(10) (13)

Nos. 84-1656, 84-1999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

—against—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

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

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner

VS.

CITY OF CLEVELAND, et al.,

and

VANGUARDS OF CLEVELAND,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL CONFERENCE OF BLACK MAYORS, INC. IN SUPPORT OF RESPONDENTS

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Interest of *Amicus*

The National Conference of Black Mayors, Inc. ("NCBM") respectfully submits this brief in support of respondents. Its members represent 22 million people of all races in 283 communities, including Los Angeles, Chicago, Philadelphia, Washington, D.C., New Orleans and Atlanta, as well as Highland Beach, Maryland, Penermon, Mississippi and Pembroke, Illinois.

The Justice Department is currently challenging nationwide the long-accepted legal principles justifying affirmative action. Fifty-one jurisdictions (including Los Angeles, Chicago and Philadelphia) have been asked by the Department to revise existing consent decrees for the purpose of eliminating goals and timetables from affirmative action plans. Department of Justice Press Release, April 2, 1985. NCBM members have worked hard for agreement on these plans and, in doing so, for racial peace. These efforts will be seriously jeopardized if this Court overturns the decisions of the courts below.

NCBM has formed a coalition of national organizations, the National Committee to Defend and Extend Affirmative Action, which provides continuing support for programs of equal access to jobs.

NCBM's members should be accorded substantial latitude in staffing municipal work forces. All of the municipalities in which NCBM's members hold office have substantial black populations. It is critical that these municipalities have the right to choose employees from a qualified and diverse pool of applicants which reflects the municipalities' racial composition. This is true not only because of the imperative of public peace, but also because of the need for public cooperation, founded on the true consent of the governed. NCBM therefore urges this Court to permit

public employers to implement reasonable, appropriately-tailored, voluntary race-conscious plans in response to acute racial disparities in their work forces that are a direct consequence of the country's lamentable history of racial discrimination in public employment.

Consent of the Parties

All parties in both actions have consented, in letters on file with the Clerk, to the filing of this brief.

Summary of Argument

The affirmative action plans at issue are valid under the thirteenth, fourteenth and tenth amendments. The fourteenth amendment does not command "color blindness." The plans need only be substantially related to achieving important state interests, which include the need (1) to eliminate the disabling effects of racial discrimination in public and publicly-funded employment; (2) to enlarge the pool of applicants for public employment, thus increasing the quality of workers in public service and improving public service itself; (3) to set a positive example for private employers; and (4) to preserve racial harmony and maintain public order.

The fourth interest is particularly compelling for the cities represented by NCBM's members. Lack of equal employment opportunities historically has been a cause of unrest in our nation's major urban areas. Reasonable, precisely-tailored affirmative action plans, such as those at issue here, are a fair means of diffusing racial tensions.

The plans are also authorized under the thirteenth amendment. That amendment, which was a response to the racial strife of the Civil War era, embodies a sweeping prohibition against slavery's heir, racial discrimination. In 42

U.S.C. § 1981, Congress has clothed the federal courts with power to extirpate such discrimination.

Municipal authority to promulgate affirmative action plans is bottomed on the tenth amendment. If our system of federalism is to remain vital, municipalities must be permitted to experiment with affirmative action as a means of maintaining public order and securing racial concord.

The affirmative action plans may also be constitutionally required. The fourteenth amendment demands more than simply ending past official racial discrimination. Positive steps, such as affirmative action, are essential to achieving equal opportunity in public and publicly-funded employment.

Title VII was extended to cover public employees under the fourteenth amendment. Affirmative action was explicitly endorsed by Congress. Municipal employers should be accorded the same approval of affirmative action as this Court has given for private employers, especially as the federal executive role in this area diminishes.

Any expansive interpretation of *Firefighters Local Union No. 1784* v. *Stotts* that would invalidate the plans at issue is bereft of textual support and is at war with Title VII.

ARGUMENT

POINT I

The Affirmative Action Plans Are Valid Under the Fourteenth, Thirteenth and Tenth Amendments.

The cities of New York and Cleveland are empowered to consent to the affirmative action plans at issue under the fourteenth, thirteenth and tenth amendments. As narrowly-tailored, reasonable and temporary methods of

eliminating the effects of past discrimination in public and publicly-funded employment, the plans are reasonable means of serving important state interests under the fourteenth amendment. As a method of eradicating remaining badges and incidents of slavery, the plans are authorized by the thirteenth amendment. Finally, as creative means of securing public order, promoting racial harmony and improving the quality of public service, the plans are justified by the tenth amendment.*

A. The Equal Protection Clause of the Fourteenth Amendment Does Not Prohibit the Affirmative Action Plans.

The equal protection clause of the fourteenth amendment does not prohibit the affirmative action plans at issue. Both plans are circumspectly drawn, reasonable and temporary. They were prompted, in part, by the compelling needs of

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* The Vanguards' complaint alleged jurisdiction, *inter alia,* under the thirteenth and fourteenth amendments, *Vanguards of Cleveland* v. *City of Cleveland,* 753 F.2d 479, 481 (6th Cir.), *cert. granted,* 106 S. Ct. 59 (1985). Local 28's complaint alleged jurisdiction, *inter alia,* under the fourteenth amendment. *EEOC* v. *Local 638,* 753 F.2d 1172, 1185 (2d Cir.), *cert. granted,* 106 S. Ct. 58 (1985) *(Sheet Metal Workers).* The tenth amendment was not pleaded by any party. This Court has made clear, however, that it is not confined by the pleadings when taking, for example, the fateful step of striking down a statute as unconstitutional. *See, e.g., Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *compare* Rule 34.1(a) of this Court (". . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."). If, as we contend, the authority of the tenth amendment vindicates the plans at bar, the grave interests at stake should lead this Court to confirm that authority.

Moreover, the Equal Employment Opportunity Commission ("EEOC") claims that *Sheet Metal Workers* ". . . is purely a Title VII case," Brief for the EEOC at 25, footnote, *Local 28* v. *EEOC,* but it frames the fifth question presented in its *Sheet Metal Workers* brief as: "Whether such remedies are unconstitutional." Thus, constitutionality, *vel non,* is before the Court.

Cleveland and New York to eliminate the disabling effects of hoary and flagrant histories of racial discrimination in employment.

In *Vanguards,* the District Court found "a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department." 753 F.2d at 483. In *Sheet Metal Workers,* the Second Circuit, in decision after decision, cataloged "long continued and egregious race discrimination." 753 F.2d at 1186; *EEOC* v. *Local 638,* 565 F.2d 31, 36 n.8 (2d Cir. 1977); *EEOC* v. *Local 638,* 532 F.2d 821, 825 (2d Cir. 1976). The City of New York was not the employer guilty of discrimination in *Sheet Metal Workers.* It was recognized, however, that "Local 28 . . . exercises complete control over entry into the sheet metal trades in New York City." 532 F.2d at 824. The City was granted the opportunity to intervene in *Sheet Metal Workers* based, in part, on its status as a regular contracting party with the sheet metal industry. *United States* v. *Local 638,* 347 F. Supp. 164, 166 (S.D.N.Y. 1972). Thus, New York City is not unlike Cleveland, to the extent both municipalities are attempting to eliminate the effects of past racial discrimination in public, or publicly-funded, employment.

The affirmative action plans are consistent with the purposes of the fourteenth amendment and are substantially related to achieving important state interests, including the need (i) to eliminate the disabling effects of racial discrimination in public and publicly-funded employment; (ii) to enlarge the pool of applicants for public employment; (iii) to set a positive example for private employers; and (iv) to preserve racial harmony and maintain public order

1. *The Legislative History of the Fourteenth Amendment and Statutes Promulgated Concurrent Therewith Support Affirmative Action.*

The fourteenth amendment was not intended to be "color blind." This Court has recognized that "color blindness" can be exploited as a pretext to justify continued discrimination. *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 45-46 (1971). As a result, affirmative action will be needed until society satisfies "the century-old promise [of the fourteenth amendment] of equality of economic opportunity." *Fullilove* v. *Klutznick,* 448 U.S. 448, 463 (1980) (Burger, C.J.); *see Regents of the Univ. of Cal.* v. *Bakke,* 438 U.S. 265, 405 (1978) (Blackmun, J.).

The historical context within which the fourteenth amendment was adopted belies any characterization of the amendment as color blind. The amendment was passed during Reconstruction, as part of the national effort to eliminate racial discrimination. Professor Ely has explained:

> [T]he express preoccupation of the framers of the [fourteenth] amendment was with discrimination against Blacks, that is, with making sure that Whites would not, despite the thirteenth amendment, continue to confine Blacks to an inferior position.

Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. Chi. L. Rev. 723, 728 (1974).

The legislative history of several Reconstruction statutes, passed at or around the time Congress proposed the fourteenth amendment, vitiates the notion that the fourteenth amendment prohibits all race-conscious legislation. *See generally* Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment,* 71 Va. L. Rev. 753 (1985). The foremost example is the Freedmen's Bureau Act of 1866 ("1866 Act"), Act of July 16, 1866, Ch. 200,

14 Stat. 173 174-76, passed by Congress less than one month after it approved the fourteenth amendment. *Compare* Cong. Globe, 39th Cong., 1st Sess. 3149 (1866) (House approved Senate changes to fourteenth amendment and voted it into law on June 13, 1866) *with id.* at 3524, 3562 (Conference Report on Freedmen's Bureau Act accepted on July 2 and 3, 1866).

The 1866 Act continued the operations of the Freedmen's Bureau, established one year earlier, to provide special assistance and protection to blacks. Act of March 3, 1865, Ch. 90, 13 Stat. 507, 508. The 1866 Act gave blacks preference, for example, in the acquisition of certain real estate, *id.* at 372 (statement of Sen. Hendricks), and the availability of education, *id.* app. at 71 (statement of Rep. Rousseau). As a result, the legislation was opposed on grounds still echoed today by opponents of the race-conscious plans at issue. *See, e.g.*, Brief for the EEOC at 32-34, *Local 28* v. *EEOC* (advancing the contention of invalidity as to the order establishing tutorials, counseling, and low-interest loans for nonwhites in the apprenticeship program, funded by contempt fines imposed on whites). Critics argued that the 1866 Civil Rights bill unfairly penalized whites for the benefit of blacks, Cong. Globe, 39th Cong., 1st Sess. 402 (statement of Sen. Davis); *id.* app. at 78 (statement of Rep. Chanler), and that the bill would harm blacks by fostering dependence on government, *id.* at 401 (statement of Sen. McDougall), or provoking white resentment, *id.* app. at 69-70 (statement of Rep. Rousseau).

Supporters of the bill, however, recognized that the government had "liberated four million slaves in the South . . . [and to] stop right here and do nothing more . . . would be a cruel mockery." *Id.* at 588 (statement of Rep. Donnelly). They admitted that the 1866 Act was not

color blind. Its racial distinctions were necessary to ameliorate the condition of those who for so long had been victims of the most brutal form of discrimination, *see id.* at 631-32 (statement of Rep. Moulton), and who lacked the political power otherwise to protect themselves, *id.* app. at 75 (statement of Rep. Phelps) (quoted in *Bakke,* 438 U.S. at 397 (Marshall, J., dissenting)). Based on these arguments, the 1866 Act was passed overwhelmingly over the veto of President Andrew Johnson. It is unlikely that the thirty-ninth Congress intended the fourteenth amendment, enacted in June 1866, to invalidate race-conscious remedial action when the same Congress passed the Freedmen's Bureau Act, which is clearly race-conscious, less than one month later.

To accept the fourteenth amendment as "color blind" is tantamount to ignoring the framers' contrary intent* and to condoning the perpetuation of historical discrimination. As Justice Blackmun warned in *Bakke*: "We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy." 438 U.S. at 407. That would be, however, the inevitable result of an interpretation of the equal protection clause which would bar the affirmative action plans at issue.

2. *The Affirmative Action Plans Serve Important State Interests.*

Recognizng that "[i]n order to get beyond racism, we must first take account of race," *Bakke,* 438 U.S. at 407 (Blackmun, J.), a majority of the Justices of this Court, in *Bakke* and in *Fullilove,* have agreed that, in appro-

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* The Attorney General has emphasized the importance of ascertaining the original intent of the framers when interpreting constitutional provisions. *E.g.,* Blumenthal, *The Right's Quest for Law From a Mythical Past,* The Washington Post, November 3, 1985, § C, at 1. No less a standard should be relevant to the fourteenth amendment.

priate circumstances, race-conscious remedies are constitutionally permissible. As to the test under which racial classifications embodied in affirmative action plans should be reviewed, this Court has not settled on a standard. Justices Brennan, White, Marshall and Blackmun would demand that "racial classifications designed to further remedial purposes . . . serve important governmental objectives and must be substantially related to achievement of those objectives." *Bakke,* 438 U.S. at 359. Chief Justice Burger and Justice Powell would require much the same showing, yet with greater inquiry into whether the plan is narrowly tailored. *Fullilove,* 448 U.S. at 480-82 (Burger, C.J.); *id.* at 510-15 (Powell, J.); *Bakke,* 438 U.S. at 305 (Powell, J.). The plans satisfy both tests.

a. Remedying the Effects of Past Discrimination

The plans serve several important governmental interests. The first is that of remedying identified discrimination. *See Fullilove,* 448 U.S. at 472-78 (Burger, C.J., Powell, White, JJ.); *id.* at 515 (Powell, J.); *id.* at 519-21 (Brennan, Marshall, Blackmun, JJ.); *Bakke,* 438 U.S. at 307 (Powell, J.); *id.* at 362 (Brennan, White, Marshall, Blackmun, JJ.). To establish this interest, the governmental body implementing the plan must show that qualified persons have made findings of past discrimination. *Valentine* v. *Smith,* 654 F.2d 503, 508 (8th Cir.), *cert. denied,* 454 U.S. 1124 (1981). While NCBM would contend that the cities of Cleveland and New York are competent to make this judgment, *see, e.g., McDaniel* v. *Barresi,* 402 U.S. 39 (1971), that question need not be reached. Federal courts, which are clearly competent to make such determinations, *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 419-20 (1977); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971), have made repeated findings of racial discrimination in both cases. *Vanguards,* 753 F.2d at 483;

Sheet Metal Workers, 753 F.2d at 1186; 565 F.2d at 36 n.8; 532 F.2d at 825.

b. Enlarging the Pool of Applicants

Affirmative action in the private sector has enlarged the pool of talent from which employers can draw. As a result, there have been increases in productivity and improvement of customer relations. *See* Fisher, *Businessmen Like to Hire By the Numbers,* Fortune, Sept. 16, 1985, at 28. In *Detroit Police Officers' Association* v. *Young,* 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1981), the Sixth Circuit recognized that affirmative action can increase productivity and improve public relations in the public sector as well. The court found that in Detroit the presence of black police officers, who had long been excluded from police work by racial discrimination in hiring, generated public support and cooperation from the city's large black community and contributed to crime prevention. 608 F.2d at 695.

c. Role Model

Municipalities also have an important interest in setting an example for private employers and the community. *See* H.R. Rep. No. 238, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2153. The failure of highly visible government agencies to eliminate vestiges of discrimination in their work forces undermines the government's claim to "represent all the people equally." *Id.* NCBM's members, therefore, are uniquely positioned to assume a leadership role in eradicating the effects of past discrimination in public and private employment.

d. Preserving Public Order

Cities need to preserve racial peace and public order through affirmative action. New York and Cleveland, like

the cities represented by NCBM's members, have the same obligation. As the discussion below demonstrates, lack of equal employment opportunities historically has been a cause of unrest in major urban areas in this country.

(i) Civil Disorder and its Causes

Race riots in America have long had their roots in unemployment and employment discrimination. The New York Draft Riots of July 1863 ". . . had their origin largely in a fear of black labor competition which possessed the city's Irish unskilled workers." Man, *Labor Competition and the New York Draft Riots of 1863,* 36 The Journal of Negro History, October 1951, at 375. A similar fear contributed to several other riots, including those in East St. Louis in 1917 and those in Washington, D.C. and Chicago in 1919. *See* J. Baskin, Urban Racial Violence in the Twentieth Century 22-23 (Glencoe Press, 1969); Gompers, *East St. Louis Riots—Their Causes,* 24 American Federationist, August 1917, at 621-26. The June 1943 riot in Detroit, which left 34 dead and over 1000 injured, originated, at least in part, in racial discrimination suffered by blacks who, along with whites, had gone to Detroit to work in war-related industries. A. Lee & N. Humphrey, Race Riot 92 (New York: Dryden Press, 1943).

The 1960's saw social upheaval in many American cities. The riots in Harlem in the summer of 1964 were traced to black unemployment and the income disparity between black families and white families. *Harlem: Hatred in the Streets,* Newsweek, August 3, 1964, at 16-20. During the summer of 1967, the cities of Newark, Detroit, Milwaukee, Cincinnati and Boston had large-scale riots. Other cities witnessed serious, though smaller, public disorders. Rossi, Berk, Boesel, Edison & Grover, Between White and Black—The Faces of American Institutions in the Ghetto, Supple-

mental Studies for the National Advisory Commission on Civil Disorders 77-79 (Frederick A. Praeger, Pubs. 1968).

In July 1967, President Lyndon Johnson empanelled the National Advisory Commission on Civil Disorders to determine the causes of these riots and how they could be prevented in the future. The National Advisory Commission on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 1 (Mar. 1, 1968) ("Commission Report"). One of the major findings of this Commission was, in the broadest terms, that:

> Unemployment and underemployment are among the most persistent and serious grievances of our disadvantaged minorities. The pervasive effect of these conditions on the racial ghetto is inextricably linked to the problem of civil disorder.

Id. at 231. This finding was based upon the Commission's investigation and over 1200 interviews which it conducted shortly after the disorders. Of all the factors found to be causes of the riots, including police practices, housing, and white attitudes, only unemployment, underemployment and/or employment discrimination were found to be a cause in all twenty cities investigated. *Id.* at 81-83. Significantly, discrimination by unions was a major grievance among respondents in thirteen of the cities surveyed and discrimination by local and state governments was cited as a serious problem by respondents in nine of the cities surveyed. *Id.* at 82.

The causal relationship of unemployment and poverty to urban riots is well documented. Rossi, *supra,* at 95-96; *see* Campbell & Schuman, Racial Attitudes in Fifteen American Cities, Supplemental Studies for the National Advisory Commission on Civil Disorders 48 (Frederick A. Praeger, Pubs. 1968). The Commission found that the

typical rioter, though better educated than the non-rioter, ". . . was more likely to be working in a menial or low status job as an unskilled laborer. If he was employed, he was not working full time and his employment was frequently interrupted by periods of unemployment." Commission Report, *supra,* at 73. The Commission found, on this point, that "[the rioter] feels strongly that he deserves a better job and that he is barred from achieving it, not because of lack of training, ability, or ambition, but because of discrimination by employers." *Id.* A supplemental study to the Commission Report corroborated the accuracy of this profile. The supplemental survey indicated that 71 percent of blacks thought employment discrimination was a problem and 50 percent of blacks viewed discrimination by their city government as prevalent. Campbell & Schuman, *supra,* at 23.

The reality of these perceived employment difficulties was borne out by the statistics. Unemployment rates for blacks were at least double those for whites in all Census Bureau categories in 1967. Commission Report, *supra,* at 124. The Commission noted the low-status and low-paying nature of most jobs held by blacks, finding that black men were more than three times as likely as whites to be in unskilled or service jobs which pay far below average. *Id.*

Recent data compiled by the United States Department of Labor and the Census Bureau indicate that severe problems of unemployment and underemployment among minorities and a racially-based income disparity persist. In September 1985, for example, the unemployment rate for whites was 6.1 percent, as compared with a 15.3 percent unemployment rate among blacks and a 10.4 percent unemployment rate among persons of Hispanic origin. United States Department of Labor, 108 Monthly Labor Review 73 (Nov. 1985). In addition, 36 percent of black workers

are classified by the Census Bureau as blue collar, while only 31 percent of white workers are so classified. Almost 54 percent of whites are classified as white collar, while only 36 percent of blacks are classified as such. Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Consumer Income, ser. P-60, 1981, Table 52, at 184 (1982). Furthermore, the $27,686 mean income for whites families dwarfs the $18,833 mean income for Hispanic families and the $15,432 mean income for black families. Bureau of the Census, U.S. Department of Commerce, Money, Income and Poverty Status of Families and Persons in the United States, ser. P-60, 1984, at 10 (Aug. 1985).

The persistence of minority unemployment and underemployment, a racially-based income disparity, and continued racial discrimination in public employment, as evidenced all too clearly by the findings in the cases at bar, suggest that the Commission's findings regarding the causes of and cures for urban unrest have not lost their high relevance.

(ii) Prevention of Civil Disorder

After determining that employment problems were a major cause of the race riots in 1967, the National Advisory Commission on Civil Disorders made recommendations for national action to prevent similar civil disorders from recurring. The Commission proposed a comprehensive national policy to address the problems of black unemployment and underemployment. Job creation in both the public and private sectors was recommended, as were training programs. The Commission also urged opening of the existing job structure by eliminating arbitrary barriers to employment. Commission Report, *supra,* at 231-36. As part of this national policy, and particularly pertinent to *Sheet Metal Workers,* the Commission recommended:

> Linking enforcement efforts with training and other aids to employers and unions, so that affirmative action to hire and promote may be encouraged in connection with investigation of both individual complaints and charges of broad patterns of discrimination.

Id. at 234. The Commission stated further that "[t]he efforts of the Deparment of Labor to obtain commitments from unions to encourage Negro membership in apprenticeship programs are especially noteworthy and should be intensified." *Id.*

The Commission also recommended job creation for blacks, stating that it strongly recommended " . . . that local governments undertake a concerted effort to provide substantial employment opportunities for ghetto residents." *Id.* at 153. To accomplish this goal, the Commission suggested " . . . that municipal authorities review applicable civil service policies and job standards and take prompt action to remove arbitrary barriers to employment of ghetto residents." *Id.*

New York and Cleveland have endorsed reasonable affirmative action plans as an effective method of stemming some of the historical causes of urban unrest, as outlined by the Commission. This Court has long abstained from interference with the states' traditional "police powers." *See Charles River Bridge* v. *Warren Bridge,* 36 U.S. (11 Pet.) 420 (1837). In addition, local leaders are necessarily more attuned to the needs of their communities than this Court. As a result, this Court should not substitute its judgment for that of local leaders who, after careful study and lengthy negotiation, have decided to implement affirmative actions plans. *See United Steelworkers of America* v. *Weber,* 443 U.S. 193, 208 (1979) (quoting 110 Cong. Rec. 15893

(1964) (remarks of Rep. MacGregor) (problems raised by such controversial issues as preferential treatment in employment "are more properly handled at a governmental level closer to the American people and by communities . . .")); *cf. Bakke,* 438 U.S. at 404 (Blackmun, J.) ("Programs of admission to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this.").

3. *The Affirmative Action Plans Are Reasonable, Narrowly-Tailored and Temporary.*

To eliminate sucessfully the vestiges of past discrimination, employers must be permitted to implement race-conscious hiring and promotion schemes. The Cleveland Fire Department's race-conscious promotion plan in *Vanguards* and the membership goal proposed in *Sheet Metal Workers* are critical in this regard.

The plans are not permanent. They are "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Weber,* 443 U.S. at 208. The *Vanguards* plan will remain in effect only for four years, 753 F.2d at 485, and the *Sheet Metal Workers* plan will remain in effect only until Local 28 ends its contumacious resistance to court orders and permits the elimination of the effects of past discrimination, 753 F.2d at 1187.

Nor will the plans result in the hiring of unqualified persons, risking stigmatization of minority workers. As the Eighth Circuit has recognized: "The absence—not the presence—of affirmative action stigmatizes minority groups, by perpetuating the disadvantages of minorities. . . . Where the applicant is qualified, the risk of stigma is considerably less because presumably the person can perform the task

adequately." *Valentine,* 654 F.2d at 511. The *Vanguards* plan, in fact, allows a reduction of the percentage of promotions reserved for minorities if an insufficient number of "qualified" minorities is available. 753 F.2d at 485.

In addition, the interests of non-minority workers will not be trammelled. Petitioners are white male workers. Such non-minorities are rarely stigmatized by the operation of a racial preference. The *Vanguards* plan, though it arguably diminishes non-minority workers' expectations with respect to promotion, does not bar their advancement. 753 F.2d at 485. During phase one of the plan, all promotions are made by coupling the highest ranking minority and non-minority candidates. Thereafter, Cleveland is to maintain a specific percentage of minority firefighters at each grade level in accordance with future promotions examinations. Even then, if there is an insufficient number of "qualified" minority candidates, the percentage goals can be reduced by the City to the extent necessary for the safe and efficient operation of the Fire Department. 753 F.2d at 485. Similarly, the *Sheet Metal Workers* plan does not unnecessarily affect the rights of any readily ascertainable group of non-minority employees. 753 F.2d at 1187. Thus, there will be no stigmatization of non-minorities who have failed to be hired or promoted.

When affirmative action relief is designed to eliminate the effects of past discrimination, it may impinge on the settled expectations of theoretically innocent parties whether or not the affected non-minorities oppose the remedy. *Fullilove,* 448 U.S. at 484. The non-minorities need not themselves be guilty of discrimination. *Id.* at 484-85. However, it may reasonably be assumed that some or all of those adversely affected by the remedial action previously benefitted from their non-minority status. *Id.* at 485. In any event, as Chief Justice Burger has stated, "[w]hen effectuat-

ing a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.*

B. The Affirmative Action Plans Are Valid Means of Enforcing the Policy and Command of the Thirteenth Amendment and the Civil Rights Statutes Promulgated Thereunder.

This Court has held that the thirteenth amendment and 42 U.S.C. §§ 1981 and 1982 create broad powers in Congress and the federal courts to remedy racial discrimination. The instant cases involve court-ordered remedies that mitigate the effects of long-standing systematic discrimination. Under its thirteenth amendment power to enforce the prohibition against slavery, Congress passed §§ 1981 and 1982 as part of the 1866 Civil Rights Act. Section 1981 prohibits racial discrimination, *inter alia,* in public employment. Section 1982 prohibits racial discrimination in the renting, leasing, and ownership of real property.

This Court recently noted that to understand the purpose and reach of these statutes, "we must be mindful of the 'events and passions of the time' in which the law[s] [were] forged." *General Building Contractors Ass'n* v. *Pennsylvania,* 458 U.S. 375, 386 (1982) (quoting *United States* v. *Price,* 383 U.S. 787, 803 (1966)). In reviewing the historical context, one commentator has noted that "[p]roponents hoped that passage of the thirteenth amendment would eliminate sectional strife and hatred." Buchanon, *The Quest for Freedom: A Legal History of the Thirteenth Amendment,* 12 Houston L. Rev. 1, 11 (1974). NCBM has a similar interest in promoting racial equality and reducing racial tensions in urban areas.

This Court has consistently construed the thirteenth amendment and the 1866 Civil Rights Act as sweeping

prohibitions against racial discrimination, as well as broad grants of remedial power available to prevent or correct the effects of discrimination. The remedies available under Title VII and the Civil Rights Act of 1866 " 'augment each other and are not mutually exclusive.' " *Johnson* v. *Railway Express Agency,* 421 U.S. 454, 459 (1975) (quoting H.R. Rep. No. 238, 92nd Cong., 1st Sess. 19 (1971)); *accord Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47 (1974). The power to fashion effective remedies for racial discrimination under the thirteenth amendment is even broader than such power under the fourteenth amendment. *Civil Rights Cases,* 109 U.S. 3, 23 (1883); *see Clyatt* v. *United States,* 197 U.S. 207, 217 (1905). As declared in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968):

> "By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." *Civil Rights Cases,* 109 U.S. 3, 20. Whether or not the amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*"

Id. at 439 (emphasis in original); *accord Griffin* v. *Breckenridge,* 403 U.S. 88, 105 (1971).

Relief should, within the law, be as drastic as necessary to redress the wrongs resulting from racial discrimination. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 239 (1969).*

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* *See, e.g., McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 287-89 (1976) (invalidating employment discrimination

(footnote continued on following page)

In view of this Court's understanding that "the existence of a statutory right implies the existence of *all* necessary and appropriate remedies," *Sullivan,* 396 U.S. at 239 (emphasis added), the Court should recognize the thirteenth amendment, and the statutes passed pursuant to its enabling power, as an independent basis supporting the affirmative action plans at issue.

C. A Municipality's Authority to Promulgate an Affirmative Action Plan in Public or Publicly-Funded Employment Is Drawn From the Tenth Amendment.

In *National League of Cities* v. *Usery,* 426 U.S. 833, 845 (1976), this Court held that a state's ability to determine the terms and conditions of public employment is an "undoubted attribute of state sovereignty."* That principle supplies guidance here as to municipal decisions regarding terms and conditions of public employment.

This Court has recently proclaimed that "[t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal no matter how unorthodox or unnecessary anyone else—including the judiciary—

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against whites and non-whites under § 1981); *Runyon* v. *McCrary,* 427 U.S. 160, 172-73 (1976) (same); *Sullivan,* 396 U.S. at 238 (invalidating restrictions on the ability of non-whites to own and convey real estate under § 1982); *Jones,* 392 U.S. at 414 n.13 (same).

* *But cf. EEOC* v. *Wyoming,* 460 U.S. 226, 238 n.11 (1983) (". . . we are not to be understood to suggest that *every* state employment decision aimed simply at advancing a generalized interest in efficient management—even the efficient management of traditional state functions—should be considered to be an exercise of an 'undoubted attribute of state sovereignty.' ") (emphasis added).

deems state involvement to be."* *Garcia* v. *San Antonio Metropolitan Transit Authority,* 105 S. Ct. 1005, 1015 (1985). In *Fullilove,* Chief Justice Burger, quoting Justice Brandeis, recognized the significance of this concept in upholding an affirmative action plan:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.

448 U.S. at 491 (quoting *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Chief Justice Burger's quotation of Justice Jackson also bears repeating:

> Each such decision [striking down legislative social experimentation and compromise] takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.

Fullilove, 448 U.S. at 490-91 (quoting R. Jackson, The Struggle for Judicial Supremacy 321 (1941)).

That is the essence of the NCBM's position here. Municipalities, in our federal scheme, should be free to take whatever fair and reasonable steps are necessary to combat the disabling effects caused by their histories of racial discrimination in employment.

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* NCBM does not suggest, of course, that the tenth amendment could save legislation prohibited by the subsequently enacted fourteenth amendment. *Hunter* v. *Underwood,* 105 S. Ct. 1916, 1923 (1985).

POINT II

Municipalities Have an Affirmative Obligation Under the Fourteenth Amendment to Eradicate Lingering Vestiges of Racial Discrimination in Public and Publicly-Funded Employment.

Not only are the affirmative action plans at issue constitutionally permissible, they also may be required. The fourteenth amendment demands more from municipalities than merely ending past official discrimination; they must take affirmative steps to ensure equal opportunity in public and publicly-funded employment. This Court's rulings in the area of education are instructive in defining the duty of a state, or in this case its political subdivision, a municipality, to eliminate the effects of past discrimination in public employment.

In *Green* v. *County School Board,* 391 U.S. 430 (1968), this Court ruled that a school board which has historically operated a dual school system is "clearly charged with [an] *affirmative* duty to take whatever steps might be necessary to convert to a unitary [school] system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38 (emphasis added). Similarly, in *Swann* v. *Charlotte-Mecklenburg Board of Education,* this Court recognized that a local government has the duty to "eliminate from the public schools all vestiges of state-imposed segregation." 402 U.S. at 15; *see Columbus Board of Education* v. *Penick,* 443 U.S. 449, 458-61 (1979); *Milliken* v. *Bradley,* 433 U.S. 267, 281-83 (1977).

A municipality's obligation in public employment should be at least as rigorous as its responsibility in education. A primary justification for promoting equal educational opportunities is the role education plays in "preparing [children] for later professional training," *Brown* v. *Board of*

Education, 347 U.S. 483, 493 (1954), and "provid[ing] the basic tools by which individuals might lead economically productive lives. . . ." *Plyler* v. *Doe,* 457 U.S. 202, 221 (1982). It would be a cruel irony to provide a child with a good education, yet deny him or her the opportunity to make full use of that education in a public service job.*

POINT III

Affirmative Race-Conscious Relief Is Valid Under Title VII.

A. Since a Municipality's Affirmative Obligation Under the Fourteenth Amendment Can Be Met Through an Affirmative Action Plan, and Title VII Was Extended to Cover State and Municipal Employees to Effectuate the Purposes of the Fourteenth Amendment, Such a Plan Cannot Violate Title VII.

An affirmative action plan is, in many circumstances, the most effective method for a municipality to meet its obligation under the fourteenth amendment to root out racial discrimination in public and publicly-funded employment. *See Bakke,* 438 U.S. at 362 (Brennan, White, Marshall, Blackmun, JJ.); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. at 46; *Brooks* v. *Beto,* 366 F.2d 1, 24 (5th Cir. 1966), *cert. denied,* 386 U.S. 975 (1967). Thirty-five years ago, Justice Frankfurter, dissenting in *Dennis* v. *United States,* 339 U.S. 162, 184 (1950), declared that "there is no greater inequality than the equal treatment of

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* When coverage of Title VII was extended to state and local government employees in 1972, it was recognized that "[s]tate and local governments ha[d] failed to fulfill their obligation to assure equal job opportunity." S. Bill No. 2515, 92nd Cong., 2d Sess., *reprinted in* Legislative History of the Equal Employment Opportunity Act of 1972, at 1173 (BNA 1973) (remarks of Sen. Javits) (quoting U.S. Comm'n on Civil Rights, 1969 Report on Equal Opportunity in State and Local Government at 10).

unequals." By 1971, this Court transformed the theory of Justice Frankfurter's dissent into law by holding that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Swann,* 402 U.S. at 46. Race-conscious practices have often been upheld by this Court since *Swann.**

When Title VII was amended in 1972, Pub. L. No. 92-424, 86 Stat. 688, affirmative action was recognized by Congress as a fundamental remedial principle of Title VII. Not only did Congress reject amendments to Title VII which would have precluded the use of race-conscious remedies, 118 Cong. Rec. 4918 (1972), but both the House and Senate reports cited, with approval, judicial decisions upholding affirmative action. *See* S. Rep. No. 415, 92nd Cong., 1st Sess. 8 n.4 (1971); H.R. Rep. No. 238, 92nd Cong., 1st Sess. 5 n.1 (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News at 2141 n.1. In fact, the House report explicitly stated that "[a]ffirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforce-

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* *See Fullilove,* 448 U.S. at 476-78 (upholding race-conscious statute designed to prevent perpetuation of past discrimination in allocation of government contracts to minority-owned businesses); *Bakke,* 438 U.S. at 320 (Powell, J., concurring in judgment) (permitting consideration of racial criteria in medical school admissions to compensate for effects of past discrimination); *United Jewish Orgs.* v. *Carey,* 430 U.S. 144, 161 (1977) (plurality opinion) (upholding race-conscious redistricting plan to eliminate effects of past electoral discrimination); *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747, 763 (1976) (upholding preferential hiring to eradicate effects of past discrimination in employment); *cf. Califano* v. *Webster,* 430 U.S. 313, 318-20 (1977) (per curiam) (upholding sex-based preference in social security to redress long standing disparate treatment of females); *Kahn* v. *Shevin,* 416 U.S. 351, 353-55 (1974) (upholding property tax exemption for widows, but not widowers, because spousal loss historically imposed a disproportionately heavy burden on widows).

ment of Title VII in remedying employment discrimination." *Id.* at 16, 1972 U.S. Code Cong. & Ad. News at 2151.

A municipality, therefore, can meet its positive obligation under the fourteenth amendment to eliminate the effects of past discrimination through an affirmative action plan. Title VII was extended to serve the purposes of the fourteenth amendments. *See Weber,* 443 U.S. at 203; *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 453 n.9 (1976). Thus, to construe Title VII as invalidating the affirmative action plans at issue would be to ignore the purposes that Title VII was designed to achieve.

B. Affirmative, Voluntary Race-Conscious Relief Is Permissible for Public Employers.

In *United Steelworkers of America* v. *Weber,* this Court upheld under Title VII a voluntary race-conscious affirmative action plan. Like the plans here, the plan upheld in *Weber* (1) did not require the discharge of non-minority workers and their replacement with minorities; (2) did not create an absolute bar to the advancement of non-minorities; and (3) was temporary in nature and designed to terminate when the underutilization of minorities had been corrected. 443 U.S. at 208.

In contrast to *Weber, Sheet Metal Workers* did not involve a voluntary affirmative action plan. While the plan is supported by the City and State of New York, among others, it was issued in response to the petitioners' repeated violations of court orders and, while reasonable under the criteria established in *Weber,* can be affirmed by looking solely to the District Court's equitable authority to enforce its own orders.*

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* Federal district courts have inherent power to hold a party in civil contempt upon clear and convincing proof of noncompliance with a court order. *Powell* v. *Ward,* 643 F.2d 924, 931 (2d Cir.),

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A difference between the affirmative action plan approved in *Weber* and that at issue in *Vanguards* is that *Weber* involved a private employer while *Vanguards* involves a public employer. This Court, however, has recognized that when Congress extended Title VII coverage to public employees in 1972, it "expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard* v. *Rawlinson*, 433 U.S. 321, 331 n.14 (1977). The Equal Employment Opportunity Commission recognized "the clear Congressional intent to encourage voluntary affirmative action." 29 C.F.R. § 1618.1 (1985).* Disallowance of the public em-

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cert. denied, 454 U.S. 832 (1981). Moreover, federal district courts have broad discretion to fashion appropriate coercive remedies for noncompliance in the face of civil contempt, based on the nature of the harm and the probable effect of alternative sanctions. *United States* v. *United Mine Workers*, 330 U.S. 258, 303-04 (1947); *N.A. Sales Co.* v. *Chapman Industries Corp.*, 736 F.2d 854, 857 (2d Cir. 1984). It is not necessary to show that petitioners disobeyed the District Court's order willfully. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). Since the purpose is remedial, the petitioners' motives in doing the prohibited act are irrelevant. *Id.*

The petitioners in *Sheet Metal Workers* were found in contempt for repeatedly failing to comply with the two affirmative action plans. The Second Circuit held that there was clear and convincing evidence showing that petitioners "had not been reasonably diligent in attempting to comply with the orders of the court and the administrator." 753 F.2d at 1182. In fact, as the Court of Appeals noted, the petitioners "virtually concede[d] the facts showing those violations," but offered no acceptable arguments to excuse their noncompliance. *Id.* at 1179-81. This Court should not countenance petitioners' contumacious conduct; the integrity of the judicial power should be upheld by affirming the order finding petitioners in contempt.

* EEOC interpretations of Title VII, being those of the agency charged with enforcing the statute, are "entitled to great deference," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975) (quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971)), and should be followed absent "compelling indications that [they are] wrong." *Miller* v. *Youakim*, 440 U.S. 125, 145 n.25 (1979) (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969)).

ployment affirmative action plan in *Vanguards* would frustrate the purposes of Title VII by discouraging the voluntary settlement of employment discrimination claims. *See Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *Bakke*, 438 U.S. at 364 n.8; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 44. Municipalities, even more than private employers, should be able voluntarily to accomplish federal government goals. *See United Jewish Orgs.* v. *Carey*, 430 U.S. at 162-63. State and municipal action is particularly important in employment discrimination because Title VII reserves for states the right to enforce the Civil Rights Act through state agencies. *See* 42 U.S.C. § 2000e-5(b)(c) (1982); 1972 U.S. Code Cong. & Ad. News. at 2154. Indeed, the importance of state and local action in this area grows as the federal government's role diminishes. *See, e.g.*, Pear, *Rights Chief Assails Hiring Goals as Failure*, N.Y. Times, Nov. 1, 1985, § A, at 19, col. 1 (Reagan Administration intends to dismantle affirmative action program for federal contractors).

If the plans were disallowed, public employers would be in an untenable position. On the one hand, public employers would be faced with liability to minorities for past discrimination. *Monell* v. *Department of Social Services*, 436 U.S. 658, 694-95, 701 (1978). On the other, public employers would confront liability to non-minorities for voluntary preferences adopted to ameliorate the effects of past discrimination against minorities. *Weber*, 443 U.S. at 209-10 (Blackmun, J., concurring); *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom. United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979). The EEOC has found "that by enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute

they are seeking to implement." 29 C.F.R. § 1618.1 (1985).

C. The *Stotts* Decision Does Not Prohibit Affirmative Race-Conscious Relief.

This Court did not rewrite Title VII in *Firefighters Local Union No. 1784* v. *Stotts,* 104 S. Ct. 2576 (1984), so as to bar all affirmative action, except victim-specific relief. This Court was careful to note that the discrete issue presented in *Stotts* was the District Court's authority to override a *bona fide* seniority system to require layoffs of more senior whites, in the absence of a showing of intentional discrimination. *Id.* at 2585. *Stotts* is limited to competitive seniority cases involving *bona fide* seniority systems and does not bar all race-conscious prospective relief. *Stotts* is both factually and legally distinguishable from the cases at bar.*

First, *Stotts* did not involve a finding of intentional discrimination. In *Vanguards,* however, the District Court expressly found "a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department." 753 F.2d at 483. Similarly, in *Sheet Metal Workers,* the District Court found that the union had purposefully discriminated against nonwhites in violation of Title VII. 753 F.2d at 1186.

Second, *Stotts* concerned a court-ordered plan, which was imposed over the objections of the City of Memphis. The Court explicitly refused to decide whether the City

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* A number of courts have limited *Stotts* to its facts and narrow holding. *See Deveraux* v. *Geary,* 765 F.2d 268, 271-75 (1st Cir. 1985); *Paradise* v. *Prescott,* 767 F.2d 1514, 1527 (11th Cir. 1985); *Kromnick* v. *School District of Philadelphia,* 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied,* 105 S. Ct. 782 (1985) (*Stotts* limited to orders implicating § 703(h) of Title VII); *Van Aken* v. *Young,* 750 F.2d 43, 44-45 (6th Cir. 1984) (*Stotts* does not affect voluntary plans or affirmative action in which seniority is not at issue).

could have voluntarily adopted such a provision. 104 S. Ct. at 2590. There was no suggestion in *Stotts* that the Court was overruling *Weber's* endorsement of voluntary affirmative action.*

Third, in *Stotts,* this Court explicitly restricted the victim-specific limitation of section 706(g) to "make-whole" relief. 104 S. Ct. at 2589. Section 706(g) does not limit the authority of a court to award prospective, race-conscious relief designed to dismantle prior patterns of job segregation and ensure the prospective integration of an employer's workforce by enhancing future employment opportunities for minorities. The last sentence of section 706(g), which provides that a court cannot compel an employer to reinstate, hire, promote or give back pay to any individual if the employer has taken action against that individual for a non-discriminatory reason, does not address the broader issue of prospective relief.

Finally, *Stotts* was in essence a case about the scope of a District Court's power to amend a consent decree over the objections of one of the parties. 104 S. Ct. at 2594-95 (Stevens, J., concurring in the judgment). The entire discussion in *Stotts* centers on the District Court's improper award of "make-whole" relief. Unlike the injunction in

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* On January 7 and 8, 1982, the District Court held an evidentiary hearing specifically to consider intervenor Local 93's objections to the 1981 proposed consent decree. At a second evidentiary hearing held on April 27, 1982, the District Court indicated that the intervenor's primary objection to the decree was its use of racial "quotas." 753 F.2d at 482. Although the proposed consent decree ultimately adopted by the District Court was not agreed to by Local 93, its objection was the same as that made at the April 1982 hearing: the use of racial goals, which it characterized as "quotas." *Id.* at 483. Local 93 has had its day in court. The issue is not whether every affected party consented to the consent decree, but rather, as was true here, whether the consent decree is constitutionally and statutorily authorized in a context where every party was heard or had an opportunity to be heard.

Stotts, which had the effect of shifting the impact of the layoffs to other identifiable individuals, the goals at issue in the two cases at bar do not have the effect of depriving any particular individual of his job or even of an employment opportunity.

An expansive interpretation of *Stotts* has no basis in the text of the opinion and would be contrary to Title VII's legislative history, which reflects an endorsement of affirmative action.

CONCLUSION

For the foregoing reasons, the National Conference of Black Mayors, as *amicus curiae,* respectfully prays that the judgments of the Second and Sixth Circuits be affirmed.

Dated: January 2, 1986

Respectfully submitted,

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APPENDIX

APPENDIX OF RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment XIII:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

United States Constitution, Amendment XIV, Sections 1 and 5:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2. [§ 703]: Unlawful Employment Practices—Employer Practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. 2000e-5(g) [§ 706(g)]:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the

unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 1981: Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.