IN THE

Supreme Court of the United States

October Term, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

BRIAN F. WEBER, ET AL.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, ET AL.

No. 78-436

UNITED STATES OF AMERICA

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, ET AL.

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

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL URBAN LEAGUE AND HOWARD UNIVERSITY AS *AMICI CURIAE*

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January 1979.

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BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL URBAN LEAGUE AND HOWARD UNIVERSITY AS AMICI CURIAE

Interest of Amici

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation

established under the laws of the State of New York. It was founded to assist black persons to secure their constitutional and statutory rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of race discrimination issues regarding employment. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). The Legal Defense Fund believes that its experience in such litigation and the research it has performed will assist the Court in this case. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

The National Urban League, Incorporated, is a charitable and educational organization organized as a not-for-profit corporation under the laws of the State of New York. For more than 69 years,

the League and its predecessors have addressed themselves to the problems of disadvantaged minorities in the United States by improving the working conditions of blacks and other minorities, and by fostering better race relations and increasing understanding among all persons.

Howard University was established as a private nonsectarian institution by Act of Congress on March 2, 1867. Since its inception, the University has grown from six departments in 1867 to its present composition of seventeen schools and colleges. Nearly 40,000 students have received diplomas, degrees or certificates from Howard; of that total, well over 14,000 have received graduate and professional degrees. Throughout this century of growth, the unique mission of the University has been supported in the main by congressional appropriations. Since 1928 Howard University, while remaining a private institution, has received continuous annual financial support from the federal government.[1/] Today, the Uni-

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1/ The Committee on Education commenting on the bill to amend section 8 of an act entitled "An Act to incorporate the Howard University..." stressed:

versity's land, buildings and equipment are valued at more than 150 million dollars. Thus, both the executive and legislative branches are sensitive to the need to maintain Howard as an institution in service to blacks.

1/ Cont'd

> Apart from the precedent established by 45 years of congressional action, the committee feels that Federal aid to Howard University is fully justified by the national importance of the Negro problem. For many years it has been felt that the American people owed an obligation to the Indian, whom they dispossessed of his land, and annual appropriations of sizable amounts have been passed by Congress in fulfillment of this obligation....
>
> Moreover, financial aid has been and still is extended by the Federal Government to the so-called land-grant colleges of the various States. While it is true that Negroes may be admitted to these colleges, the conditions of admission are very much restricted, and generally it may be said that these colleges are not at all available to the Negro, except for agricultural and industrial education. This is particularly so in the professional medical schools, so that the only class A school in America for training colored doctors, dentists, and

Howard University has a unique interest in the resolution of this case by the Supreme Court. This case raises questions of great importance about the permissible scope of voluntary affirmative action under Title VII. Affirmance of the lower court's proscription against voluntary intitatives will chill voluntary programs in particular and affirmative action generally.

1/ Cont'd

pharmacists is Howard University, it being the only place where complete clinical work can be secured by the colored student. Committee on Education Report Accompanying H.R. 8466 (1926). See also, 14 Stat. 1021 (1926).

SUMMARY OF ARGUMENT

I. In enacting Title VII in 1964 Congress neither expressly approved nor expressly disapproved race-conscious efforts to correct the effects of discriminatory practices. However, subsequent judicial decisions and executive actions established that Title VII permitted, and in some circumstances required, the remedial use of race. In amending Title VII in 1972 Congress approved this interpretation of the statute. The Equal Employment Opportunity Commission's Guidelines on Affirmative Action correctly codified this interpretation authorizing employers and unions to adopt racial preferences as remedial measures where they have a reasonable basis for that action.

II. Race-conscious affirmative action is justifiable where an employer or union has a reasonable basis for believing that it might otherwise be held in violation of the law. The employer or union need not admit nor prove

prior discrimination, and it may take race-conscious action to remedy the disadvantages affecting minorities as a result of discrimination by others. A more rigid standard -- like that adopted by the majority of the Fifth Circuit requiring proof or admission of discriminatory practices -- would largely eliminate voluntary affirmative action. Moreover, a lawsuit challenging race-conscious action under that standard does not present a case or controversy because it is not in the interest of either litigant to prove the central factual issue, prior discrimination. Finally, the Fifth Circuit's standard, if accepted by this Court, would raise serious questions as to the constitutionality of Title VII.

III. Kaiser and the Steelworkers properly instituted a race-conscious plan because they had a reasonable basis to believe that their craft selection practices had violated, and without affirmative action would continue to violate, both Title VII and Executive Order 11,246. Moreover, it was appropriate and socially responsible for the Company and the Union to design a program which would remedy some of the

effects of decades of discriminatory practices by employers, unions, and governmental bodies which had denied training opportunities to blacks in the skilled crafts.

The affirmative action plan was proper since it expanded the employment opportunities of all workers, black and white. The race-conscious component of the plan conformed to provisions which had been approved by courts and by administrative agencies and was designed as an interim measure which would terminate after remedying the discriminatory practices. Finally, it resulted from collective bargaining in which the interests of all the workers were represented and it thus furthered the policies favoring the voluntary resolution of both labor and discrimination disputes.

ARGUMENT

I. TITLE VII PERMITS EMPLOYERS AND UNIONS TO TAKE VOLUNTARY RACE-CONSCIOUS AFFIRMATIVE ACTION

A. Legislative History: 1964

The Civil Rights Act of 1964 was the first comprehensive federal legislation ever to address the pervasive problem of discrimination against blacks in modern American society. See M. Sovern, Legal Restraints on Racial Discrimination in Employment 8 (1966). Extensive hearings had focused the attention of Congress on the adverse social and economic consequences of discrimination against blacks in employment and other fields,[2/] and when the House Judiciary Committee issued its report on the bill which became the Civil Rights Act of 1964, it clearly stated that a primary objective of the Act was to encourage voluntary action to eliminate the effects of discrimination against black citizens:

2/ See, e.g., Hearings on Equal Employment Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 88th

In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.

* * *

No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.

2/ Cont'd

Cong., 1st Sess. 3, 12-15, 47-48, 53-55, 61-63 (1963); Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2300-03 (1963); Hearings on Equal Employment Opportunity Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 116-17, 321-29, 426-30, 449-52, 492-94 (1963).

> It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination.... H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 at 2018.

This Court has repeatedly recognized the purpose of the Act: "The objective of Congress in the enactment of Title VII ... was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975). "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). This Court also has recognized that Congress selected "[c]oopera-

tion and voluntary compliance ... as the preferred means for achieving this goal." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). The Court, in keeping with the intent of Congress (see H.R. Rep. No. 914, pp. 10-11, supra), has endorsed the imposition of judicial remedies under Title VII as "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 417-18, quoting United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973).

The record in this case shows that what Congress intended and what the Court has endorsed is precisely what happened: Kaiser and the Steelworkers examined their practices and concluded that there was a reasonable basis to believe that they would be found liable for discrimination against blacks; they had "looked at the large sums of money that companies were being forced to pay, and we looked at our problem, which was that we had no blacks in the crafts, to

speak of," A. 83 (English); and they voluntarily adopted a plan to bring blacks into craft jobs. See Section IIIA and n. 26, infra. In the absence of compelling legislative history to the contrary, Title VII cannot be read to foreclose the use of such race-conscious numerical plans to accomplish the primary purpose of the Act.

The legislative history of the original enactment of Title VII in 1964 conclusively demonstrates neither approval nor disapproval by Congress of race-conscious efforts to correct the effects of the past discriminatory exclusion of blacks from training and job opportunities. The major argument against congressional approval of such efforts is premised upon the addition to the bill on the Senate floor of §703(j), which states that nothing in Title VII shall "require" preferential treatment because of race "on account of an imbalance...."[3/]

3/ "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with

Prior to the adoption of this amendment, the Senate floor managers of the bill had explained that Title VII would not require an employer to maintain a racially balanced work force because,

> While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against. 110 Cong. Rec. 7213 (1964) (interpretive memorandum of Senators Clark and Case).

Notwithstanding this assurance, opponents of the bill continued to argue "that a quota system will be imposed, with employers hiring and unions accepting members, on the basis of the percentage of population represented by each specific minority group." Id. at 9881 (remarks of Senator

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3/ Cont'd

respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such

Allott). To put these doubts to rest, Senator Allott proposed an amendment precluding a finding of unlawful discrimination "solely on the basis of evidence that an imbalance exists ..., without supporting evidence of another nature that the respondent has engaged or is engaging in such practice." Id. at 9881-82. The sense of this amendment was incorporated, in the language of §703(j), as part of the Dirksen-Mansfield compromise which resulted in the end of the Senate debate and the enactment of the Civil Rights Act of 1964. As Senator Humphrey explained in presenting the compromise amendments to the Senate,

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. Id. at 12723.

3/ Cont'd

race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." 42 U.S.C. §2000e-2(j).

This legislative history does not indicate that Congress intended to forbid race-conscious numerical action to correct the effects of past discrimination. The concern of Congress in enacting §703(j) was not directed to the question whether race could be taken into account for remedial purposes; rather, its intent was to ensure that findings of discrimination would not be based solely on evidence of statistical imbalance and thereby to allay the fear that Title VII would have the effect of requiring employers to maintain a specific racial balance of employees.[4/] The language of §703(j), like that of

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4/ Senators Clark and Case also stated that "any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race." 110 Cong. Rec. at 7213. See also id. at 6549 (remarks of Senator Humphrey). Senator Allott believed that "a quota system of hiring would be a terrible mistake," but did not indicate whether such a system would be unlawful. Id. at 9881-82. These statements may indicate an intention to prohibit employers from deliberately maintaining a particular racial composition of employees as an end in itself, but they do not suggest any inten-

§703(h), does not restrict or qualify otherwise appropriate remedial action but defines what is and what is not an illegal discriminatory practice. Cf. Franks v. Bowman Transportation Co., supra, 424 U.S. at 758-62. Indeed, the legislative history of the 1964 Act shows no detailed consideration of the scope and nature of remedial actions which might be taken by employers and unions or ordered by the courts, and it shows no consideration whatever of the permissibility of race-conscious remedial measures. See generally, EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964. There is no indication that "in the absence of any consideration of the question, ... Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination or other compelling ends." Bakke, supra, 57 L.Ed.2d at 803 n.17 (opinion of Brennan, White, Marshall, Blackmun, JJ.).

4/ Cont'd

tion to foreclose "the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination." Regents of the University of California v. Bakke, 57 L.Ed.2d 750, 803 n.17 (1978) (opinion of Brennan, White, Marshall, Blackmun, JJ.).

B. Judicial and Executive Interpretations: 1964-1972

In the years following the enactment of Title VII, the courts and federal executive agencies recognized that Congress had not intended to outlaw one of the most effective means of remedying past discrimination, and accordingly they interpreted Title VII to permit, and in some instances to require, the use of race-conscious numerical remedies. The courts held that §703(j) could not be construed as a ban on such remedies: "Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." United States v. Local 38, IBEW, 428 F.2d 144, 149-50 (6th Cir.), cert. denied, 400 U.S. 943 (1970). Title VII was held to authorize remedial orders requiring union referrals of one black worker for each white worker,[5/] specific percentages of blacks in regular apprenticeship classes and special appren-

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5/ Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969).

ticeship programs for blacks only,[6] and preferential work registration, examination, and referral procedures for blacks with experience in the construction industry.[7] As the Second Circuit stated in summarizing these decisions, "while quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not." United States v. Wood Lathers Local 46, 471 F.2d 408, 413 (2d Cir.), cert. denied, 412 U.S. 939 (1973).[8]

Also during the period between the enactment of Title VII in 1964 and its amendment in 1972, the Department of Labor determined that numerical goals and timetables were necessary to implement

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6/ United States v. Ironworkers Local 86, 315 F.Supp. 1202, 1247-48 (W.D. Wash. 1970), aff'd, 443 F.2d 544, 553 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

7/ United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 133 (8th Cir. 1969).

8/ The courts of appeals in eight circuits have upheld the authority of the district courts to order race-conscious numerical relief under Title VII or other federal fair employment laws, see nn. 94-95 , infra.

the equal employment opportunity and affirmative action obligations of government contractors under Executive Order No. 11,246, and that a permissible method of meeting the goals and timetables in the construction industry was the hiring of one minority craftsman for each nonminority craftsman. See Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U. Chi. L. Rev. 723, 739-43 (1972). Both the Department of Labor[9/] and the Department of Justice[10/] found no conflict between such race-conscious measures and the provisions of Title VII. The courts agreed, holding that §703(j) did not impose any limitation on actions taken pursuant to the Executive Order program and that,

> To read §703(a) in the manner suggested by the plaintiffs, we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action

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9/ Office of the Solicitor, U.S. Department of Labor, Legal Memorandum, in Hearings on the Philadelphia Plan and S. 931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 255, at 274 (1969).

10/ 42 Op. Att'y Gen. No. 37 (Sept. 22, 1969).

> under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history. Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 173 (3rd Cir.), cert. denied, 404 U.S. 854 (1971).

See also Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680, 684-86 (7th Cir. 1972), and cases cited therein. Thus, by the time Congress considered the 1972 amendments to Title VII, it was well established that the 1964 Act permitted race-conscious remedial action.

C. Legislative History: 1972

In amending Title VII by the enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, Congress approved these interpretations of Title VII. Congress was aware that

> Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act

> discriminatory practices through various institutional devices, and testing and validation requirements. S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971).

The committee reports specifically cited cases which had approved race-conscious solutions for these complex and pervasive problems. See, e.g., id. at 5, n.1; H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 8 n.2, 13 n.4 (1971). And, in a section-by-section analysis presented to the Senate with the conference report, the Senate sponsors of the legislation stated that,

> In any area where the new law does not address itself, or in any area 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. 118 Cong. Rec. 3460-63 (1972), reprinted in EEOC, Legislative History of the Equal Employment Opportunity Act of 1972, at 1844.

See Bakke, supra, 57 L.Ed.2d at 811 n.28 (opinion of Brennan, White, Marshall, Blackmun, JJ.).

Moreover, with full awareness of the judicial decisions interpreting Title VII to permit the remedial use of race, Congress not only confirmed but expanded the remedial authority of the courts by amending §706(g) to provide expressly that appropriate affirmative action under that section "is not limited to" reinstatement, hiring, and an award of back pay, and that a remedial order may

include "any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). See Comment, The Philadelphia Plan, supra, 39 U. Chi. L. Rev. at 759 n.189.

Finally, "Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Executive Order 11,246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race conscious action." Bakke, supra, 57 L.Ed.2d at 811 n.28 (opinion of Brennan, White, Marshall, Blackmun, JJ.). The detailed history of the Dent and Ervin amendments and their rejection by the House and Senate has been documented elsewhere and need not be repeated here. See Comment, The Philadelphia Plan, supra, 39 U. Chi. L. Rev. at 751-57. See also, Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1028 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Local 212, IBEW, 472 F.2d 634, 636 (6th Cir. 1973). In sum, "[e]xecutive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race." Bakke, supra, at 811 n.28 (opinion of Brennan, White, Marshall, Blackmun, JJ.).

D. EEOC Guidelines on Affirmative Action

The Equal Employment Opportunity Commission recently codified and reaffirmed this interpretation of Title VII in its Guidelines on Affirmative Action, 44 Fed. Reg. 4421-30 (Jan. 19, 1979), 29 C.F.R. Part 1608. These guidelines were proposed in part to encourage voluntary compliance by "authorizing employers to adopt racial preferences as a remedial measure where they have a reasonable basis for believing that they might otherwise be held in violation of Title VII." Bakke, supra, 57 L.Ed.2d at 818 n.38 (opinion of Brennan, White, Marshall, Blackmun, JJ.). Under the guidelines an employer or union, following a reasonable self-analysis of its practices which discloses a reasonable basis for concluding that action is appropriate, may voluntarily take reasonable affirmative action including the use of "goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees." 29 C.F.R. §1608.4(c). Such action may be taken where there is a reasonable basis for believing that it is an appropriate means of, inter alia, correcting the effects of past discrimination, eliminating

the adverse impact on minorities of present practices, or terminating disparate treatment. 29 C.F.R. §§1608.3, 1608.4(b). It is not necessary for an employer or union to establish that it has violated Title VII in the past; there is no requirement of an admission or formal finding of past discrimination, and affirmative action may be taken without regard to arguable defenses which might be asserted in a Title VII action brought on behalf of minorities. 29 C.F.R. §1608.4(b). See Section II A, infra. The guidelines recognize that

> Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII. Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation. Rather, persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of Title VII. Correspondingly, Title VII must be construed to permit such voluntary

> action, and those taking such action should be afforded ... protection against Title VII liability .... 29 C.F.R. §1608.1(c).

These guidelines "constitute 'the administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.'" Albemarle Paper Co. v. Moody, supra, 422 U.S. at 431; Griggs v. Duke Power Co., supra, 401 U.S. at 433-34. The degree of deference to be accorded to such an interpretation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976), quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

When judged by these standards, the Guidelines on Affirmative Action are entitled to great weight. First, the EEOC's careful and thorough consideration is evident: the proposed guidelines were intitally issued on December 28, 1977, 42 Fed. Reg. 64,826; comments were received from almost 500 individuals and organizations; the

Commission considered this Court's opinions in the Bakke case before taking any final action; and substantial changes were made before the Commission voted to approve the guidelines in final form on December 11, 1978. See Supplementary Information: An Overview of the Guidelines on Affirmative Action, 44 Fed. Reg. at 4422-23. The EEOC's extensive consideration of the comments, the legal authorities, and the precise wording of the guidelines is reflected in some detail in the overview issued with the final guidelines. Id. at 4422-25. Second, the validity of the reasoning set forth in the guidelines is apparent from the legislative history of the 1964 enactment and the 1972 amendment of Title VII, as well as from judicial and other executive agency interpretations of the statute. See pp. 18-21, supra. Finally, the guidelines are fully consistent with prior interpretations of Title VII by the EEOC expressly approving "[n]umerical goals aimed at increasing female and minority employment" as "the cornerstone of . . . a[n affirmative action] plan." EEOC Decision 74-106, 10 FEP Cases 269,

274 (April 2, 1974); EEOC Decision 75-268, 10 FEP Cases 1502, 1503 (May 30, 1975). See also, Equal Employment Opportunity Coordinating Council, Policy Statement on Affirmative Action Programs for State and Local Government Agencies, 41 Fed. Reg. 38,814 (Sept. 13, 1976), reaffirmed and extended to all persons subject to federal equal employment opportunity laws and orders in the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290, 38,300 (Aug. 25, 1978), 29 C.F.R. §1607.13B.

II. A STANDARD PERMITTING EMPLOYERS AND UNIONS TO TAKE RACE-CONSCIOUS AFFIRMATIVE ACTION WHEN THEY HAVE A REASONABLE BASIS TO DO SO IS CONSISTENT WITH TITLE VII AND THE CONSTITUTION

A. An Employer or Union May Take Race-Conscious Affirmative Action Where It Acts upon a Reasonable Belief that Such Action Is Appropriate

An employer when considering whether to institute a race-conscious affirmative action plan, or a court when reviewing a challenge to such a plan, need only determine that there is a reasonable basis for the plan in order to conclude that the plan is lawful. The employer is not required to admit that it had engaged in unlawful

prior discriminatory practices or to submit evidence sufficient for a court to find that the employer had violated the fair employment laws in order to justify the institution of the plan. EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.1(c). See Section I D, supra. A rigid standard requiring conclusive proof of prior discrimination would largely eliminate voluntary affirmative action, see pp. 32-34, infra. The circumstances which constitute a reasonable basis for instituting an affirmative action plan vary according to the particular employment situation. However, an employer or union may develop a race-conscious affirmative action plan when there is reason to believe that such action is appropriate, inter alia, (1) to provide a remedy for prior discriminatory practices of the employer or union, (2) to insure the legality of current practices, (3) to provide a remedy for discriminatory practices related to the business of the employer or union, or (4) to comply with Executive Order No. 11,246 or other legal requirements for affirmative

action. 11/ Moreover, the action undertaken must be reasonably related to the identified problems which justify the institution of the plan, see Section III B, infra.

In enacting Title VII Congress selected "[c]ooperation and voluntary compliance ... as the preferred means for achieving" the elimination of discrimination in employment. Alexander v. Gardner-Denver Co., supra, 415 U.S. at 44. The standard for determining whether an affirmative action plan is lawful under Title VII must similarly encourage voluntary compliance and voluntary action. The standard adopted by a majority of the court below, which would require an employer to admit that it was guilty of unlawful discriminatory practices or to submit conclusive proof of such practices before it could lawfully institute an affirmative action plan, would frustrate the purposes of Title VII.

11/ Of course, in certain circumstances an employer or union may be required to institute an affirmative action program. The justifications for race-conscious affirmative action which are listed are not exclusive but rather those that are relevant to the affirmative action plan designed by Kaiser and the Steelworkers.

> [T]he standard produces ... an end to voluntary compliance with Title VII. The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action ... [T]he defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. G. Pet. 32a-34a12/ (Wisdom, J., dissenting).13/

12/ This form of citation refers to the petition for a writ of certiorari filed by the United States and the Equal Employment Opportunity Commission.

13/ Ironically, if the applicable standard were to require conclusive proof or an admission of prior discrimination, then the back pay remedy which the Court indicated should provide a "spur or catalyst" for voluntary compliance, Albemarle Paper Co. v. Moody, supra, 422 U.S. at 417-18, would instead provide a barrier to voluntary compliance. The admission of prior discrimination or the submission of conclusive proof of discrimination would serve as an open invitation for a suit seeking back pay by black workers. The failure of the company to admit or to prove conclusively its prior discrimination would serve as an equally open invitation for a suit seeking back pay in addition to injunctive relief by white workers. If whenever undertaking affirmative action employers were confronted with monetary liability to one group of workers or the other,

The "high tightrope" that employers are required to walk by the Fifth Circuit's standard is illustrated by Kaiser's experience with Title VII suits at its three plants in Louisiana -- at Baton Rouge, Chalmette and Grammercy. Black workers at both the Chalmette and the Baton Rouge plants brought lawsuits alleging Title VII violations. In the Chalmette suit, the Fifth Circuit reversed the district court's dismissal of the complaint because it found on facts remarkably similar to those at the Grammercy plant that a prima facie violation of Title VII had been established. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1389-90 (1978). In the

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13/ Cont'd

employers would refrain from ever taking affirmative action.

"Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law." Bakke, supra, 57 L.Ed.2d at 818 (Brennan, White, Marshall, Blackmun, JJ.); see McDaniel v. Barresi, 402 U.S. 39 (1971).

Baton Rouge suit, the parties, after lengthy litigation and discovery procedures,[14] entered into a settlement which provided that Kaiser pay $255,000 in monetary relief to the plaintiff class and an additional amount in attorneys' fees. Burrell v. Kaiser Aluminum & Chemical Corp., Civil Action No. 67-86 (M.D. La.) (consent decree filed Feb. 24, 1975). Kaiser's experience with the Title VII suits brought by black workers in its plants in Louisiana and its review of suits brought against other companies acted -- as intended by this Court in Albemarle Paper -- as a "spur or catalyst" for change.[15] In the third plant, at Grammercy, where Kaiser adopted an affirmative action plan designed to remedy possible prior violations and to forestall a lawsuit brought on behalf of black workers, see Section IIIA, infra, it was subjected to this lawsuit by

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14/ See, e.g., Burrell v. Kaiser Aluminum and Chemical Corp., 408 F.2d 339 (5th Cir. 1969) (per curiam), rev'g 287 F.Supp. 289 (E.D. La. 1968).

15/ The superintendent for industrial relations at the Grammercy plant noted that "the OFCC, the EEOC, the NAACP, the Legal Defense Fund [had all] been into the [Baton Rouge] plant, and as I was saying, whatever their remedy is believe me, it's one heck of a lot worse than something we can work out ourselves." A. 83-84, see p. 58 n. 26, infra.

Brian Weber alleging reverse discrimination. The Fifth Circuit's rigid standard, requiring conclusive proof or an admission of prior discriminatory practices, would not only result in less voluntary compliance but would also result -- as indicated by Kaiser's experience in Louisiana -- in the filling of the court dockets with Title VII suits.[16/] See G. Pet. 32a (Wisdom, J., dissenting).

Race-conscious affirmative action is justifiable if an employer or a union has a reasonable basis for believing that it might otherwise be

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16/ There was a "staggering" increase in the number of Title VII cases filed between 1970 and 1976: from 344 employment cases filed in fiscal year 1970 to 5,321 in fiscal year 1976. Administrative Office of the United States Courts, 1976 Annual Report of the Director, at 107-08. This increase is understandable in light of the facts that the coverage of Title VII was broadly expanded by the Equal Employment Opportunity Act of 1972, see e.g., Chandler v. Roudebush, 425 U.S. 840, 841 (1976), and that the interpretation of Title VII on numerous issues was first clarified during this period. See e.g, Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

held in violation of Title VII. An affirmative action plan may be used to remedy the effects of possible prior discriminatory practices or to prevent possible continuing discriminatory

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16/ cont'd

This enormous growth rate in Title VII filings slowed after fiscal year 1976. While there was an increase of 1,390 filings or of 35.4% from FY 1975 to FY 1976 (3,931 filings as compared to 5,321 filings), in FY 1977 there was an increase of 610 filings or of 11% to 5,931. Administrative Office of the United States Courts, 1977 Annual Report of the Director, at 112. In FY 1978 there was a decrease of 427 filings or of 7% (from 5,931 to 5,504 filings). Administrative Office of the United States Courts, 1978 Annual Report of the Director, at 88.

While it is difficult to draw hard conclusions from the dramatic change in the rate of Title VII case filings from a "staggering" increase to a decrease, it may be inferred that the clarifications in the law and the emphasis on voluntary affirmative action were beginning to have an effect. If voluntary affirmative action is severely restricted -- as it would be if the Fifth Circuit is affirmed -- then the remedy for employment discrimination would lie primarily in the courts and not in voluntary resolution, and a return to a substantial increasing rate of Title VII cases could be expected.

practices.[17/] This Court has held that a statistical disparity resulting from a facially neutral practice is sufficient to establish a prima facie disparate impact violation of Title VII, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); and that gross statistical disparities alone may be sufficient to constitute a prima facie showing of intentional discrimination, Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977). Accord-

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17/ "If the self analysis shows that one or more employment practices: (1) have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited, (2) leave uncorrected the effects of prior discrimination, or (3) result in disparate treatment, the person making the self-analysis has a reasonable basis for concluding that action is appropriate. It is not necessary that the self-analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exist arguable defenses to a Title VII action." EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.4(b); see also §1608.3(b).

ingly, employers and unions may rely on statistical analysis in determining whether there is a reasonable basis for taking affirmative action.[18/] Where, as in this case, the statistical analysis indicates a prima facie showing that the employer's prior practices were discriminatory and that, if the employer did not take race-conscious affirmative action, its continuing practices would be discriminatory, see pp. 82-85, infra, the employer has a reasonable basis for taking such action.

But the analysis need not demonstrate that there is a prima facie case in order for race-conscious action to be justifiable. Requiring an employer to demonstrate a prima facie case would frustrate voluntary compliance and the effective implementation of private remedies for discriminatory practices for the same reasons, although not quite as severely, as requiring the employer to admit that it had engaged in dis-

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18/ "The effects of prior discriminatory practices can be initially identified by a comparison between the employer's workforce, or a part thereof, and an appropriate segment of the labor force." EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.3(b). See also §§1608.3(a), 1608.4(a).

criminatory practices.[19] In order to justify race-conscious affirmative action an employer need only show that it had a reasonable basis for believing that, in the absence of such action, it might be held in violation of Title VII.

Furthermore, an employer or union may take race-conscious action to remedy the disadvantages affecting minorities as a result of the discriminatory practices of other companies or unions or as a result of governmental or societal discrimination.[20] Such action is particularly

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19/ Neither Kaiser nor the Steelworkers argued in the district court that there was a prima facie case of discrimination even though it is apparent that such an argument was readily available, see pp. 56-58, infra. In fact, the parties did not introduce important but available evidence which would have confirmed the prima facie showing, see p. 60 n. 27, infra. The reason for the omission is obvious: by proving or almost proving prior discrimination, the parties would invite a suit brought on behalf of black workers which would involve the parties in the complex litigation which they had sought to avoid by agreeing to the affirmative action plan.

20/ "Although Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands

necessary where, as is the case with skilled craftsmen, see pp. 89-104, infra, there is a limited pool of available minorities because of a history of discrimination by employers, by unions, by educational institutions and even by law. See EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.3(c). If the pervasive, complex, and systemic discriminatory practices in this country -- and their socially dangerous effects, such as the disproportionate unemployment rate among minorities -- are ever to be undone, employers must be encouraged to undertake socially responsible affirmative action. See Bakke, supra, 57 L.Ed.2d at 844-45 (Blackmun, J.).

It is almost inevitably the case that employers like Kaiser become part and parcel of the general practices of discrimination. When Kaiser selected from a pool of skilled craftsmen to which minorities had limited access because of discriminatory business, union, and vocational

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20/ Cont'd

other than their own, such an objective is perfectly consistent with the remedial goals of the statute." Bakke, supra, 57 L.Ed.2d at 804 n.17 (opinion of Brennan, Marshall, White, Blackmun, JJ.).

training practices, it relied on and, in effect, supported the discriminatory practices of others. Reliance on the discriminatory policies of others which has an adverse impact on minorities, whether done intentionally or simply without sufficient business justification, may constitute a violation of Title VII.[21/] At the very least, a company which has relied on the discriminatory practices of others should be encouraged to take action which would effectively eliminate that reliance and correct the adverse racial effects caused by those practices.

21/ See, e.g., Griggs v. Duke Power Co., supra, 401 U.S. at 430 ("Because they are Negroes, petitioners have long received inferior education in segregated schools...." The petitioners' Title VII rights were violated because the company instituted education and testing requirements which were not job-related and which failed blacks more frequently than whites as a result of the discrimination in education); Bakke, supra, 57 L.Ed. 2d at 819 ("[O]ur cases under Title VII ... have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination.") (Opinion of Brennan, White, Marshall, Blackmun, JJ.).

Finally, an employer which is a qualifying government contractor may, and indeed must, undertake affirmative action to comply with the requirements of Executive Order No. 11,246. In enacting the Equal Employment Opportunity Act of 1972, Congress specifically considered and rejected efforts to outlaw the use of numerical, race-conscious plans under the Executive Order program. See Section I C, supra; Comment, The Philadelphia Plan, supra, 39 U. Chi. L. Rev. at 751-57. Race-conscious action which is undertaken in good faith reliance on the Executive Order is not only permissible under Title VII but furthers the purposes of Title VII. EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.5.[22/]

B. An Action to Enforce the Fifth Circuit's Construction of Title VII Would Not Present a "Case or Controversy"

The court of appeals held, and respondent apparently agrees, that the Company and Union

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22/ Regardless of the justification for race-conscious affirmative action, the measures undertaken must be appropriately designed to remedy the identified problems. The standards for determining appropriate action are discussed in Section III B, infra.

could have successfully defended this action if they had alleged and proved that they had discriminated on the basis of race against black employees or applicants. The defendants made no effort to present this defense; on the contrary, they claimed that they had not discriminated against blacks. The evidence adduced by the defendants on this issue was apparently intended to show the absence of past discrimination against blacks, and thus supported the claims and interests of the plaintiff rather than of the defendants themselves. The defendants were in possession of a variety of evidence showing past discrimination against blacks, including the OFCC letter described in n. 42, infra, but they failed to introduce the evidence into the record. Although the scanty evidence that was placed in the record strongly suggested a history of discrimination against blacks, counsel for the defendants consistently declined to press such an inference or to urge such a defense. Despite this peculiar state of affairs, the courts below attempted to make a factual finding as to whether or not there had been such a history of discrimination.

What occurred in this instance is not unique, but seems an inherent difficulty with cases of this sort. As the Company candidly notes, no employer "can be expected to confess to past discrimination in order to justify a challenged racial preference." Petition, No. 78-435, p. 11. Such a confession would give rise to potentially massive liability to black employees and applicants for back pay and/or punitive damages. See pp. 31-34, supra. No employer will seek to prove liability to a large number of minorities or women merely to avoid liability to a white male. The same dilemma exists outside of the employment area.

An action which can only be fully defended by establishing liability to third parties, and which as a consequence will not be so defended, does not present a "case or controversy" within the meaning of Article III. The parties to a proceeding in federal court must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends ..." Baker v. Carr,

369 U.S. 186, 204 (1962). The nature of the interests of each party should assure that they will "frame the relevant questions with specificity, contest the issues with the necessary adverseness, and pursue the litigation vigorously." Barlow v. Collins, 397 U.S. 159, 172 (1970) (Brennan, J., concurring). The courts are unequipped, in the absence of such competing interests, to resolve factual questions which usually require discovery and a contested evidentiary hearing. These considerations are of particular import where, as here, upholding plaintiff's undefended claim of non-discrimination would adversely affect the interests of third parties, the black workers.

Previous standing decisions have focused on whether the plaintiff has a "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution ...." Sierra Club v. Morton, 405 U.S. 727, 731 (1972). That requirement is as applicable to a defendant as it is to a plaintiff, for the necessary vigorous contest of issues requires two competing parties. This Court has

repeatedly held that a party lacks standing to litigate an issue if success in the litigation will not accrue to its benefit. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975). A fortiori the required interest is lacking where success in the litigation will operate to the disadvantage of the "prevailing" party. Even where the plaintiff himself has standing to bring an action, it must be brought against a party with standing to defend it.

An adversary relationship does exist between the parties to this case as to the ultimate outcome -- whether the defendants can continue their affirmative action program. But the purpose of the case or controversy requirement is to insure that the parties will aid the court by vigorously contesting each of the subsidiary issues of law and fact which the court must decide. Ordinarily a controversy as to the ultimate issue will be adequate to prompt the parties to controvert all reasonably disputable subsidiary issues. But a dispute as to the outcome of the action is insufficient to create a

"case or controversy" where there are no adverse interests as to a critical question of law or fact.

Were it possible for an action such as this to proceed as it did below, with the judges left to their own devices to determine if there was past discrimination against blacks, it would be equally permissible for the defendants to join the plaintiff in a formal stipulation that there had never been such discrimination. Of course, the courts would not be bound by a stipulation that was contrary to the truth, and the courts will not decide a question presented by "stipulated" facts that are not the case. Swift & Co. v. Hocking Valley R.R. Co., 243 U.S. 281, 289 (1917). But the courts would have no way of ascertaining the accuracy of such a stipulation. Stipulations are ordinarily accepted because the courts can rely on the adverse interests of the parties to assure that stipulations will only be agreed upon if true; no such presumption can be relied upon where, as here, it is in the interests of all parties to agree there is no history of discrimination.

An action against a defendant who lacks any adverse interest in a key factual issue poses Article III problems similar to those presented by "friendly actions" which this Court has consistently refused to decide. United States v. Johnson, 319 U.S. 302, 305 (1943) (no "honest and actual antagonistic assertion of rights"); Lord v. Veazie, 8 How. 251, 254-55 (1850). Regarding the question of past discrimination "the plaintiff and defendant have the same interest, and that interest [is] adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question ... was decided in the manner that both of the parties to this suit desire it to be." Lord v. Veazie, supra, 8 How. at 255. The instant case bears a substantial resemblance to Chicago etc. R.R. v. Wellman, 143 U.S. 339 (1892), an action between a railroad and passenger regarding the validity of state price regulation which this Court dismissed at the suggestion of the state. Even though there was no claim or evidence of collusion, the Court thought it inappropriate to decide a case in which the amicable relationship

between the parties resulted in an abortive trial of complex factual issues, lacking "presentation of all the facts from the lips of witnesses, and a full inquiry into them...." 143 U.S. at 345. In such a case the intervention of an interested party does not confer on the court jurisdiction which it originally lacked. United States v. Johnson, supra.

We suggest that these difficulties will exist under any construction of Title VII which requires the defendant in a case such as this to adduce evidence or make allegations which entail a "real and appreciable" danger of increasing the likelihood that the defendant will be held liable to third parties, including black workers or the United States. See Marchetti v. United States, 390 U.S. 39, 48 (1968). Clearly such a defendant cannot be required to prove it was guilty of discrimination. Neither can it be forced to adduce a prima facie case of past discrimination, for such a prima facie case would shift to the employer the burden of proof in any subsequent action by minority employees or applicants. Teamsters v. United States, supra, 431 U.S. at

359-62; Franks v. Bowman Transportation Co., supra, 424 U.S. at 772. Similarly a defendant cannot be asked to admit and to prove that it had believed it was discriminating against blacks, for such an admission might provide grounds for an award of punitive damages. See Carey v. Piphus, 55 L.Ed.2d 252, 260-61, n.11 (1978). The standard we set out in part II A, unlike the Fifth Circuit's construction of Title VII, poses none of these Article III problems.

C. The Fifth Circuit Has Given Title VII an Unconstitutional Construction

The Fifth Circuit construed Title VII to prohibit race-conscious remedies to correct "societal discrimination", a phrase which denoted discrimination by anyone other than the defendants themselves. As this Court has consistently recognized, race-conscious policies are frequently "the one tool absolutely essential" for redressing past discrimination. North Carolina Bd. of Ed. v. Swann, 402 U.S. 43, 46 (1971). Thus, under many if not most circumstances Title VII, as construed below, would prohibit any meaningful

effort by an employer to provide redress for discrimination by other employers, or by state, local or federal officials. Any such prohibition would violate the Fifth Amendment, which applies to federal legislation the same constraints applicable to the states under the Equal Protection Clause. See Bolling v. Sharpe, 347 U.S. 497 (1954).

A blanket prohibition against race-conscious redress of discrimination by others would be neutral on its face. But, like the prohibition in Hunter v. Erickson, 393 U.S. 385 (1969), it would be far from neutral in its operation. It would not deny to whites any remedies which they now enjoy, for whites have never been subject to the long-standing pervasive discrimination that has been inflicted on blacks and certain other minorities. Hernandez v. Texas, 347 U.S. 475, 478-79 (1954). Not only, as in Hunter, do whites not need such redress, but as a practical matter they would not qualify for it were it available to all victims of discrimination. Title VII, moreover, would not prevent an employer from using a beneficent quota or program to help people who suffered in the past from physical disabilities, illness,

or discrimination on the basis of age or political views. Only women and racial minorities as a practical matter would be cut off from such assistance. The prohibition created by the Fifth Circuit is far more restrictive than that in Hunter, in which the Court struck down a city charter provision that established special requirements for enacting an open housing ordinance but still permitted the adoption of one. Here the purported prohibition against race-conscious employer redress is absolute.

Both the states and federal government are free to enact, and repeal, laws providing remedies for victims of discrimination. Railway Mail Association v. Corsi, 326 U.S. 88 (1945). But this Court has never upheld legislation prohibiting voluntary steps to provide such redress. Certainly the remedial measures required by the Constitution of a public entity to redress its own discrimination cannot be prohibited. North Carolina Bd. of Ed. v. Swann, supra. We submit that voluntary private action to redress the discrimination of others is also protected by the Fourteenth Amendment. The Thirty-Ninth Congress which framed the Fourteenth Amendment clearly approved the numerous private organiza-

tions, generally known as Freedmen's Societies, which were actively engaged after the Civil War in providing special relief and assistance, including education and job training, to blacks. That Congress enacted a series of race-conscious federal programs intended to operate jointly with those private efforts and the Fourteenth Amendment, was seen as providing a constitutional basis for this federal activity.[23/] Moreover, the men who framed the Amendment acted against a long history of federal efforts under the Fugitive Slave Act to prohibit private assistance to runaway slaves,[24/] and were determined to reverse the past role of the federal government from obstructing to assisting such private efforts.

For the first century after Emancipation, private race-conscious voluntary action to remedy discrimination by others was virtually

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23/ Brief of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae, No. 76-811, pp. 10-53.

24/ J. tenBroek, Equal Under Law, 57-65 (1951); the 1850 Fugitive Slave Act provided civil and criminal liability for anyone assisting a runaway slave. 11 Stat. 462, § 7.

the only form of redress available to blacks. Today such activities remain of vital importance. Congress could not conceivably prohibit charities or private foundations from attempting through race-conscious programs to alleviate the effects of discrimination. In 1963 an employer in Louisiana, had it had the courage to break with local prejudice, could have offered employment to a black man or woman in a good faith effort to redress in a limited way a lifetime of discrimination at the hands of state officials or other private employers. Congress did not have the power to prohibit such a beneficent act, and there is no reason to believe it intended to do so.

Even if Title VII as construed by the Fifth Circuit is not unconstitutional per se, it certainly would be in many instances. As construed below Title VII prohibits a private employer from using a race-conscious program to remedy unconstitutional discrimination by state or federal officials. Both state and federal officials were involved in the funding and supervision of the Louisiana vocational schools which, as we note infra pp. 93-95, denied certain craft training

to blacks because of their race; the history of de jure discrimination in Louisiana public schools is well known. The likely impact of these practices on blacks who might have sought work at Kaiser is readily apparent. Cf. Gaston County v. United States, 395 U.S. 285 (1969). For most of the victims of that government discrimination the only effective remedy available would be the sort of training and employment program offered by Kaiser; to forbid that would be to perpetuate the very discrimination which the Fourteenth Amendment was enacted to prohibit.

But an employer could not ordinarily determine whether the past discrimination whose burden an applicant still bore was sufficiently tainted by state action to place it outside the permissible scope of Title VII. "The question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other hand, frequently admits of no easy answer," Moose Lodge No. 197 v. Irvis, 407 U.S. 163, 172 (1972). An employer cannot reasonably be expected to conduct the necessary investigation into the history of each applicant and of

the state where he or she was educated and trained. If required to guess at its peril whether the past discrimination inflicted on a particular applicant involved state action, the possibility of liability to a rejected white would deter all but the hardiest of employers from providing race-conscious redress to any blacks at all. Such a chilling effect on constitutionally protected activity is impermissible. See N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

Title VII, moreover, now applies to state and local governments; in the Fifth Circuit's view Louisiana and New York are also forbidden to use race-conscious employment programs to aid victims of private discrimination in their own states or public discrimination in any other state. National League of Cities v. Usery, 426 U.S. 833, 847 (1976), expressly warned against federal interference with voluntary local affirmative action plans, and Gaston County noted that, where neutral state practices would perpetuate past discrimination, there seemed little "legal significance" to whether that discrimination had occurred in another state. 395 U.S. at 293 n. 9.

Title VII could not constitutionally restrict the power of a state or local government to remedy such discrimination by, for example, the 1973 Louisiana statute requiring that affirmative action be taken in filling new positions in vocational training schools "[w]henever the ratio of members of the minority to majority race employed at all levels in the schools is substantially out of keeping with the minority to majority race ratio of persons in the region...." La. Rev. Stat. Ann. §1996C. Title VII should be construed to avoid this difficulty, and, since the statute on its face makes no distinction between public and private employers, the same construction should apply to both.

III. THIS AFFIRMATIVE ACTION PLAN IS PERMISSIBLE UNDER TITLE VII

A. The Plan Was Properly Instituted

The Industrial Relations Superintendent for Kaiser's Grammercy plant stated in general terms the reasons why Kaiser and the Steelworkers instituted their plan:

> ... the Company ... [and] the Union, looked around and read the Court decisions being

> made. We looked at the settlement that had just been made with the steel industry and the steel companies. We looked at the large sums of money that companies were being forced to pay, and we looked at our problem, which was that we had no blacks in the crafts, to speak of. A. 83.

While Kaiser neither admitted that it had discriminated in the selection of craftsmen nor introduced detailed evidence concerning its self-examination, the need to solve this "problem" -- when viewed in the light of Kaiser's employment practices -- justified, and even compelled, the adoption of an affirmative action plan. The joint Company-Union Committee[25/] which reviewed the representation of minority and female employees in the trade, craft and maintenance classifications in Kaiser plants agreed that this representation "must be increased in order to assure full compliance with the standards presently being enunciated by the Government and recent court

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25/ The Master Aluminum Agreement obligated a joint Company-Union committee to review the representation of minority and female employees in craft jobs. A. 139-55 (Joint Ex. 2). The parties did not introduce any evidence concerning the scope of that review.

decisions". A. 145 (Joint Ex. 2). 26/

Kaiser and the Steelworkers had four independent but interrelated justifications for the adoption of an affirmative action plan: (1) to provide a remedy for prior discriminatory practices; (2) to avoid engaging in current discriminatory practices; (3) to provide a remedy for the discriminatory practices of others in the training and development of craft workers; and (4) to ensure compliance with Executive Order 11,246.

1. Kaiser's Prior Discrimination. The district court determined that the evidence did not establish that Kaiser had discriminated either in hiring or in the selection of craft employees. G. Pet. 64a-65a. The court of appeals majority

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26/ Kaiser officials described in some detail the reasons why the affirmative action plan was necessary and lawful: (1) as a "direct result of employment discrimination over the years [and] the lack of opportunity on the part of the blacks . . .", black craftsmen were unavailable, A. 90 (Bouble), see also A. 93, 108 (Bouble), A. 63 (English) (specifically describing discrimination in the building trade programs); (2) recruiting efforts to attract a representative number of skilled black craftsmen had been unsuccessful, A. 91-92 (Bouble), A. 63 (English); (3) the Company

noted the district court's finding and stated that the "appellants [Kaiser and the Steelworkers] all but concede that Kaiser has not been guilty of any discriminatory hiring or promotion" practices (footnote omitted). G. Pet. 17a. Of course, as Judge Wisdom stated, "no litigant wanted to see past discrimination found." G. Pet. 34a. Certainly neither Kaiser nor the Steelworkers would directly admit prior discrimination against black workers in order to prevail in this lawsuit; such an admission would only invite a lawsuit by black workers which might result in substantial monetary liability, see pp. 31-34, supra.

The lack of adversity of interest among the parties concerning a central factual issue -- the existence, or a reasonable basis for believing

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26/ Cont'd

had a "fear of the consequences" of suits on behalf of black employees brought by private parties or the federal government, A. 84; (4) the Company had been under considerable pressure from the Office of Federal Contract Compliance, A. 93-94 (Bouble), see p. 105 n.86, infra; (5) the plan was considered "remedial . . . [for] discrimination in the past, not ours, per se, but the total sum and substance of education and training to obtain skills, that created a situation that called for a remedy such as the one we derived out of our discussions [with the Union]," A. 98 (Bouble).

in the existence, of prior discrimination -- raises serious questions concerning the justiciability of this action, see Section II B, supra. Moreover, the absence of any litigant with an interest in coming forward with proof of prior discrimination creates serious evidentiary problems which are illustrated by the failure of the parties in this case to introduce relevant and available evidence concerning the possible existence of prior discrimination.[27] These evidentiary problems require that, in such cases as this, the courts must carefully scrutinize the evidence because it is not in the interest of any

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27/ For example, the parties did not introduce any evidence on the following important issues concerning the question of prior discrimination at the Kaiser plant: (1) the findings by the Office of Federal Contract Compliance concerning the discriminatory practices at Kaiser and its recommendation for remedying the effects of those practices, see pp. 104-05, infra; (2) the existence of segregated facilities; (3) the racial composition of the supervisory staff and whether there were any controls concerning the exercise of supervisory discretion, see p. 78 n.42, infra; (4) the census data concerning the availability of skilled craft workers in the labor force, see p. 67 n.31, infra; (5) actual job descriptions,

party to develop a full factual record on the possible existence of prior discrimination. See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1296-97 (1976). Furthermore, the courts in such cases should use their full authority to take judicial notice of relevant facts:

> Appellate courts have a special need to resort to facts not found in the record. When the question before the Court is not merely the rights of the parties, but the

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27/ Cont'd

qualifications and pay rates for craft jobs; (6) the qualification standards, employment testing, education requirements, etc., if any, which Kaiser has used in selecting applicants for hire, see pp. 81-83, infra; (7) the actual application of the standards for the selection of craftsmen prior to 1974, see p. 78 n.42, infra; (8) any justification for the use of a five or three year "prior industrial experience" requirement for selection as a craftsman prior to 1974, see p. 69, infra; (9) the date when the five year experience standard for hire into the craft positions was reduced to three years, see p. 70 n.32, infra; (10) the details, including the chronology, of Kaiser's self-described active recruiting efforts for black craftsmen, see p. 77 n.41, infra; (11) the method for the selection of craftsmen in 1974 which appears to be in violation of the affirmative action plan, see p. 111, infra.

> interests of others who may be affected by the rule the Court makes to govern the case, it would be foolish for the Court to rely only on the evidence the parties have chosen to prove below.28/

In this case, and in others like it, it is critical that the courts take proper judicial notice of relevant facts because the litigants do not have an interest in the full presentation of the evidence; the substantial rights of persons who are not parties to the lawsuit are affected; and the authority of the federal government to achieve the national policy of equal employment opportunity is at issue.29/

28/ 21 Wright and Graham, Federal Practice and Procedure §5102 at 462-63 (1977); see also Weinstein, 1 Evidence ¶200[03].

29/ The Court extensively relied on judicial notice in an analogous case, Regents of the University of California v. Bakke, supra, 57 L.Ed.2d at 784-88, 790-92 (opinion of Powell, J.), 821-26 (opinion of Brennan, White, Marshall, Blackmun, JJ.). See also, Roe v. Wade, 410 U.S. 113, 130-147, 149 (1973); Keyes v. School District No. 1, 413 U.S. 189, 197 (1973); Beauharnais v. Illinois, 343 U.S. 250, 258-61 (1952); Moore v. East Cleveland, 431 U.S. 494, 508-09 & n.4 (1977) (Brennan, J., concurring); cf. United States v. Carolene Products Co., 304 U.S. 144, 148-50 (1938).

The evidence, when properly viewed, indicates that Kaiser had a reasonable basis for believing that it had engaged in discriminatory practices and that it was required to formulate a remedial affirmative action plan. Moreover, the evidence establishes, contrary to the legal conclusion of the district court, a prima facie case of discrimination with respect to (a) Kaiser's selection of craftsmen, (b) Kaiser's operation of the craft training program prior to 1974, and (c) Kaiser's employment of industrial workers. However, since the proper standard is whether Kaiser had a reasonable basis to believe that its practices were discriminatory and not, as the lower courts held, whether there was sufficient proof to establish a violation of the fair employment laws, it is not necessary to reverse the conclusion of no discrimination -- although incorrect -- in order to reverse the judgment.

Statistical proof plays an important role in judicial and administrative determinations of whether practices violate the fair employment laws. Similarly, a statistical analysis may provide a reasonable basis for an employer to conclude that its prior employment practices were

discriminatory and that affirmative action is appropriate. See pp. 36-37, supra. In contested litigation, evidence of statistical disparity may provide the basis for a prima facie showing of discrimination within two separate theoretical frameworks. Under the first theory, that of adverse impact, the plaintiff "need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." Dothard v. Rawlinson, supra, 433 U.S. at 329. "There is no requirement ... that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants." Id. at 330. If adverse impact of the standard is demonstrated, the employer must meet "the burden of showing that any given requirement [has] ... a manifest relationship to the employment in question." Griggs v. Duke Power Co., supra, 401 U.S. at 432. Once the employer meets this burden, the plaintiff may then show that other standards which have less or no discriminatory effect would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" Albemarle Paper Co. v. Moody, supra, 422 U.S. at 425.

Under the second theory, that of disparate treatment, proof of discriminatory motive is required but in some circumstances motive can be inferred from the "mere fact of differences in treatment," Teamsters v. United States, supra, 431 U.S. at 335 n.15, 339-340 n.20; the significance of this difference may be demonstrated by a statistical evaluation, Hazelwood School District v. United States, supra, 433 U.S. at 308-09 n.14, 311 n.17. The burden then shifts to the defendant to demonstrate that the plaintiff's proof is "either inaccurate or insignificant." Teamsters v. United States, supra, 431 U.S. at 360. Evaluation of the statistical evidence here indicates that there was a reasonable basis to believe that Kaiser discriminated in its practices regarding the selection and training of craftsmen and the employment of industrial workers under both the adverse impact and the disparate treatment theories.

a. Selection of Craftsmen. Prior to the institution of the affirmative action program Kaiser employed 273 craft workers at its Grammercy

plant, of whom only 5 or 1.83% were black.[30/] A. 167 (K. Ex. 3). The large majority of these craftsmen were employed "off the street" rather than being trained at the plant; only 28 craftsmen were trained by Kaiser prior to 1974. See p. 79, infra. In order to be hired as a craftsman, an applicant was required to have five years of "prior industrial experience"; this requirement was reduced, at some unspecified time, to three years. A. 70 (English).

Kaiser obtained most of its workforce from two parishes, St. James and St. John the Baptist, which had a combined general population which was 46% black, and a workforce which was 39% black.

30/ The Superintendent of Industrial Relations at Kaiser's Grammercy Plant, Dennis English, testified that prior to the 1974 Agreement "we had about a two to one and a half percent minority ... we had a total of five ... [The total number of craft employees was] somewhere around 290, at that time." A. 62. We have selected the precise figure on the statistical exhibit rather than the approximation of Mr. English for the purposes of the statistical calculations. However, the result would be approximately the same with either set of numbers.

A. 60.[31/] It is apparent that the selection process, including the use of the prior indus-

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31/ The actual census data were not introduced by the parties in this case. The 1970 census figures for St. James and St. John the Baptist Parishes show that the black proportion of the "blue collar" work force was actually 40.6%, not 39%. The census shows the following racial breakdowns for the workforce, U.S. Bureau of the Census, Census of Population: 1970, Vol. 1, Characteristics of the Population, Part 20, Louisiana, Table 122 (hereinafter "Census"):

	St. James			St. John the Baptist		
	TOTAL	BLACK	% BLACK	TOTAL	BLACK	% BLACK
Total Employees	4,976	2,014	40.5	6,321	2,312	36.6
Crafts	883	179	22.9	1,246	253	20.3
Operatives	1,290	517	40.1	1,425	612	42.9
Laborers	456	343	75.2	665	479	72.0
Blue Collar	2,529	1,039	41.1	3,336	1,344	40.3

trial experience requirement, had a substantial adverse impact on black workers. While blacks

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31/ Cont'd

St. James & St. John the Baptist Combined

	TOTAL	BLACK	% BLACK
Total Employees	11,297	4,326	38.3
Crafts	2,029	432	21.3
Operatives	2,715	1,129	41.6
Laborers	1,121	822	73.3
Blue Collar	5,865	2,383	40.6

These figures include all the employed persons in these occupational categories. (The blue collar category is the sum of the totals in the craft, operative and laborer categories). There are no published census data by parish for the "experienced" workforce which would include unemployed as well as employed persons; nor are there published data by parish which divide the craft category into sub-categories, e.g., electricians, carpenters, as there are for states and Standard Metropolitan Statistical Areas, see nn. 36-38, infra.

were 39% of the labor force, they were only 2% of the craftsmen employed at Kaiser. Thomas Bouble, who for eight years had been Kaiser's Director of Equal Opportunity Affairs and who had been employed by Kaiser for nineteen years, stated that, as a result of discrimination in employment and training opportunity, blacks were underrepresented in skilled crafts "in every industry in the United States, and in every area of the United States." A. 90. Moreover, blacks "until just recently ... did not get into [the] building trade [training] programs" which provided a substantial portion of the training opportunity for craft positions. A. 63 (English), A. 104 (Bouble); see also pp. 89-104, infra.

Since this prior experience requirement had an adverse racial impact, the burden in litigation would fall on Kaiser to establish the "business necessity" or manifest job relationship of the requirement. See p. 64, supra. There is no evidence concerning the business necessity of this requirement. Nor is it likely that Kaiser could show any manifest job relationship for this apparently arbitrary requirement: the requirement was changed from five years to three years

without any apparent harm;[32] the requirement for prior industrial as opposed to other relevant experience -- e.g., in the armed forces, as a private contractor, etc. -- seems unjustifiable; and the application of the same requirement across-the-board to craft positions which varied greatly[33] does not appear to be validly related to the job requirements of each position. Thus, the evidence indicates that under the adverse impact principle of Griggs and Albemarle Paper, Kaiser had reason to believe that it had violated Title VII.[34]

Moreover, the Company had reason to believe that its craft selection practices also constituted a violation of Title VII under the disparate

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32/ The record does not indicate when the requirement was changed.

33/ At the Grammercy plant, Kaiser employed craftsmen in the following occupations: General Repairman, Air Conditioner Repairman, Insulator, Carpenter-Painter, Garage Mechanic, Machinist, Electrician, Instrument and Electrical Repairman. A. 167 (K. Ex. 3).

34/ The district court stated that the low proportion of blacks in the plant's craft population

treatment principle set forth in Teamsters and Hazelwood School District. See pp. 64-65, supra. While Company officials testified that trained blacks were "unavailable" despite Kaiser's active recruiting efforts, A. 62-63 (English), A. 90, 93 (Bouble), they did not refer to any census data in support of their assertion. In fact, the census

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34/ Cont'd

"might suggest that Kaiser had discriminated against blacks when filling craft positions." G. Pet. 65a. The court then concluded that this showing of discrimination was rebutted by the mere fact that Mr. English, the Industrial Relations Superintendent, had testified that Kaiser had vigorously sought black craftsmen. Id. Even if Mr. English's protestation of good faith recruitment is accepted -- and there is considerable doubt concerning the recruitment efforts, see pp. 77-78 infra -- this conclusion is contrary to applicable law. "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation," Griggs v. Duke Power, supra, 401 U.S. at 432. The district court's failure to consider the "consequences" of the prior experience requirement was plain error. In fact, in a case involving another Kaiser plant the Fifth Circuit reversed a district court's finding of no discrimination on almost identical facts, Parson v. Kaiser Aluminum, supra, 575 F.2d at 1389-90.

data show[35/] that the proportion of blacks working in crafts at Kaiser (approximately 2%) was disproportionately low when compared to the available proportion of trained blacks listed in the "craftsmen and kindred workers" category in the workforce for the parishes of St. James and St. John the Baptist (21.3%), see p. 67 n.31, supra, for the state of Louisiana (16.0%)[36/] or for the

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35/ This Court has taken judicial notice of census data when determining whether there is a prima facie case of employment discrimination. See Griggs v. Duke Power, supra, 401 U.S. at 430 n.6; cf. Dothard v. Rawlinson, supra, 433 U.S. at 329-30; see also Watkins v. Scott Paper Co., 530 F.2d 1159, 1185 n.36 (5th Cir.), cert. denied, 429 U.S. 861 (1976).

36/

Louisiana:	Total	White	Black	Percent Black
Total experienced labor force	1,217,334	903,556	311,110	25.6
Craftsmen and kindred workers	177,770	149,039	28,464	16.0
Carpenters	18,193	14,278	3,884	21.3

Standard Metropolitan Statistical Areas of the cities of New Orleans (18.7%)[37] and Baton Rouge

	Total	White	Black	Percent Black
36/ Cont'd				
Mechanics & Repairmen	37,627	32,096	5,493	14.6
Electricians	7,967	7,713	242	3.0

Census, Table 172.

37/ New Orleans:

Total experienced labor force	386,072	281,715	103,234	26.7
Craftsmen and kindred workers	52,433	42,522	9,792	18.7
Carpenters	4,366	3,196	1,165	16.7
Mechanics & Repairmen	11,029	9,430	1,589	14.4
Electricians	2,713	2,590	118	4.3

Census, Table 172.

(17.8%).[38/]

When the statistical analysis adopted by this Court in Castaneda v. Partida, 430 U.S. 482 (1977), and Hazelwood School District, supra, is

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38/ Baton Rouge:

	Total	White	Black	Percent Black
Total experienced labor force	106,600	78,780	27,663	30.0
Craftsmen and kindred workers	16,639	13,674	2,960	17.8
Carpenters	1,292	850	442	34.2
Mechanics & Repairmen	3,085	2,596	489	15.9
Electricians	800	781	19	2.4

Census, Table 172.

applied to the disparity between the proportion of blacks in the craft positions in the plant and the proportion of blacks in the workforce of the parishes, of the State of Louisiana, or of the Baton Rouge or New Orleans SMSA,[39/] the results indicate a prima facie case of intentional discrimination. This analysis shows that there is a difference of 7.8 standard deviations between the actual number of blacks hired as craftsmen by Kaiser and the number one would expect as a result of nondiscriminatory hiring from a labor market consisting of the parishes of St. James and St. John the Baptist[40/] and a difference of 6.4

39/ These workforces have been chosen in addition to the workforce of St. James and St. John's parishes because Kaiser's officials stated that they actively recruited craftsmen throughout the area and specifically in Baton Rouge and New Orleans. A. 62. Moreover, the published census data for the parishes do not divide the "craftsmen" category into sub-categories of "carpenters," "mechanics and repairmen" and "electricians."

40/ This statistical model measures fluctuations from the expected value in terms of the standard

standard deviations if the labor market includes the entire state of Louisiana. A fluctuation of more than two or three standard deviations "undercut[s] the hypothesis that decisions were being made randomly with respect to race," Hazelwood School District, supra, 433 U.S. at 311 n.17. In fact, even if the black proportion of the avail-

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40/ Cont'd

deviation, which is defined as the square root of the product of the total number in the sample (here, 273) times the probability of selecting a black (.213) times the probability of selecting a non-black (.787). The standard deviation based on the workforce of the two parishes is 6.8. The difference between the expected (.213 x 273 = 58) and observed number of blacks hired during this period is 53, which is 7.8 standard deviations ([58-5] divided by 6.8 = 7.8). Castaneda v. Partida, supra, 430 U.S. at 496-97. The likelihood that a comparable craft workforce would occur by chance is less than 1 in 10^{21}. On average, in only one of more than one hundred million trillion randomly selected groups each containing 273 craftsmen recruited from this workforce would there be a group containing five or fewer blacks. This statistic was derived from the binomial probability distribution. See Mosteller, Rourke, Thomas, Probability with Statistical Applications, 130-146 (1970); Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338, 353-357 (1966).

able pool of skilled workers had been 8% -- i.e., half of that which the census data indicate for Louisiana -- there would have been a difference of 3.7 standard deviations between the actual number and the expected number of black craftsmen at the Grammercy plant.

Although the availability of trained black craftsmen was much greater than Kaiser's superintendent asserted, it was, as he also indicated, much less than would be expected absent discrimination in employment and training programs in the area. The superintendent's mere statement that Kaiser engaged in an active minority recruitment program -- a statement which was required in order to avoid a direct admission of discriminatory practices -- does not rebut the prima facie case.[41/] The statistical disparities indicate

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41/ Kaiser did not present specific evidence concerning the scope, duration or application of its recruitment efforts. In fact, the Office of Federal Contract Compliance, in a 1971 letter to the Grammercy plant manager, indicated that "Kaiser had not been effective in utilizing minority recruitment sources" and that "affirma-

that, whatever the intention of Kaiser's top management, the selection practices for craftsmen were applied in a racially disparate manner at the Grammercy plant.42/

41/ Cont'd

tive action as required by the OFCC regulations has not been taken to identify and attract minority applicants..." The 1971 findings by the OFCC were lodged by the United States with the Clerk of the Court, see G. Pet., p. 18 n.6.

42/ There was no evidence placed in the record concerning who administered the selection system, or what controls, if any, existed to insure that the system was being applied fairly and without discrimination. However, a 1973 OFCC "review of persons transferring into the maintenance crafts (all Caucasians) revealed that several Caucasians did not possess the required prior experience for such transfers...." The OFCC Memorandum dated January 31, 1973, was lodged by the United States with the Clerk of the Court, see G. Pet., p. 18 n.7.

At the Company's plant in Chalmette, Louisiana, where black workers had brought a lawsuit alleging unlawful discrimination, there was also a prior experience requirement for entry into craft positions. The Fifth Circuit observed that "[t]here is some evidence in the record that this requirement is not consistently applied and that decisions to waive or modify it are within the

b. Craft Training Programs. During the period from 1964 through 1971, the Company at various times operated on-the-job training programs for the positions of general repairman and carpenter-painter. A. 136 (Stipulation pp. 2-3). An employee was required to have three years of prior experience in the applicable job "category" in order to enter the training program for general repairman[43/] and one year of prior experience to enter the program for carpenter-painter. During the operation of these programs, seventeen trainees were enrolled in the general repairman program and eleven trainees were enrolled in the carpenter-painter program. Only two of the twenty-eight trainees, both in the carpenter-painter program, were black. Id.

42/ Cont'd

discretion of the supervisor involved in the hiring practice," Parson v. Kaiser Aluminum, supra, 575 F.2d at 1381.

43/ Although the prior experience requirement was modified in 1971 to permit employees with two years of prior experience to enter the program, there was only one trainee in 1971. A. 126 (Stipulation p. 2).

This low proportion of blacks in the training programs (7%) compared to the proportion of blacks in the workforce (39%) demonstrates the adverse impact of the Company's selection practice. See Griggs v. Duke Power Co., supra, 401 U.S. at 430 n.6; Dothard v. Rawlinson, supra, 433 U.S. at 329. The prior experience requirement was a ready mechanism for discriminatory exclusion of blacks from the craft training programs as well as from direct entry into the craft positions. See pp. 67-70, supra. While there was some evidence concerning the cost of the training programs and an indication that this cost would be reduced by selecting persons with prior experience, these statements do not establish a "business necessity" for the use of this discriminatory requirement. G. Pet. 36a (Wisdom, J., dissenting).44/

44/ The district court ignored the discriminatory training program. The appellate court majority attempted to dismiss this proof of prior discrimination by concluding "that this program was so limited in scope that the prior craft experience cannot be characterized as an unlawful employment practice," G. Pet. 17a n.13. Title VII does not countenance a discriminatory practice because it "only" has an impact on a few individuals: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for

c. General Hiring Practices. Kaiser also had a reasonable basis for believing that it had engaged in prior discriminatory practices in its general hiring procedures. G. Pet. 35a (Wisdom, J., dissenting):

> The evidence showed that although 39 percent of the area workforce was black, only 14.8 percent of Kaiser's employees in 1974 were black. That was an increase from around 10

44/ Cont'd

each applicant regardless of race . . . ." Furnco Construction Corp. v. Waters, 57 L. Ed.2d 957, 969 (1978); see also G. Pet. 37a (Wisdom, J., dissenting); Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972) ("The degree of discrimination . . . is unimportant under Title VII. Discriminations come in all sizes and all such discriminations are prohibited by the Act").

In fact, Kaiser's affirmative action plan had not even remedied the "small" discrimination in the training program. If Kaiser's program had operated in a racially neutral manner, then one would expect that approximately ten of the trainees (the black proportion of the workforce, 39%, multiplied by the number of positions, 28) would have been black. Since only two blacks were trained, the approximate number of blacks who were discriminatorily denied this training opportunity was eight. Through trial, only seven blacks had been selected for the training program under the affirmative action plan.

> percent in 1969. The testimony that Kaiser had hired "the best qualified" before 1969 left open the possibilities that Kaiser had determined qualifications through nonvalidated tests, or impermissibly subjective processes. The statistics here constituted a prima facie case of discrimination. (Footnote omitted.)

The increase in the black proportion of employees at the plant resulted from the adoption by Kaiser in 1969 of a plan for hiring one black for each white hired until the black proportion of the plant workforce was comparable to the black proportion of the outside workforce. A. 82, 87 (English). This plan was adopted by Kaiser upon the recommendation of OFCC personnel who found after a review of the plant that Kaiser "had a relatively low percentage of minorities in the workforce." A. 82. While the affirmative action plan for hiring removed the adverse impact or disparate treatment from Kaiser's post-1969 initial selection procedures, the severe disparity between the proportion of blacks in the plant, 10-11%, 45/ and the proportion of blacks in the

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45/ The parties stipulated that in 1969 minorities constituted "10 or 11 percent" of the plant workforce. A. 49.

outside workforce, 39%, constituted a prima facie case of pre-1969 hiring discrimination. Griggs v. Duke Power Co., supra, 401 U.S. at 430 n.6; Dothard v. Rawlinson, supra, 433 U.S. at 329. Discrimination in hiring is directly related to discrimination in the selection for craft training not only, as Judge Wisdom stated, G. Pet. 35a, "because in the absence of that discrimination, more blacks could have entered a training program based solely on seniority," but also because the institution of a new training program in which selection was based upon date of hire seniority would perpetuate the discrimination in hiring and might well constitute a new violation of the fair employment laws.

2. Modification of Kaiser's Present Practices. In addition to remedying prior discriminatory practices, an employer has an affirmative obligation to insure that its present practices do not constitute on-going discrimination. An employer does not satisfy this obligation by merely determining that its practices were developed and implemented without racial animus, but

must also consider the racial effects of those practices. Kaiser was required not only to cease its reliance on "prior industrial experience" in selecting and training craftsmen, see pp. 65-70, supra, but also to insure that its new practices were free from discriminatory effect. Kaiser faced a difficult challenge in designing a workable system. The difficulty was created by the longstanding discriminatory practices of employers in the industry (including Kaiser), of public educational institutions, and of unions which all contributed to blacks being severely underrepresented in the craft labor force, see pp. 88-103, infra. If Kaiser had continued to rely solely upon affirmative recruitment to attract a representative proportion of black craftsmen, it would have "end[ed] up baying at the moon, as it were." A. 93 (Bouble).[46/] The development of a program to train inexperienced employees or new hires was

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46/ While Kaiser officials underestimated the availability of black craftsmen, it is clear that they were correct in their general conclusion that discrimination in employment and education had restricted training opportunities and that blacks were underrepresented in the skilled workforce.

the only realistic way for Kaiser to select craftsmen in a manner which would not have an adverse racial effect. A. 64-66 (English).

In order for Kaiser to lawfully hire skilled craftsmen from a labor force which was disproportionately composed of white workers, it would have had to develop valid, job-related measures for evaluating relevant experience or skill.[47/] But even if Kaiser could demonstrate that the experience requirement was job-related, the requirement would still be unlawful if there were a selection system which had a less discriminatory effect and which would also have "serve[d] . . . [its] legitimate interest in 'efficient and trustworthy workmanship'." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 425. Here an alternative system was available: a training program. While Kaiser may have been able to develop and

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47/ When an employer uses the prior "experience" of applicants as a selection criterion the employer must show, if the criterion has an adverse racial impact, that it is a valid selection procedure. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§1607.3, 1607.16Q.

support a lawful experience requirement, the decision to remove the discriminatory effect from its selection procedure by instituting a training program was a proper method of complying with Title VII.[48/]

Employers must be given the clear option of removing the adverse effect of selection practices rather than being required to engage in potentially expensive and possibly ineffective efforts to validate selection criteria. Otherwise, the national goal of assuring equal employment opportunity will not be realized in the foreseeable future. Kaiser's decision to adopt a program

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48/ See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.6. In order to remove the adverse impact from its selection practices, Kaiser would be required to select blacks for approximately 39% of its trainee positions, the black proportion of the area workforce. Thus, at least for the Grammercy plant, Kaiser's affirmative action plan -- which included a ratio of one black for each white hired -- operated primarily to remove the adverse effect of nonvalidated selection practices rather than to remedy prior discriminatory practices.

to train inexperienced black and white workers rather than to concentrate its resources on an attempt to justify pre-existing practices for selecting "experienced" workers -- which clearly would have resulted in few blacks being hired -- is precisely the type of responsible business decision that is required for the effective implementation of Title VII.

Moreover, if Kaiser had continued to hire "experienced" craftsmen despite its knowledge[49/]

49/ Kaiser officials acknowledged that discrimination in training programs limited the supply of black craftsmen, and that this was one of the basic reasons for the institution of the affirmative action plan. Furthermore, the OFCC brought this matter directly to the attention of the plant manager. After noting that in 1971 there was not a single black craftsman at the plant, the OFCC stated that "[m]aintenance craft training programs are needed; the qualification and potential of minorities presently employed at Kaiser should be reviewed and those determined to be eligible should be given high priority for such training, any direct hiring into these classifications should include at least the minority ratio that exists in the company's recruitment area." Letter dated January 25, 1971, to Mr. Melancan, plant manager, from Guy W. McCarty, Chief Contract Compliance Officer, see p.78 n.42, supra.

that the availability of experienced black workers was severely limited because of discrimination in admission to industry and union training programs, it would have been potentially liable for intentional discrimination. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-68 (1977); Washington v. Davis, 426 U.S. 229, 241-42 (1976);[50/] see pp. 64-65, supra. Kaiser could not avoid liability by assigning the discriminatory animus to the unions or to the other companies which operated craft training programs. If Kaiser, rather than instituting an affirmative action training program, had continued to select "experienced" craftsmen by relying on the discriminatory training programs in its recruitment area, and if this process had resulted, as could be expected, in the selection of a low proportion of black workers, Kaiser's

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50/ "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." Washington v. Davis, supra, 426 U.S. at 253 (Stevens, J., concurring).

practices would constitute a prima facie showing of an intentional violation of the fair employment laws.[51/]

3. General Discrimination in the Training and Development of Craft Workers. Kaiser's prior selection practices -- including its selection of craft workers from the pool of qualified craftsmen who had "prior industrial experience" and who frequently were trained in programs operated by the construction trade unions -- must be examined in light of the longstanding practices of deliberate discrimination in the crafts.[52/] These practices contributed directly to the present problems of the disproportionately high rate of black unemployment and the limited availability of black craftsmen. Given the effects of decades of discrimination, it was difficult if not impossible

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51/ See e.g., Commonwealth of Pennsylvania v. Local 542, Operating Engineers, Civil Action No. 71-2698 (E.D. Pa., Nov. 30, 1978), Slip Opinion at 122-43 (Higginbotham, J.).

52/ Kaiser officials did, in fact, examine their practices in this light. See n.26 and p. 69, supra.

for Kaiser to adopt racially neutral selection procedures for craft positions which did not severely limit the employment opportunities of black workers. Facially neutral employment practices often have an adverse racial effect because discrimination by educational institutions and by other employers and unions has limited the skills and experience which black workers have been permitted to acquire. In many circumstances it is unlawful for employers to ignore the effects of such practices, see pp. 69-71, supra, and in all circumstances it is a national policy of the highest priority to encourage voluntary action to remedy those effects, see pp. 38-40, supra.

For a hundred years prior to the passage of the Civil Rights Act of 1964 the workplace for blacks was marked by deliberate practices designed to restrict them to specific positions in the job market and to eliminate them altogether from the skilled trades.[53/] By the end of the Civil War blacks constituted the great majority, approxi-

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53/ The history of this period is by necessity summarized in this brief. A full historical

mately 80%, of all skilled tradesmen in the South.[54] The predominance of blacks in the skilled trades directly resulted from the fact

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53/ Cont'd

discussion of blacks and the workplace may be found in Spero and Harris, The Black Worker (Atheneum ed., 1968) (hereinafter "Spero and Harris"); and a brief but thorough discussion may be found in Myrdal, An American Dilemma (Harper & Row ed., 1962) at 1079-1124 (hereinafter "Myrdal"). A thorough discussion of black workers during the period from World War I through World War II is found in Weaver, Negro Labor, A National Problem (1946) (hereinafter "Weaver"), and of blacks in labor unions in Marshall, The Negro and Organized Labor (1965) (hereinafter "Marshall"); Marshall and Briggs, The Negro and Apprenticeship (1967) (hereinafter "Marshall and Briggs"); and Northrup, Organized Labor and the Negro (1944) (hereinafter "Northrup"). For more recent discussions, see Hill, Black Labor and The American Legal System: Race, Work and the Law (1977), and Gould, Black Workers in White Unions (1977).

54/ Spero and Harris, p. 16; Myrdal, p. 1101.

that slaves with skills had a greater market value and could produce additional income.[55] The post-Civil War period saw the development of extensive efforts to limit or eliminate the opportunity for black workers to use their skills or to acquire new ones.[56]

After the Civil War blacks were excluded by law or practice from practically all apprentice programs.[57] Moreover, blacks were assigned to

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55/ Spero and Harris, pp. 5-6; Myrdal, pp. 887, 1100-1101.

56/ There had been attempts prior to the Civil War to limit the opportunities of blacks to work as craftsmen. For example, the Georgia Legislature passed a law in 1845 making it a criminal offense for a "white person ... [to] contract or bargain with any slave, mechanic or mason, or free person of color, being a mechanic or mason ...," quoted in Spero and Harris, p. 8. However, these efforts were generally unsuccessful because of the political and economic power of the slave owners, id., pp. 7-9. Myrdal, p. 1101.

57/ The enactment of the Black Codes regulated the conditions of freedmen's labor and subjected them to the control of their former masters or other white men. Myrdal, p. 228. For example,

vocational schools which "seldom fitted them for the current demands of the so-called 'Southern Industrial Revolution'."[58] Accordingly, blacks were effectively precluded from entrance into formal training programs.

Blacks continued to be assigned to segregated and inferior vocational education schools until well after Brown v. Board of Education, 347 U.S.

57/ Cont'd

in December of 1865, the South Carolina Legislature passed an Act providing "that no person of color shall pursue or practice the art, trade, or business of an artisan, mechanic, or shopkeeper, or any other trade, employment, or business, (besides that of husbandry, or that of a servant under a contract for service or labor,) on his own account and for his own benefit, or in partnership with a white person ... until he shall have obtained a license therefor from the judge of the district court...." McPherson, The Political History of the United States of America During the Period of Reconstruction (Reprinted 1969), p. 36. These codes were abolished during Reconstruction but they later reappeared in various forms. Myrdal, p. 228.

58/ Hall, Black Vocational, Technical and Industrial Arts Education (American Technical Society 1973), p. 19; Weaver, p. 41.

438 (1954). The "usual practice in the South, ... has been to have segregated vocational schools where Negroes are trained only for occupations they have traditionally held."59/ "The Negro industrial high schools in the South ... had little or no equipment, and their graduates were seldom prepared to earn a living in a skilled trade."60/ It was the practice for these vocational high schools "to provide training in those occupations that Negroes could get employment in, in [the] community."61/ This standard, which perpetuated existing patterns of employment discrimination, was approved by HEW as late as 1961.62/ For example, as of 1961 in the New Orleans area there were four vocational education high schools. In the one school which admitted blacks to its training programs, the apprentice courses available were for carpenters, cement masons, plasterers and lathers: "The program is limited to these trades as they

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59/ Marshall, p. 135.

60/ Weaver, p. 41.

61/ United States Commission on Civil Rights, Employment (1961), p. 97.

62/ Id.

are the ones to which Negroes have access".[63] The trade schools which were exclusively for white students offered apprentice courses for boilermakers, carpenters, millmen, electrical workers, glaziers, iron workers, painters, plumbers, steamfitters, sheet metal workers, machinists and operating engineers.[64] In Louisiana in 1961 there were twenty-seven vocational education schools, twenty-three reserved exclusively for whites and four exclusively for blacks.[65] The pattern remained in effect into the 1970s.[66]

Moreover, as unions, especially in the crafts, increased their control and influence in

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63/ State Advisory Committee, United States Commission on Civil Rights, 50 States Report (1961), p. 209.

64/ Id.

65/ Id.

66/ The statistics provided by HEW for "students and faculty in Louisiana's vocational schools ... show seven schools as overwhelmingly black and 25 schools as overwhelmingly white. Many of the schools operated by State departments of education are obviously segregated." Adams v. Richardson, 351 F.Supp. 636, 639 (D.D.C. 1972).

the labor market during the period after 1900, the access of black workers to training programs and skilled positions became even more limited.[67] Many of the A.F.L. unions excluded blacks by express constitutional provision or by ritual requirements.[68] Other unions denied admission to blacks or restricted their access to jobs by a series of "unwritten" practices.[69] It is important to note that all of the crafts "are not equally bad."[70] In the older crafts such as the

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67/ Myrdal, p. 1102.

68/ Karson and Radosh, "The American Federation of Labor and the Negro Worker, 1894-1949," in The Negro and the American Labor Movement (ed. Jacobsen, Anchor 1968), pp. 157-58. These unions included several, like the Machinists, the Boilermakers, and the Iron and Shipbuilders, which operated apprentice programs.

69/ Id., p. 158; Marshall, "The Negro in Southern Unions," in The Negro and the American Labor Movement (ed. Jacobsen, Anchor 1968), p. 145 ("Unions in the newer occupations like the plumbing and electrical trades have been able to bar Negroes from their unions and from better jobs in the industry through their control of apprenticeship training and their influence with some licensing boards."). See Northrup, pp. 23-37.

70/ Myrdal, p. 1102.

carpenter, painter and trowel trades, where black workers had traditionally been established, they were able to maintain, although on a diminishing basis, access to training and jobs.[71] But black workers never had a chance to enter the newer occupational categories, or those which increased greatly during the industrialization of the South, e.g., plumber, electrician, machinist. The craft unions that controlled or influenced employment in these occupations severely restricted or totally excluded black entry, see nn.67-70, supra; as a result, blacks were unable to obtain a share of the increased employment opportunities in the twentieth century, see pp. 100-102, infra. The persistence into the 1970s of these discriminatory practices is confirmed by the extraordinary number of judicial findings of Title VII violations by craft unions.[72]

71/ Id., pp. 1101-1102; Northrup, pp. 26-41.

72/ "Judicial findings on discrimination in crafts are so common as to make it a proper subject for judicial notice." G. Pet. 46a n.18 (Wisdom, J., dissenting). See United States

Finally, traditional patterns of discrimination and segregation by management contributed to the exclusion of blacks from craft positions and industrial training programs.

> Employers traditionally have felt that Negroes were 'suited' mainly for hot, dirty, or otherwise disagreeable jobs. Historically, management has been willing to hire Negroes for white jobs only where they would work for lower wages than whites or would act as strikebreakers or otherwise help prevent unionization.73/

72/ Cont'd

Commission on Civil Rights, The Challenge Ahead (1976), pp. 58-94 (summarizing judicial findings of discrimination by craft unions).

73/ Marshall and Briggs, p. 34. "Virtually all these 'Negro job' industries have the common feature that they are regarded as undesirable from one or several viewpoints. Many of them carry a social stigma, particularly in the South, where they tend to be despised not only because they are located at the bottom of the occupational ladder, but also because of the very fact that they are traditionally 'Negro jobs.'" Myrdal, p. 1080.

While in the last fifteen years there have been changes in these traditional attitudes, various practices have served to perpetuate the prior systems of segregation.[74/] The racial allocation of jobs, and especially the limitation on the opportunity of black workers to move into craft positions in industrial plants, have persisted.[75/]

73/ Cont'd

"Outside capital which promoted the South's industrialization adhered closely to the color-caste system of the region. The occupational patterns which evolved were in accord with this basic principle: clean, light, well-paid jobs for whites and heavy, dirty, lower paid jobs for Negro." Weaver, p. 6; see pp. 7-8.

74/ "The influence of industrial unions has been mainly to perpetuate job segregation by formalizing separate seniority lines and resisting changes which would make it possible for Negroes to be transferred and promoted on the basis of seniority." Marshall, "The Negro in Southern Unions," in The Negro and the American Labor Movement (ed. Jacobsen 1968), p. 143.

75/ See, e.g., James v. Stockham Valves & Fittings Co., 559 F.2d 310, 340-45 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); Pettway v.

As a result of these deliberate practices of discrimination, the proportion of blacks employed as skilled craftsmen decreased substantially from 1865 through 1940.[76] Moreover, a pattern devel-

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75/ Cont'd

American Cast Iron Pipe Co., 494 F.2d 211, 236-39 (5th Cir. 1974); Robinson v. Union Carbide Corp., 538 F.2d 652, 661 (5th Cir. 1976); Stevenson v. International Paper Co., 516 F.2d 103, 116 (5th Cir. 1975); United States v. Bethlehem Steel Corp., 446 F.2d 652, 655 (2d Cir. 1971).

76/ For the period 1865 through 1890, see Myrdal, p. 1101. For the period from 1890-1940, see Northrup, pp. 18-19:

	1890 % Black	1910 % Black	1940 % Black
Carpenters	25.6	23.2	13.7
Painters	22.2	25.3	14.5
Bricklayers	47.0	54.7	31.5
Plasterers and Cement Finishers	52.5	66.5	54.5
Plumbers	not available	15.5	11.1
Electricians	not available	2.9	1.5
Total	not available	26.3	15.2

oped which remains a serious problem: during times of economic slowdown, black workers lose what little gains they may have made and their unemployment rate increases much faster than that of white workers.[77] While black workers experienced significant employment gains during the war years, 1942-1944, almost half of the black workers who were employed in war industries, a much greater proportion than for white workers, were employed in areas of acute labor shortage. Accordingly, black workers were far more likely than white workers to be laid off after the war.[78] Furthermore, "[i]n the South, the occupational color-caste system was so firmly entrenched that even in the majority of tight labor markets [during the War], there were but slight relaxations" in the barriers to black employment.[79]

77/ See Weaver, pp. 8-15 for a discussion of the effects of the Depression on black workers. "Almost a half of the skilled Negro males in the nation were displaced from their usual types of employment during the period 1930 to 1936; a third of those outside their usual occupations were in unskilled work, and over 17 percent were unemployed." Id., p. 9.

78/ Weaver, pp. 86-87 and 78-93.

79/ Id., p. 92.

From 1950 through 1965 the position of black workers continued to deteriorate relative to that of white workers. "Declining employment opportunities in jobs traditionally open to them, together with population shifts which increased the number of young Negro males, caused these groups to experience declining relative labor force participation rates, rising unemployment rates, and declining relative incomes during these years."[80/] In 1965, after reviewing these figures and the projection that the non-white labor force was expected to rise at a substantially greater rate than the white labor force, then Professor Marshall emphasized "the urgency of the need to

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80/ Marshall and Briggs, p.3. For example, "[a]fter having been consistently less than double the white rates before 1957, non-white unemployment rates were consistently more than double those of whites after 1957. In 1948, teen-age male unemployment rates were 7.6 percent for non-whites and 8.3 percent for whites; in 1965, these relative positions were reversed and the teen-age male unemployment rates were 22.6 percent for non-whites and 11.8 percent for whites." Id., p.3 n.2 (emphasis in original).

get more Negroes into the skilled trades."[81/] Unfortunately, while the enactment and enforcement of Title VII, the enforcement of the Executive Order, and the adoption of voluntary affirmative action have had some positive effect,[82/] the continued discriminatory practices and the operation of many businesses and unions according to traditional patterns have prevented the necessary significant increase of black workers in the skilled trades.[83/] The urgency remains; responsible affirmative action by companies like Kaiser and unions like the Steelworkers must

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81/ Id., p. 4.

82/ See generally, United States Commission on Civil Rights, The Challenge Ahead (1976).

83/ See p. 99 nn. 74-75, supra. See also The Challenge Ahead, supra, 26-31. "In summary, the effect of intentional and direct employment discrimination in the building trades continue [sic] to be severe. The proportion of unions that neither discriminate directly nor intentionally or that do not continue to use widely practiced institutional mechanisms that adversely affect the employment opportunity of minorities and women is unfortunately quite small." Id. at 94 (footnote omitted).

be firmly supported if the longstanding practices of deliberate employment discrimination and their effects are to be finally terminated.

4. Compliance with the Executive Order. As a substantial government contractor, Kaiser was and is obligated to comply with the requirements of Executive Order No. 11,246. These requirements include the adoption of goals and timetables for minority participation where there is an "under-utilization" of minorities in the contractor's workforce. 41 C.F.R. §60-2 (Revised Order No.4). OFCC officials warned Kaiser in 1971 that its plan for compliance with the Executive Order contained "deficiencies" and that Kaiser should provide specific plans for correcting these deficiencies.[84/] One OFCC recommendation to Kaiser -- which was very similar to the plan adopted -- was that the Company establish a craft training program; selection for the program "should include at least the minority ratio that exists in the

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84/ Letter dated January 25, 1971, to Mr. Melancan, plant manager, from Guy W. McCarty, Chief Contract Compliance Officer, see pp. 77-78 n.41, supra.

company's recruitment area"; and "the figure of 50 percent would be used as the minority population ratio in the area from which Kaiser draws its workforce...."[85/] In compliance review sessions, OFCC personnel repeatedly criticized Kaiser's craft selection practices and suggested that alternatives be adopted.[86/]

Kaiser acted consistently with the provisions of the Executive Order and Revised Order and with the recommendations of OFCC personnel when it adopted race-conscious provisions for its affirmative action plan. Cf. United Jewish Organizations v. Carey, 430 U.S. 144 (1977). This independent justification for the plan is only briefly discussed because the United States has intervened in this lawsuit in part to support enforcement

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85/ Id.

86/ The Director of Equal Employment Affairs for Kaiser testified that, "... I don't think I have sat through a compliance review where it wasn't apparent that there was few, if any, minorities in the craft occupations, and there was always, certainly the suggestion, on the part of the compliance review officers, that we devise and come up with methods and systems to change that particular thing." A. 93.

efforts under the Executive Order. However, it is important to emphasize that the race-conscious procedures of Revised Order 4 for enforcing the Executive Order were only added after twenty-seven years of enforcement experience demonstrated the ineffectiveness of alternative approaches.87/

87/ The Committee on Government Contract Compliance established by President Truman reported in 1953 that under the initial Executive Orders, the non-discrimination clauses had become "almost forgotten, dead and buried under thousands of words ...." Sovern, Legal Restraints on Racial Discrimination in Employment, Appendix G at 254 (1966) (partial reprint). Changes made in the Executive Order program during the 1950s did not improve compliance because of "[t]he indifference of employers to establishing a positive policy of non-discrimination ...." Committee on Government Contracts, Pattern for Progress: Final Report to President Eisenhower, p. 14 (1960) (emphasis in original). As a result of this finding, Executive Order No. 10,925, 3 C.F.R. 443 (1959-63 Comp.), included a provision that "[t]he Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin." The refinement of the concept of affirmative action into a more effective tool for insuring equal employment opportunity and for

B. The Plan Was Properly Designed

1. The Plan

In 1974 Kaiser and other major aluminum companies entered into an industry-wide "master" agreement with the Steelworkers. The agreement provided, inter alia, that (a) a joint company-union implementation committee would review all existing craft classifications "with respect to their representation of minority and female employees"; (b) in filling craft and assigned maintenance jobs including training or apprentice positions, "not less than one minority or female employee will enter for every non-minority employee entering, including, if necessary, off the street hires, until the goal is reached unless at a particular time there are insufficient available

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87/ Cont'd

providing remedies for discriminatory practices led to the adoption of the present race-conscious enforcement provisions. See, e.g., Associated General Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 12-14 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Contractors Ass'n of Eastern Pa. v. Secretary of Labor, supra, 442 F.2d at 170-71. See Jones, The Bugaboo of Employment Quotas, 1970 Wis. L. Rev. 341.

qualified minority and/or female candidates"; (c) a minority goal was to be established at each plant according to the availability of minorities in the relevant workforce; the goal for women was set at 5%. A. 145 (Joint Ex. 2).[88] For the Grammercy plant a minority goal of thirty-nine percent was established for each craft family. G. Pet. 63a (opinion of the district court).[89]

88/ These goals represented "the parties' best estimates of the initial goals to be achieved, recognizing that these goals may change as future court/Government decisions are rendered." Id.

It should be noted that the goals were established for each of six "craft families." A. 145 (Joint Ex. 2). Thus, if the goal for minority representatives was attained for the "carpenter craft family," the entry ratio for those craft jobs would cease, but the entry ratio for the "electrician craft family" would continue until the goal for minority representation in that craft family had been attained. Id. This was a sensible arrangement; while there had been discrimination against minorities with respect to entry into all crafts, the discrimination was more severe in some crafts, e.g., electrician, than in others, e.g., carpenters, see pp. 96-97, supra.

89/ In the application of the master agreement to the Grammercy plant there was provision only for

This lawsuit resulted from the application of this plan to the Grammercy plant during 1974. Thirteen trainees for the apprentice positions were selected under the affirmative action plan -- seven black workers and six white workers.[90] The

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89/ Cont'd

the selection of one minority for each non-minority for craft jobs. G. Pet. 62a (op. district court). There is no explanation in the record why women were not included. A Kaiser official testified that women, like minorities, had "certainly" been denied training opportunities. A. 90 (Bouble).

90/ In April 1974, there were nine training openings which were posted for bid, in May one opening, and in October three openings. The chart below summarizes the training programs available and the race of the trainees selected. A. 166 (K. Ex. 2); G. Pet 63a (op. district court).

	Number of Blacks	Number of Whites	Total
April			
Instr. Repairman	1	1	2
Electrician	1	1	2
General Repairman	3	2	5

Company followed the affirmative action plan in filling the training vacancies on an alternating basis: the first training vacancy was awarded to the black worker who had the greatest amount of plant seniority among the black workers who had submitted bids for the job; the second vacancy was similarly awarded to the white worker who had the greatest amount of plant seniority among the white workers who had submitted bids for the job. A. 72-75 (English). In each of the seven instances where black workers were selected for the apprentice positions, at least one white worker was passed over who had greater plant seniority than the black worker who was selected. G. Pet. 63a-64a (opinion of the district court).

90/ Cont'd

	Number of Blacks	Number of Whites	Total
May			
Air Conditioner Repairman		1	1
October			
Carpenter	1	1	2
Insulator	1		1
Total	7	6	13

It is important to note that during 1974, Kaiser hired twenty-two experienced craftsmen in addition to its selection of thirteen apprentices. A. 65. Only one of these twenty-two crafts men was black. Id. There was no explanation as to why Kaiser selected twenty-seven white workers as craftsmen or apprentices and only eight black workers as craftsmen or apprentices despite the fact that it had a contractual obligation to fill "apprentice and craft jobs ... at a minimum [with] not less than one minority employee ... for every non-minority employee ...."[91] G. Pet. 62a (opinion of the district court). During 1974

91/ Since the agreement went into effect on February 1, 1974, G. Pet. 62a, it is highly unlikely that all twenty-two of the craftsmen hired during 1974 were selected prior to the institution of the plan. The only possible explanation for the disparity, apart from Kaiser's having violated the agreement, was that "qualified" minority candidates were unavailable, and that Kaiser had an immediate requirement for additional craftsmen. However, if Kaiser was using the "prior industrial experience" requirement to determine which craftsmen were qualified and if Kaiser was using the same selection practices in 1974 that it had used prior to 1974, then there is reason to believe that Kaiser was violating not only the agreement but also Title VII, see pp. 65-78, supra.

there was a marked disparity, even with the affirmative action plan, between the proportion of blacks selected for craft and apprentice positions, 23%, and the proportion of blacks in the workforce of St. James and St. John the Baptist Parishes, 39%. After the application of the affirmative action plan for one year, there was an increase in the proportion of black craftsmen or apprentices at the plant, from 1.83% to 4.43%. A. 167 (Kaiser Ex. 3).

2. The Standard and Its Application

An employer or union must not only have a reasonable basis for undertaking affirmative action, but it must also design measures which are appropriately related to the problems to be corrected.92/ It is not possible to anticipate

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92/ "The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect of past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the

all the circumstances which would require the implementation of a race-conscious plan nor all the forms that a plan may take. The nature of the plan and its justification will vary according to the circumstances. But it is possible, as the EEOC has done in its Guidelines on Affirmative Action, to establish some guides for unions and employers to follow in designing proper plans.[93/] The standard for determining whether a

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92 / Cont'd

victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination." EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.4(c).

93/ "In considering the reasonableness of a particular affirmative action plan or program, the Commission will generally apply the following standards: (i) The plan should be tailored to solve the problems which were identified in the self analysis, see §1608.4(a), supra, and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives. (ii) Goals and timetables should be reasonably related to such considerations as

particular kind of action is appropriate, like the standard for determining whether there is a reasonable basis for the institution of affirmative action, must be flexible and designed to encourage voluntary implementation of measures which will effectively remedy discriminatory practices. The plan adopted by Kaiser and the Steelworkers was properly designed and implemented for several compelling reasons.

a. The remedy established by the plan -- including the use of a ratio to insure a proper timetable for the remedy and the establishment of a goal to insure a proper duration for the plan -- has been repeatedly approved by courts in litigated cases[94/] and in negotiated settle-

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93/ Cont'd

the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available." 29 C.F.R. §1608.4(c)(2).

94/ See cases cited at pp. 18-19 nn.5-7, supra. See also Boston Chapter, N.A.A.C.P, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert.

ments.[95] Furthermore, this form of race-conscious affirmative action has been adopted or

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94/ Cont'd

denied, 421 U.S. 910 (1975); Associated General Contractors of Mass., Inc. v. Altshuler, 361 F.Supp. 1293 (D. Mass), aff'd, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2nd Cir. 1973), cert. denied, 421 U.S. 9 1 (1975); Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973); Erie Human Relations Commission v. Tullio, 493 F.2d 371 (3rd Cir. 1974); N.A.A.C.P. v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), vac'd and rem'd on other grounds, 431 U.S. 951 (1977); United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); Sims v. Local 65, Sheet Metal Workers, 489 F.2d 1023 (6th Cir. 1973); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973).

95/ See, e.g., EEOC v. A.T.& T. Co., 556 F.2d 167 (3rd Cir. 1977), cert. denied, 57 L.Ed.2d 1161

approved by the federal agencies charged with enforcing the Executive Order,[96] Title VII and other fair employment provisions.[97] In fact, in adopting their plan Kaiser and the unions properly relied on the general requirements of the Executive Order and related judicial decisions and on the specific requirements which were instituted in the closely analogous situation involving the nationwide settlement in the steel industry, see pp. 56-58, supra. The adoption of the plan was consistent with the judicial decisions, the government regulations and the steel industry consent decree.[98]

95/ Cont'd

(1978); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

96/ See Section I, supra and pp. 104-06, supra.

97/ See Section I, supra.

98/ The majority below inaccurately distinguished the approval of the consent decree on the ground that there was a showing of "massive discriminatory practices" in the steel industry. G. Pet.

b. The affirmative action plan was appropriately designed to remedy the effects of prior discriminatory practices and to insure that the Company and the Steelworkers did not engage in continuing discriminatory practices. Past craft selection practices of Kaiser had a severe adverse racial impact; despite the fact that blacks constituted 39% of the workforce and a substantial portion of the skilled workforce, they were practically excluded from entry into craft positions, see pp. 65-78, supra. If no affirmative action plan had been instituted, then blacks would have continued to be excluded from the craft jobs. Moreover, the plan was an interim measure designed

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98/ Cont'd

4a. In fact, there was no evidence submitted in that case concerning the discriminatory practices in the steel industry nor was there an admission by the steel companies or the Steelworkers that they had engaged in unlawful practices, United States v. Allegheny-Ludlum Industries, Inc., 63 F.R.D. 1 (N.D. Ala. 1973). The effect of the lower court's standard requiring such evidence or such an admission would be not only to discourage voluntary affirmative action but also to discourage negotiated settlements in contested litigation.

to terminate after redressing prior discriminatory practices. Finally, the development of an expanded training program in conjunction with the plan was a responsible social action designed to provide some remedy for the discriminatory practices by business, unions, and others which had substantially limited the employment opportunities of blacks in the craft trades.

c. The affirmative action plan did not unnecessarily restrict the employment opportunities, nor frustrate the existing job expectations, of white workers. In fact, the plan actually increased these opportunities. G. Pet. 41a-42a (Wisdom, J., dissenting). A craft training program which was open to all incumbent workers, white as well as black, regardless of their prior experience in the crafts, was instituted as a basic part of the affirmative action plan. In the small training programs which Kaiser had operated between 1964 and 1971, employees had been eligible only if they had one to three years of prior craft experience, see p. 79, supra. Weber had never submitted a job bid for one of these prior train-

ing programs because he did not have the requisite experience. A. 38, 43 (Weber).[99/] Weber admitted that under the new program he, and other white workers, had expanded training and employment opportunities. A. 51. Ironically, were it not for the affirmative action plan, Weber would never have had the opportunity to become a craftsman at Kaiser; under the program he will have that opportunity.

d. The affirmative action plan was the product of collective bargaining between the Steelworkers and Kaiser. Collective bargaining is the cornerstone of federal labor policy, United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960), and central to that policy is the principle of majority rule. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). However, "Congress did not ... authorize a tyranny of the

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99/ "There were prior training programs, but I was not allowed to participate because I didn't have the training required by the company, at that time." A. 38. The single class member who testified, Fortune Moran, had submitted a bid for one of the prior training programs; but he had been rejected because he lacked the requisite prior experience. A. 56.

majority over minority interests." Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 64 (1975). A union has a duty to fairly represent its minority members and to bargain in a manner consistent with "the national labor policy [which] embodies the principles of non-discrimination as a matter of highest priority." Id. at 66. The union's "duty to bargain in good faith for all its members does not prevent it from fairly advancing the national policy against discrimination, even if it requires assisting some of its members more than others." Franks v. Bowman Transportation Co., supra, 424 U.S. at 778-79.

Kaiser understood that it had a serious problem: its selection practices had resulted -- and without a race-conscious training program would continue to result -- in the employment of disproportionately few black workers in the craft positions. See pp. 56-57, supra. In accordance with its collective bargaining obligation, Kaiser raised this issue with the bargaining unit representative, the Steelworkers. For many years, one of the Steelworkers' collective bargaining goals was the establishment of an extensive craft

training program which would be open to employees who had no prior experience. A. 85 (English). If Kaiser had simply selected craft trainees from the area workforce which was 39% black, it could have achieved in effect, with some affirmative recruiting, its plan to enlist one minority for each non-minority without any specific numerical provisions in its affirmative action plan. But the selection of new hires for the training program ran counter to the Union's longstanding interest in expanding employment and training opportunities for incumbent workers.

The compromise which was agreed upon -- the affirmative action plan -- allowed both parties to attain the goals which they had brought to the bargaining table. The Company established a realistic plan for increasing its force of black craftsmen and the Union expanded the job opportunities for all the workers at the plant. This creative and cooperative resolution of a grave social as well as industrial problem furthered both the national policy favoring collective bargaining and the national policy favoring the voluntary correction of discriminatory employment practices. Such solutions should be strongly supported.

CONCLUSION

The amici urge that the affirmative action plan instituted by Kaiser and the Steelworkers be approved and that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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January, 1979.


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MEILEN PRESS INC. — N. Y. C.