No. 84-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKER'S INTERNATIONAL ASSOCIATION, AND LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Petitioners

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

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

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~~MOTIONS PURSUANT TO RULES 38.7 AND 42 AND~~ BRIEF AMICUS CURIAE OF NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS

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MOTIONS PURSUANT TO RULES 38.7 AND 42

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1. Motion Pursuant to Rule 38.7

The "Brief for the Equal Employment Opportunity Commission", filed herein ostensibly renounces the role of respondent (EEOC Br. p. 10). It is a thinly disguised vehicle for total demolition of affirmative action goals, a carefully balanced remedy crafted by the federal courts under the guidance of decisions of this Court.

Consider the fact that the United States sought and obtained in the Court of Appeals the very relief in this case that it now calls violative of Title VII and the Constitution. Consider the fact that another litigant changing position from the Court of Appeals to the Supreme Court would be chastised by the mildest version of judi-

cial estoppel.* Consider that the Solicitor General has burdened this Court and the litigants and amici in this case with the responsibility of dealing with briefs in three other cases that he has filed. While no one would discourage the Solicitor General's right to confess error, the error he should confess herein is the multiplication of briefs and the 180° change of position of the EEOC between the Court of Appeals and the Supreme Court with respect to the issue of central importance in this case.

The Solicitor General now asks for more time to explain the new EEOC position. Amicus understands his difficulties. But his change of position in this case puts the burden of defending the historic position of the EEOC and the United States with respect to affirmative action goals upon two ancillary respondents, with special responsibilities of their own, and upon amici.

Mindful of the understandable and almost exception-proof position of this Court against permitting oral argument by an amicus curiae, movant North Carolina Association of Black Lawyers, moves this Court to allow 15 minutes of oral argument by its counsel of record in this case.

The multiplication of briefs presents no small burden. Instead of the 50 pages allocated to a respondent's brief by Rule 54.3, the Government briefs served on the remaining respondents herein total 125 (not including 69 pages of Appendix in *Orr v. Turner*, No. 85-177). In

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* See, for example, Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982): "Unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist. . . . Judicial estoppel is intended to protect the integrity of the judicial process. . . . Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. . . . The doctrine of judicial estoppel applies to a party who has successfully asserted a position in a prior proceeding; he is estopped from asserting an inconsistent position in a subsequent proceeding." (690 F.2d at 598-599).

the course of this avalanche, in reversing its position from the Court of Appeals the Government cites 125 separate cases (148 counting duplications).

More important still, on an issue of crucial national importance the judgment below which the EEOC abandons in this Court is left an orphan. Amicus greatly respects the litigating prowess of the Attorney General of the State of New York, and of the Corporation Counsel of the City of New York, the remaining respondents. But they have governmental responsibilities of their own which they must take into account. The judgment below needs an independent and unfettered advocate, especially with respect to the vital question raised as to Section 706(g) of Title VII.

2. Motions Pursuant to Rule 42

(1) Should the Court not grant amicus' motion pursuant to Rule 38.7, amicus respectfully moves this Court to appoint a special counsel or amicus curiae to defend the judgment granted to the EEOC in the Court of Appeals, with particular reference to the availability of race-conscious affirmative action goals under Section 706(g). The same grounds led this Court to appoint a special counsel in *Bob Jones v. United States*, 456 U.S. 922 (1982), 461 U.S. 576 (1983) "to brief and argue . . . as *amicus curiae* in support of the judgments below" (456 U.S. at 922), when the Department of Justice in a comparable switch declined to defend its judgment won in the Court of Appeals. See also *United States* v. *Lovett*, 328 U.S. 303 (1946). The arguments in support of amicus' above motion pursuant to Rule 38.7 are enlisted in support of this alternative motion. The *Bob Jones* precedent should be operative in these "most extraordinary circumstances." (Cf. Rule 38.7).

(2) Amicus, North Carolina Association of Black Lawyers, further respectfully moves this Court pursuant to Rule 42.

After this brief had been substantially completed, movant's counsel of record had the opportunity to read the brief which the EEOC prepared to be filed in *Williams v. City of New Orleans*, 729 F.2d 1573 (5th Cir. 1984, en banc). As to that brief and the circumstances surrounding the Department of Justice's decision not to present it to the Court of Appeals, see the opinion of Judge Wisdom, joined by five other judges, concurring in part and dissenting in part (729 F.2d at 1570-1584, with particular reference to 729 F.2d at 1572n5). That unsubmitted EEOC brief's review of the legislative history of Section 706(g), and of the decisions of this Court relating thereto, is a model of dispassionate legal research, in striking contrast to the revisionist interpretations presented for the EEOC herein. Accordingly, North Carolina Association of Black Lawyers respectfully further moves this Court to direct counsel for the EEOC herein to file in this court, and serve on parties and amici, copies of the EEOC brief that was prepared for the en banc hearing in *Williams v. City of New Orleans*. The objective of this motion is to afford this Court the litigating assistance of counsel to which it is entitled with respect to an issue of crucial national significance, and to partially correct the litigating imbalance created by the EEOC's renouncement of its role of respondent in this Court, and its multiplication of briefs herein.

In view of the above, movant, North Carolina Association of Black Lawyers, respectfully moves this Court that:

1. Amicus' North Carolina Association of Black Lawyers' counsel of record be granted 15 minutes of oral argument;

2. Alternatively, that this Court appoint counsel to defend the judgment below, with particular reference to the question whether race-conscious affirm-

ative goals are "appropriate" relief for identified race discrimination, under Section 706(g) of Title VII of the Civil Rights Act of 1964, as amended, and under the equal protection component of the 5th Amendment of the U.S. Constitution; and that

3. Counsel for the EEOC herein be directed to file in this Court, and serve on parties and amici herein, copies of the EEOC's unsubmitted en banc brief in *Williams v. City of New Orleans*, 729 F.2d 1573 (5th Cir. 1984).

Respectfully submitted,

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North Carolina Association
of Black Lawyers

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BRIEF AMICUS CURIAE OF NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS

INTEREST OF AMICUS CURIAE

The attorneys for petitioners, the attorneys for respondents, and the attorney for the Equal Employment Opportunity Commission, an erstwhile respondent, have consented to the filing of this brief of the North Carolina Association of Black Lawyers in support of the position of the respondents under Rule 36.

Amicus, North Carolina Association for Black Lawyers, is an unincorporated professional association composed primarily of black and other minority lawyers and law teachers, located chiefly in the State of North Carolina.

The member attorneys of the North Carolina Association of Black Lawyers have been in the forefront of the legal and social struggle of the past four decades for civil rights in North Carolina, particularly working against racial discrimination and the polarization of the work force along racial lines. They had been encouraged

by the slow but unmistakable easing of racial tensions, and by what seemed to be the long sought beginnings of an era in which men and women would replace decades of racial bigotry and distrust with mutual respect. Yet 20 years after the enactment of the Civil Rights Act of 1964 they see in North Carolina, as elsewhere, the continued racial polarization of the work force, the continued prominence of black workers in lower-paying job categories and in unemployment statistics.

Our particular interest in filing an amicus brief in this case is to persuade the Supreme Court to affirm the judgment below, particularly insofar as it enforces judicially ordered race-conscious goals and time tables as a temporary remedy for identified, past, egregious racial discrimination that cannot be remedied by lesser means.

The North Carolina Association of Black Lawyers and its members have had, over the years, a close association with North Carolina Central University School of Law, a state law school located in Durham, North Carolina. The plurality of members of the Association are graduates of that Law School, as are the preponderance of the black lawyers practicing in North Carolina. In its inception an all-black institution, North Carolina Central University Law School has been for years the most integrated professional school in the United States, with approximately 55% black and 45% white students working side by side. This institution's interracial collaboration in student body, faculty and alumni, presents a model for all who aspire to a racially healthy and collaborative North Carolina and United States.

Unfortunately, comparable depolarization is not evident in our state work force, and there is no realistic reason to expect that there can be, without the possibility of judicially enforced affirmative relief being directed to job quarters that are both laggard and recalcitrant. We do not suggest that Title VII of the Civil Rights Act of 1964 dictates "racial balance" in employment. Of course, it does not. But Congress did specifically legis-

late in 1964 as a remedy for proven discrimination "such affirmative action as may be appropriate" (Sec. 707(g)), without any limitation to "specific victims". This Court has found race-conscious affirmative relief "appropriate", when measured by the extent of the constitutional violation, as a remedy for racial discrimination in school desegregation and voting rights setting. With respect to employment and unemployment, the same question arises: What kind of country are we aiming to be? Surely not a nation enmeshed in permanent racial polarization.

We add our lawyers' voices here to the cause of racial depolarization and Dr. King's dream by urging that in sensitive judicial hands, Title VII is equal to its primary task, which has already been identified by the Court: "to open employment opportunities for Negroes in occupations which have been traditionally closed to them" (*United Steelworkers v. Weber*, 443 U.S. 193 (1979)).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus, North Carolina Association of Black Lawyers, focuses its argument for affirmance of the judgment below upon a single critical issue: the legality, under Section 706(g) of Title VII, and the constitutionality, under the equal protection component of the 5th Amendment, of the race-conscious membership goal decreed by the district court and affirmed by the Court of Appeals.

Amicus argues that the sole statutory question before this Court as to the affirmative goal remedy is whether such relief is "appropriate" under Section 706(g) of Title VII. In Section 706(g) Congress delegated to the federal courts the power and responsibility of determining "appropriate" equitable relief for violations of Title VII, as set forth in Sections 703-704. (I). An unbroken procession of previous decisions of this Court confirm that there is no statutory bar in Title VII to judicially prescribed affirmative goal relief. (II)

Amicus further argues that affirmative action goals, such as the membership goal prescribed by the courts below, constitute "appropriate" relief under Section 706 (g). (III). Objections of petitioners and the EEOC to the remedy decreed by the courts below ignore the statutory language of Title VII, misread the legislative history, and contravene this Court's consistent interpretation in its decisions of the parameters of Section 706(g). Particularly misleading is the petitioners' and EEOC's attempt to confine 706(g) remedies to "make whole" relief. (IV). Finally, amicus argues that this Court's constitutional decisions bearing on race-conscious affirmative remedies reinforce the judgment below. (V).

For these reasons, amicus respectfully asks this Court to affirm the judgment of the Court of Appeals, with respect to the race-conscious membership goal decreed by the district court as partial remedy for egregious past racial discrimination by defendant union.

The main thrust of amicus' argument is that, contrary to petitioners' and the Government's contentions, Title VII contains no bar to a race-conscious affirmative goal remedy. On the contrary, Section 706(g)'s express provision for "affirmative" relief fully supports affirmance of the judgment below with respect to the membership goal, in light of past decisions of this Court.

Petitioners argue that the comments of legislators which it cites support a construction of Title VII which bars race-conscious affirmative remedial goals for "egregious" past racial discrimination. This misses the mark, because the cited legislator comments concern the violation sections of the statute (Sec. 703-704), and not the remedial section (Sec. 706(g)). Beyond this, petitioner simply states that *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984) (*Stotts*) foreclosed all race-conscious remedial relief to individuals who were not shown to be specific victims of the identified discrimination. Amicus argues that this conclusion is demonstrably wrong.

The Government, in its four briefs * served upon parties and amici herein, initially agrees with amicus' position that resolution of the goal issue depends solely on this Court's construction of Section 706(g), and not upon construction of the violation sections (Sec. 703-704). But, in practice, when convenient, the Government departs from its previously avowed position. The Government, like petitioner, argues that this Court has already decided, in *Stotts*, that race-conscious affirmative remedial goals violate Section 706(g) because they benefit individuals who are not shown to be specific victims of the identified "egregious" racial discrimination. On the way to that conclusion the Government's briefs sow many errors and confusions that amicus believes should be identified, and corrected, at the outset, to provide the setting for amicus' argument in this brief. These errors and confusions may be summarized here under three headings:

1. The Government confuses "part" with "whole" in discussing the impact of *Stotts* upon Section 706(g)

In her opinion for the Court in *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982), Justice O'Connor carefully noted that two chief statutory purposes guide the Court in interpreting Section 706(g)—(1) the group or class "remove barrier" relief (within which injunctions and affirmative goals fit), and (2) "make whole" individual relief. In contrast, the Government argues that *Stotts*, in dealing expressly with a "make whole" contention, served to wipe out the possibility of any affirmative group relief to "remove barriers" grounded in race from individuals seeking employment or membership in a union or employment program, unless the individuals had been previously proven to be "victims" of the identified violation of Title VII. Clearly, *Stotts* dealt solely

* Amicus cites herein the principal Government brief in this case as "G. Br. #1", the Government brief from *Vanguards* as "G. Br. #2", the Government brief from *Wygant* as "G. Br. #3" and the Government brief from *Orr v. Turner* as "G. Br. #4".

with "Title VII's secondary, fallback purpose . . . to compensate the victims for their injuries. . . ." (*Ford*, 458 U.S. at 230), and specifically with the special restriction on "make whole" relief where seniority rights protected by Section 703(h) are concerned. *Stotts*, in fact, had no concern with the question whether race-conscious affirmative goals might be "appropriate" in light of "Title VII's primary goal . . ., the goal of ending discrimination." (*Ford*, 458 U.S. at 230). That precise question, in the context of a judicial remedy under Section 706(g), is freshly before the Court in this case.

2. The Government assumes *a priori*, without any authority and against this Court's decisions, that Section 706(g)'s express language excludes all race-conscious affirmative goal relief

This Government assumption is indeed odd in view of the breadth of Congress' language in Section 706(g): "the court may enjoin the respondent . . . and order such affirmative action as may be appropriate, which may include, but is not limited to . . . hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." The Government's tortured arguments around this language are all gravely flawed, and leave its conclusion as simply an *a priori* assumption.

In a curious switch from its earlier correct contention that Section 706(g) must be interpreted independently of Sections 703-704 (the violation sections), the Government argues that Section 703 negates the availability of race-conscious affirmative goals.

After *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) had expressly left the question open, *Weber*, 443 U.S. 193 (1979), held that Section 703(a)-(d) did not bar all race-conscious relief. And Section 703(j) (even if germane with respect to Section 706(g)) by its terms refers only to "preferential treatment . . . on account of an imbalance", and not to a remedy for "egregious" racial discrimination. Note that the

Government identifies "the very egregiousness of petitioners' violations" as follows: "The original finding of liability in 1975 was 'based on direct and overwhelming evidence of purposeful racial discrimination over a period of many years' . . . . And both before and after this finding petitioners continued to build a record of resistance to other state and federal court orders designed to ensure non-discriminatory membership procedures." (G.Br. #1, p.34).

The Government argues (G.Br. #2, p.8) that the "plain meaning" of the last sentence of Section 706(g) bars a race-conscious affirmative goal remedy.

This sentence was clearly directed to foreclose individual "make whole" relief in the absence of a proof of a violation (of Section 703-704) against him—"discrimination on account of race, color, religion, sex, or national origin. . . ." Once again, it has no reference to "primary purpose" affirmative relief that is otherwise "appropriate". In its brief in *Local 28*, the Government, oddly, seems to back off from reliance on this last sentence of Section 706(g) as an independent argument. In fact the Government brief in *Local 28* says much on this with which amicus can agree:

> The final sentence of Section 706(g) precludes a court only from awarding relief such as employment, union membership, or other preferences to non-victims on the basis of race, sex, national origin, or religion. It does not otherwise limit a court's 'broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of [Title VII] eliminate their discriminatory practices and the effects therefrom' (*Teamsters v. United States*, 431 U.S. 324, 361 n.47 (1977)). Affirmative action that corrects and prevents discriminatory practices without itself requiring discrimination is entirely consistent with the language and policy of Section 706(g). (G. Br. #1, p. 30).

Of course, here again, the Government indulges in the same bootstrap assumption referred to above, that race-

conscious affirmative goal relief *is* "discrimination" (as defined in Section 703). *Weber* squarely held to the contrary. We should, however, applaud the Government's ensuing resonance of amicus' basic contention: "We believe that those who violate Title VII should be made to take, specific, affirmative steps to correct their discriminatory practices and ensure equal opportunity in the future." (G.Br. #1, p. 31) If shorn of the Government's philosophical *a priori* * (unsupported in the statute or the cases) amicus could concur in this ringing testimony to the breadth of the "affirmative action" clause of Section 706(g).

3. The Government makes an irrational leap in projecting the limited "victim" requirements in *Franks, Teamsters* and *Stotts*—all "make whole" cases with a "seniority" ingredient—to race-conscious affirmative goals judicially decreed in "egregious" cases in order to further "Title VII's primary goal—the goal of ending discrimination" (*Ford,* 458 U.S. at 230)

Given that there is no statutory or decisional bar to affirmative goal relief, as such, the question is open in this Court whether judicially decreed race-conscious affirmative goal relief is "such affirmative action as may be appropriate . . ." under Section 706(g). The Government makes an irrational leap from the limited requirements as to "victims" in the "make whole", "seniority" context of *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) (*Franks*), *Teamsters* and *Stotts* to race-conscious affirmative goals decreed to further "Title VII's primary goal . . . the goal of ending discrimination." (*Ford,* 458 U.S. at 230).

(1) The Government overstates the magnitude of the "victim" requirement in *Franks* and *Teamsters.* When an individual applicant seeks to recover the "make whole"

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* For a contrary philosophical and "policy" view, see Broderick, *Affirmative Action After Stotts: The U.S. Supreme Court's 1985 Term,* 15 N.C.C.U. L. JOUR. 145 (1985) at pp. 188-189.

relief of competitive seniority in Phase 2, after class or group findings of discrimination in Phase 1, the burden is on the *employer* to prove that the individual is *not* a victim. Indeed, *Teamsters* extended this burden of proof on employers to non-applicants who have been deterred from applying. (2) The Court explained its requirements for non-applicants showing deterrence on the grounds that, if successful, they would receive competitive seniority at the expense of other "bona fide" seniority employees. In this context, one understands *Stotts*. (3) The reasons for requiring a limited "victim" approach in the "make whole" seniority cases has no applicability to affirmative goal relief. Those hired, or admitted to membership, under an affirmative goal remedy have *no* seniority over those otherwise senior because of a bona fide seniority system. They have *no* quasi-entitlement to selection or admission (as would "make whole" beneficiaries). The employer in the affirmative goal situation has full control over individual selection as to qualifications, etc.; his only responsibility is to make a reasonable overall effort to achieve the recommended goal. Assuming that a particular race-conscious affirmative goal meets this Court's requirements as to permissible affirmative action programs, there is no benefit in imposing even limited "victim" analysis; and the cost and delays of importing a Phase 2 proceeding here could not, therefore, be justified.

Amicus therefore rejects as insubstantial these Government arguments that race-conscious affirmative action goals per se, are not available or not "appropriate" to "nonvictims" under Section 706(g). Amicus recognizes that race-conscious affirmative goals must comply with the limiting factors identified by this Court (Cf. *Weber*). Since the membership goal here decreed by the district court was properly approved as not clearly erroneous by the Court of Appeals, amicus argues that the judgment below should be affirmed in that regard.

ARGUMENT

I. IN SECTION 706(g), CONGRESS DELEGATED TO THE FEDERAL COURTS PLENARY AUTHORITY AND RESPONSIBILITY OF DETERMINING "APPROPRIATE" EQUITABLE RELIEF FOR TITLE VII VIOLATIONS (SECTIONS 703-704)

The sole issue in this case with respect to the affirmative goal remedy is whether such relief is consistent with the language of Section 706(g), the remedial section of Title VII. This is conceded in the EEOC's principal brief in this case. (G. Br. #1, 11).

The statutory language is compelling: The original 1964 statute read:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . , the court may enjoin the respondent . . . and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . ." (Sec. 706(g)).

Thus Section 706(g), as enacted in 1964, by its terms delegated to the federal courts the task of devising equitable remedies for an "unlawful employment practice", that is, a violation of Section 703 or 704. The brief legislative history of the section reinforces the clear statutory language. The sole predicate for relief is clearly stated: a finding that "the respondent has intentionally engaged in the alleged practice. This alone is a condition for the granting of relief." (110 Cong. Rec. 11724 (1964)). The remedy of damages was withheld, but devising the scope of equitable relief was fully delegated to the courts in Section 706(g).

This conclusion is reinforced by a late change in that section shortly before the crucial votes in the Senate. What had previously been a mandatory requirement of affirmative relief upon a judicial finding of violation was modified to the language that was ultimately enacted as Section 706(g). Senator Dirksen explained the change as follows:

> The mandatory requirement for affirmative action, including reinstatement and back pay, upon a finding of a violation has been revised to read: "may . . . order such affirmative action as may be appropriate, which may include reinstatement and backpay." (110 Cong. Rec. 12819 (1964)).

Senator Dirksen also called attention to a "new section (Sec. 707) establishing a cause of action based on a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title [VII], provided that the pattern or practice is of such a nature and is intended to deny the full exercise of those rights." (110 Cong. Rec. 12819 (1964)). This, of course, is the type action brought in *Local 28*, the authorization having been extended from the Attorney General to the EEOC by the 1972 amendments.

Section 706(g) thus by its terms clearly delegates to the court the task of designing not just individual "make whole" relief, but such "affirmative action as may be appropriate". Petitioner and the EEOC would, without justification, have the Court read into this statutory language and history an express and total bar to affirmative goal relief even after Congress' sole condition has been satisfied, the finding that "the respondent [petitioner here] has intentionally engaged in the alleged practice. . . ." (110 Cong. Rec. 12819 (1964)).

This almost plenary delegation of the remedy-defining prerogative to the courts derives from the 1964 Act itself. The 1972 Amendments did add two phrases to the language of Section 706(g): Instead of "such affirmative action as may be appropriate which may include reinstatement or hiring of employees, with or without back pay", the 1972 Amendments gave us the present statutory language": "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, . . . *or any other equitable relief as the court deems appropriate.*" (The 1972 Amendments also added a two year *limitation* on back pay.) While the position is tenable that this new

language did not increase the remedial power of the courts, the 1972 amendments certainly confirm amicus' argument that the original 1964 language of Section 706(g) constituted a plenary delegation of equitable remedial authority to the courts. When Congress wanted to limit its delegation it was well aware (both in 1964 and 1972) how to do so, e.g. the 1964 exclusion of a damages remedy and the express 1972 limitation with respect to back pay.

As amicus argues in the next section, this Court in its decisions has been constant in giving effect to the Congressional design of broad equitable relief, and has rooted its application of these remedial powers in two distinct statutory purposes of Title VII.

II. PREVIOUS DECISIONS OF THIS COURT CONFIRM THAT THERE IS NO STATUTORY BAR IN TITLE VII TO JUDICIALLY PRESCRIBED AFFIRMATIVE GOAL RELIEF

Decisions of this Court bearing upon the validity under Section 706(g) of Title VII of race-conscious, affirmative goal relief for proven racial discrimination may conveniently be discussed under four headings: (1) First, and foremost, the *general* remedial decisions in which this Court interpreted Section 706(g) in light of what the Court called the two major purposes of Title VII. (2) The *seniority* remedial decisions, in which the Court at once gave its most expansive reading to Section 706(g), and yet specified remedial limitations upon its equitable relief powers deriving from the seniority-protective Section 703(h). (3) The affirmative action decisions, both the constitutional decisions and *Weber*, the single Title VII affirmative action decision before *Stotts*. (4) The final heading represents the coalescence of the general remedial decisions, the seniority remedial decisions, and the affirmative action decisions—in *Stotts*.

Amicus contends that, properly interrelated, these decisional landmarks establish conclusively that there is no statutory bar in Title VII to judicially prescribed affirma-

tive goal relief as a remedy for identified past racial discrimination, an unlawful employment practice under Section 703 (Section 703(c) in this case.)

A. The General Remedial Decisions (*Griggs*, *Albemarle*, and *Franks*): The Two Chief Purposes of Title VII

Griggs v. Duke Power Co., 401 U.S. 424 (1971) was a "violation", rather than a "remedy" case, and we note it here only for the Court's focus on "The objective of Congress in the enactment of Title VII" (401 U.S. at 429): "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees." (401 U.S. at 430). Of course, "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." (401 U.S. at 429-430). "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." (401 U.S. at 431). This twice-stated reference to removal of barriers "when barriers operate invidiously . . ." is the Court's first identification of the "primary objective" of Title VII.

Four years later, came *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), which was expressly a "remedy" decision, directly involving interpretation of Section 706(g). In question was whether a district court "has virtually unfettered discretion to award or deny back pay" (422 U.S. at 414). The statutory language of Section 706(g) specified back pay as a remedy, but it said that the Court "may" award back pay, not that it "must". In *Albemarle* this Court reversed the district court for abuse of discretion for denying back pay after a proven violation. The ground given by the district court was that the defendant employer had not been in "bad faith". In holding that presumptively back pay would be available for a proven violation, the Supreme Court undertook its most complete review of the purposes of Title VII.

The remedial section (Section 706(g), held the Court, must "be measured against the purposes which inform Title VII". Justice Stewart's opinion then referred to the *Griggs* "removal of barriers" passage, and noted that back pay "has obvious connection" with this "primary objective." "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history' . . ." (422 U.S. at 417-418). Only after this dependence on the "primary objective" to measure the remedial situation, did the Court identify a second objective of Title VII which led to the same conclusion:

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful unemployment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. (422 U.S. at 418)

The Court then cited other precedents concerning "the historic purpose of Equity to 'secure complete justice'" [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" (422 U.S. at 418). The Court found "clear meaning" for the terms "complete justice" and "necessary relief" where proven racial discrimination was concerned: the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." (422 U.S. at 418).

Albemarle thus added a second major Congressional objective to the Court's perspective on 706(g). There was the "removal of barriers" objective of *Griggs*, still given first place. But there was the newly recognized "make

whole" objective of Section 706(g). After reviewing the legislative history of 706(g) to reaffirm these points, the opinion of the Court continued:

> As this makes clear, Congress' purpose in vesting a variety of 'discretionary' powers in the courts was . . . to make possible the 'fashion[ing] [of] the most complete relief possible,'. . .
>
> It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. (405 U.S. at 421).

A landmark in this Court's jurisprudence of Section 706(g), *Albemarle* gives the lie to suggestions of petitioner and the EEOC that only "make whole" relief is available under the statutory scheme.

Franks v. Bowman Transportation Co., 424 U.S. 753 (1975), the final case to be noted under this heading, properly belongs in this discussion of *general* remedial cases, although it concerns seniority (and will be returned to under the next grouping).

Like *Albemarle*, *Franks* is most properly a remedial case. In fact, it constitutes a direct and immediate extension of *Albemarle*. *Franks* took careful note of the fact that Congress had made an exception for bona fide seniority systems in its violation section (Section 703(h)). Much as in *Local 28*, in *Franks* there was an express finding of racial discrimination after full trial. Much as in *Local 28*, defendant employer pointed to an exception (703(h)) in the violation section (Section 703) as limiting the relief which could be given under 706(g). After reviewing the legislative history in *Franks*, the Court concluded that "the thrust of the section (703(h)) is directed toward defining what is and what is not an illegal discriminatory practice. . . There is no indication in the legislative materials that Section 703(h) was intended to modify or restrict relief otherwise appropriate once an

illegal discriminatory practice occurring after the effective date of the Act is proved—as in the instant case—a discriminatory refusal to hire." (424 U.S. at 745-746).

This decisiveness of *Franks* in sharply separating the violation section of Title VII (Section 703) from the remedy section (Section 706(g)) should have warned off petitioner and the EEOC from their attempted replay here of this losing argument of the employer in *Franks*. Yet, in almost identical fashion, petitioner herein, and the EEOC, cite various legislators' reassurances that an employer or union would not be required to establish racial balance to avoid being in violation of Section 703.

Retroactive, competitive, rightful place seniority, then, is ordinarily (as with back pay) an ingredient of "make whole" relief under 706(g). The prospective beneficiaries of the *Franks* decision were the unnamed black members of the class, which as a class of rejected applicants, had successfully proven the employer's racial discrimination in making desirable job transfers. What remained for these individual black class members to do in order to obtain competitive seniority? Not a great deal. The Court placed no burden on these unnamed applicants to prove that they "have been actual victims of (the proven) racial discrimination." On the contrary, since "petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents [employer and union] . . . the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination." (424 U.S. at 772).

B. The Seniority Remedial Decisions (*Franks* and *Teamsters*): The Bite of Class or Group Relief in Face of Proven Racial Discrimination

Like *Franks*, *Teamsters v. United States*, 431 U.S. 324 (1977) (*Teamsters*) is both a general remedial decision and a seniority decision. As a general remedial decision it reaffirms that a remedy may be "appropriate" in light of Title VII's "primary purpose" to "remove barriers

that have operated in the past to favor an identifiable group of white employees over other employees" (*Griggs*, 401 U.S. at at 429-430), or in light of Title VII's purpose of "making persons whole for injuries suffered through past discrimination" (*Albemarle*, 422 U.S. at 421, *Franks*, 424 U.S. at 771).

Admittedly, when an individual claims a quasi-entitlement, say to competitive, rightful place seniority (as in *Franks*), under the "make whole" rationale, he cannot recover if there is proof that he is not a victim of the proven discrimination. However, the class or group aspect of the Section 706(g) remedy which is keyed to the "remove barriers" purpose, has considerable force even with respect to the prospect of an individual receiving competitive seniority (in Phase 2) after proof of a pattern or practice of racial discrimination against the group or class in Phase 1. For once the group or class has prevailed in Phase 1, the burden of proof rests upon the *employer* to show that a rejected applicant member of the group or class was not a victim of the identified discrimination. And *Teamsters* (going beyond *Franks*) allows that burden on the employer to disprove "victimness" even with respect to non-applicants who show that they were deterred from applying and are qualified. The *Franks-Teamsters* recognition of this burden of proof on such employers constitutes a general remedial decision as to the force of the group or class "remove barriers" purpose of Title VII.

As a seniority decision *Teamsters* affirms the force of Section 703(h) (bona fide seniority system), in certain cases, as negating relief in Phase 2 to an individual claiming "make whole" relief who is shown *not* to have been a victim of the racial discrimination identified in Phase 1. In fact, as to such an individual, Section 703 (h) negates even a violation. Another aspect of *Teamsters* directly derives from the protection accorded a bona fide seniority system. Under *Franks* once post-Act class race discrimination is proven in Phase 1, an applicant member of that class may be given competitive seniority

displacing an employee whose seniority is otherwise protected by Section 703(h)). *Teamsters* in extending the carryover to Phase 2 of a presumption in favor of a deterred non-applicant, specified that the non-applicant (potential victim) must evidence more than present willingness to take the job, and qualifications. The reason given by the Court was that a successful nonapplicant would acquire the competitive, rightful place seniority status. In a protracted Phase 2 proceeding, the court granted that the non-applicant would have a "not always easy burden" (431 U.S. at 368), but added that a district court may find "credible and convincing" as little as "an employee's informal inquiry, expression of interest, or even unexpressed desire . . ." *Teamsters*, 431 U.S. at 371 n.58.

So *Teamsters*, like *Franks*, strongly supports this Court's recognition of the appropriateness and force of class or group ("remove barriers," *Griggs*, 401 U.S. at 429-430) relief under Section 706(g). Where such relief has been limited, the explanation lies in the Court's strong reliance on the "bona fide seniority system" exception of Section 703(h).

Petitioner and the EEOC seek to avoid this obvious consequence by suggesting against the plain language of 706(g) and the ruling decisions of this Court, that *only* "make whole" relief is available under Section 706(g).

C. The Availability and Limits of Race-Conscious Affirmative Goal Relief: The Affirmative Action Decisions (*Bakke, Weber* and *Fullilove*)

While the Courts of Appeal have without exception * viewed the broad scope of Section 706(g), as interpreted by this Court, as permitting race-conscious affirmative goal relief, they have been aware of possible limitations on such relief deriving from this Court's decisions, both statutory and constitutional.

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* Justice Blackmun made a useful selection of these cases in his *Stotts* dissent (104 S. Ct. at 2606 n.10).

United Steelworkers v. Weber, 443 U.S. 193 (1979) (*Weber*) is the only Title VII decision of this Court directly dealing with race-conscious affirmative goals. In upholding a race-conscious training program *Weber* answered one crucial question: Were *all* race-conscious remedies for past racial discrimination themselves "discrimination" such as to constitute an unlawful employment practice under Sections 703 and 704 of Title VII. The *Weber* Court held, "No"—at least as to voluntary programs, reserving the question faced here of judicially decreed relief under Section 706(g). But the Court indicated factors that might invalidate any race-conscious plan by stating why it viewed the plan in *Weber* as falling "on the permissible side of the line" (443 U.S. at 208): the objective of the plan was "to eliminate conspicuous racial imbalance in traditionally segregated job categories" (443 U.S. at 209). The plan was temporary (443 U.S. at 209). Further, "the plan does not necessarily trammel the interests of white employees." (443 U.S. at 209).

In the year prior to *Weber*, in an equal protection context, the Court, although severely divided, seemed to have established two constitutional propositions: (1) a rigid racial quota (reserving 16 of 100 medical school admissions exclusively to minorities) was per se unconstitutional); and (2) race might be used as a factor without violating equal protection under certain circumstances, provided there were authoritative findings of past racial discrimination. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In the year following *Weber*, in *Fullilove v. Klutznick*, 448 U.S. 448 (1979) the Court upheld a Congressionally-enacted set-aside that gave racial preference to specified minority groups. The Court was satisfied with Congressional findings of past demonstration which the set-aside was "reasonably" designed to remedy. The controlling opinion of Chief Justice Burger emphasized the plan's "flexibility"—i.e., minority persons who were shown not to have been disadvantaged by the past racial discrimination which the racial preference was

designed to remedy were not benefited. Further, the Court seemed to incorporate the *Weber* factors as applicable in this constitutional context.

Although *Bakke* and *Fullilove* were constitutional cases Courts of Appeals have carefully noted their warnings in passing on Title VII remedial preferences.

D. The Coalescence in *Stotts* of the General Remedial (A.), Seniority Remedial (B.), and Affirmative Goal (C.) Decisions

Against the background of these cases it is not difficult to analyze *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984) (*Stotts*), which can be considered a coalescence of these three groups of cases.

In *Stotts* a class action alleging a pattern of race discrimination was brought by black firemen against the City. The district court approved a consent decree which established affirmative goal relief as a remedy for patent (but officially unadmitted) racial discrimination. In an economic crisis the city issued a general layoff order: last hired, first fired, in accordance with the established seniority system. The district court enjoined the city from laying off certain firemen who had been hired pursuant to the affirmative goal remedy. The court of appeals affirmed this injunction, the effect of which was to give certain beneficiaries of the affirmative goal remedy protected competitive seniority. Nonminority firemen claimed that the bona fide seniority system protected them from the injunction, and appealed. This Court agreed with the majority firemen, and reversed.

In his plurality opinion Justice White first denied that the injunction could be upheld as a construction of the consent decree. He then rejected plaintiff black firemen's claim that the court's injunction was a legitimate exercise of its inherent power to modify the consent decree. In ruling that the injunction was an improper exercise of judicial power Justice White stated that even after trial the district court could not have given the minority firemen layoff protection against more senior employees as-

serting seniority rights pursuant to a bona fide seniority system. In a collision between seniority rights claiming the protection of Section 703(h), and the status of black firemen hired in accordance with an affirmative goal consent decree, the seniority rights prevailed.

Subsequent discussion in the plurality opinion of *Franks* and *Teamsters* and the legislative history of Title VII, was clearly directed to the conclusive bearing on those cases of the seniority protection given to bona fide seniority systems by Section 703(h). To escape *Teamsters'* bar to "make whole" relief and fit within *Franks* it was essential, said Justice White, that the firemen who had been hired pursuant to the affirmative goal remedy be victims of the racial discrimination which had justified the affirmative goal remedy. Since there was no such showing in the record, there was no basis for a "make whole" remedy that would have the effect of awarding the black firemen plaintiffs "competitive seniority." This could not be done under either *Franks* or *Teamsters*.

There is not a line in Justice White's plurality opinion, nor in the concurrence of Justice O'Connor, which suggests that in *Stotts* this Court was overruling its general remedial decisions—*Griggs*, *Albemarle*, *Franks* and *Teamsters*—which had each recognized as the "primary objective" of Title VII "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" (*Albemarle*, 422 U.S. at 417; citing *Griggs*, 401 U.S. at 429-430). There is no suggestion in the controlling opinions in *Stotts* that the Court was withdrawing from its steadfast insistence that relief under Section 706(g) was measured primarily by this purpose, as well as by the purpose of individual "make whole" relief.

After *Stotts*, as much as before, it is open to the Court under Section 706(g) to approve equitable relief that is measured by "the central statutory purposes of eradicating discrimination throughout the economy and making

persons whole for injuries suffered through discrimination." (*Albemarle*, 422 U.S. at 421, *Franks*, 424 U.S. at 771).

Stotts dealt with the "make whole" purpose—in the context of a bona fide seniority system. This case (*Local 28*) deals with the "primary" "remove barriers" objective in the context of "egregious" past discrimination. Amicus argues below that in that context, in *Local 28*, the Court should find the "membership goal" "appropriate."

III. THE AFFIRMATIVE MEMBERSHIP GOAL RELIEF GRANTED BELOW AS A REMEDY FOR PROVEN "EGREGIOUS" RACIAL DISCRIMINATION IS VALID UNDER SECTION 706(g) OF TITLE VII, AS PREVIOUSLY INTERPRETED BY THIS COURT

As amicus argued in II, above, there is no *a priori* bar to race-conscious affirmative membership goals in either the language of Section 706(g) or in the decisions of this Court interpreting its scope. However, limits have been set, or guidelines authoritatively outlined, in decisions of this Court with respect to affirmative goal relief. These limits, deriving from the Title VII cases (*Franks*, *Teamsters*, *Weber* and *Stotts*) and the constitutional (equal protection) cases (*Bakke* and *Fullilove*) which have been discussed above (at pp. 19-20), apply to judicially prescribed affirmative goals, subject to traditional equitable principles. The membership goal set in the courts below falls well within this Court's limits on affirmative goal relief and traditional equitable principles, and therefore should be affirmed as not clearly erroneous.

A. Race-conscious Affirmative Action Goals as a Remedy for Past Racial Discrimination May Constitute "Appropriate" Relief Under Section 706(g), Provided They Conform to Limits Set by This Court

In previous discussion of *Albemarle*, *Franks* and *Teamsters* (at pp. 13-18), amicus has argued that this Court has given recognition to the sweeping remedial authority Congress gave the courts in Section 706(g) to enforce

"the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." (*Albemarle*, 422 U.S. at 421; *Franks*, 424 U.S. at 771). Although, like the retroactive competitive seniority relief *awarded* in *Franks* (despite Section 703(h)) affirmative goals are not specified by name in Section 706(g), they are (like the competitive seniority in *Franks*) well within the above statutory purposes. Particularly are they "appropriate" to "remove barriers" (*Griggs*, 401 U.S. at 429-430), where egregious past discrimination and present recalcitrance are evident. The Court has taken account of the scope and flexibility of equitable relief in applying Section 706(g). In *Franks* the Court noted that " 'The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. . . . Moreover, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. . . . In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests. . . . [C]laims under Title VII involve the vindication of a major public interest. . . ." *Franks*, 424 U.S. at 777-778 nn. 39-40.

B. The Limits of Permissible Affirmative Goal Relief Under Title VII and the Constitution, as Established in *Bakke, Weber* and *Fullilove*, Channel the Judicial Prescription of Affirmative Goal Relief Under Section 706(g)

Amicus has discussed more fully elsewhere (pp. 19-20) the patient development by this Court of limits to race-conscious affirmative goal relief in *Bakke, Weber* and *Fullilove*. Although no case in this Court has specifically ruled on the scope of affirmative goal relief in judicial remedial decrees, the limits suggested by these cases should furnish the Court with adequate guidelines to fill the lacuna.

C. The Membership Goal Set in the Courts Below Fits Well Within the Limits of Permissible Affirmative Goal Relief and Traditional Equitable Principles

The 29.23% membership goal set as an affirmative goal by the district court, and affirmed by the court of appeals, fits well within the confines of permissible race-conscious affirmative goals under the guidelines of this Court both as to Title VII (*Weber*) and as to equal protection (*Bakke, Fullilove*). The goal was set in face of "egregious" past racial discrimination by the union, and gravest recalcitrance with respect to the "remove barriers" objective which this Court has identified as "the primary objective" of Title VII. (*Albemarle*, 422 U.S. at 417, citing *Griggs*, 401 U.S. at 771). There is here no rigid "quota", as petitioner and EEOC argue, but a reasonable membership "goal" to be achieved, "reasonable" in light of the extent of the past discrimation. The membership goal relief is well within permissible channels or limits, as established by this Court.

IV. OBJECTIONS OF PETITIONERS AND THE EEOC TO THE AFFIRMATIVE GOAL REMEDY DECREED BY THE COURTS BELOW IGNORE THE STATUTORY LANGUAGE OF SECTION 706(g), MISREAD ITS LEGISLATIVE HISTORY, AND CONTRAVENE THIS COURT'S CONSISTENT INTERPRETATION OF SECTION 706(g) IN LIGHT OF THE BASIC PURPOSES OF TITLE VII

Rejecting the straightforward account of what Congress has done, and how this Court has interpreted Title VII, petitioner and EEOC present to the Court a "might have been" scenario of these events. Their basic confusion derives from a convenient forgetfulness of what this Court has repeatedly identified as "the primary objective" of Title VII: "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" (*Albemarle*, 422 U.S. at 417, citing *Griggs*, 401 U.S. at 429-430).

Petitioners rely upon a reading of legislative history that concerns Section 703 (the violation section) rather than Section 706(g) (the remedial provision). Beyond that, they rest their case upon the mistaken conclusion that *Stotts* has already banished affirmative action goals.

The EEOC agrees that the affirmative goal issue requires a construction of Section 706g); yet it resorts to legislative history comments that were made with reference to Section 703. More puzzling is the EEOC's misleading account of the major decisions of this Court dealing with Title VII, highlighted by the curious omission of any concern with what the Court has identified as Title VII's "primary objective" (pp. 6, 13, above). Finally, the EEOC brief presents (G.Br. #2, pp. 6-8) a ridiculously restrictive picture of equity jurisprudence that is at odds with actions and statements of this Court in construing the scope of an "appropriate" equitable remedy under Title VII (p. 14, above).

Amicus has dealt at length above (I.) with the applicable decisions of this Court. Here amicus will concentrate on the specific implications of these decisions upon the "appropriate"-ness of a Section 706(g) affirmative goal remedy, free of the shackles petitioner and the EEOC would "inappropriately" put upon it by a futile requirement of "specific victim" relief.

In *Teamsters* Justice Stewart's majority opinion emphasized (reaffirming *Franks*) that "by 'demonstrating the existence of a discriminatory hiring pattern and practice' [in Phase 1] the plaintiffs had made out a prima facie case of discrimination against the individual class members. . . ." (431 U.S. at 359). The force of Phase 1 itself (group remedy), by this showing, brought about the consequence that "the burden therefore shifted 'to the employer to prove that individuals who reapply were not in fact victims of previous hiring discrimination'." The proof (in Phase 1) of the alleged "broad-based policy of employment discrimination . . . [constituted] reasonable grounds to infer that individual hiring decisions were

made in pursuit of the discriminatory policy and to require the employer to come forth with evidence dispelling that inference." (*Id.*) The Court clearly recognized in *Teamsters* that this carryover from Phase 1 to Phase 2 was a deliberate affirmation of Section 706(g)'s capacity to generate group consequences:

> The holding in *Franks* that proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief is consistent with the manner in which presumptions are created generally. *Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities* and to conform with a party's superior access to the proof.... These factors were present in *Franks*.... Moreover, the findings of a pattern or practice changed the position of the employer to that of proven wrongdoer. (431 U.S. at 359 n.45.).

Teamsters extends this burden of proof even to nonapplicants who give evidence that they are qualified, and satisfy the court in Phase 2 that they were deterred by employer's discriminatory practices from applying. However, because of the special advantages which individuals are seeking in Phase 2, i.e. retroactive competitive seniority at the expense of otherwise more senior employees, the Court specified more evidence of deterrence was needed than mere present willingness to accept the job. (431 U.S. at 370).

The intimation of petitioners and EEOC that this limited requirement of *Teamsters* with respect to nonapplicants (who would receive competitive seniority) entails comparable proof (in a Phase 2) by all beneficiaries of affirmative goal relief (who would not, after *Stotts* receive competitive seniority or its equivalent) is a complete non-sequitur. Under affirmative action goals no individual has any right to be hired or admitted to a union or employment program. No competitive seniority is achieved (*Stotts*). The employer or union routinely passes on qualifications of each hiree or admittee. The thrust of affirmative goal relief under Section 706(g) is merely that

in view of the employer or union's demonstrated "egregious" hiring or admittance practices, the primary objective of Title VII to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" (*Griggs*, 401 U.S. at 429-430, *Albemarle*, 422 U.S. at 417) makes it "appropriate" to establish a goal that a certain percentage of the group proven to have been "egregiously" discriminated against be included among the qualified persons hired, promoted or admitted to an employment program.

What consideration then would make it "appropriate" to require a Phase 2 as a condition of granting affirmative goal relief? The answer is that nothing would be gained by it, and much would be lost. Petitioners' and EEOC's position here would have the Court discard its historic commitment to "remove barriers" as the primary purpose of Title VII. It would saddle the affirmative goal remedy with a procedural requirement that is purposeless and exhausting (both of claimants and courts).

This Court has stood vigilantly over its delegated equitable remedial powers under Section 706(g), using them as "appropriate" in light of "the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination" (*Albemarle*, 422 U.S. at 421; *Franks*, 424 U.S. at 771). Of these "twin purposes of Title VII" (*Franks*, 424 U.S. at 799) it is the "remove barriers" purpose (*Griggs*, 401 U.S. at 429-430) that petitioner and EEOC seek to consign to oblivion.

We have here not an Executive Order to be modified by the Executive at its whim, but a statute enacted by Congress after the "Longest Debate" in its history, and painstakingly interpreted by this Court in 15 years of decisions. Congress can modify Title VII, and it has done so. But the function of the Executive remains to "take care the laws be faithfully executed." The EEOC here asks this Court here to amend Title VII and to discard its past decisions concerning Section 706(g). However "respectfully submitted", this suggestion is absurd.

V. THIS COURT'S CONSTITUTIONAL DECISIONS BEARING ON RACE-CONSCIOUS AFFIRMATIVE GOAL REMEDIES REINFORCE THE JUDGMENT BELOW

Only two cases decided by this Court set constitutional limits upon race-conscious affirmative relief: *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Neither of these cases suggests an equal protection obstacle to the "appropriate" remedy under Section 706(g) of Title VII which was granted below.

Three principal rulings of the divided Court in *Bakke* have clear application to the affirmative goal problem presented to the Court of Appeals. None of them constitutes a bar to an affirmative goal remedy. (1) In *Bakke* a majority of the Court agreed that race-conscious affirmative action was constitutionally permissible as a remedy for demonstrated racial discrimination. (2) Justice Powell's controlling opinion required that there be findings of past discrimination by a responsible governmental body as a predicate to race-conscious preferential relief. (3) Justice Powell's controlling opinion insisted that a rigid racial quota (e.g. the reservation of 16 of 100 seats in the medical school class for blacks and other minorities) was per se a violation of equal protection.

In *Local 28* the affirmative goals were established as a remedy for "egregious" past racial discrimination by the union. There were express findings of past discrimination by the district court, affirmed by the Court of Appeals. There was no rigid racial quota, but goals to be striven for with a reasonable effort in light of egregious demonstrated racial discrimination which the union showed no disposition to correct.

Fullilove concerned the Congressionally established race-conscious set-aside in light of what the Court accepted as adequate Congressional consideration (which the Court found equivalent to satisfying the "findings" requirement

of *Bakke*). The Chief Justice's opinion, which was joined by three Justices and was operatively the opinion of the Court, pointed to the flexibility of the set-aside: it left room for exclusion of the unqualified, and those who were shown not to have been victims of the racial discrimination in the construction trade. The Chief Justice also noted compliance with other reassuring factors much like those that had been cited in *Weber* as marking the outer limits of legitimate affirmative action.

The Chief Justice expressly identified situations in which the Court had already approved race-conscious relief:

The approved racial set-aside in *Fullilove* had been established by Congress, and Chief Justice Burger noted that the same latitude might not be given to race-conscious *judicial* relief (a question that was not before the Court). However, Chief Justice Burger had made clear in *Milliken v. Bradley*, 418 U.S. 717 (1974) in denying a race-conscious remedy, that "The controlling principle [is] that the scope of the remedy is determined by the nature and extent of the constitutional violation." For this principle he cited "Swann". In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Chief Justice, for a unanimous Court, upheld race-conscious school busing in a particularly recalcitrant school district. Race-conscious busing was not upheld "to require . . . any particular degree of racial balance or mixing", but simply as "one tool of school desegregation in light of perceived inadequacy of lesser remedies and the degree of the constitutional violation. The Court did not overlook difficulties with the remedy, but recognized that "reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally [employed]". In the companion case, *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), a unanimous Court speaking through the Chief Justice held unconstitutional

North Carolina's Anti-Busing Law, which prohibited student school assignments on the basis of race. Chief Justice Burger rejected the claim that a "color-blind" concept of the Constitution should sustain the state law: "Just 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. To forbid, at this stage, all assignments made on the basis of race would deprive the school authoritities of the one tool absolutely essential to fulfillment of their [constitutional obligation]."

A constitutional remedy may not be a statutory remedy. But when each is the product of the equitable powers of the Court in light of the degree of the violation, a distinction between them hardly makes sense.

For this reason, the conclusion of some Courts of Appeals seems cogent: That if affirmative action goals meet the statutory requirements of Title VII (as discussed above), they also pass the constitutional test of equal protection. The restrictions on conscious goals as a remedy for identified discrimination under Title VII are strict enough to satisfy the constitutional requirements for judicial relief.

CONCLUSION

The judgment of the court of appeals should be affirmed with respect to its approval of the district court's race-conscious membership goal.

Respectfully submitted,

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* *See*, e.g., *Kromnick v. School District*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985).