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

BRIEF OF THE STATES OF CALIFORNIA, LOUISIANA, MICHIGAN, MINNESOTA, NEBRASKA, NEW JERSEY, NEW MEXICO, OREGON, WEST VIRGINIA, WISCONSIN, AND THE PENNSYLVANIA HUMAN RELATIONS COMMISSION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici States and the Pennsylvania Human Relations Commission respectfully submit this brief in support of respondents. Amici urge this Court to affirm the decisions below, and thus affirm that court orders and other governmental action approving, mandating, or enforcing bona fide affirmative action plans are both lawful under Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), and constitutional under the equal protection guarantees of the Fifth and Fourteenth Amendments.

Amici's interest in these cases stems both from their interest in preserving the right of public employers to take appropriate steps to eliminate the effects of past discrimination within their own workforce and their interest in ensuring the effective enforcement of federal and state laws forbidding employment discrimination. Many of amici have themselves engaged in affirmative action to correct past discrimination.[1] Many of amici have also enforced affirmative action programs to redress employment discrimination which violates federal and state employment discrimination laws.[2] All of amici wish to preserve gov-

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1. *See, e.g., La Riviere v. Equal Employment Opportunity Commission*, 682 F.2d 1275 (9th Cir. 1982), approving a voluntary affirmative action program designed to eliminate the effects of past gender-based discrimination in the California Highway Patrol. See also *Chmill v. City of Pittsburgh*, 488 Pa. 470, 412 A.2d 860 (1980), upholding a voluntary affirmative action plan adopted by the Pittsburgh Civil Service Commission to help remedy past racial discrimination by the Pittsburgh Bureau of Fire, and *Local 526-M, Michigan Corrections Organization, etc. v. State of Michigan*, 110 Mich. App. 546, 313 N.W.2d 143 (1981), rejecting constitutional challenge to affirmative action plan.

2. *See, e.g., Department of Fair Employment and Housing v. City and County of San Francisco*, FEHC Dec. No. 82-11 [1982-83 CEB 5], appeal pending, ordering Fire Department of San Francisco to engage in an affirmative action program to remedy past race discrimination in promotions.

ernmental use of bona fide affirmative action plans to remedy past employment discrimination.

In amici's experience, the goals and timetables established by affirmative action plans have proven to be an effective means of eradicating the effects of past discrimination, particularly for jobs which have been historically segregated or for employers which have resisted voluntary efforts to integrate their work-force. Affirmative action efforts are frequently necessary if equal employment opportunity is to become a reality for this generation of employees, and not merely the goal for future generations who may benefit from the mere elimination of discriminatory practices.

Amici will address the lawfulness of court-ordered and/or court-approved affirmative action plans to remedy the effects of past employment discrimination. Since similar statutory and constitutional challenges to the legality of such plans are raised in Nos. 84-1656 and 84-1999, amici submit this one brief for consideration in both cases.

The State of California, through its Attorney General John K. Van de Kamp, and the other Amici States through their Attorneys General, therefore submit this brief pursuant to Supreme Court Rule 36.4. Amicus Pennsylvania Human Relations Commission files this brief with the consent of the parties pursuant to Supreme Court Rule 36.2.

SUMMARY OF ARGUMENT

Bona fide affirmative action plans, establishing goals and timetables to eliminate the effects of past discrimination, are lawful and necessary remedies for unlawful employment discrimination. Courts may approve, impose, or enforce such plans consistent with statutory and con-

stitutional guarantees, and the beneficial results of bona fide affirmative action efforts move the work force closer to the goal of equal employment opportunity for all.

In this brief, amici address the propriety of goals and timetables as a remedy under § 706(g) of Title VII, whether such a remedy is voluntarily adopted and included in a court-approved consent decree,[3] or is imposed by a court after a finding of past discrimination.[4] Affirmative action plans further Title VII's goal of eradicating employment discrimination, and are permissible remedies under § 706 (g) of Title VII.

Furthermore, amici will demonstrate that governmental involvement in race-conscious affirmative action plans, whether such involvement results from court action or from voluntary action by public employers, is consistent with the constitutional guarantee of equal protection.[5] So long

3. No. 84-1999 involves court approval of an affirmative action plan in a consent decree resolving a Title VII action alleging race discrimination by a public employer against minority firefighters (*Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), cert. granted sub nom. *Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, — U.S. — [106 S.Ct. 59] (1985) (No. 84-1999)). Petitioner therein, joined by the United States Department of Justice, argues that § 706(g) of Title VII prohibits court approval of such a plan.

4. No. 84-1656 involves a court-ordered affirmative action plan after a judicial finding of unlawful discrimination by a union (*Equal Employment Opportunity Commission v. Local 638 . . . Local 28 of the Sheet Metal Workers' Int'l. Ass'n.*, 753 F.2d 1172 (2d Cir. 1985), cert. granted sub nom. *Local 28 of the Sheet Metal Workers' Int'l. Ass'n., v. Equal Employment Opportunity Commission*, — U.S. — [106 S.Ct. 58] (1985) (No. 84-1656)). Petitioners therein, again joined by the United States Department of Justice, argue that § 706(g) of Title VII prohibits courts from ordering the adoption of race-conscious affirmative action plans.

5. Nos. 84-1656 and 84-1999 raise equal protection objections to the affirmative action plans at issue in the respective cases. Petitioners in No. 84-1656, joined by the Justice Depart-

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as affirmative action plans are carefully structured to undo the effects of past discrimination, and satisfy the guidelines for bona fide plans which this Court enunciated in *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208-209 (1979) and *Fullilove v. Klutznick*, 448 U.S. 448, 490-492 (1980) (Burger, C.J., with White, and Powell, JJ.) and 520-521 (conc. by Marshall, J., with Brennan and Blackmun, JJ.), equal protection guarantees are satisfied.

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ARGUMENT

I. TITLE VII PERMITS COURTS TO APPROVE, IMPOSE, OR ENFORCE AFFIRMATIVE ACTION PLANS TO REMEDY THE EFFECTS OF PAST EMPLOYMENT DISCRIMINATION.

A. Prospective Relief Has Long Been Recognized As an Appropriate Means of Eliminating the Effects of Past Discrimination.

In *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), this Court held that Title VII does not prohibit voluntary bona fide affirmative action plans according racial preferences in order to eliminate traditional patterns of racial segregation, stating that ". . . Congress chose not to forbid all voluntary race-conscious affirmative action." (*Id.*, at 206). However, *Weber* did not address "what a court might order to remedy a past proved violation of the Act." (*Id.*, at 200).[6]

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ment, argue that court-ordered affirmative action offends equal protection, and petitioner in No. 84-1999 argues that the consent decree denies non-minorities equal protection. The Justice Department also suggests in a footnote that the relief awarded in No. 84-1999 is unconstitutional.

6. *Weber* also did not address equal protection implications which arise if public employers adopt affirmative action

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During the more than 20 years that Title VII has been in existence, however, the judicial enforcement provision of the Act has been widely understood as permitting courts to order race-conscious affirmative action which operates prospectively to eliminate the effects of past discrimination, in addition to make-whole relief to individual victims of discrimination. The prospective relief which benefits the class victimized by discrimination, plus the make-whole relief to identified individuals, serve, respectively, "the central statutory purposes [of Title VII] of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." (*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

The judicial authority provision of Title VII, § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (hereinafter § 706(g)), is certainly broad enough to support an order requiring prospective affirmative action. It provides, in pertinent part, that a "court may . . . order such affirmative action as may be appropriate, . . . or any other equitable relief as the court deems appropriate." Pursuant to this statutory authority, "federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of § 707(a) [of Title VII, 42 U.S.C. § 2000e-6(a)] eliminate their discriminatory practices and the effects there-

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plans (*Weber*, 443 U.S. at 200), but, as a statutory matter, public and private employers are equally subject to Title VII. Non-federal public employers are included within the statutory definition of "employer" (§ 701(b) of Title VII, 42 U.S.C. § 2000e(b)), except for political officers and their immediate staff (§ 701(f) of Title VII, 42 U.S.C. § 2000e(f)), and federal employees are also protected (§ 717 of Title VII, 42 U.S.C. § 2000e-16). As discussed *infra*, constitutional equal protection concerns also do not prohibit race-conscious remedial plans.

from." (*International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 n. 47 (1977)).

Eliminating the effects of discriminatory practices is unquestionably one of the goals of Title VII. As stated in *Albemarle*, 422 U.S. at 418:

> "Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar discrimination in the future' [Citation.]"

See also *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770 (1976), and *Teamsters*, 431 U.S. at 364, quoting this portion of *Albemarle*.

Absent any affirmative efforts, the mere ending of discriminatory practices will do little to assist the present generation of employees who have been victimized by discrimination. If the effects of past discrimination are left to be dissipated by time alone, the right to full equality in employment opportunity will remain only a goal, and not a reality, for many years to come. As Justice Marshall observed in *Regents of the University of California v. Bakke*, 438 U.S. 265, 395-396 (1978) (Marshall, J., concurring and dissenting):

> "The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.
>
> . . .
>
> "In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society."

The early school desegregation cases confirm that the mere ending of discriminatory practices is often an incomplete remedy, and that race-conscious plans may be necessary to remedy the effects of past discrimination. As stated in *Green v. County School Board of New Kent County*, 391 U.S. 430, 437-438 (1968):

> "School boards . . . were nevertheless 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."

Similarly, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971), the Court said:

> "'Racially neutral' . . . plans may fail to counteract the continuing effects of past school segregation. . . ."

And as stated in a companion case approving a race-conscious student assignment plan, *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971):

> "Any other approach would freeze the status quo that is the very target of all desegregation processes."

The purposes of Title VII are similarly frustrated by practices which "operate to 'freeze' the status quo of prior discriminatory employment practices." (*Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)).

As noted above, the language of § 706(g) is certainly broad enough to encompass an award of prospective affirmative action. Courts' authority under § 706(g) has always been described as broad equitable discretion to correct "a historic evil of national proportions." (*Albemarle*, 422 U.S. at 416). As further explained in *Albemarle*, 422 U.S. at 418:

> ". . . Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice.' . . ."

See also *Franks*, 424 U.S. at 764, and *Teamsters*, 431 U.S. at 361 n.47.

The equity powers of the courts have long been relied upon in school cases to implement race-conscious plans. In *United States v. Montgomery County Board of Education*, 395 U.S. 225, 227 (1969), where the Court approved a district court order which, among other relief ordered, established a ratio for white to minority faculty, the Court explained that district courts are "to be guided by traditional equitable flexibility to shape remedies in order to adjust and reconcile public and private needs." As further explained in *Swann v. Charlotte-Mecklenburg*, 402 U.S. at 15:

> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

Relying on the broad equitable authority granted courts by § 706(g), a multitude of courts, including this Court, have approved race-conscious plans providing prospective relief to a class, once a pattern or practice of discrimination against that class is shown. Make-whole relief for individual members of that class may require a showing of actual injury, but such evidence has never been required for class-wide prospective relief. In *Teamsters*, this Court noted, with apparent approval, a consent decree which, *inter alia*, obligated the employer to hire one minority person for every white person hired until work force parity was attained (*Id.*, 431 U.S. at 330 n.4). As the Court explained:

> "[A] court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order against continuation of the discriminatory practice, an order

> that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order 'necessary to ensure the full enjoyment of the rights' protected by Title VII.[47]" (*Id.*, at 361).

Footnote 47 in the above quotation described the authority of federal courts to order prospective relief.

Numerous decisions by appellate and district courts have similarly awarded or approved affirmative actions plans which operate prospectively to eliminate the vestiges of past discrimination.[7] While these cases are too numerous to attempt a comprehensive listing herein, the Court is certainly aware of the plethora of opinions and consent decrees and can take notice that any determination that such plans violate rather than remedy Title VII will cause an immense upheaval.

This Court and lower federal courts have thus consistently approved consent decrees which include affirmative action plans, and federal appellate and district courts have frequently imposed such plans as part of the relief ordered in Title VII cases. In light of the broad equitable power granted to courts under § 706(g), the consistent use of this discretionary equitable power to adopt or impose affirmative action plans, and the continuing need to

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7. "In Title VII class-action suits, the Courts of Appeals are unanimously of the view that race-conscious affirmative relief can also be 'appropriate' under § 706(g).[10]" *(Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, —, [104 S.Ct. 2576, 2606] (1984) (Blackmun, J., dissenting, with Brennan and Marshall JJ.). Footnote 10 in the above quotation provides citations to opinions from each circuit approving the use of affirmative action remedies in Title VII pattern or practice cases. See also Spiegelman, *Court-Ordered Hiring Quotas after Stotts: A Narrative etc.*, 20 Harv. C.R.-C.L. L.Rev. 339, 345 and n. 15 (1985) ("[T]he courts of appeals in over fifty cases have upheld quotas as remedies for adjudicated violations of the Act.")

eliminate the residual effects of past discrimination, which is one of the central purposes of Title VII, § 706(g) should continue to be interpreted as authorizing courts to award all appropriate relief, including, where necessary, affirmative action plans.

B. Nothing in Stotts Requires This Court To Reverse the Widely-Accepted Understanding of § 706(g).

Despite the long-held understanding that appropriate Title VII remedies include bona fide affirmative action plans establishing goals and timetables which operate prospectively to undo the effects of past discrimination, petitioners, joined by the United States Department of Justice, argue that this remedy now violates Title VII. The basis for this argument is one sentence taken from this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 [104 S.Ct. 2576] (1984).

In *Stotts*, the Court, relying on *Franks*, 424 U.S. at 764-766, and *Teamsters*, 431 U.S. at 367-371, ruled that while individual victims of discrimination may be awarded make-whole relief, including retroactive, competitive seniority, "mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." (*Stotts*, 104 S.Ct. at 2588).

While *Stotts* dealt solely with a district court's authority under § 706(g) to override bona fide seniority systems, the decision further states that the policy behind § 706(g) is "to provide make-whole relief only to those who have been actual victims of illegal discrimination, . . ." (*Stotts*, 104 S.Ct. at 2589). Petitioners and supporting amici seek to transform this sentence into a limitation of not merely make-whole retroactive relief, but also of any prospective relief in the form of goals and time-

tables for hiring or promoting members of the victimized class.

While the impact of *Stotts* on affirmative action plans is, of course, an issue only this Court can decide, the interpretation urged by petitioners and supporting amici is contrary to that given *Stotts* by every circuit court which has addressed this question. Furthermore, petitioners' overbroad interpretation undercuts the effectiveness of Title VII as a statute designed to eliminate the effects of past discrimination.

If *Stotts* means that voluntary consent decrees may not include affirmative action provisions, the illogical result would be that plans lawful under *Weber* somehow become unlawful when approved by courts. As stated in *Deveraux v. Geary*, 765 F.2d 268, 274 (1st Cir. 1985), pet. for cert. filed, 54 U.S.L.W. 3229 (Sept. 19, 1985) (No. 85-492):

> "The expansive reading of *Stotts* urged by [non-minority employees objecting to an affirmative action consent decree] would require us to find that *Stotts* overruled *Weber sub silentio*. In view of the importance of any such action, it seems likely that the Court would have directly addressed *Weber* if it had intended to overrule that decision. All the circuits considering the issue have concluded in the absence of any express pronouncement to the contrary, that *Weber* remains good law."[8]

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8. Decisions which, like *Deveraux*, approve affirmative action consent decrees and reject the "argument that the *Stotts* Court meant to rewrite Title VII law to make all affirmative action plans improper absent a finding of actual past discrimination" (*Deveraux*, 765 F.2d at 271) include, in addition to one of the two decisions at issue herein, *Vanguards*, 753 F.2d at 488 n. 7 ("[T]o apply *Stotts* to voluntary employer plans would mean that all such plans are impermissible under title VII no matter how reasonable. This reading of *Stotts* is directly contrary to *Weber*."); *Massachusetts Ass'n. of Afro-American Police, Inc. v. Boston Police Department*, — F.2d —, (1st Cir. Dec. 20, 1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911

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Furthermore, if *Stotts* forbids court-imposed affirmative action remedies for proven violations of Title VII, then courts, despite their broad equitable powers, are absurdly denied perhaps the most effective means of eliminating discriminatory effects. *Stotts* prohibits courts from disturbing seniority plans, except where necessary to provide complete relief to individual victims of discrimination, but *Stotts* has no effect on court-imposed affirmative action plans which merely provide prospective classwide relief, and do not adversely affect vested seniority rights.[9]

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(3d Cir. 1984), cert. *denied*, — U.S. — [105 S.Ct. 782] (1985); *United States v. City of Cincinnati*, 771 F.2d 161, 168 (6th Cir. 1985) ("*Stotts* did not control this [non-seniority] issue."); *Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir. 1984) ("[H]ere we deal with a remedy applied voluntarily by a public employer at the point of hiring. Thus contrary to the facts of *Stotts*, no employees with vested seniority rights were deprived of them."); *Britton v. South Bend Community School Corp.*, 775 F.2d 794, 808 (7th Cir. 1985) ("Unlike *Stotts*, there is no override of a bona fide seniority plan. . . . *Stotts* did not even purport to, much less actually, overrule *Weber*."); *Grann v. City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 296] (1984) (" . . . *Stotts* involved seniority rights, which cannot be awarded to one employee without adversely affecting the rights of other employees, while the male detectives here lost nothing when the city remedied the discrimination against women."); *Paradise v. Prescott*, 767 F.2d 1514, 1528 (11th Cir. 1985) ("[T]he central issue in [*Stotts*] concerned the district court's authority to override a bona fide seniority system to require layoffs of more senior whites, in the absence of a showing of intentional discrimination. Here, the order under review involves promotions, not layoffs pursuant to a bona fide seniority system."); and *Turner v. Orr*, 759 F.2d 817, 824 (11th Cir. 1985), pet. for cert. filed, 54 U.S.L.W. 3036 (July 31, 1985) (No. 85-177) ("[A] primary basis of the Supreme Court's holding in *Stotts* is that the district court's order required the city to violate the provisions of a bona fide seniority system.").

9. Decisions rejecting the applicability of *Stotts* to court-imposed affirmative action remedies which do not affect vested seniority rights include, in addition to the other decision at issue herein, *Local 638 . . . Local 28*, 753 F.2d at 1186 ("In our case § 703(h) is not involved because there is no seniority plan in

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Bona fide seniority systems have long been recognized to be beyond the reach of Title VII remedies, absent proof that individual persons have been victims of discriminatory employment practices. Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides that such plans are not unlawful, and prior decisions of this Court have held that such plans do not violate Title VII even though they may perpetuate the effects of past discrimination (*Franks*, 424 U.S. at 761). As stated in *Teamsters*, 431 U.S. at 349, where the Court held that bona fide seniority systems were immune from the *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), analysis of unlawful discriminatory effect:

> "Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale."

Nevertheless, neither § 703(h) of Title VII nor the expectations of other innocent employees bar courts from approving or awarding make-whole relief, including retroactive seniority, to individual victims (*Franks*, at 774-775, and *Teamsters*, at 347). The lower court's errors in *Stotts* were to fail to limit seniority awards to individual discriminatees and to attempt to override a seniority system merely to eliminate discriminatory effects. As explained in *Stotts*, 104 S.Ct. at 2588:

> "The difficulty with this approach is that it overstates the authority of the trial court to disregard a seniority system in fashioning a remedy after

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conflict with the remedies imposed by AAAPO or the fund order."), *United States v. City of Buffalo*, — F.2d — (2d Cir. Dec. 19, 1985) ("[T]he decree in this case does not conflict with a seniority plan protected by § 706(h) [*sic.*] . . . ."), and *Diaz v. American Tel. & Tel.*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985).

a plaintiff has successfully proved that an employer has followed a pattern or practice having a discriminatory effect on black applicants or employees."

Stotts has no effect, however, on a trial court's authority to fashion relief which does not intrude on seniority rights. Affirmative action goals and timetables, whether adopted in a voluntary consent decree or imposed as a court remedy, are an effective means of eradicating the vestiges of discrimination. Title VII's remedial provision, § 706(g), should therefore be construed so as to permit affirmative action plans[10] and thus permit the goal of equal employment opportunity to become a reality within the foreseeable future.

II. COURT ORDERS WHICH APPROVE, IMPOSE, OR ENFORCE AFFIRMATIVE ACTION PLANS ARE CONSTITUTIONALLY PERMISSIBLE

Race-conscious plans have long been recognized as a legitimate means to eliminate the effects of past discrimination, and this Court has consistently held that governmental classifications on the basis of race are not unconstitutional *per se*. Such classifications must, of course, be scrutinized under the equal protection guarantees

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10. Since affirmative action plans which do not affect the bona fide seniority rights protected by § 703(h) of Title VII are appropriate under § 706(g) either as consent decrees or as court-imposed mandates, this Court need not decide whether district courts may ever approve consent decrees which they have no authority to order as a remedy. Furthermore, affirmative action plans embodied in either voluntary consent decrees or court-imposed orders are also permissible under § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j). This section means only that employers are not required to grant racial preferences merely because of racially imbalanced work forces, not that racial preferences are prohibited (*Weber*, 443 U.S. at 205-206).

established by the Fourteenth Amendment and the equal protection component of the Fifth Amendment,[11] but racial classifications by the government are constitutional so long as they are justified by, and necessary for the achievement of, a sufficiently important governmental interest. The most recent reaffirmation of this principle is found in *Palmore v. Sidoti*, 466 U.S. 429, — [104 S.Ct. 1879, 1882] (1984), in which this Court, in holding that private prejudice did not justify racial classifications divesting a natural mother of custody of her child, unanimously stated:

> "[Racial] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of its legitimate purpose [citations omitted]."

Similarly, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), where this Court upheld the federal statute setting aside for minority-owned businesses a percentage of federal funds granted to public works projects, the Court rejected the contentions that all racial classifications by the government are unconstitutional and that governmental actions must be "color-blind". As stated in the opinion announcing the judgment of the Court:

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11. Court orders such as those at issue in the instant case are, of course, governmental action and thus subject to scrutiny under equal protection guarantees. The Fourteenth Amendment governs racial classifications by state courts (*Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948); *Palmore v. Sidoti*, 466 U.S. 429, — n. 1 [104 S.Ct. 1879, 1881-1882 n. 1] (1984)). The Due Process Clause of the Fifth Amendment includes an equal protection component imposing similar standards on actions of the federal government (*Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980)), including federal courts (*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 19 (1971)).

> "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." (448 U.S. at 491) (Burger, C.J., joined by White and Powell, JJ.)

Other members of the Court agreed that racial classifications were permissible under the equal protection guarantees in appropriate situations. See *Fullilove*, 448 U.S. at 496 (Powell, J., concurring), and 448 U.S. at 517 (Marshall, J., concurring, joined by Brennan and Blackmun, JJ.)

Likewise, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a majority of the members of this Court approved, in principle, the adoption of race-conscious affirmative action plans by governmental entities. In announcing the judgment of the Court, Justice Powell stated that state racial classifications are constitutionally permissible if the state shows a substantial purpose or interest, and the use of racial classifications is necessary to accomplish that purpose or safeguard that interest (438 U.S. at 305). As other members stated:

> "[R]acial classifications are not *per se* invalid under the Fourteenth Amendment." (438 U.S. at 356) (Brennan, J., concurring and dissenting, joined by White, Marshall, and Blackmun, JJ.).

The use of racial classifications by courts to remedy past discrimination has also long been recognized as both necessary and constitutional in school desegregation cases. In *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Davis v. Board of School Comm'rs. of Mobile County*, 402 U.S. 33 (1971), the Court approved a variety of race-conscious remedies

imposed by federal courts to correct historic discrimination in public schools.

Furthermore, while recent decisions of this Court have declined to address the constitutionality of governmental affirmative action as a remedy for employment discrimination,[12] school desegregation cases have approved court-imposed racial classifications of teachers and staff to achieve racial balance among schools. In *United States v. Montgomery County Board of Education*, 395 U.S. at 232-236, granting the request of petitioner United States, the Court directed the affirmance of a district court order desegregating the faculty and staff of a public school system. The district court judge had ordered the board of education to move towards a goal of a ratio of black and white faculty in each school which was substantially the same as existed throughout the system. The order set out a schedule to achieve this goal, specifying a minimum number of minority teachers to be assigned full-time to each school during the next school year, and a ratio of minority substitute, student, and night school teachers. See also *Davis v. Board of School Comm'rs. of Mobile County*, 402 U.S. at 35, and *Milliken v. Bradley*, 433 U.S. 267, 283 (1977).

As explained in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 19:

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12. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 200 (1979), did not involve governmental action, and *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, — [104 S.Ct. 2576, 2585] (1984), only addressed a court's authority to override a bona fide seniority system, not affirmative action plans which do not interfere with seniority rights.

> "[T]he Mobile school board has argued that the Constitution requires that teachers be assigned on a 'color blind' basis. It also argues that the Constitution prohibits district courts from using their equity powers to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention."

While this Court has declined to review this position in recent employment discrimination decisions, many recent decisions by each circuit court of appeals, in affirming the use of affirmative action programs, have necessarily rejected any contention that such programs violate equal protection guarantees either when adopted by a public employer or approved by court order.[13] Unless each of

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13. See, e.g., *Deveraux v. Geary*, 765 F.2d 268, 274-275 n.5 (1st Cir. 1985), pet. for cert. filed, 54 U.S.L.W. 3229 (Sept. 19, 1985) (No. 85-492) ("[W]e adhere to the precedent upholding the validity of voluntary affirmative action programs instituted by public employers."); *Bushey v. New York State Civ. Serv. Comm'n.*, 733 F.2d 220, 227 n.8 (2d Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 803] (1985); *Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117, 1130 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 900-904 (3rd Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 782] (1985); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 274 (4th Cir. 1976), cert. denied, 429 U.S. 920 (1976); *Williams v. City of New Orleans*, 729 F.2d 1554, 1560-1561 (5th Cir. 1984); *United States v. City of Miami*, 664 F.2d 435, 442 (5th Cir. 1981) ("A consent decree may properly include provisions requiring the defendant to take affirmative action rectifying the effects of past discrimination."); *Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir. 1984) ("[A]gainst the long history of the patent racially discriminatory hiring record of the Detroit Fire Department 'the voluntary race-conscious affirmative action plan' . . . did not violate any applicable federal constitutional or statutory provision."); *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1155-1157 (6th Cir. 1984), cert. granted, — U.S. — [105 S.Ct. 2015] (1985); *Bratton v. City of Detroit*, 704 F.2d 878, 885-886 (6th Cir. 1983), mod. 712 F.2d 222 (1983), cert. denied, 464 U.S. 1049 (1984); *Britton v. South Bend Community*

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these circuits has misread the import of *Bakke* and *Fullilove*, and has misunderstood the history of cases approving race-conscious remedies to eradicate school segregation, these decisions correctly determine that both courts and public employers may, consistent with equal protection guarantees, utilize affirmative action plans to eliminate the effects of past employment discrimination.

A determination that affirmative action plans involving governmental action are not *per se* violations of equal protection does not, of course, mean that all such plans are bona fide and will survive constitutional scrutiny. The standard of review applicable to governmental efforts to undo the effects of past racial discrimination in employment has not been definitively established by this Court, but recent cases do establish that even though racial classifications are designed to correct past discrimination, such classifications will be closely monitored by the courts to ensure that the government's interest in implementing affirmative action is sufficiently strong and that the plan

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School Corp., 775 F.2d 794, 801 (7th Cir. 1985) ("The Supreme Court has consistently held that a governmental body may use race-conscious plans to eradicate the effects of past discrimination."); *Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 561 (7th Cir. 1984), pet. for cert. filed, 53 U.S.L.W. 3896 (June 10, 1985) (No. 84-1936); *Warsocki v. City of Omaha*, 726 F.2d 1358, 1360 (8th Cir. 1984); *Setser v. Novack Investment Co.*, 657 F.2d 962, 965-966 n.2 (8th Cir. 1981) (en banc), cert. denied, 454 U.S. 1064 (1981); *Johnson v. Transportation Agency, Santa Clara County*, 770 F.2d 752, 756 (9th Cir. 1985); *La Riviere v. Equal Employment Opportunity Commission*, 682 F.2d 1275, 1280 (9th Cir. 1982); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (10th Cir. 1979); *Paradise v. Prescott*, 767 F.2d 1514, 1530 (11th Cir. 1985); and *Segar v. Smith*, 738 F.2d 1249, 1293-1294 (D.C. Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 2357] (1985).

is carefully and narrowly drawn so as to be sufficiently related to the plan's purpose.

In *Bakke*, where a majority of members of this Court agreed that appropriate race-conscious affirmative action efforts by governmental entities do not violate equal protection guarantees, four Justices opined that racial classifications which are drawn for remedial purposes need not be subjected to the same strict scrutiny analysis applicable to racial classifications which are drawn to stigmatize or which are based upon racial hatred or prejudice. Instead of requiring that remedial racial classifications be necessary to further a compelling governmental interest, with no less restrictive alternatives available, these Justices concluded that "racial classifications designed to further remedial purposes '"must serve important governmental objectives and must be substantially related to achievement of those objectives."'" (*Bakke*, 438 U.S. at 359) (Brennan, J., concurring and dissenting, joined by White, Marshall, and Blackmun, JJ.). Justice Powell, whose opinion announced the judgment of the Court, applied the same strict scrutiny test applicable to other racial classifications, requiring that "'a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.'" (*Id.*, at 305).[14]

In *Fullilove*, the Court similarly failed to have a majority of Justices clarify the applicable standard of review.

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14. The opinion of the other four Justices did not address the constitutional issue. (*Bakke*, 438 U.S. at 412) (Stevens, J., concurring and dissenting, joined by Burger, C.J., and Stewart and Rehnquist, JJ.).

Three Justices held that they need not adopt either of the analyses articulated in *Bakke*, since the statute in question would survive scrutiny under either test (*Fullilove*, 448 U.S. at 492) (Burger, C.J., joined by White and Powell, JJ.), while three other Justices relied on their opinion in *Bakke* to hold that the appropriate test is "whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." (*Fullilove*, 448 U.S. at 519) (Marshall, J., joined by Brennan and Blackmun, JJ.).

Most recently, in *Palmore v. Sidoti*, the Court did unanimously apply strict scrutiny to a racial classification, but the classification at issue was based upon private prejudice, not a remedial purpose. Nevertheless, the language in that decision arguably means that this Court will conclude that strict scrutiny is always the applicable test. As stated therein:

> "A core purpose of the Fourteenth Amendment was to do away with all governmentally-imposed discrimination based on race. [Citation.] Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. [Citation.] Such classifications are subject to the most exacting scrutiny; . . ." (*Id.*, 104 S.Ct. at 1881-1882) (footnote omitted).

Whether the applicable standard of review is traditional strict scrutiny or a less rigorous analysis, bona fide affirmative action plans are nonetheless constitutional so long as the plans satisfy the guidelines described by this Court in approving race-conscious remedial plans. If affirmative action plans are carefully drawn to eliminate

the effects of past discrimination, then they will "survive judicial review under either 'test' . . . ." (*Fullilove*, 448 U.S. at 492) (Burger, C.J., joined by White and Powell, JJ.).

III. AFFIRMATIVE ACTION PROGRAMS FURTHER THIS NATION'S GOAL OF ERADICATING ALL EFFECTS OF PAST DISCRIMINATION.

This country has established the goal of achieving full equality in employment opportunity, but this goal will not be attained, or even approached, within a reasonable period of time unless efforts are made in both the private and public sectors to undo the effects of years of discrimination. Eliminating past discriminatory effects in employment is, of course, one of Title VII's primary purposes (*Albemarle*, 422 U.S. at 418 and 421; *Franks*, 424 U.S. at 770; and *Teamsters*, 431 U.S. at 364).

As discussed above, affirmative action remedies for Title VII have been approved by every circuit court. Affirmative action plans have also been required or approved by numerous federal and state governmental entities as an effective means to eliminate the effects of past discrimination and attain full equality.[15]

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15. Federal affirmative action efforts, in addition to the public works program approved in *Fullilove*, include Executive Order 11246, 30 Fed. Reg. 12319 (1965) and 41 C.F.R. Parts 60-2 and 60-4 (1985) (federal contractors); Executive Order 11478, 34 Fed. Reg. 12985 (1969) (federal employees); and EEOC Guidelines on Affirmative Action, 29 C.F.R. Part 1608 (1985) (Title VII employers).

Almost every state has statutes, regulations, or executive orders requiring affirmative action efforts to correct the effects of

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Affirmative action plans have won widespread approval from both courts and other governmental entities because such plans are both necessary and effective. Affirmative action efforts have proven their value.

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past discrimination. See Alaska Stat. §§ 44.19.444-44.19.445 (1985), and Alaska Admin. Order No. 59, reported in 8A Fair Emp. Prac. Man. (BNA) 453:225; Arizona Exec. Order No. 83-5, reported in 8A Fair Emp. Prac. Man. (BNA) 453:436; Cal. Gov't Code §§ 19400-19406, 19790-19798 (West 1980), Cal. Exec. Orders Nos. B-85-81 and D-20-83, reported in 8A Fair Emp. Prac. Man. (BNA) 453:853, and Cal. Admin. Code tit. 2, Rule 7286.8, reprinted in 8A Fair Emp. Prac. Man. (BNA) 453: 862; Colo. Exec. Order dated April 16, 1975, reported in 8A Fair Emp. Prac. Man. (BNA) 453: 1036, Colo. Admin. Code (4 CCR) § 1-6-1, reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:1039, Colo. Admin. Code (4 CCR) §§ 5-2-4 and 5-6-1 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:1105, Colo. Admin. Code (3 CCR) § 80.9, reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:1128, and Colo. Admin. Code (3 CCR) § 90.13, reprinted in 8A Fair Emp. Prac. Man. (BNA) 453: 1157; Conn. Gen. Stat. Ann. § 46a-68 (West Supp. 1985), and Conn. Exec. Order No. 9, reported in 8A Fair Emp. Prac. Man. (BNA) 453:1246; Del. Exec. Orders Nos. 74 and 81, reported in 8A Fair Emp. Prac. Man. (BNA) 453:1446; D.C. Code § 1-2524 (1981), D.C. Code §§ 1-507 - 1-514 and 1-1141 - 1-1151 (1981); Fla. Stat. Ann. § 110.112 (West 1982), and Fla. Exec. Order No. 79-50, reported in 8A Fair Emp. Prac. Man. (BNA) 453:1827; Ga. Exec. Order dated July 29, 1976, reported in 8A Fair Emp. Prac. Man. (BNA) 453:2051; Hawaii Exec. Order No. 77-4 and Admin. Directive 80-2, reported in 8A Fair Emp. Prac. Man. (BNA) 453: 2259, and Hawaii Equal Employment Opportunity Regulations §§ 12-31-1 - 12-31-7, reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:2351; Ill. Ann. Stat. ch. 68, §§ 2-105 and 7-105 (Smith-Hurd Supp. 1985), Ill. Ann. Stat. ch. 127, §§ 63b and 119b (Smith-Hurd Supp. 1985), 56 Ill. Admin. Code 2520, Subpart G, and 44 Ill. Admin. Code 750, Subpart C; Ind. Code Ann. §§ 4-15-12-1 et seq. (Burns Supp. 1985); Iowa Admin. Code § 240, Chapters 2.13 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:3091, and Iowa Admin. Code § 240, Chapters 20.1 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:3151; Kan. Admin. Regs. 21-30-14 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:3306; Ky. Rev. Stat. §§ 45.550-45.640 (1980), and Ky. Exec. Orders Nos. 80-106 and 84-549, reported in 8A Fair Emp. Prac.

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"During the 1970's, the U.S. Commission on Civil Rights released studies approving affirmative action and documenting employment gains for blacks in industries adopting affirmaive action." (Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones*

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Man. (BNA) 455:74; Me. Rev. Stat. Ann. tit. 5, §§ 781-790 (1979); Md. Ann. Code art. 78A, § 7A (1977), and Md. Exec. Order dated December 9, 1970 (Code of Maryland Register 01.01.1976.05), reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:655; Mass. Exec. Orders Nos. 227 and 237, reported in 8A Fair Emp. Prac. Man. (BNA) 455:883-884, and Mass. Equal Employment Opportunity Anti-Discrimination and Affirmative Action Program (Admin. Bul. 75-14), reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:961; Mich. Comp. Laws Ann. § 37.2210 (West 1985), Mich. Exec. Order 1983-4, reported in 8A Fair Emp. Prac. Man. (BNA) 455:1030, and Mich. Civil Rts. Div. directive dated April 1978, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1132; Minn. Stat. Ann. § 43A.19 (West Supp. 1985), and Minn. Dept. of Human Rights regulations, ch. 5000, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1301; Miss. State Personnel Board Manual of Policies, Rules 5.10 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1505; Mo. Exec. Order No. 82-27, reported in 8A Fair Emp. Prac. Man. (BNA) 455: 1643, and Mo. Admin. Code (4 CSR) 180-3.080, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1715; Mont. Exec. Order No. 24-81, reported in 8A Fair Emp. Prac. Man. (BNA) 455:1845; Neb. Rev. Stat. §§ 81-1355 et seq. (1981), and Neb. Exec. Order dated June 16, 1978, reported in 8A Fair Emp. Prac. Man. (BNA) 455:2048; Nev. Exec. Order dated February 22, 1983, reported in 8A Fair Emp. Prac. Man. (BNA) 455:2226; N.H. Exec. Order 81-3, reported in 8A Fair Emp. Prac. Man. (BNA) 455:2436, and N.H. State Plan for Equal Employment in Apprenticeship and Training, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:2521- 2543; N.J. Stat. Ann. § 10:5-34 (West 1976), N.J. Stat. Ann. §§ 11:2D-1 et seq. (West Supp. 1985), N.J. Exec. Order No 61, reported in 3 Empl. Prac. Guide (CCH) ¶ 25,722; N.M. Exec. Order 81-45, reported in 8A Fair Emp. Prac. Man. (BNA) 455: 2849, and N.M. Human Rts. Commission Regulations §§ XIII-XV, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:2880; N.Y. Exec. Law § 296 (12) (Consol. 1982), N.Y. Exec. Orders Nos. 6 and 21, reported in 8A Fair Emp. Prac. Man. (BNA) 455: 3071-3072, and N.Y. Admin. Code tit. 9, § 466, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:3125; Ohio Rev. Code Ann. § 4112.04 (A)(10) (Baldwin Supp. 1979), Ohio Exec. Order dated September

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of Equal Opportunity, 69 Minn. L. Rev. 735, 803 (1985)).

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13, 1973, reported in 3 Empl. Prac. Guide (CCH) ¶ 26,715, Ohio Dept. of State Personnel Rules and Regulations, ch. 123: 1-49-01 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:231, Ohio Bureau of Equal Employment Opportunity for Construction Regulations, ch. 123: 2-3-01 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:282, and Ohio State Apprenticeship Council rules 4101: 1-5-02 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:307; Okla. Stat. Ann. tit. 74, § 840.25 (West Supp. 1985), and Okla. Exec. Order No. 79-14, reported in 8A Fair Emp. Prac. Man. (BNA) 457:425; Or. Rev. Stat. §§ 182.100, 243.305, 243.315, and 659.025 (1983), Or. Exec. Order 79-22, reported in 8A Fair Emp. Prac. Man. (BNA) 457:709, and Or. Admin. R. 839-11-200, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:693; Pa. Exec. Order 1984-1, reported in 3 Empl. Prac. Guide (CCH) ¶ 27,251, Regulations of Penn. Human Relations Commission §§ 49.51 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:889, Regulations of Penn. Dept. of Labor and Industry, Industrial Board, §§ 81.1 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:935, Affirmative Action Guidelines of the Penn. Human Relations Commission, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:851, and Penn. Employee Selection Guidelines § 15 (1 Pa. Admin. Bull. 2359 (1971)), reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:861; R.I. Exec. Order 85-11, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:1245; S.C. Code Ann. § 1-13-110 (Law. Co-op. Supp. 1984), and S.D. Admin. R. 65-20 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457: 1451; Tenn. Code Ann. § 4-21-306 (1985), and Tenn. Exec. Order No. 8, reported in 8A Fair Emp. Prac. Man. (BNA) 457: 1865; Tex. Exec. Order MW-6, reported in 8A Fair Emp. Prac. Man. (BNA) 457: 2007; Utah Exec. Order dated May 4, 1979, reported in 8A Fair Emp. Prac. Man. (BNA) 457:2218; Va. Exec. Order No. 1-82, reported in 8A Fair Emp. Prac. Man. (BNA) 457: 2626; Wash. Exec. Order No. 84-10, reported in 8A Fair Emp. Prac. Man. (BNA) 457: 2826, Wash. Rev. Code §§ 49.04.100-49.04.130 (1974), reprinted in 8A Fair Emp. Prac. Man. (BNA) 457: 2873, Wash. Admin. Code R. 168-08-298(4)(q), reprinted in 8A Fair Emp. Prac. Man. (BNA) 457: 2912, Wash. Admin. Code R. 168-18-010 - 168-18-100, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457: 2928a, and Wash. Admin. Code R. 296-04-300 - 296-04-480, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457: 2970; W. Va. Exec. Order 16-78, reported in 8A Fair Emp. Prac. Man. (BNA) 457: 3026; Wis. Stat. Ann. §§ 16.765 and 230.01 et seq. (West Supp. 1985), and Wis. Exec. Orders Nos. 9, 26, and 28, reported in 8A Fair Emp. Prac. Man. (BNA) 457: 3217-3218.

> "Affirmative action programs have achieved the opening of jobs for blacks at other-than-menial levels and the creation of an appreciable black middle class. . . .
>
> "Two studies released in 1983 concluded that blacks made 'greater gains in employment at those establishments contracting with the federal government—and thus subject to the OFCCP affirmative action requirements—than at non-contractor companies.' Major corporations . . . reported significant employment gains for minorities under affirmative action programs. Perhaps of even greater importance is a 1983 survey on affirmative action. In it, a number of major corporations reported that affirmative action had helped break down racial stereotypes, improved employee morale, streamlined personnel policies, and, at some companies, even expanded business. A concerted effort by the courts and administrative agencies to achieve affirmative action goals has contributed to these successes. Affirmative action programs have begun to achieve the goal of equal opportunities for all." (*Id.*, at 804-805) (footnotes omitted).

As further documented in Edwards, *Preferential Remedies and Affirmative Action in Employment in the Wake of Bakke*, 1979 Wash. U.L.Q. 113, 134 (1979), "preferential remedies do work."

Judicial decisions reviewing affirmative action programs have similiarly concluded that such programs are effective means to eliminate vestiges of discrimination, and, moreover, necessary to achieve that goal. As Justice Blackmun stated in his separate opinion in *Bakke:*

> "In order to get beyond racism, we must first take account of race. There is no other way." (438 U.S. at 407) (Blackmun, J., concurring and dissenting).

These sentiments were recently echoed in *United States v. City of Buffalo*, — F.2d —, — (2d Cir. Dec. 19, 1985), where the court said:

> "[U]nless prospective relief were available the wrong could not, because of the inability to identify each of the victims, be remedied by 'make-whole' relief.
>
> . . .
>
> "[B]road discriminatory conduct demands equally broad prospective equitable relief. Otherwise the wrong will not be remedied."[16]

Of course in remedying any wrong, the remedy should only extend so far as necessary to reach the decided goal, and both Title VII and the equal protection guarantees require that affirmative action plans be appropriately limited so that full equality is achieved, but a new discriminatory system is not established. The Title VII guidelines set forth in *Weber*, 443 U.S. at 208, require that affirmative action plans be "designed to break down

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16. Many other decisions have also discussed the necessity for according racial preferences to undo past discriminatory effects, including *Johnson v. Transportation Agency, Santa Clara County*, 770 F.2d 752, 759 (9th Cir. 1984) ("Affirmative action is necessary . . . to remedy long-standing imbalances in the work force."); *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982) ("There may be situations in which the carrot of a goal, or the stick of a required minimum, is necessary to encourage a dilatory or obstructive employer to end discrimination."); *Valentine v. Smith*, 654 F.2d 503, 509 (8th Cir. 1981), cert. denied, 454 U.S. 1124 (1981) ("Arkansas could not practically achieve its constitutionally permissible ends in the foreseeable future without the use of race-conscious remedies."); and *United States v. City of Miami*, 614 F.2d 1322, 1336 (5th Cir. 1981), mod. on other grds., 664 F.2d 435 (5th Cir. 1981) ("[A]ffirmative relief is *required* to ensure that the effects of past discrimination are negated.") (emphasis by court).

old patterns of racial segregation and hierarchy," "not unnecessarily trammel the interests of the white employees," not "create an absolute bar to the advancement of white employees," and be "a temporary measure."

The necessity for limiting affirmative action plans so as only to remedy past discrimination was also set forth in *Fullilove*. The opinion by Chief Justice Burger announcing the judgment of the Court, 448 U.S. at 487, noted that "application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress." See also the concurring opinion of Justice Powell, at 498 ("[T]he means selected must be narrowly drawn to fulfill the governmental purpose."), and Justice Marshall, at 521 ("[R]acial classifications employed in the set-aside provision are substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination.").

With appropriate limitations, such as were found to exist in both decisions under review herein,[17] race-conscious plans which operate prospectively, and help ensure that the remnants of past discrimination do not continue to haunt the work force, are an essential tool in the Nation's struggle to eradicate employment discrimination. In *Setser v. Novack Investment Co.*, 657 F.2d 962, 966 n.3 (8th Cir. 1981) (en banc), cert. denied, 454 U.S. 1064 (1981), the court, quoting from a 1977 statement by the United States Commission on Civil Rights, provided a

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17. See *Vanguards*, 753 F.2d at 484-485, and *Local 638 . . . Local 28*, 753 F.2d at 1186-1188, for discussions of how the affirmative action plans in question in each case comply with the guidelines set forth above.

most compelling and persuasive justification for affirmative action:

> "'The short history of affirmative action programs has shown such programs to be promising instruments in obtaining equality of opportunity. Many thousands of people have been afforded opportunities to develop their talents fully—opportunities that would not have been available without affirmative action. The emerging cadre of able minority and women lawyers, doctors, construction workers, and office managers is testimony to the fact that when opportunities are provided they will be used to the fullest.
>
> 'While the effort often poses hard choices, courts and public agencies have shown themselves to be sensitive to the need to protect the legitimate interests and expectations of white workers and students and the interests of employers and universities in preserving systems based on merit. While all problems have not been resolved, the means are at hand to create employment and education systems that are fair to all people.
>
> 'It would be a tragedy if this nation repeated the error that was made a century ago. If we do not lose our nerve and commitment and if we call upon the reservoir of good will that exists in this nation, affirmative action programs will help us to reach the day when our society is truly colorblind and nonsexist because all people will have an equal opportunity to develop their full potential and to share in the effort and the rewards that such development brings.'
>
> United States Comm. on Civil Rights, Statement on Affirmative Action, 12 (1977)."

These words eloquently describe the importance of a decision from this Court affirming the use of bona fide affirmative action plans, in appropriate situations, to accomplish the goal of eliminating the effects of past discrimination.

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CONCLUSION

Race-conscious affirmative action plans designed to eliminate the vestiges of racial discrimination in employment are an effective and necessary means to achieve the goal of equal employment opportunity. Such plans are consistent with the remedial purpose of Title VII, and pass scrutiny under equal protection guarantees, so long as they are carefully designed to remedy past discrimination. For the foregoing reasons, amici respectfully urge this Court to affirm the decisions below.

DATED: January 24, 1986

Respectfully submitted,

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