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IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AND LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,
*Petitioners*

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,
*Respondents*

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

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

vs.

CITY OF CLEVELAND, et al.
AND
VANGUARDS OF CLEVELAND,
*Respondents*

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

## BRIEF FOR THE CITY OF BIRMINGHAM, ALABAMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The City of Birmingham, Alabama submits this brief Amicus Curiae pursuant to United States Supreme Court Rule 36.4.

## Interest of the Amicus Curiae

The City of Birmingham is unusually well qualified to assess the arguments presented in these consolidated cases. Birmingham's history in racial matters is regrettable and well known. Further, its awakening to its obligations of non-discrimination was brought about only through prodding by the federal government and by extensive litigation. Recently, however, Birmingham has made progress in changing both racial attitudes and stratified municipal employment patterns. This progress, in part, is attributed to the successful implementation of affirmative action goals in employment. Most importantly, the City of Birmingham has determined that its earlier grudging acceptance of affirmative action was misplaced pessimism. Through the growing representation of all segments of society in its municipal departments, those departments — especially fire and police — are better able to serve and protect all citizens of Birmingham in every neighborhood and community in the City.

Birmingham, like Cleveland, agreed in a conscientiously-constructed consent decree (hereinafter referred to as "Birmingham Decree" and "Cleveland Decree," respectively) to race and gender-conscious affirmative action designed to remedy the pernicious effects of past discrimination against blacks and women. Like the Cleveland Decree, the Birmingham Decree has been challenged by white municipal employees who, to a degree, are the certain beneficiaries of the City's past discriminatory policies. Unlike the Cleveland action, however, where all plaintiffs are private parties, the Birmingham litigation that resulted in the adoption of the Birmingham Decree was brought by the United States as well as by private parties. Moreover, the Justice Department took the lead in forging the goal remedies in the Birmingham Decree. Despite this earlier role, however, the United States now is an aggressive advocate

in reverse-discrimination litigation collaterally attacking employment decisions required by the very decree it constructed.

In 1974, several blacks and an area N.A.A.C.P. chapter brought employment discrimination lawsuits against the Jefferson County Personnel Board (the local civil service system) and the City of Birmingham under Title VII of the Civil Rights Act of 1964, as amended. Subsequently, the Department of Justice also filed a Title VII pattern and practice action against the City, other municipalities, and other governmental entities, charging them with pervasive race and sex discrimination in employment. The cases were consolidated in federal district court in Birmingham. Over the course of approximately seven years, some issues — involving applicant testing for entry level police and fire jobs — were tried to conclusion; other issues were extensively prepared for litigation.

Prior to settlement of the actions, some of the issues pertaining to municipal employment were litigated in two separate trials. In 1977, the trial court ruled that tests used to screen and rank applicants for employment as police officers and firefighters discriminated against blacks. That decision was affirmed on appeal. *Ensley Branch of the N.A.A.C.P. v. Seibels*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980). In a second trial in 1979, other employment tests, qualifications and practices were challenged. Finally, with the active participation of the Department of Justice, all parties — the City, the Department of Justice, and the private plaintiffs — entered into negotiations to settle the lawsuits. Prior to an announcement of the decision of the 1979 trial, negotiations yielded a Court-approved consent decree, signed by the private plaintiffs, by the City of Birmingham, and by the Department of Justice, which became effective on August 21, 1981.

As its lynchpin, the Birmingham Decree includes an affirmative action program whose long-term goal was to achieve a municipal work force whose percentages of whites, blacks and women were in reasonable proportion to the percentages of those groups in the labor force of Jefferson County. The decree also provides interim goals that encouraged the City to

hire and promote qualified blacks and women, where available, to City jobs at rates that range from fifteen percent (15%) to thirty percent (30%) annually for women and that range from thirty-three percent (33%) to fifty percent (50%) annually for blacks. For the past four years, the City has complied with the consent decree goals to the extent that persons qualified for hiring or promotion were available. Because the Birmingham Decree had goals — and not quotas — the City was never compelled to hire any particular individual who was not qualified for his or her position.

Moreover, the Birmingham Decree contained a provision to "immunize" the City from liability in subsequent discrimination claims brought by passed-over employees for the City's failure, *inter alia*, to promote an employee pursuant to the affirmative action goals. That provision, in paragraph 2, stated: "Nothing herein shall be interpreted as *requiring* the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer, or promote a less-qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job-related selection procedure." (emphasis added). This provision allowed the City the flexibility to decline to hire or promote an individual, even though that individual might otherwise be a candidate for hire or promotion under the Birmingham Decree.

Finally, paragraph 3 of the Birmingham Decree provided that "the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by any other party to this litigation, or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack." In short, the City understood that the consent decree provided redress for past discrimination, protected the municipal treasury from potentially catastrophic liability, allowed the City to maintain qualified employees consistent with the local civil service law, and required all parties to defend the decree so that, among other things, the City would not have to expend taxpayer dollars on legal fees for the defense of employment

discrimination lawsuits. After seven years of litigation, the City hoped to put those tax dollars to constructive use.

In 1984 (ten years after the first suit against Birmingham had been brought and three years after that litigation was settled by entry of consent decrees), Birmingham was sued for alleged reverse discrimination by whites who charged that the Birmingham Decree, and Birmingham's implementation of that decree, unlawfully deprived them of employment opportunities. Much to the surprise of Birmingham, the Justice Department intervened in vigorous support of the white individuals and challenged the City's implementation of the Birmingham Decree. In December of 1985, after a full trial in two consolidated actions pertaining to two of the City's departments, the district court rejected the claims of reverse discrimination, finding, *inter alia*, that although Birmingham considered race and sex in promotions, it did so pursuant to a valid consent decree. *In re Birmingham Reverse Discrimination Employment Litigation*, CV-84-P-0903-S (N.D.Ala. Dec. 20, 1985). In upholding the lawfulness of the consent decree, the district court followed the Eleventh Circuit Court of Appeals' precedent which upholds race-conscious remedies that benefit persons not shown to be victims of discrimination, when the remedies are not imposed under circumstances that existed in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), and otherwise comport with the guidance provided in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985).

The results of the hiring and promotion goals in the Birmingham Decree are clear. The City of Birmingham is finally beginning to have a municipal work force, particularly a police force and fire department, that reflects Birmingham's multiracial community. This reflection of Birmingham's pluralism gives municipal departments a much needed familiarity with the customs, standards and experiences that exist in the various communities in Birmingham, and allows the City of Birmingham to render the quality of services that are necessary to serve the entire community. For example, the Birmingham Police

Department currently has about one and a half times more blacks employed than at the time of the entry of the Decree. The number of black police sergeants has increased from *zero* in 1981 to twenty-four in 1986. The number of black police lieutenants has increased from *zero* to three. The number of black police captains has increased from zero to one (promoted in 1985).

In the Birmingham Fire & Rescue Service, the number of blacks has almost doubled since the signing of the decree. In the officer ranks of the Birmingham Fire Department, there are now thirteen lieutenants and one captain who are black. At the time of the decree, there were no blacks employed above the entry level rank of firefighter.

The twenty percent (20%) black representation in the Birmingham Police Department and the twelve percent (12%) black representation in the Birmingham Fire & Rescue Service remain modest percentages for a city whose population exceeds fifty percent (50%) black. But even those small fair employment advances are almost entirely attributable to the employment goals and timetables which the Birmingham Decree directs the City of Birmingham to follow.

The issues in these consolidated cases are, therefore, of vital interest to the City of Birmingham for a variety of reasons. First, this Court's ruling may affect any appeal taken in the Birmingham Reverse Discrimination Litigation, as well as affect the outcome of three other reverse discrimination actions evolving from the consent decree promotions now pending against the City of Birmingham. Second, this Court's ruling will determine whether the Birmingham Decree, signed by Birmingham with the intent of putting behind it the many years of discriminatory employment practices, of rectifying the consequences of those practices, and of ending interminable litigation, will in fact have those intended effects. Third, this Court's ruling will send a much-needed message to the lower courts and to all potential litigants by clarifying and reinforcing the continued viability of affirmative action incorporated in court decrees.

Birmingham's recent experience litigating reverse discrimination claims brought by white plaintiffs and by the Department of Justice compels the City to indicate to this Court that the arguments presented in the briefs of the United States and the Equal Employment Opportunity Commission reflect a political bias that is contrary to the long-held positions of these entities and that does not represent Congressional intent. The City of Birmingham has been betrayed not only by a Justice Department whose philosophy has changed over the past five years, but by a Justice Department that consistently refused to abide by its self-imposed and court-approved obligations in the Birmingham Decree.

In the *Birmingham Reverse Discrimination Litigation*, the Justice Department presented arguments that were ambiguous, perplexing, and at times, directly contrary to arguments that it had earlier presented in the original Birmingham Decree litigation. Accordingly, the arguments of the EEOC (presented on its behalf by the Department of Justice in *Sheet Metal Workers*, No. 84-1656) are not due the deference normally accorded interpretations by governmental bodies of statutes they administer and enforce. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n. 4 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976). The similar arguments of the United States, *Amicus Curiae* in *Vanguards of Cleveland*, No. 84-1999 (also presented by the Department of Justice), are not only entitled to no deference, but are patently suspect inasmuch as they represent complete abandonment of the positions historically advanced by the Department.

## SUMMARY OF THE ARGUMENT

The United States Department of Justice had for years advocated and obtained court-ordered race-conscious and gender-conscious remedies in employment discrimination litigation. The Department sought, authored and obtained such a decree in litigation with *Amicus*, the City of Birmingham, as well as with other jurisdictions and private employers across the coun-

try. The Department has consistently contended in these actions that such remedies are lawful as well as necessary to effectuate the purposes of Title VII.

The government made the same arguments in support of the lawfulness and need for minority-conscious goals to this Honorable Court when the case of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), was before this Court. In defending the lawfulness of such remedies, the government expressly contended that goals may benefit an entire class, some of whose members were victims of discrimination, without being limited solely to the actual victims.

The government's historical position in support of the very kinds of goals contained in the decrees now before this Court, not its recent abandonment of that position, is entitled to considerable deference. *Nashville Gas. Co. v. Satty*, 434 U.S. 136, 142 n. 4 (1977). Indeed, the historical position is the legally correct position.

Race and gender conscious remedies are necessary to effectuate the goals of Title VII. Such remedies are not unfair to non-minorities even if they benefit individuals not shown to have been victims of discrimination. Guidance provided by this Court in its previous decisions, including in *Weber*, *supra*, assures that non-minorities do not unfairly bear the burdens of the affirmative action goals because such goals are approved or imposed by the lower courts only after considering the need for the goals, their impact on non-minorities, and other relevant factors.

The experience of the *Amicus* demonstrates that the goals contained in its consent decree were necessary to achieve meaningful employment opportunities for minorities in Birmingham, Alabama. *Amicus*' experience has also demonstrated that this achievement has not occurred at the expense of non-minorities. Finally, the experience of *Amicus* demonstrates the crucial need for an employer, particularly a municipal employer with scarce funds, to be able to settle employment discrimination litigation on a basis that is fair to its employees, minorities and non-minorities alike, and also on a basis that relieves the

employer of being forced to participate in protracted and expensive litigation. The consent decree signed by *Amicus* and by the City of Cleveland are such decrees and, along with the decree imposed upon the Sheet Metal Workers after litigation, are authorized by Title VII.

## ARGUMENT

### I. The United States Department of Justice Had For Years Advocated Court-Ordered Race-Conscious Remedies As Lawful and Necessary

#### A. *The United States Advocated and Obtained Race-Conscious Remedies in Litigation with Birmingham and Other Jurisdictions Across the Country*

The Department of Justice sought, authored and obtained in Birmingham's litigation a consent decree containing race and gender-conscious aspects which are similar to provisions of decrees before this Court which are being attacked.

The Birmingham Decree contains gender specific hiring and promotion goals that permit, and indeed compel, Birmingham to hire and promote qualified minorities in preference to qualified non-minorities. For example, the interim relief provided in the Birmingham Decree requires the City to fill 50% of certain vacancies in the police and fire departments with blacks who are qualified and are available for promotion and to promote qualified blacks to subsequent vacancies in higher level positions at twice the percentage of blacks in the positions from which promotions are traditionally made.[1] While the decree does not compel Birmingham to hire or promote an unqualified or less qualified minority in preference to a person who is "demonstrably better qualified based on the results of a job related selection procedure,"[2] it does not otherwise permit Bir-

[1]Other similar percentages and ratios are prescribed for female promotions and for blacks and females hired into entry-level jobs.

[2]Paragraph 2 of the decree reads, in pertinent part: "Nothing shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer

mingham to prefer a qualified non-minority over a qualified, but arguably less qualified, minority if doing so would prevent Birmingham from meeting prescribed hiring or promotional ratios. The decree, therefore, contemplates that in some instances, minorities who have not been found to be actual victims of past discrimination will be preferred over whites.

At the hearing held in 1981 to determine the fairness of the proposed Birmingham Decree, this matter was directly addressed when the decree was explained as requiring preferential treatment of qualified minorities over more qualified non-minorities, without any condition that the less qualified minorities be actual victims.[3] The government unequivocably represented this feature of the decree to be lawful.[4] When the decree was challenged in Court by white employees of the City Engineering Department, the Justice Department filed, on October 12, 1982, a motion to dismiss the challenge or alternatively a motion for summary judgment in favor of the City of Birmingham and other defendants. The Justice Department maintained that the white plaintiffs' action "constitute[d] an impermissible collateral attack on the lawfully entered Consent Decrees" entered into by the United States and the City of Birmingham and the Jefferson County Personnel Board. United States' Motion to Dismiss or Alternatively Motion for Summary

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or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure."

[3]In response to the district court's question of how Birmingham would choose between qualified blacks and whites, the City responded:

> Assuming that both the whites and blacks were both qualified, but assuming . . . the whites were perceived to be better, if the blacks were perceived minimally qualified, and we required additional blacks to meet our goals, then we would take them.

August 3, 1981 Hearing at 63, *United States v. Jefferson County*, No. 75-P-0666-S (N.D. Ala. Aug. 21, 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1984). The government did not differ from that view.

[4]The Justice Department's representative stated: "We believe to the extent that the two decrees contain affirmative hiring goals and promotion goals for blacks and women, that these goals are lawful that they do not unlawfully discriminate against whites." *Id.* at 10.

Judgment, *Birmingham Association of City Employees v. Arrington*, No. CV-82-P-1852-S (N.D. Ala. filed Oct. 12, 1982) (later consolidated with other actions, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*).

Two years later, however, the Justice Department made known its intention to enter a reverse discrimination lawsuit against the City of Birmingham as a party plaintiff, thereby aligning itself with white private plaintiffs who were challenging the modest promotions made pursuant to the affirmative action goals of the Birmingham Decree. Paradoxically, however, despite its stated intention to intervene as a party plaintiff and contest promotions made pursuant to the decree's goals, the Justice Department also vowed that the United States plans "vigorously to defend the validity of those Consent Decrees and to defend the validity of any remedial measures required by those Consent Decrees." Hearing at 29 *Welks v. Arrington*, No. CV-83-AR-2116-S and *Zannis v. Arrington*, No. CV-83-AR-2180-S (N.D. Ala. Feb. 28, 1984) (later consolidated with other actions, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*). The City of Birmingham continues to be perplexed by the Justice Department's contradictions.

On May 4, 1984, the Justice Department filed a brief in the Birmingham reverse discrimination case that presented a most disingenuous interpretation of the goals provided in the consent decree. The brief stated that the goals and preferences as to race and sex in hiring and promotion take race into account only in "tie-breaker situations," that is, when two candidates in every respect are equally well qualified. Memorandum of the United States In Response to Motions of Defendants Arrington and City of Birmingham and the Defendant-Intervenors at 12-13, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*, (filed May 4, 1984). The Justice Department advocated that theory in a hearing on July 3, 1985, when it argued that "the decree would contemplate a tie-breaker use of race, but that would be it. . . ." July 3, 1985 Hearing at 11, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*.

After hearing of the tie-breaker theory of the consent decree, the district court summarily rejected the government's contention and reminded the Justice Department that the words of the decree contain much broader mandates. May 14, 1984 Hearing at 23, *In re Birmingham Reverse Discrimination Employment Litigation*. Yet, despite the Justice Department's attempt to disavow the unambiguous text and only logical meaning of the decree it had devised, and despite the United States' entry as a party plaintiff in the reverse discrimination action, the Justice Department advised the district court that "the United States has every intention of vigorously defending the validity of the Decree and of all the relief required by the Decree" and that "we have not taken one false step from that commitment. . . ." The district court replied: "That is a matter that obviously is debatable." *Id.* at 38.

The only arguable justification for the Justice Department's attack on the consent decree in the hearing of February 1984, the motion of March 1984, the May 1984 brief and the May 1984 hearing would be that the Justice Department's failure to defend the decree was justified by *Stotts*. Yet, this Court did not render its decision in *Stotts* until June 12, 1984, months after the Department's about-face. Moreover, none of the courts of appeal prior to *Stotts* had rendered any decisions that in any way could have impugned the validity of the Birmingham Decree's race and gender conscious goals, and none of the courts of appeal since *Stotts* has construed *Stotts* to invalidate such goals in consent decrees or even in litigated matters where the goals do not abrogate *bona fide* seniority systems.

The Justice Department's narrow and facile interpretation of the Birmingham Decree eviscerates the decree, as there are rarely, and perhaps never, occasions to select between *equally* qualified candidates and, if the occasion should arise, it would be so rare as to have no meaningful impact on minority workforce representation. The conclusion is inescapable that the government's present interpretation of the Birmingham Decree has evolved by way of hindsight to be consistent with the government's newspeak view of affirmative action.

Even now, after years of litigation, after a trial, and after a judgment for the City of Birmingham, the City remains confused by the Justice Department's interpretation of paragraph 3 of the Birmingham Decree, which requires the Department to defend the decree against collateral attack. The Department's contradictory intervention on behalf of white plaintiffs coupled with its cynical vow to defend the decree according to the dictates of paragraph 3 still astonish the City of Birmingham. The present view is a repudiation of and consequently an abdication of the government's long-time role in securing compliance with Title VII through goals and timetables. While this new governmental policy first surfaced in the Birmingham action prior to the *Stotts* decision, the government obviously has embraced *Stotts* as a justification for its actions in attempting to dismantle the carefully-wrought Birmingham Decree as well as dozens of similar decrees previously sought, promoted and signed by the government.[5] The government's broad interpretation of *Stotts* is unjustified. It does not represent a colorable reconsideration of statutory construction or of the intent of Congress when Title VII was enacted, but rather represents nothing more than the political rhetoric and apology of the current Justice Department.

This hidden agenda of the government — its plan to persuade courts to adopt as law the Department's abdication of affirmative action — is not immediately apparent from the government's briefs in these pending cases, but is abundantly clear from actions taken by the government in the Birmingham Reverse Discrimination Litigation. In the Birmingham cases, the government advocated and obtained the imposition of gender and race-conscious goals, remedies considered by all parties and the court as plainly lawful, and vowed to defend the decree

[5]The Justice Department has invited some 51 jurisdictions across the country, which are subject to decrees containing race and or gender conscious goals, to join the Department in seeking to reopen the decrees and to eliminate the minority-conscious goals. Hearing on the Nomination of William Bradford Reynolds to be Associate Attorney General, 99th Cong., 1st Sess. 91-92 (June 4, 1985).

against collateral attack. Later, with a change in leadership in the Justice Department, the government led the attack on the decree by proffering a narrow construction of the Birmingham Decree that was plainly contrary to its express wording and contrary to the parties' intentions. Moreover, the government's narrow interpretation could not be justified as necessary to render the decree lawful except under a very broad reading of *Stotts*. No court of appeals, however, has yet interpreted *Stotts* so broadly as would be necessary to invalidate the Birmingham Decree or the decrees now being challenged by petitioners in these two consolidated actions.

In inviting this Court to accept its narrow view of permissible remedies under Title VII and the United States Constitution, the government implicitly suggests that its present interpretation of the Constitution and of Congressional intent is the Department's long-standing interpretation. However, for years (and as recently as August 1981 when the Birmingham Decree was entered), the Justice Department actively sought, obtained and defended the very remedies it now contends are unlawful.

The Birmingham litigation is just one of dozens of similar actions across the country in which the government obtained race-conscious remedies of the kind imposed in the cases now before this Court. Indeed, the Civil Rights Commission in 1972 credited the Civil Rights Division of the Justice Department for having brought or participated as the Amicus in the cases resulting in "the landmark decisions sustaining the use of numerical goals and timetables as a remedy for past discrimination." 1972 Civil Rights Commission Report 277 n. 76. *See, e.g., United States v. Local 86, Ironworkers*, 443 F.2d 544, 553 (9th Cir. 1971). This historical role of the government reflects the statutory interpretation that warrants the deference normally accorded a governmental agency charged with the statute's enforcement. *Sutty, supra*, 131 U.S. at 142 n. 1.

### B. *The United States Advocated Race-Conscious Remedies As Lawful and Necessary Before This Honorable Court*

Just as the United States, by way of hindsight, developed a constrained interpretation of the Birmingham Decree which differed from the government's interpretation at the time of signing, the United States has recently developed and is now proposing to this Court a view of Title VII and of Congressional intent that differs from the position it previously took in this Court.

In its brief before this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the government went to great lengths to explain that race-conscious remedies are lawful and necessary. While *Weber* involved a voluntary affirmative action plan, as opposed to one imposed by a court or with a court's approval, the government in *Weber* did not confine its defense of affirmative action to such voluntary plans. In 1979 the government represented to this Court:

> Yet while the court of appeals acknowledged that an employer can lawfully take race-conscious action to remedy its prior discrimination, the court held that such action is permissible only in very limited circumstances: to justify the race-conscious action, according to the court of appeals, the employer must prove that it engaged in discrimination, and its remedial action must be limited to benefiting the particular victims of its discriminatory conduct. *In our view, this standard is too narrow.*

Brief for the United States and the Equal Employment Opportunity Commission in *United Steelworkers of America v. Weber*, (Jan. 30, 1979) (hereinafter "U.S.A. E.E.O.C. *Weber* brief") at 16-17. (Emphasis added).

Because Kaiser's affirmative action plan was not implemented pursuant to a court decree, this Court in *Weber* did not address whether the affirmative action plan which it held to be lawful could have been lawfully imposed by a court. Petitioners' argument that Section 703(g) of Title VII would prevent a court from implementing a *Weber*-type affirmative

action plan is contrary to the government's position in *Weber*. There the government argued:

> A court could have imposed such a remedy [as was adopted by Kaiser] if, after litigation, it had found that Kaiser had discriminated against blacks. The legislative history of Title VII establishes that numerical race-conscious measures, such as the Gramercy training programs, were contemplated as appropriate relief for courts to grant if they were necessary to remedy proven discrimination. And even without an admission or finding of discrimination, the same program could have been incorporated into a consent decree in settlement of litigation.

U.S.A./E.E.O.C. *Weber* brief at 18-19.

Noting that consent decrees "commonly contain affirmative action obligations, including goals and timetables" and that the validity of such decrees is "not undermined by disclaimers of past discrimination," the government insisted in its *Weber* brief that affirmative action — whether court-imposed or otherwise — need not be confined to proven victims of discrimination:

> [A]s in the case of settlement agreements and consent decrees, the court should not insist on clear proof of a violation by the employer against the particular persons benefited by the affirmative action program.
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> * * *
>
> It is true . . . that the blacks selected for the training programs had not been identified as victims of prior discrimination. . . . But . . . class-wide numerical relief need not always be limited to identifiable victims.

U.S.A./E.E.O.C. *Weber* brief at 40, 52.

In 1979, the government understood Title VII's legislative history as permitting race-conscious goals and Section 706(g) as not intended to prohibit such remedies. The government explained that the concern raised by *some* Congressmen that the Act would require the use of quota systems led to assurances by the Act's sponsors that the Act did not require employers to maintain racially balanced work forces. These assurances, how-

ever, "did not suggest restrictions on remedies that could be ordered after a finding of discrimination." U.S.A. E.E.O.C. *Weber* brief at 29. Rather, Congress intended to preserve management prerogatives to the fullest extent possible, *in the absence of discrimination*. As explained by the government in 1979, "the last sentence of Section 706(g) simply stated that a court could not order relief under the authority of the Act if employers took action against employees or applicants on grounds other than those prohibited by the Act" and "did not in any way restrict the scope of the remedies [such as race-conscious numerical goals] that could be ordered for the kinds of discrimination prohibited by the Act." U.S.A. E.E.O.C. *Weber* brief at 30-31.

The government's extensive review of the legislative history of the 1972 amendments to Title VII led it to conclude, in 1979, that "[a]ny doubts that Title VII authorized the use of race-conscious remedies were put to rest with the enactment of the Equal Employment Opportunity Act of 1972. . . ." U.S.A. E.E.O.C. *Weber* brief at 31. As noted by the government, Congress in 1972 was aware of the numerous court decisions ordering or upholding numerical relief as a remedy for violations of Title VII, and expressly stated its intent, in the Act's section-by-section analysis, to continue that case law. U.S.A. E.E.O.C. *Weber* brief at 32-33, 34 n. 17 (citing such cases in 5th, 7th, 8th and 9th circuits and citing S. Rep. No. 92-415, 92d Cong., 1st Sess. at 21, 27-28 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 8, 13 (1971); 118 Cong. Rec. 1661-1676, 7166 (1972)).

Senator Javits opposed a proposed amendment to restrict federal agencies from ordering the use of numerical ratios in hiring, arguing that such a restriction "would deprive the courts of the opportunity to order affirmative action under Title VII . . . in order to correct a history of unjust and illegal discrimination . . ." and "would torpedo orders of courts seeking to correct a history of unjust discrimination . . . because it would prevent the court from ordering specific measures which would assign specific percentages of minorities that had to be

hired. . . ." *Id.* at 1665, 1667, cited in U.S.A. E.E.O.C. *Weber* brief at 33-34. The government further noted that the other co-floor leader, Senator Williams, also opposed any prohibition of numerical relief because such a prohibition "would strip Title VII . . . of all its basic fiber." 118 Cong. Rec. 1676 (cited in U.S.A. E.E.O.C. *Weber* brief at 34).

According to the government, these views "prevailed in the Senate" and "were shared by the House, where the committee that reported out the bill wrote:

> 'Affirmative action is relevant not only to enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination'."

U.S.A. E.E.O.C. *Weber* brief at 34, quoting H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 16 (1971).

Thus the government concluded in 1979:

> In light of Congress's keen awareness of the kinds of remedies courts had been granting in Title VII cases, and in light of the protests from Senator Ervin and others over the use of race-conscious remedies, this amendment to Section 706(g) provides substantial support for the proposition that Congress intended that numerical, race-conscious relief is available under Title VII to remedy employment discrimination.

U.S.A. E.E.O.C. *Weber* brief at 35.

We recognize that this Court's principal opinion in *Stotts* was influenced to some extent by statements in the Congressional Record which, at first blush, seem at variance with the government's analysis of legislative history in its *Weber* brief. *Stotts*, 104 S. Ct. 2576, ___, 81 L.Ed.2d 483, 500-01. Considering that this Court in *Stotts* was reviewing racial distinctions in layoffs imposed over the opposition of a party and in contravention of a collectively-bargained *bona fide* seniority system, the Court's review of legislative history was made with such facts in mind. This Court's statements in *Stotts* about Congressional intent should be considered in the context of the

intent under consideration — *i.e.*, Congress' intent to permit or prohibit a court-ordered racial quota over a party's objection when the quota overrides non-minority seniority rights in preference to minorities who are not proven victims of discrimination. Since this Court in *Stotts* was not attempting to discern Congressional intent with respect to racial quotas consented to by the parties or imposed pursuant to findings of discrimination, nor was it discerning Congressional intent with respect to racial quotas which do not abridge rights in a *bona fide* seniority system devoid of intentional discrimination, we invite this Court to reconsider legislative history in light of the facts presented by the cases now before it. We especially invite the Court to review the analysis of legislative history in the government's 1979 *Weber* brief, made much closer in time to the history under consideration and at a time when the government was still advocating the use of employment goals as necessary and lawful remedies without regard to whether they benefit actual victims of discrimination. The legislative history does not disclose an *intent of Congress* (in contrast perhaps to intent of some individual Congressmen) to prohibit race-conscious remedies of the kind imposed by consent decree upon the cities of Birmingham and Cleveland or imposed by the court upon Local 28 of the Sheet Metal Workers.[6]

The government's long-standing construction of Title VII as permitting a court to impose race-conscious remedies, evidenced by its securing such relief in countless actions, including Birmingham's litigation, and by its brief in *Weber*, is entitled to considerable deference. The government's recently-contrived construction of legislative history and its misreading of *Stotts* is nothing more than a retrenchment motivated by policies (adopted prior to *Stotts* and without regard to the ex-

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[6]Of course, the Fourteenth Amendment provides an additional and independent basis for race-conscious relief in suits against municipalities such as Cleveland and Birmingham, although it was not an available basis for relief in *Stotts*. Congressional intent with respect to Section 706(g) is irrelevant to remedies available in such actions. *Paradise v. Prescott*, 767 F.2d 1514, 1529 (11th Cir. 1985).

isting case law) that are at odds with the purpose and intent of Title VII.

Unless this Honorable Court clarifies its holding in *Stotts* by limiting it to the facts of that case, reaffirms its approval of affirmative action as approved in *Weber*, and explicitly approves the actions of its lower courts in imposing race-conscious remedies where necessary to remedy past discrimination, it will send a fateful message to the government and to individuals who are, or may be, subject to discrimination. That message will sound the death knell of Title VII in all but the most narrow of circumstances, as it would encourage the government to undo all progress gained through years of vigorous enforcement of Title VII.

## II. Race-Conscious Remedies Are Appropriate, Without Regard to Proof of Discrimination Against Each Beneficiary of the Remedies, as They Are Necessary to Effectuate the Goals of Title VII and Are Not Unfair to Individuals Not Benefited By Them

### A. *Race-Conscious Remedies That Are Not Victim-Specific Are Necessary To Effectuate Title VII's Goals*

The mandate for race-conscious remedies can be demonstrated by Birmingham's employment history before and after entry of its consent decree. As of January 1, 1966, Birmingham had a total of 9 black employees out of a total of 1,689 employees in its classified services, which consists of higher paying jobs. On the other hand, the unclassified service, which consists primarily of casual laborers, was predominantly black.

In January, 1975, the year the Justice Department sued Birmingham for employment discrimination, the City had only 155 black classified employees out of a total classified workforce of 2,223 persons. The unclassified service remained predominantly black.

Employment discrimination was clearly evident in hiring black police officers and firefighters. It was not until 1966 that Birmingham hired its first black police officer. Ten years later, after the City was sued for employment discrimination by the Justice Department, only 28, or 5%, of the sworn officers were black. There were two black sergeants. No black had a rank above sergeant. Hearing on the Nomination of William Bradford Reynolds to be Associate Attorney General, 99th Cong., 1st Sess. (June 5, 1985) (Statement of W. Gordon Graham, Personnel Officer, City of Birmingham). The City's first black firefighter was not hired until 1968. In 1966, only 13, or 2.1%, of the firefighters were black.

In July, 1981, just before entry of the Birmingham Decree, the effects of past discrimination against blacks persisted in Birmingham's police and fire departments — notwithstanding the district court's race-conscious order in 1977 requiring consideration (but not otherwise requiring *selection*) of more blacks in these departments, and despite Birmingham's adoption of *voluntary* affirmative action plans. *United States v. Jefferson County*, No. 75-P-0666-S (Aug. 21, 1981), *aff'd* 720 F.2d 1511 (11th Cir. 1984). As of July 21, 1981, 79 of Birmingham's 180 police officers were black, 3 of its 131 police sergeants were black, and none of its 40 police lieutenants and captains was black. In the fire department, 42 of the 453 firefighters were black, and none of the 140 lieutenants, captains and batallion chiefs was black. *Id.*

Similarly disproportionate statistics existed with respect to employment of females in the same departments, where for many years positions were restricted to males. *Id.* at 8.

Clearly, the mere elimination of the long-standing barriers to employment of blacks and females — something that had already been accomplished before entry of the Birmingham Decree — was inadequate to remedy the effects of such pervasive historical discrimination. Since entry of the decree in 1981, opportunities for blacks and females have been enhanced, though not at the expense of qualified white males. In the four years after entry of the decree, Birmingham hired 130

police officers of which 67 were white and 63 were black; 92 were male and 38 female. There were 50 police sergeant promotions — 27 white and 23 black; 38 male and 12 female. Of 10 lieutenant promotions, 7 were white and 3 black; 9 were male and 1 was female. In the Fire and Rescue Service, Birmingham hired 85 firefighters of which 47 were white and 38 black; 82 were male and 3 female (prior to the Birmingham Decree no females had been employed). In this period, mid 1981 to mid-1985, there were 29 fire lieutenant promotions, 17 white and 12 black. Of the 10 captain promotions, 9 were black and 1 white.

Absent the consent decree, this modest progress would not have been made. It is the only mechanism available to the City to assure equal employment opportunity.[7] Yet, without the consent decree, Birmingham would be subject to new charges of race and sex discrimination, especially given the nature of an archaic civil service system, which has become a powerful lobby for the status quo.

It is equally apparent that the race-conscious remedies imposed by consent decree upon the City of Cleveland and by court order on the Sheet Metal Workers were necessary and appropriate remedies to overcome the effects of past discrimination. Although *de jure* segregation in Cleveland's municipal employment was halted before it ceased in Birmingham, the *de facto* segregation in Cleveland's police and fire departments was historically well-entrenched prior to the entry of the Cleveland Decree. Department custom and practice effectively prevented blacks from joining or advancing within municipal em-

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[7] This is particularly true since the civil service system under which Birmingham operates places the responsibility for testing and identifying qualified candidates with an independent entity, the Jefferson County Personnel Board, which is subject to a separate consent decree entered contemporaneously with Birmingham's decree. Without the race-conscious remedies in the Board's decree, namely the requirement that candidate certifications include sufficient numbers of minorities to enable Birmingham to meet its goals, Birmingham would have no mechanism — as none is provided under state law — to assure that minorities are even considered for a given job.

ployment. Through the Cleveland Decree, however, the City of Cleveland, like the City of Birmingham, has made progress in providing equal employment.

Any claims that race-conscious remedies other than those which benefit actual victims of discrimination are not necessary and would not frustrate settlement of Title VII actions ignore reality. The United States suggests that parties may

> agree on a formula for identifying class members who have been injured and for determining the degree of their injury. . . . If the formula is simple and mechanical, the parties will have no trouble applying it themselves. *Even if the formula is complex or requires judgments about the facts relating to individual claims*, the parties may still be able to settle the case without outside assistance if their counsel are able to develop a cooperative relationship. . . . . . [t]he parties may identify those entitled to relief by assessing the nature and effect of the allegedly discriminatory practices and applying that assessment to the facts of the individual cases. This process would involve establishing criteria for determining whether a member of the affected class would have received the relevant employment benefit absent the challenged practices.

Brief of the United States as *Amicus Curiae* in 84-1999 at 29, 30. (Emphasis added).

The United States' "formula" approach is both self-contradictory and unworkable. The government first suggests that parties may settle a Title VII action without making "judgments about the facts relating to individual claims." Yet, how can such judgments be avoided if the parties must determine "whether any member of the class would have received the employment benefit" absent discrimination? Once the criteria for the formula are determined, each individual case would necessarily require examination to determine the presence of each criterion. Unless a formula includes criteria such as the individual's qualifications, as well as his relative qualifications as compared to all other persons (minorities and non-minorities alike) who received or *might* have received the job in question, any formula that attempts to determine "whether a mem-

ber of the affected class would have received the relative employment benefit" could not possibly accomplish its stated purpose. If any lesser formula is acceptable, then so should be the race-conscious remedies in the cases now before this Court, as neither *assures* that the remedy is victim-specific. To assure victim-specificity, the parties cannot avoid considering whether the individual was qualified for a job as well as more qualified than other individuals who would have been considered for the job, absent discrimination.

Evaluation of relative qualifications automatically converts a "settlement" into a series of mini-trials over individual claims, at which not only would the merits of the individual's claim be tried but, most assuredly, claims of intervening "affected" employees. In the case of a municipality or other large employer, especially where the discrimination pervades all aspects of employment, including recruitment, hiring and promotions, the numbers of persons who *might* have been hired or promoted in the absence of discrimination could easily number in the thousands. For example, in the nationwide steel consent decree, it was conservatively estimated that individual determinations by a special master for the 60,000 claimants, with each person's case taking one hour to resolve, would require 28 years. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 851 n. 28 (5th Cir. 1975). Of course, one hour per case is grossly inadequate, considering the time needed to investigate and review qualifications of each claimant and other matters, such as what make whole relief is appropriate for him, and considering the likelihood of intervention by other employees.

The United States, perceiving the devastating impact upon affirmative action of any requirement to identify actual victims, argued to this Court in 1979:

> And even if some mechanism could be devised for identifying victims in the course of voluntary compliance efforts, the cost and delay of that effort would be prohibitive.

U.S.A. E.E.O.C. *Weber* brief at 53.

If Title VII is interpreted to impose the same limitations on remedies in every case, whether settled or litigated, and if that limitation is the identification of actual victims, then settling parties would be compelled to guard against threat of collateral attack by either (a) incorporating elaborate procedures to identify, with complete assurance, the actual victims and to determine their individual relief, *or* (b) securing the consent of *all* intervenors and *potentially affected* third parties. The first alternative is a "settlement" that is just as time-consuming, expensive and burdensome as a trial. What would be the employer's motivation to admit liability or the employees' motivation to accept anything less than full backpay if they are required to present full proof of the extent of their individual injury?

The second alternative, negotiating a settlement among the plaintiff, defendant and all potentially affected third parties, is no alternative at all. It would be impossible to identify all potentially affected third parties, not to mention to secure their consent. Yet, no employer would enter into a consent decree if the decree were open to collateral attack from third parties who could invalidate the decree by showing that some of the persons identified were not actual victims of discrimination.

### B. *Race-Conscious Remedies That Are Not Victim-Specific Are Fair*

Race-conscious remedies of the kind challenged by petitioners are not unfair to members of the historically favored race. Since race-conscious remedies are imposed to eradicate the effects of historical discrimination, such remedies will not unfairly injure third parties if the remedies are carefully constructed to integrate the disadvantaged class into the workforce to the degree that would have occurred absent discrimination. In many situations, one possible measure of the degree of minority participation in a non-discriminatory environment is the percentage of minorities in the community's labor force. When a white employee has *benefited* by the discrimination, it is not

unfair to retard his future promotions to make way for blacks or women as long as the *number* of blacks or women hired does not exceed the relative *number* of blacks or women that would have been hired absent discrimination. The impact on the favored class members is the same whether the proven victims receive their rightful places or whether the same number of persons (potential though not proven victims) occupy those places.[8]

Accordingly, any concern that employers will bargain away rights of non-minority employees to avoid the expense of litigation is unwarranted. As long as the district court has the responsibility to assure that the numerical impact of the decree's affirmative action provisions approximates the impact that non-discrimination would have had upon the favored class, then non-minorities will not be injured. Moreover, in considering the fairness of any class action settlement, the district court should evaluate the fairness of the proposed settlement upon class members as well as upon employees who may be affected by the settlement. In evaluating whether settlement is fair and adequate, the district court should apply this Court's guidelines for voluntary affirmative action as discussed in *Weber*. This approach is neither novel, unmanageable, nor impracticable. It is the very approach followed routinely by district courts in approving consent decrees, including the district court in Birmingham's Title VII litigation, and by appellate courts in reviewing the appropriateness of race-conscious remedies whether imposed by consent decree or otherwise.

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[8] This argument was presented to this Court by the government in 1979 in its defense of voluntary affirmative action and applies equally to affirmative action incorporated in a court decree:

> Nor would the interests of white employees have been materially advanced if participation in the training program had been premised on the identification of particular blacks and women who had been victims of prior discrimination. The incumbent employees would be affected similarly by a remedy in favor of identifiable victims of specific discrimination as by a remedy that approximates that result by instead including a specified proportion of minority employees not so identified.

U.S.A., E.E.O.C. *Weber* brief at 53.

Thus, the legitimate interests of non-minorities are protected by the court when it considers whether race-conscious remedies are necessary and appropriate. Relevant to this determination is whether the relief is temporary and terminates when manifest racial imbalances are eliminated, whether there is evidence of historical discrimination, whether the discrimination was intentional, whether the relief does not unnecessarily trammel interests of whites by effectively barring their advancement or requiring their discharge and replacement with blacks, and whether beneficiaries of the relief are qualified for any employment opportunity conferred. *See Weber*, 443 U.S. at 208; *Paradise*, *supra*, 767 F.2d at 1527-34.

These considerations are entirely consistent with this Court's decision in *Stotts*, where the court-imposed layoff remedy unnecessarily trammeled rights of whites because it required discharge of whites, in contravention of a *bona fide* seniority system. The circumstances presented in *Stotts*, however, should constitute the only exception to the lawfulness of court-ordered race-conscious remedies that fail to identify specific victims. Absent a *bona fide* seniority system, Title VII does not guarantee non-minority employees protection against layoffs or preferential consideration in promotions. The absence of such guarantees, however, does not unfairly injure a non-minority as long as any advantages accorded to minorities pursuant to consent decree or other court order are appropriate to remedy past discrimination.

An employer's self-interest in limiting litigation costs by entering into consent decrees, therefore, does not threaten legitimate interests of incumbent employees. This Court's prior decisions in *Weber* and *Stotts* and the lower courts' role in assuring that race-conscious remedies comport with those decisions provide genuine protection to incumbent employees. Moreover, the employer's cost-consciousness is by no means an improper motivation for settlement. When the fact of discrimination is not a debatable matter, protracted litigation only perpetuates the discrimination, further entrenches its effects, delays relief to plaintiffs, and consumes financial resources that

might otherwise be utilized to meet municipal obligations.

Birmingham readily admits that one of its incentives to enter into its consent decree was to avoid further protraction of litigation which was in its seventh year and had cost tens of thousands of dollars, yet was guaranteed to last many more years and cost thousands of more dollars before all issues covering all City departments were finally tried. That seemingly interminable litigation would have been successfully terminated by the 1981 consent decree had it not been for the irresponsible reading, by the government and by some reverse discrimination plaintiffs, of this Court's decision in *Stotts*. In the eighteen months since *Stotts* was decided, Birmingham has expended hundreds of thousands of dollars defending — from governmental and private challenge — the very remedies sought by the government and carefully approved by the Court in 1981.

We cannot believe that this Court intended *Stotts* to cause such wasteful litigation, to erect such a barrier to settlement, or to deprive the lower courts of such a valuable tool to remedy effects of past discrimination regardless of the case's circumstances. Remarkably, the need for clarification of this Court's ruling in *Stotts* is not due to any conflict among the lower courts. Rather, clarification is needed to resolve a conflict between the lower courts, on the one hand, and the United States and private parties, on the other hand. The important factual differences between *Stotts* and the cases *sub judice* and the well-reasoned decisions below demonstrate that race-conscious remedies that are not confined to proven victims are necessary and appropriate in many cases. This Court should not extend its holding in *Stotts* to these cases. By affirming the decisions below, this Court would preserve a necessary and lawful remedy under Title VII and the Fourteenth Amendments which courts have used successfully for many years.

## CONCLUSION

For the reasons stated, the judgments of the Courts of Appeals should be affirmed.

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