Nos. 84-1656 and 84-1999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al.*,
Petitioners,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,
v.
CITY OF CLEVELAND, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second and Sixth Circuits

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BRIEF OF CITY OF DETROIT, THE DISTRICT OF COLUMBIA AND THE CITY OF LOS ANGELES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF CITY OF DETROIT, THE DISTRICT OF COLUMBIA AND THE CITY OF LOS ANGELES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

CONSENT OF THE PARTIES

Petitioners and respondents consented to the filing of this Brief. Their letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICI

The City of Detroit has suffered adverse consequences because of prior discriminatory practices of its public safety agencies, particularly its Department of Police, and a failure to correct the effects of that discrimination. For the past eleven years Detroit has implemented affirmative action plans which have gone far to eradicate the effects of past discrimination against minorities and to cure the crippling effects of that discrimination upon its public safety agencies.[1]

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[1] Detroit's race-conscious program governing promotions in its Police Department has thus far withstood two separate challenges brought on behalf of white police officers under the Equal Protection Clause and federal civil rights laws. *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), *on remand*, 36 FEP Cases 1019 (E.D. Mich. 1984), *appeal pending* (6th Cir. No. 85-1120) (sustaining race-conscious promotions to the rank of sergeant); *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (sustaining race-conscious promotions to the rank of lieutenant).

Also, the City of Detroit has used race-conscious measures in hiring to the position of firefighter which "for many decades remained, for all practical purposes, the *exclusive domain of white males*." *Van Aken v. Young*, 541 F.Supp. 448, 457 (E.D. Mich. 1982) (emphasis added). The district court's decision upholding those measures has been affirmed. *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984).

The district court in *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), found, after a lengthy trial, that Detroit's steps to increase black representation at all levels of the Police Department had played a vital role in reducing citizen distrust of the police, developing community cooperation with the Department, improving the Department's ability to function, and reducing crime. *Baker*, *supra*, 483 F.Supp. at 997-1000. Detroit has pursued these programs unilaterally and voluntarily. However, for Detroit and many other public employers, the authority of the judiciary to decree race-conscious measures in the event unlawful discrimination were established through litigation has provided a vital catalyst for voluntary remedial action.

The District of Columbia has similarly suffered the consequences of prior discriminatory practices by its public safety agencies. Presently pending is a challenge to voluntary race-conscious measures governing hiring in its Fire Department which were sustained by the district court as appropriately "designed to break down an old pattern of racial segregation and hierarchy." *Hammon v. Barry*, 606 F.Supp. 1082, 1090 (D.D.C. 1985), *appeals pending*, Nos. 85-5669 5670 5671 (D.C. Cir.).

The City of Los Angeles has addressed from a different perspective the historical underrepresentation of racial minorities and women in its public safety agencies. Without admitting any liability, the City of Los Angeles joined the United States Justice Department and a certified class of women police applicants in recommending entry of three consent decrees establishing goals and timetables for the hiring of racial minorities in the Los Angeles City Fire Department (1974) and for the hiring of racial minorities and women in the Los Angeles Police Department (1980).

Faced with strong statistical showings of underrepresentation in both departments, and a Court of Appeals ruling that police height and physical ability requirements produced disparate impact against women appli-

cants without business necessity, *Blake v. City of Los Angeles*, 595 F.2d 1367, 1375-76 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980), the City elected to resolve this complex litigation. The Los Angeles consent decrees were based largely upon the affirmative action goals and timetables contained within them. If hiring based upon these goals and timetables cannot lawfully occur, costly litigation will reopen, a decade of growth in racial undertanding in the two departments will be threatened, and the establishment of sworn services representative of the communities they serve will be delayed.

SUMMARY OF ARGUMENT

Numerous studies by prestigious, national commissions have recognized the crippling effects of unlawful discrimination upon state and local governments, particularly on the operations of police and other public safety agencies. In extending Title VII in 1972 to cover state and local governments, Congress took note of the findings of such studies. Congress aimed to free governmental functions of the crippling effects of discrimination in such vital areas as public safety, education, and the administration of justice.

The Petitioners and their *amici* including the United States contend that the courts are, *regardless* of the inefficacy of other measures, without authority to impose affirmative, race-conscious measures whenever such measures may incidentally involve the hiring or promotion, etc., of persons other than identified discrimination victims. Acceptance of this *per se* challenge would not only strip the federal courts of an essential tool for overcoming patterns of racial exclusion but would also remove a vital catalyst for voluntary action.

Neither Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, nor the Fourteenth Amendment of the United States Constitution requires such a result.

ARGUMENT

I. EXPERIENCE SHOWS THAT MINORITY PARTICIPATION AT ALL LEVELS IS VITAL TO EFFECTIVE PERFORMANCE BY PUBLIC SAFETY AGENCIES.

A *per se* rule that Title VII prohibits the decreeing of race-conscious remedial measures, insofar as such measures incidentally benefit persons not directly victimized by the employer's unlawful conduct,[2] would stifle efforts to end the mistrust and antagonisms that have developed in our cities between law enforcement agencies and minority citizens. Mutual alienation, with crippling effects on law enforcement and other vital public functions, has resulted in substantial part from long-standing policies and practices of exclusion of minorities from employment in law enforcement agencies. The experience of the City of Detroit is particularly instructive in this regard.

Detroit has suffered, and federal court records document, *see Baker*, 483 F.Supp. at 996-97, racially-based police-community tensions caused in substantial part by years of neglect in the recruitment, hiring and advancement of black public safety officers. Major riots in 1943

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[2] The United States has, until recently, consistently taken the position that affirmative remedies are appropriate under Title VII and the Constitution. The Attorney General and the EEOC have, in carrying out their responsibilities to enforce Title VII, obtained affirmative remedies in numerous cases in which they served as plaintiffs. *See, e.g., United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *E.E.O.C. v. Contour Chair Lounge Co.*, 596 F.2d 809 (8th Cir. 1979); *E.E.O.C. v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977); *Rios v. Enterprise Ass'n Steamfitter Local 638*, 501 F.2d 622 (2d Cir. 1974) (action by United States consolidated with that of individual claimants); *United States v. Masonry Contractors Ass'n*, 497 F.2d 871 (6th Cir. 1973); *United States v. Local Union No. 212, I.B.E.W.*, 472 F.2d 634 (6th Cir. 1973); *United States v. Wood, Wire & Metal Lathers Int'l Union, Local Union No. 46*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973); *United States v. Ironworkers Local 86*, 443 F.2d 544, 548 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971).

and 1967, as well as several other less noted civil disturbances before and after 1967, were just some of the many manifestations of the breakdown of police-community relations. Prior to 1974, six to eight Detroit police officers were killed in the line of duty each year. Moreover, the widespread belief in Detroit's black community that the police lacked interest in investigating black-on-black crime resulted in a loss of essential citizen cooperation in the police department's crime fighting efforts. *Id.* As described by the District Court in *Baker*:

> "[T]he Police Department was regarded as an 'occupation army' in the black community and was treated as such . . . . Officers were afraid to venture into the [black] community for fear of being harassed or worse.
>
> * * * *
>
> The primary cause was discriminatory practices. Racial criteria entered into the everyday judgments of police officers regarding who they stopped, searched or detained and how they did it. Racial slurs were common. Police brutality against black citizens was less common but still severe.
>
> * * * *
>
> Chief Hart testified that '[i]t's a matter of public record that members of the black community have been beaten up by police unjustifiably and without cause; its a matter of record.'
>
> * * * *
>
> The black community's response to Department practices was deep hatred and alienation. Not only did the community hate the police, it had no confidence in the police's interest in investigating or solving black on black crime. This lack of confidence was justifiable. The result was that the police got no cooperation from the black community in solving crime.
>
> This is significant because citizen cooperation is essential to solve crime. Lack of support in the black community was devastating to the Department's efforts to police the City. This was the view of Police

> Chief Hart, and former Chiefs Tannian and Murphy. So substantial was the community's alienation that at times there was active interference with officers performing their duty.
>
> * * * *
>
> The police themselves—and ultimately the citizens of Detroit—were the real victims of discriminatory practices."

Id.

The riots in 1967 jolted the City of Detroit into a realization that something would have to be done to correct these imbalances. *See id.* at 946. Between 1967 and 1973 some efforts were not successful. *Id.* at 947-52. In the interim the City's public safety agencies continued to be hampered by effects of their discriminatory legacy. *Id.* at 996-99.

Finally, in 1974, the City adopted a race-conscious, affirmative action plan of hiring and promotion. *Id.* at 963-64. These efforts have resulted in dramatic improvements in the ability of the Detroit Police Department to deliver effective police service. Perhaps the most stark evidence of the effectiveness of Detroit's affirmative action plan was the reduction in the number of officers killed in the line of duty. Prior to 1974, six to eight police officers were killed each year; from 1974 until 1982, no officers lost their lives in the line of duty.[3] *See id.* at 1000. In *Baker*, the district court detailed this and other improvements and concluded:

> "There is clear evidence in the record that before 1974 there existed enormous tension between the Department and the black community. There is clear evidence in the record that after the institution of the affirmative action program, police-community relations improved substantially, crime went down, complaints against the Department went down, and no police officers were killed in the line of duty.

[3] Although Detroit has since suffered the death of smaller numbers of police officers, the police department's relationship with the black community continues to improve.

> High ranking police officials attributed this change to the affirmative action program and its general aim of having the Department—at all levels—reflect the City's population."

Id.

Detroit's experience specifically indicates that visible representation of minorities at all levels of the police department, not merely at the patrol level, is of critical importance in breaking the pattern of hostility and alienation that results from prior exclusion of minorities. As stated by the district court:

> "The testimony at trial demonstrates that it is important to have blacks at all levels. The importance of black lieutenants in reducing discriminatory practices cannot be overstated. It is very difficult to mistreat blacks if one knows that the commanding officer is black. Inspector Douglas emphasized that the presence of a black lieutenant at police raids ensured that blacks on the scene would not be abused.
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> * * * *
>
> Similarly, a black lieutenant affects the perceptions of the black community. He is a commanding officer whose very presence confirms that blacks are no longer the second-class policemen which they used to be. Chief Hart put it this way:
>
> > 'When [citizens] arrive at the precinct stations, they see some black lieutenants sitting behind the desk making decisions on their lives and they feel better about that. They will cooperate with us. They don't feel that we are an army of occupation.'

Id. at 998-99. In the experience of Detroit, the ability to make race-conscious employment decisions has been the critical ingredient in efforts to restore community trust in Detroit's law enforcement agencies and to facilitate Detroit's ability to protect the lives and property of its people. *See id.* at 999.

Overwhelming evidence of the experience in many other cities demonstrates that the crisis experienced by Detroit is only one example of a nationwide problem. The Sixth Circuit has collected and summarized the many studies that make the importance of having racially representative police forces in our cities judicially noticeable. The operational need to have a minority presence in public safety agencies that is representative of the minority population of the community served

> "is based on law enforcement experience and a number of studies conducted at the highest levels. *E.g.*, National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973); National Commission on the Causes and Prevention of Violence, *Final Report : To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the National Advisory Commission on Civil Disorders (1968); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967). As these reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. See *To Establish Justice*, *supra* at 145; *Report on Civil Disorders*, *supra* at 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. *Report on Civil Disorders*, *supra* at 301; *Task Force Report: The Police*, *supra* at 144-45, 167; *Police*, *supra* at 330.
>
> These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. . . .
>
> In 1967, a presidential commission stated the proposition offered by the defendants in this case:
>
> > In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.

Task Force Report: The Police, *supra* at 167." *Detroit Police Officers Ass'n v. Young*, 608 F.2d at 695.[4]

More recently completed studies have reached the same conclusion. In a report published in October 1981, the United States Commission on Civil Rights found: "Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence." U.S. Commission on Civil Rights, *Who Is Guarding the Guardians: A Report on Police Practices*, 5 (1981). Following an investigation into the May 1980 racial disturbance in Miami, Florida, the U.S. Civil Rights Commission observed: "In Dade County, an essentially white system administers justice to a defendant and victim population that is largely black. The lack of minorities throughout the criminal justice system maintains the perception of a dual system of justice." U.S. Commission on Civil Rights, *Confronting Racial Isolation In Miami*, 290 (1982).

These studies confirm Detroit's experience that minority representation at the higher levels of law enforcement also is crucial. A 1967 Report of the President's Commission on Law Enforcement and Administration of Justice, entitled *Task Force Report: The Police*, concluded that: "[i]f minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policymaking and other crucial decisions." *Id.* at 172. Relying on this and other studies, the Sixth Circuit concluded that the need for a police department representative of the community as a whole "extends to the higher ranks in police depart-

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[4] Other courts of appeals have agreed with the Sixth Circuit concerning the operational need for a racially representative police force. *See Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

ments." *Detroit Police Officers Ass'n v. Young*, 608 F.2d at 695.

The federal government also has recognized the public safety crisis created by discrimination against minorities by state and local law enforcement agencies and has called for affirmative action to remedy this problem. The Law Enforcement Assistance Administration (LEAA)[5] has concluded "that the full and equal participation of women and minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States." 28 C.F.R. § 42.301 (1985). LEAA regulations require that where a "recipient has previously discriminated against persons on the ground of race . . . [or] color . . . , the recipient must take affirmative action to overcome the effects of prior discrimination." 28 C.F.R. § 42.203(i)(1) (1985).[6]

This Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), upheld the voluntary use of affirmative, race-conscious measures under Title VII as an appropriate

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[5] The LEAA is the arm of the Department of Justice which administers federal financial assistance to state and local law enforcement agencies and which enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3789d.

[6] The regulations also provide that, "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race . . . [or] color . . . ." 28 C.F.R. § 42.203(i)(2) (1985). Although there are statutory provisions stating that the LEAA may not require a recipient to adopt "a percentage ratio, quota system, or other program to achieve racial balance," 42 U.S.C. § 3789d(b), the regulations promulgated thereunder recognize that "[t]he use of goals and timetables is not use of a quota prohibited by this section." 28 C.F.R. § 42.203(j) (1985). Notably, the statute in its original form prohibited remedies intended "to achieve racial balance or *to eliminate racial imbalance*." 42 U.S.C. § 3766 (1976) (emphasis added). This last restriction was deleted by Section 815(b)(1) of the Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167, 1206 (1979).

means of removing racial barriers and opening employment opportunity. Acceptance of Petitioners' *per se* challenge to the decreeing of such measures would not only strip the courts of an essential remedial tool but would eliminate a vital catalyst to the voluntary affirmative action held salutary in *Weber*. Such a result would go far to defeat the purpose of Congress in 1972 of extending Title VII to state and local governments.

II. THE DESIRE TO CORRECT THE CRIPPLING EFFECTS OF DISCRIMINATION ON PERFORMANCE OF PUBLIC SAFETY FUNCTIONS WAS A LEADING CONCERN OF CONGRESS IN EXTENDING TITLE VII COVERAGE TO STATE AND LOCAL GOVERNMENTS.

In extending Title VII to cover state and local governments, Congress recognized that governmental ability to carry out vital functions in the areas of public safety, education and administration of justice was crippled in many instances by a legacy of discrimination. Congress contemplated that remedies would be devised which would effectively overcome patterns of racial exclusion and thereby remove impediments to government's ability to function. Affirmative remedies mirror Congress' objective.

Subsequent to the enactment of Title VII in 1964, widespread community unrest including riots in numerous cities and other localities provoked a heightened concern regarding the state of race relations in this country. As set forth above, a succession of national commissions drew attention to the low representation of minority groups in policing and other public safety functions as a cause of the disorders.

Congress in 1972 subscribed explicitly to the concerns expressed in these reports. In extending Title VII coverage to state and local governments, Congress looked for guidance specifically to two such reports by the U.S. Commission on Civil Rights: (1) *For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment* (1969), and (2)

Mexican Americans and the Administration of Justice in the Southwest (1970). These two Commission reports were quoted in both the Senate and House Committee reports; referred to in debate by the sponsor of the legislation; and set forth in full in the Congressional Record.

Congress took notice of the crippling effects of racial exclusions from public employment on the ability to govern. It identified the need to remedy this condition as one of the central purposes of extending Title VII to cover state and local governments. The Report of the Senate Committee on Labor and Public Welfare, citing the reports of the U.S. Commission on Civil Rights, stated:

> "This failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. . . . Discrimination by government therefore serves a doubly destructive purpose. *The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility towards the entire process of government.*" S.Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971), *reprinted in 1972 Leg. Hist.* at 419 (emphasis added).[7]

The Report of the House of Representatives Committee, also citing the Civil Rights Commission reports, was to the same effect:

> "The problem of employment discrimination is particularly acute *and has the most deleterious effect in these governmental activities which are most visible to the minority communities* (notably education, law

[7] References to *1972 Leg. Hist.* are to *Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* (Comm. Print 1972).

> enforcement, and the administration of justice) *with the result that the credibility of the government's claim to represent all the people is negated.*" H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17 (1971), *1972 Leg. Hist.* at 77 (emphasis added).

Senator Harrison Williams, chairman of the Labor and Public Welfare Committee and sponsor of S.2515, emphasized strongly the Congressional concern for the ability of units of state and local government to carry out their assigned responsibilities. He stated that the Committee had acted out of a belief that their work was "essential to the viability of State and local governmental units." *1972 Leg. Hist.* at 1116. He stated that the Senate Committee's concern with employment discrimination was based, in large part, upon the unfavorable impact which it had on "the ability of . . . governmental units to deal equitably in their contacts with those groups against whom they discriminate in employment." *Id.* As Senator Williams succinctly phrased the matter, "*If they are to carry out their jobs with any success whatever, public confidence in their impartiality is vital.*" *Id.* (emphasis added).

In the course of Senate debate, Senator Williams referred to and placed in the Congressional Record, both Reports of the U.S. Commission on Civil Rights. *1972 Leg. Hist.* at 1117, *et seq.* With respect to race-conscious remedies, the 1969 Report stated:

> ". . . [W]henever in public employment discriminatorily created patterns persist, the Constitution requires that they be remedied *by measures aimed at giving the work force the shape it presently would have were it not for such past discrimination.* It should be recognized that such measures are not a 'preference' but rather a restoration of equality; one can see inequity in such remedies only by being blind to the past injustices which they cure."

1972 Leg. Hist. at 1120 (emphasis added). The Commission's 1969 Report called for state and local governments

to adopt programs which will "bring about whatever changes in minority utilization are necessary to undo the effects of past discrimination." *1972 Leg. Hist.* at 1120. "*Where patterns of minority utilization are to be changed, the program should include specific goals, or estimates, to be achieved within a specified period of time.*" *Id.* (emphasis added).

Congressional solicitude for assuring the ability of local governmental units to carry out their essential functions is in harmony with court decisions such as *Baker* upholding Detroit's use of race-conscious measures in its police department. It matches precisely the experience of *amici* in pursuing race-conscious affirmative measures to increase minority representation in their public safety departments. To date, those measures have gone far toward undoing the pernicious effects of discrimination which influenced Congress to extend Title VII to cover state and local governments. Rather than being prohibited by § 706 (g), the affirmative measures which are at issue mirror Congress' objective.

III. THERE IS NO BARRIER UNDER TITLE VII OR THE CONSTITUTION TO JUDICIAL DECREES OF RACE-CONSCIOUS RELIEF NEEDED TO ERADICATE EMPLOYMENT DISCRIMINATION AND ITS EFFECTS.

A. Lower Court Decisions Upholding Imposition of Race-Conscious Relief are Firmly-Grounded in Remedial Principles Established by this Court.

The two pending cases present this Court for the first time with the permissibility of court-ordered affirmative relief in litigation involving employment discrimination. Appellate decisions since 1969 have unanimously upheld the permissibility of such relief, where called for by the facts of the particular cases, as consistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, as well as 42 U.S.C. §§ 1981 and 1983.[8] Petitioners and *amici*

[8] The decisions are set forth in the brief of Respondents in *Vanguards*.

including the United States present this Court with a *per se* challenge to such relief. They insist it is impermissible regardless of (1) the nature and effects of the discrimination at issue, (2) its persistence in the face of other forms of relief, (3) the public interest in having racial barriers to equal employment at last effectively removed, and (4) the crippling effect of racial exclusion upon law enforcement and other critical governmental functions.

Like the two cases now before the Court, the great majority of the lower court decisions have involved (a) private sector *craft jobs*, and (b) *public safety jobs* such as firefighting, policing, state highway patrol, and corrections. These fields of employment share a striking characteristic: *all involve positions from which black citizens, other minorities, and females traditionally have been largely, and often totally, excluded.*[9] In such cases, where

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[9] This Court in *United Steelworkers v. Weber*, *supra*, stated, "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." 443 U.S. at 198, n. 1. The Court proceeded to cite several court of appeals decisions upholding race-conscious remedial measures in some instances imposed by court decree and in others undertaken pursuant to statutory or administrative requirements.

As set forth *supra* (Section II), the pervasiveness of racial exclusions in public safety jobs was a key concern of Congress in amending Title VII to cover state and local governments. Lower courts have likewise called attention to entrenched patterns of racial exclusion from public safety employment. For example, the Sixth Circuit, in the course of sustaining Detroit's voluntary use of numerical ratios for promotions to the rank of police sergeant, stated that the persistence of racial barriers in police employment was equally appropriate for judicial notice as the racial exclusion from craft jobs judicially-noticed in *Weber*. *DPOA v. Young*, 608 F.2d 671, 690 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (see the several cases cited therein). The degree of racial exclusion in the cases involving fire departments exceeds even that in police departments, *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (no blacks among City's 535 firefighters); *Ass'n Against Discrimination v. City of Bridgeport,*

patterns of racial exclusion are especially pronounced and deep-seated, the combination of "make-whole" relief for identified victims and an injunction prohibiting future discrimination, and even ordering steps which are not race-conscious, has frequently failed to bring about increased employment opportunity. In those cases, such race-conscious devices as numerical goals for hiring, promotion, union membership, etc., have proven to be essential tools for overcoming patterns of racial exclusion.[10]

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20 FEP Cases 985, 989 (D. Ct. 1979) (no blacks among City's 428 firefighters); *Arnold v. Ballard*, 6 FEP Cases 287, 288 (N.D. Ohio 1973); *United States v. City of Alexandria*, 614 F.2d 1358, 1363, n. 12 (5th Cir. 1980). The district court in *Van Aken v. Young*, *supra*, referred to the fire fighter position in Detroit as having been "for many decades . . . the exclusive domain of white males." 541 F.Supp. at 457.

Title VII and affirmative action have opened many opportunities to black workers in craft and public safety employment. *See* Leonard, *The Impact of Affirmative Action on Employment*, 12 Journal of Labor Economics 439 (1984). In 1972 blacks made up 3.2 percent or 15,872 of the 496,000 electricians in the country, whereas in 1979 blacks represented 5.6 percent or 35,480 of the 640,000 electricians in the country. The number of black electricians has more than doubled in these seven years. In general, during the period 1972 through 1979, a period of active Title VII enforcement and affirmative action implementation, the number of blacks working in the craft and kindred census category increased by 270,000. 1980 Statistical Abstract of the United States (1980), at Table 697. In 1970, 6.34 percent or 23,796 of the 375,494 police officers and detectives in the country were black. U.S. Bureau of the Census, Census of the Population: 1970 Vol. 1, Characteristics of the Population, Part 1, United States Summary—Section 1 (1973), at Table 223. In 1982, 9.3 percent or approximately 47,000 of the 505,000 police officers in the country were black. 1984 Statistical Abstract of the United States (1984), at Table 696.

[10] In employment discrimination cases the lower courts have recognized three distinct types of relief. *Berkman v. City of New York*, 705 F.2d 584, 595-596 (2d Cir. 1983). These include (1) "*compliance relief*" which restricts the use of practices determined to be illegal and requires the hiring, promotion, etc., of members of the plaintiff class whom the court has found to be victims of the defendant's discrimination, 705 F.2d at 595; (2) "*compensatory relief*" to "make whole" the victims of the defendant's discrimina-

Under federal civil rights laws and the Constitution, the federal courts have broad powers to remedy prohibited discrimination and its effects. Title VII is no exception. Title VII has, since its enactment, authorized the federal courts to ". . . order such affirmative action as may be appropriate . . .," § 706(g), 42 U.S.C. § 2000e-5(g).[11] As

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tion as through awards of backpay and constructive seniority, *id.*; and (3) "*affirmative relief*" designed principally to remedy the effects of discrimination that "may not be cured by the granting of compliance or compensatory relief." *Id.* at 596. "Affirmative relief may also include interim hiring relief that is extended to persons other than members of the plaintiff class"—i.e., persons not victims of discrimination—"and in proportions exceeding the ratio of plaintiff class members to the total applicant pool." *Id.*

[11] While the language of § 706(g) was drawn from § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), the argument of the United States based on the NLRA model (United States brief as amicus in *Vanguards*, 8, n. 5) has multiple flaws. *First*, the United States overlooks this Court's *caveat* that NLRA principles "generally guide, *but do not bind*, courts in tailoring remedies under Title VII". *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226, n. 8 (1982) (emphasis added). *Second*, the labor cases, while stressing the necessity to make whole victims of unfair labor practices, do not address either the circumstances which might call for affirmative relief which extends to nonvictims or the permissibility of such relief. *Third*, while the labor cases provide a useful guide for the shaping of "make whole" relief under Title VII, they offer little guidance as to the nature of appropriate affirmative action to remedy racial barriers to equal employment. As to the latter, the lower courts have correctly looked to remedial principles established by this Court in other civil rights areas such as school desegregation and voting rights. *Fourth*, to the extent the labor cases are at all pertinent, they support permissibility of race-conscious affirmative relief. The labor cases refer to the NLRB's duty to ". . . *restor*[*e*] *the . . . status quo that would have obtained but for the company's wrongful* [act]," *NLRB v. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258, 263 (1969), and "to take *measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.*" *Carpenters v. NLRB*, 365 U.S. 651, 657 (1961) (Harlan, J., concurring), quoted in *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 769 (1976) (emphasis added).

"Recreat[ing] the conditions" that would have come to exist but for illegal discrimination, is the essence of race-conscious affirmative

described by Chief Justice Burger, Title VII's primary objective "was 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.*" *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971) (emphasis added). In delineating the federal courts' broad remedial mission in Title VII cases, the Court stressed "*twin* statutory objectives" including not only "making persons whole for injuries suffered through past discrimination" but also "*eradicating discrimination throughout the economy. . . .*" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (emphasis added).

The lower court decisions, unanimously upholding permissibility of race-conscious, affirmative relief, are firmly-grounded in decisions of this Court. In other civil rights contexts, this Court has declared that federal courts are *not only authorized but obliged to formulate decrees which will succeed in eradicating discrimination and its effects.* Almost contemporaneous with the effectuation of Title VII in 1965, this Court declared—in the context of a historically entrenched racial denial of black citizens' constitutional right to vote—what has since become the key tenet of remedy formulation in civil rights cases, including those under Title VII:

> "[T]he court has *not merely the power but the duty to render a decree which will so far as possible elimi-*

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relief. As stated in *Rios v. Enterprise Ass'n Steamfitters*, *supra*, 501 F.2d at 631:

> "Where a racial imbalance . . . is directly caused by past discriminatory practices *it is readily apparent that if the rights of minority members had not been violated, many more of them would enjoy those rights than presently do so and that the ratio of minority members enjoying such rights would be higher. . . .* The effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential." (emphasis added).

> *nate the discriminatory effects of the past as well as bar like discrimination in the future.*"

Louisiana v. United States, 380 U.S. 145, 154 (1965) (emphasis added).

In school desegregation decisions spanning the past 20 years, this Court has emphasized the federal courts' authority and duty to root out discrimination and its effects. In *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968), this Court declared that a school board operating a dual system is

> "clearly charged with the affirmative duty to take *whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch." (emphasis added).

This Court emphasized that the "burden on a school board . . . is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Id.* at 439 (emphasis in original). The race-neutral, freedom-of-choice plan before the Court in *Green* held no promise for eliminating racial imbalance and was accordingly disapproved. This Court held in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), that the broad equity powers which arise when a school board fails to carry out its obligation include an array of race-conscious devices to reduce racial imbalance: numerical ratios for student and teacher assignments; redrawing of school boundary lines; pairing of noncontiguous districts, and the decreeing of student transportation. In the words of Chief Justice Burger, in effecting a remedy for a civil rights violation, "[r]ace must be considered. . . ." *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971).

Petitioners and the United States overlook that the myriad of lower court decisions upholding imposition of race-conscious affirmative relief are firmly-grounded in the remedial principles declared in these decisions. In upholding use of race-conscious affirmative remedies in employment cases, lower courts have time and again

looked to the quoted language from *Louisiana v. United States* as well as the marching orders issued in *Green* and *Swann*.

This Court in turn itself endorsed those lower court decisions in the course of opinions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Four members of this Court in *Bakke* stated that Congress in 1972 "explicitly considered and rejected proposals to alter . . . the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race-conscious action." *Regents of the University of California v. Bakke*, *supra*, 438 U.S. at 353, n.28 (1978) (Opinion of Brennan, White, Marshall, and Blackmun, J.J., concurring in the judgment in part and dissenting in part). Chief Justice Burger in *Fullilove* declared that the remedial powers of the federal courts include race-conscious remedies and the "the authority of a court to incorporate racial criteria into a remedial decree also extends to statutory violations." *Fullilove*, *supra*, at 482-483 (Opinion of Burger, C.J., White, J., and Powell, J. announcing judgment). Justice Powell predicated approval of the set-aside provision in *Fullilove* on criteria utilized by the courts of appeals in what he termed the "closely analogous area" of "race-conscious hiring remedies." *Id.* at 510. (Powell, J., concurring) He referred approvingly to the lower courts' practice of imposing "temporary hiring remedies insuring that the percentage of minority group workers in a business or governmental agency will be reasonably related to the percentage of minority group members in the relevant population." *Id.* at 513.

B. Race-Conscious Relief Has Often Proved Essential to the Elimination of Racial Barriers Which Cripple Law Enforcement and Other Public Functions.

In many employment cases, the lower courts have found racial exclusions and barriers every bit as pervasive and intractable as those posed by the disenfranchisement of black citizens at issue in *Louisiana v. United States* and the unconstitutional segregation of black school children

which persisted after *Brown I* and *Brown II*. For example, in *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974), the Fifth Circuit upheld imposition of race-conscious hiring relief, including a numerical ratio and goal, in the case of the Alabama Highway Patrol, long the most visible instrument of white supremacy in the State of Alabama.[12] As reasons for upholding the appropriateness of affirmative hiring relief in the particular case before it, the Fifth Circuit noted the Alabama Highway Patrol's long history of intentional discrimination, its failure to take positive corrective steps on its own initiative, and its 37-year old reputation as an all-white organization. *See* 493 F.2d at 620-21. Indeed, an injunction prohibiting continued racial discrimination which had been issued 18 months previously in related litigation had failed to result in the hiring of a single black employee. *Id.* at 621. In such circumstances, the Fifth Circuit's approval of a race-conscious hiring remedy constituted virtually an inevitable application of the remedial principles this Court established in other fields of civil rights litigation.

The inefficacy of race-neutral relief in opening employment opportunities for blacks in public employment in Alabama has been recently detailed by Douglas B. Huron. Huron & Pendleton, *Equality of Opportunity, or Equality of Results?*, 13 Human Rights 18 (Fall 1985).[13] As re-

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[12] The decision was explicitly grounded upon this Court's three decisions in *Louisiana v. United States*, *Swann*, and *Green*. *See* 493 F.2d at 617, 619. The Fifth Circuit observed that use of "mathematical ratios" is a "useful starting point in shaping a remedy to correct past unconstitutional violations" in cases of employment discrimination litigation just as in desegregation of schools. *Id.* at 619-20 (quoting *Swann*, 402 U.S. at 25).

[13] Separate articles by Mr. Huron, a former senior trial attorney in the Justice Department Civil Rights Division and associate White House counsel, and Clarence M. Pendleton, Chairman of the U.S. Commission on Civil Rights, were juxtaposed under this title in the form of a debate on race-conscious affirmative action.

counted by Mr. Huron, the district court's order quickly brought about the hiring of Alabama's first black troopers. *Id.* at 22. Within two years, there were a substantial number of blacks on the force and the director of Public Safety data testified they were competent professionals. *Id.* Today, according to Mr. Huron, Alabama has one of the most integrated state justice forces in the country; over 20% of the troopers and 25% of support personnel are black. *Id.* The implications for black employment opportunity in other Alabama state agencies have proven immense:

> "When Justice contrasted the initial results on the trooper force with the lack of progress in other Alabama agencies, the department went back into court, asking that hiring ratios be applied to entry-level jobs in the other Alabama agencies. Judge Johnson gave the agencies plenty of time—over two years—to mend their ways.
>
> When little changed, he issued a decision finding statewide discrimination, but he demurred to Justice's plea for quotas. He said that 'mandatory hiring quotas must be a last resort,' and he declined to order them. But he noted that the denial would be 'without prejudice' to Justice's seeking the same relief one year later: 'In the event substantial progress has not been made by the 70 state agencies, hiring goals will then be the only alternative.'
>
> *The message—the threat—could not have been clearer, and the agencies immediately began to come around. In the eight largest departments, which together account for close to 75 percent of all state workers, black employment increased by over half between 1975 and 1983 and now stands at over 20 percent. And black workers, who used to be concentrated in menial jobs, now appear in substantial numbers in nearly all the larger job categories.*
>
> No doubt problems remain in Alabama, but the only fair conclusion is that dramatic progress has been achieved in public employment for blacks over the past decade. And *in view of the history of the Ala-*

bama litigation, it is clear that this would not have occurred if Judge Johnson had not first imposed a hiring quota on the state troopers—and then threatened to extend it statewide if the other agencies did not alter their discriminatory practices." *Id.* (emphasis added).

Notably, Chairman Pendleton, who took the opposing view in the article, offered no suggestion as to how employment opportunities would have been opened to blacks in such agencies as the Alabama Highway Patrol without the use of race-conscious measures. Nor do the Petitioners and their *amici* in these cases.[14]

C. The 1972 Amendments to Title VII Accentuate the Authority of Federal Courts to Decree Race-Conscious Affirmative Relief in Appropriate Cases.

As amended in 1972, the first sentence of § 706(g) now authorizes a court to order "such affirmative action as

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[14] In its strained attempt to square its new reading of § 706(g) with the remedial principles this Court established in other civil rights areas, the United States transparently misinvokes this Court's teaching that the "scope of the remedy" must fit "the nature and extent of the . . . violation." Brief for the United States as Amicus Curiae Supporting Petitioner in No. 84-1999 at 6-7. It is *precisely because* the lower courts repeatedly found that make-whole relief to discrimination victims failed to match the extent of a defendant's discrimination that they found affirmative, race-conscious relief to be required. The United States seizes from context a single isolated phrase ("[a desegregation remedy] is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)) as if to suggest that this Court somehow required relief in school desegregation cases to be "victim-specific." The passage, in context, says only that a desegregation remedy could not extend to neighboring jurisdictions not shown responsible for segregation in the school district at issue. The principle that the "scope of the remedy" must fit "the nature and extent of the . . . violation", has never supported the rigid stricture that civil rights remedies must be victim-specific. The very notion that school desegregation would be required only on behalf of "specific victims" and not black students as a group is patently absurd.

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.*" 42 U.S.C. § 2000e-5(g) (emphasized language added in 1972). The amended language was drawn by the conference committee from the Senate-approved version of the statutory amendment. *1972 Leg. Hist.* at 1816-1817, 1838-1839. The section-by-section analysis stated that the revised § 706(g) was "intended to give the courts wide discretion exercising their equitable powers to fashion *the most complete relief possible.*" *1972 Leg. Hist.* at 1848 (emphasis added).

The new language derived from amendments offered by Senator Dominick and other opponents of a proposal to shift enforcement powers to the EEOC. Senate Bill S.2515, as reported by the Senate Committee, proposed such a shift. *1972 Leg. Hist.* at 382-383. Senator Dominick's amendments retained enforcement authority in the courts but, by way of compromise, expanded upon the breadth of the courts' remedial authority. *1972 Leg. Hist.* at 553, 1348, 1499. The Senate adopted Amendment No. 878 as modified by No. 884. *1972 Leg. Hist.* at 1561. In debate, Senator Dominick praised the courts' performance in remedying civil rights violations and specifically in formulating remedies under Title VII.[15] Contrary to the United

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[15] Explaining the first of his proposed amendments which included the revised language accentuating federal judicial authority, Senator Dominick stated that the amendment "offers a welcome opportunity . . . to strike a small, but perhaps significant blow for the judicial branch of our Government." *1972 Leg. Hist.* at 697. He stated, "Consider for a moment where minorities would be without the monumental court decisions recognizing and protecting their rights in education, in public accommodations, in housing, in voting and in equal employment." *Id.* at 691. Senator Dominick cited a statement of Assistant Attorney General David L. Norman in favor of continued court enforcement; one of the reasons given by the then chief of the Civil Rights Division was "the fact that Federal courts resolve the factual and legal issues in equal opportunity cases in the areas of voting, housing and education" which "make[s] them a

States, (United States Br. in *Vanguards*, 12, n. 9), it is obvious that the amendment sought to counter those who favored EEOC enforcement, by an expansion upon the courts' remedial powers.

Ironically, Senator Dominick argued in the course of the debates on his proposed amendments that the federal courts "are free from the subtleties of political winds that occur when an administration changes course or a new administration comes in . . . ." *1972 Leg. Hist.* at 678, 692. Congress' decision to retain court enforcement was thus geared to insulate Title VII enforcement from precisely such shifts in "political winds" as evidenced by the United States' present attacks on judicial decrees whose entry it previously pressed, *see* n. 2, *supra*.

Congress in 1972 also *specifically rejected proposals to bar the ordering of race-conscious relief*. Senator Ervin proposed to prohibit government agencies from requiring employers to adopt goals or quotas for the hiring of minorities. *1972 Leg. Hist.* at 1017. Senator Javits, who led the debate against the Ervin proposal, explained that the amendment would affect not only the activities of federal agencies, but also the scope of judicial remedies available under Title VII. *1972 Leg. Hist.* at 1046, 1048.[16]

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particularly appropriate forum for resolving the same kinds of issues in employment discrimination cases." *Id.* at 1485.

Supporters of these amendments argued to the same effect. Senator Fannin stated that the "court enforcement method would more effectively repair injuries caused by employment discrimination . . ." and that "the district courts are experienced in handling civil rights matters, having in recent years dealt effectively with a broad spectrum of civil rights cases, including those involving employment discrimination." *Id.* at 698-699. Senator Cooper stated "the Senator from Colorado is correct . . . that the greatest progress in the field of civil rights against discrimination has been through the decisions of the courts." *Id.* at 1533.

[16] Senator Javits referred to court decisions ordering race-conscious relief as well as the decisions upholding race-conscious administrative measures such as the Philadelphia Plan. At his request, *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th

He stated his view that "[w]hat this amendment seeks to do is to undo . . . court decisions" approving use of race-conscious remedies. *Id.* at 1048. The amendment was rejected by a 2 to 1 margin. *Id.* at 1074.

A similar amendment offered by Congressman Dent to the House bill was also not adopted. *1972 Leg. Hist.* at 190, *et seq.* Congressman Dent's amendment was addressd to H.R. 1746 which, as reported out of Committee, proposed to transfer OFCC administration to the EEOC; the amendment proposed that EEOC not be empowered to require federal contractors to adopt goals and timetables as had been done by OFCC in administering E.O. 11246. Ultimately, administration of the Executive Order was left with OFCC and the Dent amendment was not directly addressed. *Id.* at 312-314.

The House debate reflects agreement that—unlike OFCC's authority with respect to the Executive Order—the EEOC had previously had no authority to require employees to adopt goals and timetables as an aspect of *substantive compliance* with Title VII. Contrary to arguments of *amici* (Br. of Local 542, IUOE, at 10-13), the debate does not reflect agreement that federal courts were without authority *to decree race-conscious measures as remedies for established violations.* The House's ultimate action in leaving administration of the Executive Order with OFCC—*with administrative authority intact to require adoption of goals and timetables*—is to the contrary. *A fortiori* the House did not mean to interfere

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Cir. 1971), *cert. denied*, 404 U.S. 984 (1971) was printed in the Congressional Record, along with *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971). See *1972 Leg. Hist.* at 1048-1070.

Additionally, Senator Javits referred approvingly to two consent decrees recently entered at the Justice Department's behest which contained race-conscious relief. Senator Javits stated the Ervin amendment "would make it impossible for the Justice Department to obtain such decrees in the future." *1972 Leg. Hist.* at 1071.

with the remedial use of race-conscious measures by the courts.[17]

Since 1972, the lower courts have repeatedly relied on the disposition of the Dent and Ervin amendments in construing Title VII to authorize the imposition of race-conscious relief. *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 177 (3rd Cir. 1977) *cert. denied*, 438 U.S. 915 (1978); *United States v. Elevator Constructors, Local 5*, 538 F.2d 1012, 1019-1020 (3rd Cir. 1977); *Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017, 1028 (1st Cir. 1974); *United States v. IBEW, Local 212*, 472 F.2d 634, 636 (6th Cir. 1973).

While the United States criticizes reliance by the lower courts on the history of these amendments (United States Br. in *Vanguards*, 12-14), this Court has itself found such legislative history to be persuasive specifically with respect to other rejected efforts to modify the relief provision of Title VII. *Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. at 420 & n. 13 (rejection of bills to limit judicial power to award backpay).

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[17] After correctly describing the history of these proposals, Local 542, IUOE misleadingly concludes that participants in the House discussions did not propose to change "the fact that Title VII does not authorize court-ordered racial quotas." (Br. at 13). This supposed "fact" was, as of 1972, contrary to positions taken by *five* courts of appeals, not merely two as asserted by Local 542 (Br. at 13, n. 9). In addition to the Fifth Circuit in *Local 53 of Int'l Ass'n of Heat & Frost I & A Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) and the Ninth Circuit in *Iron Workers Local 86*, *supra*, the Third, Sixth and Eighth Circuits had all declared the federal courts empowered to make remedial use of race-conscious measures: *Contractors Ass'n of Eastern Pa. v. Sec. of Labor*, *supra*, 442 F.2d at 173 n. 47 ("federal courts in overcoming the effects of past discrimination are expressly authorized in Title VII to take affirmative action"); *United States v. IBEW, Local 38*, *supra*, 428 F.2d at 151 (rejecting "pro forma" judgment, remanding for "appropriate affirmative relief", and endorsing use of race-conscious relief in *Vogler* and other decisions); *Carter v. Gallagher*, *supra*, 452 F.2d at 329-330 ("even the anti-preference treatment section of the . . . Civil Rights Act of 1964 does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices"; endorses *Vogler*, *Ironworkers Local 86*, etc.).

D. This Court's Decision in *Stotts* Does Not Disapprove Imposition of Race-Conscious Affirmative Relief.

Petitioners and the United States contend that *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576 (1984), disapproves lower court decisions sustaining race-conscious relief and limits court-ordered relief under Title VII to identified discrimination victims. This contention has been rejected by each of the courts of appeals which have addressed it to date.[18] The lower courts in *Stotts*, in allowing recently-hired minority employees to displace more senior employees, had effectively awarded such minority employees with "make-whole" relief in the form of competitive seniority. In doing so, the *Stotts* majority said, the lower courts had violated not only § 703(h)'s protection of *bona fide* seniority systems but also the policy of § 706(g) limiting "make-whole" relief to identified discrimination victims. While "make-whole" relief, such as backpay and retroactive seniority, is limited by § 706(g) to discrimination victims, affirmative relief to eradicate the effects of discrimination is not. *Stotts* merely applies the obvious limitation of "make-whole" relief to discrimination victims.

Had this Court in *Stotts* meant to disapprove race-conscious hiring and promotions, it would surely have called for modification of the underlying decrees which included such relief, 104 S.Ct. at 2581, in line with the principles specifically noted in note 9 of the majority opinion. *Id.* at 2587.[19]

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[18] Br. of United States in *Vanguards*, 17.

[19] Subsequent to the *Stotts* decision, the Department of Justice addressed letters to some 50 state and local jurisdictions which are parties to existing court decrees which include race-conscious hiring and/or promotion relief analogous to that involved in the Memphis case. The United States has filed motions in some cases asking that the affirmative relief it had previously advocated and successfully obtained be vacated in light of *Stotts*. Just as this Court found no occasion in *Stotts* to call for the vacating of the affirmative hiring relief embodied in the 1974 and 1980 decrees covering the Memphis fire department, the lower courts have thus far rejected the conten-

The United States' argument that race-conscious, affirmative relief is precluded by the last sentence of § 706(g) is practically identical to one made against judicial authority to decree race-conscious measures in school desegregation cases which this Court dismissed as meritless in *Swann*, *supra*, 402 U.S. at 16-17. *Swann* held busing and other race-conscious remedies available despite Title IV of the 1964 Civil Rights Act which specified (1) that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance", 42 U.S.C. § 2000c(b), and (2) that the statute did not "empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils . . . to achieve such racial balance." 42 U.S.C. § 2000c-6. With respect to Title IV, which parallels the last sentence of § 706(g), this Court found "no suggestion of an intention to . . . withdraw from courts their historic equitable remedial powers." *Swann*, *supra*, 402 U.S. at 17. *Swann* exemplifies this "Court's unwillingness to construe remedial statutes designed to eliminate discrimination against racial minorities in a manner which would impede efforts to obtain this objective." *Regents of University of California v. Bakke*, *supra*, 438 U.S. at 355 (Opinion of Brennan, White, Marshall, Blackmun, J.J.).

Tellingly, the United States does not directly argue that race-conscious, affirmative relief was in fact unneeded in the cases where the Justice Department and the EEOC pressed for its entry. Different administrations

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tion that *Stotts* requires the vacating of such relief. *See United States v. City of Buffalo*, 609 F.Supp. 1252 (E.D.N.Y. 1985), *aff'd*, 39 FEP Cases 1168 (2d Cir. 1985); *In re Birmingham Reverse Discrimination Employment Litigation*, No. Cv.84-P-0903F (N.D. Ala.) (Tr. of Proceedings of December 20, 1985, 1342-1360); *United States v. Richard Albrecht, et al.*, C.A. 80-C-1590 (N.D. Ill.) (Order of August 23, 1985); *United States v. State of New Jersey*, C.A. Nos. 950-73, 77-2054, 79-184 (D. N.J.) (Order of July 26, 1985) (Motion of private reverse discriminatees).

may disagree regarding the correct parsing of § 706(g). However, the United States makes no persuasive counter-argument to its long-standing, prior view regarding the vital role of race-conscious measures in the cases of such all-white bastions as the Alabama Highway Patrol.

The foundation for the lower court decisions sustaining race-conscious, affirmative relief remains firm. As long as the federal courts have "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," *Louisiana v. United States*, *supra*, 380 U.S. at 154, the use of race-conscious numerical ratios and goals must remain an available tool to remove persisting racial barriers to equal employment.

CONCLUSION

This Court should decisively reject the contention that affirmative, race-conscious remedies are prohibited. The decisions in these cases should be affirmed.

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