Nos. 84-1999, 84-1656

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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

v.

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

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

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

v.

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

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

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL BLACK POLICE ASSOCIATION AS AMICI-CURIAE IN SUPPORT OF RESPONDENTS CITY OF CLEVELAND, THE VANGUARDS OF CLEVELAND, CITY OF NEW YORK AND STATE OF NEW YORK

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CONSENT OF PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICI

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation. Over a thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted it in such efforts.

The National Association for the Advancement of Colored People is a New York nonprofit membership corporation. Its principal aims and objectives include promoting equality of rights and eradicating caste or race prejudice among the citizens of the United States and securing for them increased opportunities for employment according to their ability.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States.

The National Black Police Association ("NBPA") is a nationwide organization comprised of nearly 100 local black police associations representing 720,000 black police officers throughout the United States. Among the purposes of the NBPA is the elimination of discrimination in public safety

departments, particularly in employment with its concomitant effect of improving the delivery of public safety services to all members of the community.

Amici have a direct interest in the long-established principle that Federal courts have wide discretion in fashioning remedies for violations of Title VII and may impose classwide numerical relief where necessary. Without such relief in appropriate cases, we and our clients will be impeded—perhaps totally precluded—in our efforts to vindicate the civil rights of minority groups that have historically been victimized by unlawful discrimination.

STATEMENT OF THE CASES

1. *Local 93*

On October 23, 1980, the Vanguards of Cleveland ("the Vanguards"), minority firefighters employed by the City of Cleveland, filed a class action complaint in the United States District Court for the Northern District of Ohio alleging discrimination by the City in the hiring, promotion and assignment of minority firefighters in violation of the Thirteenth and Fourteenth Amendments, Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983.

The parties then entered into settlement negotiations, and during the negotiations, Local 93 of the International Association of Firefighters ("Local 93") intervened.

The Vanguards and the City filed a proposed consent decree on November 2, 1981. The court held evidentiary hearings on January 7-8 and April 27-28, 1982, to consider Local 93's objections to the proposed decree.

On November 12, 1982, the magistrate reported that a tentative agreement had been reached by the three parties. The agreement, which contained promotional goals for minority firefighters, was later rejected by the membership of Local 93.

The Vanguards and the City then submitted another proposed consent decree that was substantially the same as the

plan negotiated by the leaders of Local 93 but rejected by the Local 93 membership. Local 93 opposed court approval of the decree.

The district court adopted the proposed consent decree on January 31, 1983. The court found that the evidence "revealed a historical pattern and practice of racial discrimination in promotions in the City of Cleveland's Fire Department". The court concluded that the affirmative action plan incorporated in the proposed consent decree was a reasonable remedy in light of that discrimination and adopted the consent decree as a fair, reasonable and adequate resolution of the claims.

The Sixth Circuit, after reviewing the district court's findings, held that the district court did not abuse its discretion in approving the consent decree, affirmed the district court's order and denied Local 93's request for a rehearing *en banc*.

2. *Local 28*

The Department of Justice instituted this action in the United States District Court for the Southern District of New York in 1971 against Local 28 and its Joint Apprenticeship Committee ("JAC") under Title VII of the Civil Rights Act of 1964 to enjoin a pattern and practice of discrimination against nonwhites.[1] Shortly thereafter the EEOC was substituted as plaintiff, the City of New York intervened as a plaintiff and the New York State Division of Human Rights ("State"), initially named a third-party defendant, realigned itself with the EEOC and the City.

After a three week trial in 1975, Judge Henry F. Werker found that Local 28 and the JAC had purposely discriminated against nonwhites in violation of Title VII.

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[1] Local 28 and its JAC had a long history of involvement in employment discrimination litigation prior to the commencement of this action in 1971. *See State Commission for Human Rights v. Farrell*, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. New York Co. 1964); *State Commission for Human Rights v. Farrell*, 47 Misc. 2d 244, 262 N.Y.S.2d 526 (Sup. Ct. New York Co.), *aff'd*, 24 A.D.2d 128, 264 N.Y.S.2d 489 (1st Dept. 1965); *State Commission for Human Rights v. Farrell*, 52 Misc.2d 936, 277 N.Y.S.2d 287 (Sup. Ct. New York Co.), *aff'd*, 27 A.D.2d 327, 278 N.Y.2d 982 (1st Dept. 1967).

In July 1975, the court entered an order and judgment ("O&J") and appointed an administrator to propose and implement an affirmative action plan ("AAP"). The Second Circuit affirmed Judge Werker's finding that Local 28 and the JAC intentionally violated Title VII, but reversed two provisions of the O&J and the AAP. 532 F.2d 821, 829-33 (2d Cir. 1976).

Judge Werker then adopted, and the Second Circuit affirmed, a revised AAP and Order ("RAAPO") that established a nonwhite membership goal of 29% to be achieved by July 1, 1982, and ordered Local 28 and the JAC to develop the apprenticeship program, to increase and maintain nonwhite enrollment, to maintain detailed records regarding union employment practices and to submit periodic reports summarizing those records. 565 F.2d 31, 33-36 (2d Cir. 1977).

A. *First Contempt Proceeding*

On April 16, 1982, the City and State moved to hold Local 28 and the JAC in contempt for violating the district court's orders by failing to take the required steps to meet the 29% membership goal by July 1, 1982.

In August 1982, Judge Werker, after studying voluminous evidence, concluded that Local 28 and the JAC had "failed to comply with RAAPO . . . almost from its date of entry" and held Local 28 and the JAC in civil contempt. Local 28's contravention of court orders included: underutilization of the apprenticeship program, refusal to conduct a general publicity campaign, adoption of an older workers' job protection provision, issuance of unauthorized work permits to white workers from sister locals and failure to maintain and submit records as required by RAAPO and the EEOC. The court concluded: "I am convinced that the collective effect of these violations has been to thwart the achievement of the 29% goal of nonwhite membership in Local 28 established by the court in 1975. . . . I have no other recourse but to hold the defendants in civil contempt of court." Judge Werker imposed a $150,000 fine to be placed in a training fund.

B. *Second Contempt Proceeding*

On April 11, 1983, the City brought a second contempt proceeding, this time before the administrator, charging Local 28 and the JAC with further violations of the O&J, RAAPO and orders of the administrator. The administrator, after a hearing, found that Local 28 failed to provide records required by RAAPO in a timely fashion, that Local 28 and the JAC failed to provide accurate data and that Local 28 failed to serve RAAPO on the contractors who hired Local 28's members. He recommended that defendants again be held in civil contempt.

Judge Werker adopted the administrator's recommendation that Local 28 and the JAC be held in civil contempt and in September 1983 Judge Werker adopted an amended AAP and Order ("AAAPO"), that made six important changes in RAAPO. Among other changes, AAAPO required that one nonwhite apprentice be indentured for every white apprentice and that contractors employ one apprentice for every four journeymen employed; it also established a 29.32% nonwhite membership goal to be reached by July 31, 1987.

The Second Circuit affirmed all contempt relief ordered against Local 28 and the JAC and rejected defendants' arguments that the affirmative race-conscious relief contained in AAAPO was prohibited by Title VII, the Constitution or this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984). However, the court carefully reviewed AAAPO to ensure that the relief granted was warranted by the factual findings of the district court. The Court affirmed AAAPO but eliminated the intermediate one-to-one apprenticeship ratio. 753 F.2d 1172, 1183-89 (2d Cir. 1985).

SUMMARY OF ARGUMENT

Title VII was enacted to halt discriminatory employment practices and to eradicate the present and future effects of past discrimination. To achieve those goals, the courts were given wide discretion and authority under section 706(g), 42 U.S.C. § 2000e-5(g), to order effective relief.

Since the enactment of Title VII the Federal courts have adjudicated thousands of employment discrimination cases. In a small number of those cases the courts, after carefully reviewing the evidence presented, determined that a classwide numerical remedy was the only effective and practical remedy sufficient to achieve the goals of Title VII. Every circuit has reviewed the award of such relief in either a litigated decree or a consent decree and every circuit has approved it.

In awarding or reviewing the imposition of numerical remedies, the courts have taken great care to evaluate the remedy awarded in light of the purpose and duration of the goal and its effect on nonminorities. Numerical goals counterbalance deeply entrenched favoritism toward nonminorities and foster inclusion of minorities in workforces from which they had been excluded. When properly utilized and carefully tailored, numerical goals do not result in invidious "reverse discrimination" but simply and fairly bring nonminority expectations into line with what would obtain had there been no historical unlawful discrimination against minorities.

Nothing in the plain language of the statute or in the legislative history of Title VII limits a court's choice of remedies to correct a violation of Title VII to "make-whole" relief for identifiable victims of discrimination. As the courts that dealt with employment discrimination cases for over two decades recognized, racial discrimination is by its nature a class wrong and though it is often impossible to identify individual victims, many actual victims exist.

The elimination of classwide numerical relief as a possible remedy would prevent the courts from effectuating the goals of Title VII in the most egregious cases of racial discrimination. Such a result would emasculate Title VII and effectively erase more than twenty years of civil rights progress through the legal system.

ARGUMENT

I. CLASSWIDE RACE-CONSCIOUS NUMERICAL RELIEF IS A PRACTICAL NECESSITY; IT IS SOMETIMES THE ONLY REMEDY THAT CAN EFFECTUATE THE CRITICAL POLICY UNDERLYING TITLE VII.

The central objective of Title VII is to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). The courts, in a continuing effort effectively to promote that policy, have come to the realization that section 706(g) cannot be interpreted, consistent with that objective, to eliminate a court's discretion under Title VII to order numerical relief as the remedy in cases where such relief is necessary.

The failure of other remedies to achieve elimination of "the last vestiges" of discrimination, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), illustrates the direct conflict between the position of petitioners and the Solicitor General on the one hand, and the policies underlying Title VII on the other.

A. *It Would Be Impossible Effectively To Enforce Title VII Without Classwide Numerical Relief In Appropriate Cases.*

Numerical relief is not required, nor should it be, in every case in which violations of Title VII are found. There have been thousands of employment discrimination cases litigated since the enactment of Title VII; yet courts have found it necessary to impose numerical goals in fewer than 100 of those cases.[2] Nevertheless, courts in every circuit have encountered cases where the purpose of Title VII simply could not be effectuated without the affirmance or imposition of classwide numerical relief. In those cases an injunction reiterating Title VII's prohibition against discrimination or individual make-whole relief would be useless and would result in endless enforcement litigation. A Federal court must have the dis-

[2] That number is derived from reported litigated decrees.

cretion to tailor relief that it determines is necessary and that will be effective in the specific situation before it.

1. *Ingrained Patterns of Racial Discrimination*

Courts have justified the imposition of numerical relief in several types of situations. In many of the cases where numerical relief has been imposed, discriminatory practices were particularly long-standing or egregious and resulted in total or near total exclusion of minorities. In many instances numerical relief was ordered only after injunctive or other relief failed to eradicate the unlawful discrimination.

In 1974, the Fifth Circuit acknowledged the shortcomings of relief that allowed the actor who committed the discriminatory practices to "self-correct" its own unlawful behavior. *Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974).

In *Morrow*, the district court found that the Mississippi Highway Patrol had engaged in unlawful discrimination in the employment of patrol officers. Specifically, the court found that while 36.7% of the population of the State of Mississippi was black, the Mississippi Highway Patrol had never employed a black officer. Of the 27 bureaus within the Department of Public Safety, only two had any black employees and these were low level jobs. Of the Department's 743 employees, only 17 were black. The court declined to order affirmative numerical hiring goals or preferences and instead entered a decree enjoining the Mississippi Highway Patrol from future unlawful discrimination and requiring the Patrol actively to recruit black patrol officers. 3 Fair Empl. Prac. Cas. (BNA) 1162 (S.D. Miss. 1971). A Fifth Circuit panel affirmed:

> "Time may prove that the district court was wrong, i.e., that the relief ordered was not sufficient to achieve a nondiscriminatory system and eliminate the effects of past discrimination. But until the affirmative relief ordered has been given a chance to work, we cannot tell." 479 F.2d 960, 964 (5th Cir. 1973).

However, the Court *en banc* reversed and ordered the district court to "fashion an appropriate decree which will have the certain result of increasing the number of blacks on the

Highway Patrol". 491 F.2d at 1055. The Court did so because there was already strong evidence that lesser measures would be ineffective: sixteen months after the entry of the decree, there had been only six black patrol officers hired during a period when 90 patrol officers were added to a total force of approximately 500 troopers. The *en banc* court instructed the district court to order, among other things, some form of affirmative hiring relief such as temporary one-to-one or one-to-two hiring ratios until the patrol was effectively integrated. *Id.* at 1056.

The *Morrow* court recognized that discrimination against a class cannot be eliminated by a mere promise to hire more minorities in the future. The court has an obligation to develop a plan that "works and works now." *Id.*

The need for race-conscious numerical relief is similarly highlighted by a comparison of two cases arising in the Middle District of Alabama, *NAACP v. Allen,* 340 F. Supp. 703 (M.D.Ala. 1972), *aff'd,* 493 F.2d 614 (5th Cir. 1974), and *United States v. Frazer,* 317 F. Supp. 1079 (M.D.Ala. 1970). *Allen* was a private action brought to challenge the exclusion of blacks from employment in the Alabama Department of Public Safety. *Frazer* was an action brought by the Attorney General to challenge racial discrimination against blacks in the employment of persons engaged in the administration of federally financed grant-in-aid programs in several Alabama agencies.

In both cases, the district court, Chief Judge Johnson, made detailed findings of widespread discrimination against blacks in recruitment and hiring highlighted by defendants' nearly total exclusion of blacks from employment. *Allen,* 340 F. Supp. at 705; *Frazer,* 317 F. Supp. at 1087. Judge Johnson ordered relief for specific black victims and prophylactic injunctive relief in *Frazer,* 317 F. Supp. at 1090-93, and interim and long term numerical hiring goals in *Allen,* 340 F. Supp. at 706.

Comparing progress under the *Allen* decree imposing numerical goals on the Department of Public Safety and the

Frazer decree simply enjoining discrimination at a number of Alabama agencies, Chief Judge Johnson stated:

> "The *Frazer* decree has a much wider scope than the *Allen* order, which focuses on only one agency—the Alabama Department of Public Safety—but the decree in *Frazer* lacks the precision achieved in *Allen* through the use of hiring goals. The contrast in results achieved to this point in the *Allen* case and the *Frazer* case under the two orders entered in those cases is striking indeed. Even though the agencies affected by the *Frazer* order and the Department of Public Safety draw upon the same pool of black applicants—that is, those who have been processed through the Department of Personnel—*Allen* has seen a substantial black hiring, while the progress under *Frazer* has been slow and, in many instances, nonexistent. . . . Today the Alabama Department of Public Safety has nearly one hundred (100) blacks employed in nonmenial jobs in both trooper and support positions. With its eighty (80) black support personnel, the Alabama Department of Public Safety has nearly as many black clerical employees as all seventy-five (75) other Alabama state agencies combined!
>
> "Thus in a radical discrimination in employment type case, when the parties are entitled to relief by reason of the fact that their constitutional rights have been violated, this Court's experience reflects that the decrees that are entered must contain hiring goals; otherwise effective relief will not be achieved."

NAACP v. Allen, sub nom. United States v. Dothard, 373 F. Supp. 504, 506-07 (M.D. Ala. 1974) (footnotes omitted).

The facts in *Local 28* also demonstrate that the mere recalcitrance of some employers in complying with Title VII could defeat the purpose of the Act if courts did not have the power to order the discriminating employers to seek to achieve numerical goals by a time certain.

Some employers and organizations have dug in their heels and refused to comply with the mandates of Title VII, even after a judicial finding of violation. In those cases, and in cases in which numerical relief is necessary as a practical matter, courts must have the power to order effective relief.

2. *Removal of Disparate Impact of Discriminatory Procedures*

Courts have also determined that interim numerical goals are a most effective and efficient method of removing the discriminatory impact of an invalid hiring or promotional test. Interim hiring or promotional goals eliminate the disparate impact of the invalid selection practice, allow employers to begin hiring and promoting immediately and prevent a further violation of Title VII.

For example, affirmative interim hiring goals were properly imposed in *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978), *modified and aff'd*, 633 F.2d 643 (2d Cir. 1980). In *Buffalo*, the district court, after a lengthy trial, found that the City had engaged in a pattern and practice of discrimination against blacks, Spanish-surnamed Americans and women in police and firefighter hiring. The court found, for example, that while 20.4% of the City's population and 17.5% of its labor force were black, only 2.7% of the uniformed police officers and 1.2% of the firefighters were black. 457 F. Supp. at 621. The various tests for police and firefighter hiring were found not to be demonstrably related to job performance. *Id.* at 622-29. At the urging of the Department of Justice, the court entered a final decree which included, among other things, interim hiring goals providing that 50% of new police appointments must be minorities and 25% must be women, such goals to remain in effect until the city developed valid selection procedures or until the percentage of minorities and women in the police department equalled the percentage of minorities and women in the City's labor force. The Second Circuit slightly modified the decree by eliminating its long term aspects and affirmed the rest of the district court's decree including the interim goals:

> "[T]he ratio chosen was appropriate in light of 'the resentment of non-minority individuals against quotas of any sort and of the need of getting started to redress

> past wrongs.' . . . The figures chosen here were not unreasonably high in light of the finding of serious discrimination and lack of previous progress, the slow rate of hiring projected in the police department, and the likelihood that prior discrimination had discouraged minorities and women from applying for jobs." 633 F.2d 643, 647 (2d Cir. 1980).

Thus while all police officer candidates must still take and pass the non-valid test, the City's selection of minorities, out of rank order if need be, to satisfy the hiring goal eliminates the discriminatory impact of the test. The interim hiring goals were particularly effective since, after almost six years, the City has still not developed a valid selection procedure. An order requiring the City to develop valid selection procedures without an interim hiring goal would plainly have been ineffective; it also would have turned the district judge into a personnel director, monitoring all new hiring to prevent further Title VII violations.[3]

The promotional goals contained in the consent decree in *Local 93* are similar to the interim hiring goals ordered in *Buffalo*. The promotional goals seek to remove the disproportionate impact of the City of Cleveland's admittedly discriminatory promotion procedures and to begin to eradicate the effects of the past discrimination.

The use of interim hiring or promotional goals is particularly important in public sector cases like *Buffalo* and *Local 93*. Without the use of some form of affirmative action there could be no hiring or promoting (until valid selection procedures could be developed). Such freezing of all appointments or promotions in a city's police or fire department could present a hazardous situation to the citizens of the community. *See, e.g.*,

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[3] In 1985 the Department of Justice sought to modify the final decree, arguing that after this Court's decision in *Stotts*, the interim hiring goals were unlawful. The district court denied the Department's motion, rejecting the Department's interpretation of *Stotts* and holding that *Stotts* was inapplicable. 609 F. Supp. 1252 (W.D.N.Y. 1985). The Second Circuit affirmed, No. 85-6212, slip op. (Dec. 19, 1985), and a petition for certiorari was filed on December 24, 1985, *sub nom. Afro-American Police Ass'n, Inc. v. United States*.

Berkman v. City of New York, 536 F. Supp. 177, 216 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983).

Interim hiring and promotional goals have occasioned very little dispute because they merely end the discriminatory impact of an otherwise unlawful test and are not unfair to nonminorities. They do not discriminate against "better qualified" whites because the selection procedures they correct are not job related; thus "better qualified" applicants cannot be identified. *See Commonwealth of Pennsylvania v. Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) 1475, 1481 (E.D. Pa. 1975).

B. *Victim-Specific Relief Is Often Too Narrow To Achieve The Goals Of Title VII.*

The consensus among the courts on the appropriateness of classwide numerical relief is premised in large part upon practical considerations. It is easier to structure complete and fair relief in cases where identifiable individuals have been injured by unlawful discriminatory employment practices. In such cases courts award limited relief that will make those specific, individual victims whole. However, many cases are not limited to findings of individual discrete wrongs against a few identifiable victims but involve long-standing and blatant discrimination against *all* class members.

In many of the most egregious cases, it is impossible to point to a single individual as the victim. For example, given Local 28's long history of intentional discrimination and its reluctance to change its discriminatory practices even after a Court Order, it is certain that the Union rejected many, if not all, black applicants for racial reasons. Further, it failed to keep detailed employment records as required by EEOC regulations, making it virtually impossible to find and identify actual victims of petitioners' discrimination. The only effective remedy in such cases is one benefiting the class as a whole, *see United States v. Bethlehem Steel Corp.*, 446 F.2d 652; 660 (2d Cir. 1971), and it would be unfair to preclude such relief simply because a few (or, indeed, many) class members may benefit even though they were not identifiable victims of discrimination. Petitioners and the Solicitor General contend that even in such a situation, each applicant is required to show that had his or her appli-

cation been considered, without regard to race, he or she would have been hired. That is inconsistent with the fundamental purpose of Title VII.

The Second Circuit in reaffirming the interim hiring goals ordered in *Buffalo, supra*, slip op. at 739, 742, stated:

> "The hiring inequities were serious and were clearly the product of discrimination. The harmful effects were equally serious and broad in scope. The victims were not simply a small number of identifiable persons who might be made whole by a narrowly-drawn 'make-whole' decree but a large group, most of whom could not be individually identified. . . . Such broad discriminatory conduct demands equally broad prospective equitable relief. Otherwise the wrong will not be remedied. 'Make-whole' relief, absent ability to identify the individual victims, would be pointless and ineffective."

This Court, in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), addressed the danger of limiting relief to an overly narrow group of plaintiffs. While *Teamsters* did not pose the exact issue now before this Court, the relief structured by the Court in that case illustrates a basic point: denying affirmative relief to non-applicants and other victims of discrimination who cannot readily be identified "could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups." *Id.* at 365.[4]

[4] Justice Stewart, writing for this Court, cited decisions where courts have granted affirmative relief under the National Labor Relations Act, the model for Title VII's remedial provisions, even though identification of specific victims was impossible. *Id.* at 366-67. Justice Stewart also cited several Title VII cases where courts of appeals had held that nonapplicants can be victims of unlawful discrimination entitled to make-whole relief. *Id.*

Such a limitation on the equitable powers granted to courts by Title VII

> "would be manifestly inconsistent with the 'historic purpose of equity to secure complete justice' and with the duty of courts in Title VII cases 'to render a decree which will so far as possible eliminate the discriminatory effects of the past.' "

Id., citing *Albemarle*, 422 U.S. at 418.

C. *Effective Eradication Of Past Discrimination Requires Integration In The Workplace.*

There is more to eliminating the "last vestiges" of employment discrimination than simply enjoining discriminatory practices. The lingering reputation of the employer as a discriminatory entity continues to pose a formidable obstacle to minorities seeking entry into the workforce. As the *en banc* Fifth Circuit pointed out a decade ago in *Morrow*, *supra*, 491 F.2d at 1056:

> "[W]e are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of [minorities] . . . ."

On the other hand, if an employer is under an obligation to hire or promote minorities, whether imposed by court-structured relief or agreed to in a consent decree, the certain result will be an increase in minority participation in that employer's institution. As awareness of that participation spreads by word of mouth minorities will no longer perceive as futile efforts to obtain jobs in the same employment sector. *See generally id.*

Injunctions without numerical goals require tremendous faith in the very same employer who felt no obligation to obey Federal statutes outlawing employment discrimination in the first place. The reality is that such faith is often misplaced. *See, e.g., Morrow*, *supra*, 491 F.2d 1053; *Dothard*, *supra*, 373 F. Supp. 504.

II. COURTS ARE INVESTED WITH WIDE DISCRETION UNDER SECTION 706(g) TO ORDER CLASSWIDE RACE-CONSCIOUS NUMERICAL RELIEF WHERE SUCH RELIEF IS NECESSARY TO EFFECTUATE THE PURPOSES OF TITLE VII.

A. *Section 706(g) of Title VII Permits Many Forms of Relief Including Prospective Classwide Affirmative Relief And Make-Whole Relief As Remedies For Employment Discrimination.*

In enacting Title VII, Congress sought to eliminate employment discrimination and eradicate the evils of its existence. To do so, Congress took care to arm the courts with full equitable powers and therefore section 706(g) explicitly authorizes courts "to order such affirmative action . . . as the court deems appropriate". Pursuant to that broad equitable power courts have ordered a wide range of relief for injuries occasioned by discriminatory and unlawful employment practices. *See, e.g., Berkman, supra,* 705 F.2d at 595-96.

"Make-whole" relief is intended "to make persons whole for injuries suffered on account of unlawful employment discrimination". *Albemarle, supra,* 422 U.S. at 418. Petitioners and the Solicitor General concede that much.

Prospective race-conscious classwide relief, including numerical remedies, on the other hand, is directed to the achievement of equality of employment opportunities and the removal of barriers that have operated in the past to favor an identifiable group of white employees over other employees. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

Eleven circuits have held that prospective affirmative race-conscious relief including numerical remedies is permissible under Title VII[5] and is sometimes the only effective and practical remedy.

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[5] *E.g., Thompson v. Sawyer,* 678 F.2d 257, 294 (D.C. Cir. 1982); *Chisholm v. United States Postal Service,* 665 F.2d 482, 499 (4th Cir. 1981); *Firefighters Institute for Racial Equality v. City of St. Louis,* 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied,* 452 U.S. 938 (1981); *United States v. City of*

In addition this Court has steadfastly held in other contexts that prospective affirmative classwide race-conscious relief is not only constitutional but a most appropriate means of remedying the effects of past discrimination.[6]

Until recently the government consistently sought the imposition of classwide prospective numerical relief in cases where such relief was necessary to effect complete relief. *See* briefs filed by the United States at both the district and appellate levels in: *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert denied*, 404 U.S. 984 (1971); *NAACP*

Chicago, 663 F.2d 1354, 1362 (7th Cir. 1981) (en banc); *United States v. City of Alexandria*, 614 F.2d 1358, 1363-66 (5th Cir. 1980); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 943-44 (10th Cir. 1979); *EEOC v. American Telephone & Telegraph Co.*, 556 F.2d 167, 174-177 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Rios v. Enterprise Association Steamfitters Local 638*, 501 F.2d 622, 629 (2d Cir. 1974); *United States v. Masonry Contractors Association of Memphis, Inc.*, 497 F.2d 871, 877 (6th Cir. 1974); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). The Eleventh Circuit has approved consent decrees containing numerical remedies. *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3424 (U.S. Dec. 10, 1985) (No. 85-999); *Turner v. Orr*, 759 F.2d 817 (11th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3086 (U.S. July 31, 1985) (No. 85-177), but has not yet been directly confronted with the validity of such relief under Title VII in a court ordered decree.

[6] *E.g., Fullilove v. Klutznick*, 448 U.S. 448 (1980) ("10% set aside" of federal funds for minority businesses under provision of the Public Works Employment Act of 1977 does not violate the Civil Rights Act of 1964 or the Constitution); *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978) (Powell, J., joined by White, J.) and at 355-79 (Brennan, White, Marshall and Blackmun, JJ., concurring) (State University may permissibly use race as a factor in admissions); *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144 (1977) (Reapportionment of voting districts in accordance with specific numerical racial goals is permissible under of the Voting Rights Act of 1965); *McDaniel v. Barresi*, 402 U.S. 39 (1971) (To insure integrated school system, School Board properly took racial figures into account in redrawing school districts); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (To insure integrated school system, court may properly use racial ratios in both districting and faculty assignment and order busing); *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969) (district court may properly order faculty and staff desegregation pursuant to flexible racial ratios in order to insure an integrated school system).

v. Allen, supra, 493 F.2d 614; *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *Local 638, supra*, 532 F.2d 821; *EEOC v. AT&T, supra*, 556 F.2d 167; *Buffalo, supra*, 633 F.2d 643; *United States v. Ironworkers Local 86*, 315 F. Supp. 1202 (W.D. Wash. 1970); *NAACP v. Allen, supra*, 340 F. Supp. 703; *United States v. City of Chicago*, 411 F. Supp. 218 (N.D. Ill. 1976); *Local 638, supra*, 421 F. Supp. 603, *EEOC v. AT&T*, 419 F. Supp. 1022 (E.D. Pa. 1976); *Buffalo, supra*, 457 F. Supp. 612.

Although prospective race-conscious numerical relief is still necessary in certain cases, the Solicitor General now asserts that such relief is unlawful. Petitioners and the Solicitor General assert that the last sentence of section 706(g) prohibits class-wide prospective relief and limits a court's power to awarding make-whole relief to identifiable victims of discrimination.

The Third Circuit rejected that argument in *EEOC v. AT&T, supra*, 556 F.2d 167. That court carefully analyzed the "make-whole" language and the legislative history of the last sentence of section 706(g) and held that that sentence was intended to strike an equitable balance between class members seeking relief under Title VII and employers who are subject to the mandates of Title VII. "[T]he sentence does not speak at all to the showing that must be made by individual suitors, or class representatives on behalf of class members, or the EEOC on behalf of class members. The sentence merely preserves the employer's defense that the non-hire, discharge, or non-promotion was for cause other than discrimination." *Id.* at 176. *See also Williams v. City of New Orleans*, 729 F.2d 1554, 1558 n.4 (5th Cir. 1984) (en banc).

By its plain language section 706(g) establishes both make-whole and classwide prospective relief as appropriate remedies for Title VII violations. As recognized by the Second Circuit last month:

> "The source of the court's power to issue broader prospective relief is found in its powers as a court of equity and in the broad language of § 706(g), which authorizes the court to 'enjoin the respondent from engaging in such unlawful practice, and order such

> affirmative action as may be appropriate, *which may include but is not limited to*, reinstatement or hiring of employees . . . *or any other equitable relief as the court deemed appropriate* . . . .' "

Buffalo, *supra*, slip op. at 742 (emphasis in original).

The court in *Buffalo* noted that section 706(g) sets out a *nonexclusive* list of possible remedies for Title VII violations including "reinstatement or hiring of employees." The nonexclusivity of the listed remedies is apparent from Congress's insertion of the language "which may include but is not limited to" and the closing phrase "or any other equitable relief as the court deems appropriate." *Id.*

The last sentence of section 706(g) does not refer to or affect in any way the discretionary power given to courts in the language of the first sentence of section 706(g). The last sentence addresses itself only to make-whole remedies and means exactly what it says—no employer will be required to hire, promote, reinstate or award back pay to any *specified individual* unless *that individual* was an actual proven victim of discrimination.

B. *Congress Intended To Invest District Courts With Wide Authority To Remedy Discrimination And Endorsed The Courts' Use Of Affirmative Classwide Race-Conscious Numerical Remedies In Appropriate Cases.*

During the floor debates in both houses a common objection vigorously pressed by opponents of Title VII was that it would take autonomy away from employers and unions and force them to hire unqualified minorities in order immediately to integrate their work force and to maintain racial balances without any showing or finding that the employer or union had engaged in unlawful discrimination in violation of Title VII.

Of course, the bill proposed no such thing. Representative Celler and Senator Humphrey emphasized the fact that nothing in Title VII required an employer to maintain a racial balance among employees through the use of a quota or to hire unqualified minorities. As this Court noted in *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 (1979), section

703(j) was incorporated in the Dirksen-Mansfield substitute bill to silence the opposition's fears, and to make clear that Title VII did not *require* the maintenance of a racial balance through use of quotas.

In *Weber* this court recognized that 703(j) provides that nothing in Title VII *requires* an employer to grant preferential treatment to any group on account of a *de facto* racial imbalance in the employer's work force. *Weber, supra,* 443 U.S. at 206-07. The Department of Justice similarly interpreted 703(j), drawing the following distinction:

> "[W]here there has been an *intentional* policy of unlawful racial discrimination resulting in the exclusion of blacks from employment opportunities, as the lower court found here, the limitation on preferential treatment [in 703(j)] has no application." Brief of Appellee United States, at 49-50, filed Feb. 10, 1971, in *United States* v. *Ironworkers Local 86* (No. 26048 9th Cir.) (emphasis in original).

The passage of the Equal Employment Opportunity Act of 1972, which amended Title VII, emphatically establishes the proposition (if it were unclear before) that classwide numerical relief is a lawful remedy under section 706(g) and does not violate section 703(j). The views of the 1972 Congress expressed during the debates on the amending act are of considerable significance.[7] During the Senate's consideration of the amending act, Senator Ervin, one of the original opponents of the Civil Rights Act, proposed two amendments to S. 2515, the Senate equivalent of H.R. 1746 (the amending bill). The

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[7] The EEOC and Department of Justice now disavow their earlier position that the statements of the 1972 Congress should be awarded great weight in interpreting section 706(g).

> "The ruling in *Teamsters, supra* n.39, that views of a later Congress should be given little weight in interpreting a provision enacted in 1964, does not pertain here, since in 1972 the remedial provision of Section 706(g) . . . was amended and expanded . . . ." Opp. Cert. Brief of the Federal Respondents (Department of Justice and the EEOC) filed in *Communications Workers of America v. EEOC*, Nos. 77-241, 242, 243 (Nov. 1977).

first amendment proposed to add a new section to the bill that would read:

> "No department, agency or officer of the United States shall require any employer to practice discrimination in the reverse by employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges. . . ."

118 Cong. Rec. 1662 (1972), *Legislative History of the Equal Employment Opportunity Act of 1972, reprinted in* Subcomm. on Labor of the Senate Committee on Labor and Public Welfare at 1017 (hereinafter "*1972 Leg. Hist.*").

Senator Javits, speaking against the amendment, noted that the amendment would not only restrain a department, agency or officer of the United States but would also affect a court's power to remedy discrimination under Title VII.[8] Cong. Rec. at 1664, *1972 Leg. Hist.* at 1046. *Accord id.* at 1676, *1972 Leg. Hist.* at 1072 (remarks of Sen. Williams) ("I am desperately afraid—that this amendment would strip Title VII of the Civil Rights Act of 1964 of all its basic fiber. It can be read to deprive even the courts of any power to remedy clearly proved cases of discrimination.").

There can be no doubt that at the time of the debates on the Ervin Amendment Congress was fully aware that courts had ordered classwide race-conscious numerical relief pursuant to their powers under Title VII, and that the Philadelphia Plan, a plan developed under Executive Order 11246 requiring government contractors to meet race-conscious numerical goals, had been sustained by the Third Circuit. Senator Javits during the floor debates described the facts and holdings of two cases and caused the entire text of each case to be printed in the

[8] "[T]he depth of this amendment is much greater than is apparent on the surface because it would purport not only to inhibit in given respects the officers of the United States but also the courts of the United States through whom, once they make a finding or a judgment, the officers of the United States are moved." *Id.* at 1664, *1972 Leg. Hist.* at 1046 (Remarks of Senator Javits).

Congressional Record. *Ironworkers Local 86, supra*, 315 F. Supp. 1202, *reprinted at* 118 Cong. Rec. 1665-71, *1972 Leg. Hist.* at 1063-1070, upheld the award of classwide, race-conscious numerical relief under Title VII, and *Contractors Association v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), *reprinted at* 118 Cong. Rec. 1671-75, *1972 Leg. Hist.* at 1047-63, upheld the Philadelphia Plan as being consistent with Title VII.[9] Senator Javits then summarized his objections to the amendment:

> "So, there I believe that the amendment does two things, both of which should be equally rejected.
>
> "First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia type plans.
>
> "Second, the amendment, in addition to dismantling the Executive order program, would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle the effort to correct these injustices." *Id.* at 1665, *1972 Leg. Hist.* at 1048.

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[9] Senator Javits also referred to *United States v. Enterprise Association Steamfitters Local 638*, 337 F. Supp. 217 (S.D.N.Y. 1972), "I am told, and I believe the information to be reliable, that under the decision made last week by Judge Bonsal in New York, in the Steamfitters case, an affirmative order was actually entered requiring a union local to take in a given number of minority group apprentices." *Id.* at 1665, *1972 Leg. Hist.* at 1048. Senator Javits also described two cases involving consent decrees negotiated by the Justice Department:

"In one case, part of the decree required that 166 Negroes and Puerto Ricans be given preference—in filling future vacancies for which they were qualified.

"In the other case in Kansas, the company agreed to make a good faith effort to hire from three minority groups for 20 percent of the clerical positions to be filled in the next three years.

"This amendment would make it impossible for the Justice Department to obtain such decrees in the future." *Id.* at 1675, *1972 Leg. Hist.* at 1071.

The second amendment proposed by Senator Ervin sought to apply section 703(j) to the executive, thus, as Senator Javits noted, "[making] unlawful any affirmative action plan like the so-called Philadelphia Plan". *Id.* at 4918, *1972 Leg. Hist.* at 1715.

The Senate rejected both amendments by two-to-one margins. *Id.* at 1676, 4918, *1972 Leg. Hist.* at 1074-75, 1716-17.

A section-by-section analysis of the final version of H.R. 1746, the amending bill, submitted by the Conference Committee of the House and Senate, provides:

> "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."

1972 Leg. Hist. at 1844. While the 1964 legislative history was somewhat cloudy, the 1972 amendments to Title VII and section 706(g)[10] emphasize Congress's intention to allow the courts wide discretion in fashioning effective remedies, including numerical goals, for employment discrimination.

> "The provisions of this subsection [706(g)] are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible." *1972 Leg. Hist.* at 1848.

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[10] Title VII was extended to cover public employers and section 706(g) was amended to include the italicized words:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay . . . , *or any other equitable relief as the Court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission* . . . ."

1972 Leg. Hist. at 1902.

Prior to the enactment of the 1972 amendments, numerical goals or other group relief had been ordered in at least nine Title VII cases,[11] including *Ironworkers Local 86, supra,* printed in the Congressional Record by Senator Javits. The courts had clearly decided that Title VII did not prohibit classwide numerical remedies. Thus, Congress's rejection of the Ervin amendment was an unambiguous endorsement of the judicial interpretation of the broad scope of section 706(g) remedial powers conferred by the 1964 Act, including the power to order classwide numerical relief. *See, e.g., United States v. International Union of Elevator Constructors, Local 5,* 538 F.2d 1012, 1019-20 (3d Cir. 1976); *EEOC v. AT&T, supra,* 556 F.2d at 177 ("[T]he solid rejection of the Ervin Amendment confirmed the prior understanding by Congress that an affirmative action quota remedy in favor of a class is permissible.").

The Department of Justice and the EEOC, initially and throughout the 1970s, consistently interpreted section 706(g) as providing the Federal courts wide discretion in formulating relief, including numerical remedies, for Title VII violations. *See, e.g.,* briefs submitted by the United States in *United States v. International Union of Elevator Constructors, Local Union No. 5, supra; EEOC v. AT&T, supra.* That interpretation should be accorded deference. *North Haven Board of Education v. Bell,* 456 U.S. 512, 522 n.12 (1982).

The Solicitor General's new "interpretation" is not entitled to any deference, however, because it is not contemporaneous

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[11] *Vogler v. McCarty, Inc.,* 1 Fair Empl. Prac. Cas. (BNA) 197, 200 (E.D. La. 1967), *aff'd sub. nom. Heat and Frost Insulators v. Vogler,* 407 F.2d 1047, 1054 (5th Cir. 1969); *United States v. Ironworkers Local 86, supra,* 315 F. Supp. at 1247-52; *United States v. Central Motor Lines, Inc.,* 325 F. Supp. 478, 479 (W.D. N.C. 1970); *Thorn v. Richardson,* 4 Fair Empl. Prac. Cas. (BNA) 299, 303 (W.D. Wash. 1971); *Buckner v. Goodyear Tire and Rubber Co.,* 339 F. Supp. 1108, 1124 (N.D. Ala. 1972), *aff'd,* 476 F.2d 1287 (5th Cir. 1973); *United States v. Wood, Wire & Metal Lathers International Union, Local 46,* 341 F. Supp. 694, 698 (S.D.N.Y. 1972), *aff'd,* 471 F.2d 408 (2d Cir.), *cert denied,* 412 U.S. 939 (1973); *United States v. IBEW, Local 212,* 5 Fair Empl. Prac. Cas. (BNA) 469, 470, 478 (S.D. Ohio 1972), *aff'd,* 472 F.2d 634 (6th Cir. 1973); *United States v. Bricklayers, Local 1,* 5 Fair Empl. Prac. Cas. (BNA) 863, 881-82 (W.D. Tenn. 1973); *Sims v. Sheet Metal Workers, Local 65,* 353 F. Supp. 22 (N.D. Ohio 1972), *aff'd,* 489 F.2d 1023 (6th Cir. 1973).

with the enactment of the statute or its amendment. *Cf. General Electric Co. v. Gilbert*, 429 U.S. 125, 140-43 (1976); *California Hospital Association v. Henning*, 770 F.2d 856, 859 (9th Cir. 1985).

III. FEDERAL COURTS HAVE AWARDED OR APPROVED NUMERICAL RELIEF ONLY AFTER A CAREFUL EXAMINATION OF THE NEED FOR THE RELIEF AND THE EFFECT SUCH RELIEF WOULD HAVE ON NONMINORITIES.

The Federal courts have taken great care in shaping relief to fit the specific situation presented. The courts have not lightly and freely imposed or approved affirmative numerical relief. Rather, the courts have limited and tailored affirmative relief to meet the specific needs of each case while taking care to limit and reduce the effects of such relief on nonminorities. There is no specific standard governing the imposition of numerical relief because the relief ordered in any particular Title VII case must be unique and individual to the specific facts of that case. Nevertheless, certain factors useful in assessing the advisability of affirmative relief have been developed.

The factors most commonly considered by courts were articulated by this Court in *Weber*, *supra*, 443 U.S. 193. This Court, while declining to "define in detail the line of demarcation between permissible and impermissible affirmative action plans", nevertheless examined the purpose and duration of Kaiser's affirmative action plan and its effect on third parties before determining that the "plan falls on the permissible side of the line." *Id.* at 208.

The courts' responsible use of discretion and careful adherence to this Court's guidance in *Weber* is exemplified by two cases in the Fifth Circuit. In *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980), the Fifth Circuit used the same factors that were discussed in *Weber* to review de novo the proposed settlement between the Department of Justice and the City of Alexandria, which the district court had declined to approve, because it contained affirmative hiring relief for women and blacks in the police and fire departments. *Id.* at

1361. The Fifth Circuit determined that the proposed consent decree was appropriate given the presence of severe statistical imbalances. The court noted that the goals were temporary, did not bar the advancement of white males and did not require defendants to consider unqualified women and blacks for vacancies. The court concluded that "the goals will thus serve to prevent those responsible for personnel decisions from automatically choosing a white male when there is a qualified black or female. This attempt to break down traditional patterns which foreclose opportunities to blacks and women was the motivation behind Title VII." *Id.* at 1366 (citations omitted).

Accordingly, the court reversed the district court's refusal to enter the consent decree and remanded, instructing the district court to enter the decree. *Id.* at 1367.

In *Williams v. City of New Orleans*, 543 F. Supp. 662 (E.D. La. 1982), the district court, after a four day fairness hearing, declined to approve the proposed consent decree unless the one-to-one promotion goal was deleted. The trial court determined that the goal exceeded the court's remedial objectives and seriously jeopardized the career interests of nonminorities. A three-judge panel of the court of appeals concluded that the trial court had abused its discretion in conditioning its approval of the proposed consent decree on the deletion of the promotion goal and remanded the case instructing the court to sign the decree. 694 F.2d 987 (5th Cir. 1982).

On rehearing *en banc*, the Fifth Circuit found that the district court, properly following the *Weber* guidelines, did not abuse its discretion in finding that the "one-to-one promotion ratio was overbroad and unreasonable in light of the severe and longlasting effect on the rights of women, Hispanics and non-Hispanic whites." 729 F.2d 1554, 1561 (5th Cir. 1984) (*en banc*). The panel emphasized:

> "The ideal goal in this type case is to provide a suitable remedy for the group who has suffered, but at the least expense to others. . . . [W]e do not modify our previously expressed view that temporary hiring goals are ordinarily reasonable. . . . 'Title VII

> implicitly recognizes that there may be cases calling for one remedy and not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts.'" *Id.* at 1564 (citations omitted).

Those cases are neither an aberration nor a signal of a recent judicial shift. The history of judicially-imposed and judicially-approved affirmative relief in this country over the past two decades amply demonstrates judicial caution and selectivity.[12]

Similarly, the relief imposed in *Local 28* and approved in *Local 93* was carefully formulated and analyzed by the district courts and was scrutinized on review by the courts of appeal. In both cases the relief presently at issue before this Court was found to be necessary and appropriate relief in light of the facts of each case. In neither case did the courts find that the rights of nonminorities were unnecessarily trammeled.

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[12] For example, in *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission of the City of New York*, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981), the Second Circuit reviewed the record and the district court's findings and determined that they were insufficient to support long-term or interim affirmative hiring goals but found that an interim compliance goal was permissible. In *United States v. City of Buffalo*, *supra*, 633 F.2d 643, the Second Circuit determined that the record did not support imposition of a long term affirmative goal but approved as appropriate an interim affirmative hiring goal. In *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 2357 (1985), the District of Columbia Circuit vacated the district court's imposition of promotional goals and timetables because "strict goals and timetables should not be imposed when alternative equally effective methods could . . . supplant resort to a quota." *Accord Thompson v. Sawyer*, *supra*, 678 F.2d at 294; *United States v. City of Chicago*, *supra*, 549 F.2d at 437; *NAACP v. Allen*, *supra*, 493 F.2d at 621. (Numerical goals were imposed reluctantly by the trial courts in these cases after non-numerical relief proved ineffective. In each case the affirmative relief imposed was affirmed by the appellate court.)

IV. *STOTTS* DOES NOT PROHIBIT PROSPECTIVE RACE- AND GENDER-CONSCIOUS RELIEF UNDER TITLE VII.

We agree with the appellate courts that have uniformly rejected the government's argument and have held that *Stotts* did not overrule, *sub silentio*, and in dictum, nearly twenty years of Title VII law without discussing or even acknowledging the competing public policies implicated in this issue and in the array of precedential decisions.

Petitioners and the Solicitor General have read too much into *Stotts*. The courts of appeals have not interpreted the *Stotts* decision as limiting the remedial arsenal of section 706(g) to make-whole relief for identifiable victims of discrimination.[13] Not one has interpreted it as a bar to all classwide race-conscious remedies whether ordered after litigation or entered pursuant to a consent decree. Rather the courts view *Stotts* as the proper application of make-whole relief upon the facts of that case. We suggest this Court should agree.

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[13] *Deveraux v. Geary*, 765 F.2d 268 (1st Cir. 1985); *Buffalo, supra*, No. 85-6212, (2d Cir. Dec. 19, 1985); *Local 638, supra*, 753 F.2d 1172 (2d Cir.), *cert. granted*, 106 S. Ct. 58 (1985); *Commonwealth of Pennsylvania v. Local 542, Operating Engineers*, 38 Fair Empl. Prac. Cas. (BNA) 673 (3d Cir. 1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985); *Wygant v. Jackson Bd. of Education*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S.Ct. 2015 (1985); *Vanguards, supra*, 753 F.2d 479 (6th Cir.), *cert. granted*, 106 S.Ct. 59 (1985); *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984); *Britton v. South Bend Community School Corporation*, 775 F.2d 794 (7th Cir. 1985); *Grann v. City of Madison*, 738 F.2d 786 (7th Cir. 1983), *cert. denied*, 105 S.Ct. 296 (1984); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356 (9th Cir. 1985); *Paradise v. Prescott, supra*, 767 F.2d 1514; *Turner v. Orr, supra*, 759 F.2d 817.

CONCLUSION

The judgments of the courts of appeals in both *Local 93* and *Local 28* should be affirmed.

Respectfully submitted,

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