional provisions from layoffs.

The denial of a promotion does not interfere with an employee's day-to-day living in the way that a layoff does. The white employees keep their jobs and their sources of income.

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[19] Justice O'Connor said that it was not necessary "to resolve the troubling questions of whether any layoff provision could survive strict scrutiny". 106 S. Ct. at 1857; *see also id.* at 1867 n.7 (Marshall, J., dissenting).

Although some whites may not receive the pay increase from a promotion, this incremental difference is very small compared to a complete loss of income. As with hiring provisions, the effect on whites of promotional provisions is the "[d]enial of a future employment opportunity [that] is not as intrusive as [the] loss of an existing job." *Wygant,* 106 S. Ct. at 1851 (plurality opinion). Moreover, because the whites who are denied promotions remain free to compete for later vacancies, the loss of promotional pay is often of short duration.

Nor do employees' expectations favor equating promotions and layoffs. Certainly the expectation of keeping one's job is much greater than the expectation of receiving a promotion. As the First Circuit recently said:

> "There is no blinking the fact that there is a significant difference between hiring and promoting in accord with a race-conscious ratio and insulating from discharge a percentage of employees because they are members of a minority group. In the former situation, there is only a postponement of expectations; in the layoff situation, employees with greater seniority lose their jobs." *Boston Chapter, NAACP v. Beecher,* 679 F.2d at 976.

Moreover, the expectation of a promotion is comparable to that of being hired because generally the candidate is merely one of a pool of applicants competing against others for a job or promotion.[20]

No individual white trooper has a settled expectation of promotion. When a selection procedure has an adverse impact

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[20] Both hiring and promotional procedures typically include factors such as a written examination and evaluations by interviewers. The distinguishing feature between them is that promotional procedures often contain an additional seniority factor. The Government emphasizes this distinction, presumably to support the notion of whites' expectations, arguing that "[e]ligibility for promotion is a major part of the 'equity' in seniority". Gov't Br. at 39-40. In fact, although the promotional procedure that the Department proposed in 1981 would have counted seniority as 10% of the promotional score (J.A. 56), *differences* in seniority could affect scores by no more than 3% (*see* J.A. 50-51). Thus, greater seniority far from creates an expectation of promotion.

against blacks, as the Department's proposed promotional procedure here did, whites have no legitimate expectation of promotion based on that procedure.[21] As Justice Brennan wrote in *Bakke,* "the expectations of non-minority workers are themselves products of discrimination and hence 'tainted' ". 438 U.S. at 365 (quoting *Franks,* 424 U.S. at 776). In addition, any white trooper's expectation of promotion should have been reduced by the existence of affirmative action since the 1972 order setting forth a 25% incumbency provision. *See Detroit Police Officers' Ass'n v. Young,* 608 F.2d at 696 n.12.

Finally, the Government's argument that the burden of the December 1983 order falls "on a finite and often small number of identifiable individuals" (Gov't Br. at 33) ignores that in making promotional decisions, Alabama uses a "rule of three" whereby the Department may select any one of the three candidates who scores highest. *See* J.A. 126. The white individual who would have been promoted but for affirmative action thus cannot be identified; rather, the burden is in this sense "diffused" among the three highest-ranking candidates. Furthermore, there was in place no *lawful* selection procedure that could identify a burdened individual. In any event, the basic inquiry is not whether the procedure allows affected white persons to be identified but whether their legitimate interests are unduly trammelled. *See Local 35, Int'l Bhd. of Elec. Workers v. City of Hartford,* 462 F. Supp. 1271 (D. Conn. 1978), *aff'd,* 625 F.2d 416 (1980), *cert. denied,* 453 U.S. 913 (1981). Here they are not.

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[21] *See NAACP v. Allen,* 493 F.2d at 618; *Kirkland v. New York State Dep't of Corrections,* 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied,* 465 U.S. 1005 (1984); *Williams v. Vukovich,* 720 F.2d at 924-25; *United States v. Bethlehem Steel Corp.,* 446 F.2d 652, 663 (2d Cir. 1971); *Pennsylvania v. Rizzo,* 13 Fair Empl. Prac. Cas. (BNA) 1475, 1481 (E.D. Pa. 1975).

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the decision of the Court of Appeals for the Eleventh Circuit be affirmed.

September 30, 1986

Respectfully submitted,

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