U.S. Department of Justice
Civil Rights Division

Deputy Assistant Attorney General

May 4, 1983

To: Mike, Bill, and Steve

"Once more unto the breach, dear friends, once more."

Chuck

Attachment

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-1837

HANSON BRATTON, et al.,

Plaintiffs-Appellants,

and

UNITED STATES OF AMERICA,

Applicant For Intervention,

v.

THE CITY OF DETROIT, MICHIGAN,

Defendants-Appellees,

and

GUARDIANS OF MICHIGAN, et al.,

Intervening Defendants-Appellees.

MOTION OF THE UNITED STATES TO INTERVENE AS A PARTY APPELLANT AND FOR LEAVE TO FILE SUGGESTION OF REHEARING EN BANC IN EXCESS OF THE PAGE LIMIT

AND

SUGGESTION OF REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR-APPELLANT

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MOTION OF THE UNITED STATES TO INTERVENE AS A PARTY APPELLANT AND FOR LEAVE TO FILE SUGGESTION OF REHEARING EN BANC IN EXCESS OF THE PAGE LIMIT

The United States of America respectfully moves the Court (1) for leave to intervene as a party appellant in this case in order to seek further appellate review, and (2) for leave to file a suggestion of rehearing en banc in excess of 15 pages (34 pages).

INTERVENTION

A. Intervention in the Courts of Appeals

"The Federal Rules of Civil Procedure, of course, apply only in the federal district courts. Still, the policies underlying intervention may be applicable in appellate courts." Auto

Workers v. Scofield, 382 U.S. 205, 217 n.10 (1965). And, while intervention at the appellate level is not common, it is by no means unprecedented. 1/

The United States has in four previous employment discrimination cases sought to intervene as a party in the courts of appeals in circumstances similar to those obtaining here, i.e, after a panel decision and for the purpose of, inter alia, petitioning for rehearing. See Williams v. City of New Orleans, No. 82-3435 (5th Cir.) (rehearing en banc pending); Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216 (5th Cir. 1977), rehearing en banc denied, 571 F.2d 337 (1978), rev'd, 443 U.S. 193 (1979); Tedford v. Airco Reduction, Inc., 4 EPD ¶ 7654, 4 FEP Cases 406, vacated and withdrawn, 4 EPD ¶ 7776, at p. 5977, 4 FEP Cases 690 (5th Cir. 1972); Love v. Pullman Co., 430 F.2d 49, 51 (10th Cir. (1969).

The United States was permitted by the courts of appeals to intervene in Williams, Weber and Love 2/, and in Tedford the

1/ See, e.g., Williams v. City of New Orleans, No. 82-3435 (5th Cir.) (United States permitted to intervene); Love v. Pullman Co., 430 F.2d 49, 51 (10th Cir. 1969) (United States permitted to intervene); Singleton v. Jackson Municipal Separate School District, 348 F.2d 729, 730 n.1 (5th Cir. 1965), 355 F.2d 865, 867, 868 (1966) (United States permitted to intervene); Smith v. Board of Education, 365 F.2d 770, 773 (8th Cir. 1966) (United States permitted to intervene); Seguros Tepeyac, S.A., Compania Mexicana de Seguros Generales v. Bostrom, 347 F.2d 168, 172 (5th Cir. 1965), reh. denied, 360 F.2d 154, 155 (1966) (intervention allowed); Park & Tilford v. Schulte, 160 F.2d 984, 987, 988 (2d Cir. 1947), cert. denied 332 U.S. 261 (1947) (intervention allowed). Cf. United States v. Ahmad, 499 F.2d 851, 854 (3d Cir. 1974).

2/ In Weber, the Fifth Circuit granted the United States leave to intervene to file a petition for rehearing and suggestion of rehearing en banc, but denied the petition. 571 F.2d at 337. In Love the Tenth Circuit permitted the United States and the Equal Employment Opportunity Commission to intervene and to file a petition for rehearing even though the plaintiff had himself already filed such a petition.

court of appeals withdrew the panel's decision after the United States filed its motion to intervene and petition for rehearing. The proceedings in the Williams case are particularly instructive because its factual background is similar to that of the instant case and because the United States is seeking en banc rehearing in Williams on many of the same issues raised in our suggestion for rehearing en banc in this case. In Williams, a divided panel of the Fifth Circuit Court of Appeals held, on December 16, 1982, that the district court had abused its discretion in refusing to approve a proposed consent decree that required the promotion of one black officer for every white officer until blacks constituted 50 percent of the sworn officers in all ranks of the New Orleans Police Department. The United States received a copy of the panel's decision on December 18, 1982, and filed its motion to intervene and its suggestion of rehearing en banc on January 7, 1983. The United States' motion to intervene was granted on January 10, 1983, 3/ and on February 14, 1983, the full court ordered that the case be reheard en banc.

B. Intervention of Right - Section 902

Pursuant to Section 902 of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, the Attorney General may intervene as of right in an action seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution on account of race, color, religion, sex, or national origin, where he certifies that the case is of general public

3/ On January 12, 1983, the City of New Orleans requested that the court reconsider and vacate its order granting the United States' leave to intervene in this case; the City's request was denied shortly thereafter.

importance. The Attorney General has frequently exercised his authority under Section 902, at both the trial and appellate levels. See, e.g., Williams v. City of New Orleans, No. 82-3435 (5th Cir.) (appellate level) (rehearing en banc pending); Singleton v. Jackson Municipal Separate School District, 348 F.2d 729, 730 n.1 (5th Cir. 1965), 355 F.2d 865, 867-868 (1966) (appellate level); Smith v. Board of Education, 365 F.2d 770, 773 (8th Cir. 1966) (appellate level); Black v. Curb, 422 F.2d 656, 657 (5th Cir. 1970) (trial level); Spangler v. United States, 415 F.2d 1242 (9th Cir. 1969) (trial level); United States v. Jefferson County Board of Education, 372 F.2d 836, 896 (5th Cir. 1966) (reversing denial of United States' motion to intervene).

Plaintiffs in this action have asserted that the defendants' voluntary adoption of a one-to-one racial quota for promotions to the rank of lieutenant violates their Fourteenth Amendment rights to the equal protection of the law. In the attached suggestion of rehearing en banc, the United States demonstrates that plaintiffs' contention is correct (although on an entirely different constitutional analysis) and that the district court's incorporation of the one-to-one promotion quota (1) exceeded the limits of the district court's statutory remedial authority, (2) constituted an inequitable infringement on the interests of innocent non-black candidates for promotion to lieutenant, and (3) violated the equal protection guaranties of the United States Constitution. The Attorney General has made the requisite certification that this case is of general public

importance. See Exhibit A attached hereto. Accordingly, the United States respectfully submits that it should be permitted to intervene in this matter as of right.

C. Intervention Under Title VII -- Section 706(f)

Further, the Department of Justice has important responsibilities for the enforcement of Title VII of the Civil Rights Act of 1964, as amended, which prohibits, inter alia, racial discrimination in employment. The Attorney General has enforcement responsibility under Title VII when the employer, as here, is a government, governmental agency, or political subdivision. 42 U.S.C. § 2000e-5(f)(1). Moreover, Title VII authorizes the Attorney General to intervene in a civil action involving such governmental entities upon certification to the court, which has discretion to grant the application, that the case is of general public importance. The Attorney General has so certified. See Exhibit A attached hereto.

One of the principal issues in this case is whether the district court erred in incorporating into its judicial decree a requirement that one black policeman be promoted to lieutenant for every white policeman so promoted until black officers constitute 50 percent of all lieutenants in the Detroit Police Department. The resolution of this issue necessarily requires the Court to decide significant, related issues such as whether judicial imposition of the promotion quota at issue (1) exceeds the limits of judicial remedial authority under Title VII (42 U.S.C. § 2000e-5(g)), (2) constitutes either an

unreasonable or proscribed infringement on the interests of innocent non-black candidates for lieutenant, or (3) violates the equal protection guaranties of the United States Constitution.

The United States believes that each of these issues requires an affirmative answer and that the panel, therefore, decided this case incorrectly. We believe that the panel's decision will have serious consequences adverse to the proper enforcement of Title VII. In any event, the resolution of the issues in this case will clearly affect the Attorney General's Title VII enforcement responsibilities, and we believe that the Government's interest will not be represented adequately if intervention is disallowed. We believe that at this juncture of the litigation, protection of the Government's interest requires review by the full Court, sitting en banc. It is unclear what future steps the parties will take in this case. But regardless of what steps they take to pursue further appellate review, it is clear from their briefs to the panel that the legal positions of the United States on the issues raised in this case have not been advanced. It is equally clear that the Attorney General, as the chief enforcement officer of Title VII against public employers, has an interest in this litigation that is not identical to the interests of either the plaintiffs or defendants. Nor can the Government's interests in this appeal be adequately protected by participation as an amicus curiae. An amicus curiae may not petition for rehearing, suggest rehearing en banc, or petition for

certiorari. In view of the divergence of interest among the Government and the parties, and the uncertainty concerning the procedural steps which the parties might henceforth undertake and the substantive positions which they might henceforth assert, the Government cannot adequately protect its interests without the degree of participation in this litigation which only the status of a party can confer.

Thus, while the United States is entitled to intervene as of right in this case under Section 902, 42 U.S.C. 2000h-2, the case for permissive intervention under Title VII is also compelling. 4/ Cf. 42 U.S.C. § 2000e-5(f)(1); Rule 24(b)(1), Fed. R. Civ. P. Also see generally Note, Federal Intervention in Private Actions Involving the Public Interest, 65 Harv. L. Rev. 319, 328 (1951); D. Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 735 (1968). The applicant for intervention has clearly defined, judicially cognizable interests in becoming a party appellant in this case. And the legal authority for, as well as the factual circumstances of the proposed intervention under Title VII, render this application for intervention quite similar, if not identical, to those granted in Williams v. City of New Orleans, supra, Weber v. Kaiser Aluminum & Chemical Corp., supra, and Love v. Pullman Co., supra.

4/ We discuss the question of timeliness infra.

The question concerning the timeliness of this motion for leave to intervene "is to be determined from all the circumstances." Stotts v. Memphis Fire Dept., 679 F.2d 579 (6th Cir. 1982). The United States' application for intervention is timely. The Government, for reasons detailed in our suggestion for rehearing en banc, believes that the defendants' voluntary adoption of a racial quota for promotions was prohibited by the Fourteenth Amendment and that the district court's imposition of the race-conscious promotion quota at issue in this case was inconsistent with governing statutory limits on judicial remedial authority, with fundamental principles of equity, and with the equal protection guaranties of the United States Constitution. The Government acted to intervene in this case as soon as it was advised of the panel's decision and had completed its study of the decision. 5/ - This motion has been filed within the period for petitioning for rehearing, as enlarged by the Clerk of the Court. Cf. United Air Lines, Inc. v. McDonald, 432 U.S. 385, 394 (1977); Stallworth v. Monsanto Co., 558 F.2d 257, 263-266 (5th Cir. 1977).

The Government's purpose in intervening in this case is to protect and enforce the constitutional and statutory rights of United States citizens by seeking further judicial review of a race-conscious promotion quota imposed by a public employer and subsequently ordered by a federal court. Only

5/ On March 30, 1983, the United States requested from the Clerk's office a copy of the panel's decision, which was received in Washington, D. C., on April 1, 1983.

the Government can adequately protect these interests of the United States by seeking such further review in this litigation.

No undue delay or prejudice to the original parties will result from the participation of the Government as party appellant. The legality of the provision of the consent decree at issue has already been questioned by plaintiffs, and the Government's intervention for the purpose of seeking rehearing en banc will not require the submission of further evidence. In light of all the relevant circumstances, the present motion to intervene is timely "as measured by the purpose of the intervention and the possible prejudice to the parties." Natural Resources Defense Council v. Costle, 561 F.2d 904, 908 (D.C. Cir. 1977). See also Januszewicz v. Sun Shipbuilding & Dry Dock Co., 677 F.2d 286, 293 (3d Cir. 1982); United States v. American Tel. and Tel. Co., 642 F.2d 1285, 1295 (D.C. Cir. 1980).

Moreover, a more lenient standard of timeliness applies to the evaluation of a motion to intervene as of right than applies to permissive intervention because of the importance of the movant's interests. United States v. American Tel. and Tel. Co., supra; Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir. 1978); McDonald v. E. J. Lavino Company, 430 F.2d 1065, 1072-73 (5th Cir. 1970); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1125-26 (5th Cir. 1970); 7A C. Wright & A. Miller, Federal Practice and Procedure: Civil § 916 (1972); 3B Moore's Federal Practice ¶ 24.13, 24.144, 24.145

(3d Cir. 1982). 6/ As previously discussed, the United States is authorized under Section 902 of the 1964 Civil Rights Act to seek intervention as of right in this case.

SUGGESTION OF REHEARING EN BANC IN EXCESS OF THE PAGE LIMIT

The number and complexity of the issues presented in this case, the great public importance of these issues, and the Government's presentation of its views for the first time in this case, necessitate the filing of a suggestion for rehearing en banc in excess of 15 pages, the limit prescribed by Rule 40(b) Fed. R. App. P. Accordingly, the United States respectfully requests leave to file a suggestion of rehearing en banc 34 pages in length.

6/ Indeed, prejudice to existing parties sufficient to lead a court to deny permissive intervention does not necessarily lead to the same result when intervention is sought as of right. See Stallworth v. Monsanto Co., 558 F.2d 257, 265 (5th Cir. 1977).

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter an order (1) joining the United States as intervenor-appellant herein, and (2) granting leave to file a suggestion of rehearing en banc 34 pages in length.

Respectfully submitted,

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES J. COOPER
Deputy Assistant Attorney General
Department of Justice
Washington, D. C. 20530

April 29, 1983

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS

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and

UNITED STATES OF AMERICA,

Applicant for Intervention,

versus

THE CITY OF DETROIT, et al.,

Defendants-Appellees,

and

GUARDIANS OF MICHIGAN, et al.,

Intervening Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan

CERTIFICATE OF PUBLIC IMPORTANCE

The Attorney General of the United States hereby certifies to this Honorable Court that the United States has determined this case to be of general public importance in accordance with the provisions of Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Section 2000e-(f)(1), and of Section 902 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000h-2.

William French Smith
Attorney General of the
United States

April 28, 1983

IN THE UNITED STATES COURT OF APPEALS

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SUGGESTION OF REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR-APPELLANT

WM. BRADFORD REYNOLDS
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Washington, D. C. 20530
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STATEMENT OF COUNSEL

I, the undersigned counsel, express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions:

University of California Regents v. Bakke, 438 U.S. 265 (1978);

Teamsters v. United States, 431 U.S. 265 (1977);

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976);

Buchanan v. Warley, 245 U.S. 60 (1917).

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

(A) Whether, in the circumstances of this case, a municipal police department may, consistent with the Equal Protection Clause of the Fourteenth Amendment, adopt a requirement that one black police sergeant be promoted to lieutenant for each white sergeant so promoted -- without regard to whether the promoted black officer had been an actual victim of discrimitory promotional practices -- until blacks constitute 50 percent of police lieutenants;

(B) Whether a judicial decree requiring a municipal police department to promote one black police officer for every white officer -- without regard to whether the promoted black officer had been an actual victim of discriminatory promotional practies -- until blacks constitute 50 percent of

the officers in all ranks of the department

(1) exceeds the limits of judicial remedial authority under Section 706(g) of Title VII of the 1964 Civil Rights Act;

(2) constitutes an inequitable infringement on the interests of innocent non-black employees; and/or

(3) violates the equal protection guaranties of the United States Constitution?

Wm. Bradford Reynolds
Assistant Attorney General

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STATEMENT OF ISSUES PRESENTED

Whether, in the circumstances of this case, a municipal police department may constitutionally adopt a requirement that one black police sergeant be promoted to the rank of lieutenant for each white police sergeant so promoted until blacks constitute 50 percent of police lieutenants?

Whether, the district court erred in incorporating into a judicial decree the municipal police department's one-to-one racial quota for promotions to the rank of lieutenant?

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SUGGESTION OF REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR-APPELLANT

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On March 29, 1983, a panel of this Court rendered its opinion in this "reverse discrimination" case involving the Detroit Police Department (DPD), holding that the district court had properly rejected plaintiffs' constitutional and statutory challenges to a voluntary one-to-one promotion quota and had properly incorporated the challenged promotion quota into a judicial decree. The salient features of the background of this case and the decisions of the district court (reported at 483 F. Supp. 930 and 504 F. Supp. 841) and the panel are summarized below.

A. PROCEEDINGS IN THE DISTRICT COURT

The Detroit Board of Police Commissioners ("Board") "oversees how the [Police] Department is run" (483 F. Supp. at 963), including how and on what basis promotions are made. Prior to 1974, all candidates for promotion were ranked on a single list according to numerical ratings based on various factors, including individual exam scores. Promotions were made in rank order from the list of candidates. In 1974 the Board, in order to remedy the Department's prior discriminatory employment practices and to meet what the Board perceived to be an "operational need" for more black officers, adopted a race-conscious "affirmative action plan" for promotions. The panel's opinion describes the operation of the affirmative action plan, as it relates to promotions from the rank of sergeant to that of lieutenant, as follows:

> The affirmative action plan does not alter the basic criteria for determining promotion eligibility, nor does it alter the minimal requirements necessary for consideration for the rank of lieutenant. The plan mandates that two separate lists for promotion be compiled, one for black and the other for white officers. The rankings on those lists are then made in accordance with the same numerical rating system previously employed. The promotions are made alternately from each list so that white and black officers are promoted in equal numbers. This 50/50 plan is to remain in effect until fifty percent of the lieutenant corps is black, an event estimated to occur in 1990. Slip op. at 4 (footnotes omitted).

In late 1975 seven named white police sergeants and the Detroit Lieutenants and Sergeants Association filed this class action against, inter alia, the City of Detroit, the Board, Mayor Coleman Young, and other municipal officials alleging that the one-to-one racial quota for promotions to lieutenant violated

Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e et seq.), 42 U.S.C. § 1983, and the Fourteenth Amendment to the United States Constitution.

After discussing in detail the history of past employment discrimination in the DPD, as well as the history of the DPD's relations with and discrimination against the black community, the court turned to plaintiffs' Title VII claim. Finding that the Board's one-to-one promotion quota satisfied all the requirements for a permissible affirmative action plan outlined by the Supreme Court in United Steelworkers v. Weber, 443 U.S. 193 (1979), the court held that the promotion quota did not violate Title VII. Indeed, noting the city's use of unvalidated and discriminatory hiring and promotion tests until 1974, the district court held that "Weber aside, the affirmative action plan is justifiable to remedy clear violations of Title VII which continued into 1972 and 1973." 483 F. Supp. at 987.

The district court also rejected plaintiffs' constitutional challenge. Noting that the terms of the Board's one-to-one racial quota for promotions compared favorably with the racial quota upheld in Title VII in Weber, the district court determined that the promotion quota was a "reasonable" effort to remedy the present effects of the city's past intentional employment discrimination, which did not cease until 1967-1968, when an affirmative minority recruitment program was instituted by the Department. 483 F. Supp. at 987-994. The court also upheld the defendants' contention that the DPD's "operational needs" justified imposition of the one-to-one promotion quota

for lieutenants. Finding that, "[g]iven the history of racial tensions in Detroit, black officers were far more likely to relate well to the black community" (id. at 999), the district court concluded that in light of the "history of antagonism between the Department and the black community, the affirmative action plan was a necessary response to what had been an ongoing city crisis." Id. at 1000.

In a separate opinion (504 F. Supp. 841 (1980)), the district court incorporated the Board's affirmative action plan, including the promotion quota for lieutenants, into a final and mandatory judicial decree. Likening the voluntary plan to a consent decree, the court determined that the plan should be incorporated into a judicial decree (1) to insulate the plan from further attacks and (2) to ensure that the city maintained its affirmative action efforts, which the court held to be constitutionally required. Id. at 846-48.

B. THE PANEL'S DECISION

A panel of this Court affirmed. Noting that "what is valid under [the Fourteenth Amendment] will certainly pass muster under Title VII" (slip op. at 13), the panel's analysis focused solely on the the constitutionality of the Board's pro-

motion quota. The panel found its constitutional analysis governed by the Court's early pronouncements in Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981), which upheld under Title VII a one-to-one racial quota for promoting Detroit police patrolmen to the rank of sergeant. Slip op. at 10 & n.26. Adopting the standard outlined by Justices Brennan, White, Marshall and Blackmun in University of California Regents v. Bakke, 438 U.S. 265, 336 (1978), the Young court and the panel in this case determined that the substantial governmental interest in redressing the effects of past racial discrimination justifies race-conscious remedial measures so long as they are "reasonable." The reasonableness inquiry, according to the panel, requires an examination into whether any discrete group or individual is stigmatized by the racial classification and whether the racial classification is "reasonable in light of the program's remedial objectives." Slip op. at 13, 20.

Applying this standard to the instant case, the panel concluded that the evidence amply supported the Board's and the district court's finding of past intentional employment discrimination against blacks in the DPD. Having established defendants' substantial interest in remedying the DPD's past employment discrimination, the panel determined that the Board's promotion quota for lieutenants (1) did not unduly stigmatize anyone (slip op. at 20-23) and (2) passed the "test of reason-

ableness." Id. at 23. 1/ The panel expressly found it "unnecessary to address the validity of the operational needs defense to affirmative action in this context." Id. at 12 n.30.

Finally, the panel affirmed the district court's entry of the Board's affirmative action plan as a mandatory judicial decree. The panel stressed that the district court's action would promote judicial economy and would protect the Board's plan "from a mere changing of the guard or from future attacks." Id. at 39.

Judge Celebrezze concurred in the result only, finding the case governed by the constitutional analysis enunciated in Young. Id. at 42. Judge Merritt concurred in Judge Jones' constitutional analysis but dissented from, among other things, the panel's affirmance of the district court's incorporation of the Board's affirmative action plan into a judicial decree. Noting that no party to the case raised the issue as to what remedial action the defendants were required to take, Judge Merritt contended that "[t]o extend constitutionally mandatory status to the City's plan distorts the nature of the proceedings below. . . . the City is the responsible frontline actor and should remain the institution politically accountable for its policies." Id. at 44.

1/ The panel's determination that the promotion quota was "reasonable" was the product of its subsidiary conclusions that (1) the quota was "substantially related" to the objective of remedying past discimination, (2) practical limitations on the effective use of other means rendered the racial quota legitimate, (3) use of the quota was to terminate when its remedial objectives were fulfilled, and (4) the quota did not "unnecessarily trammel" the interests of white candidates for promotion to lieutenant. Id. at 24.

ARGUMENT AND AUTHORITIES

For the reasons that follow, we submit that the Board's requirement that one black police sergeant be promoted to the rank of lieutenant for every white police sergeant so promoted violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Additionally, we submit that, wholly apart from the facial validity of the promotion quota, the district court lacked authority to incorporate the promotion quota into a judicial decree. Because both of these rulings are inconsistent with governing Supreme Court precedent and involve questions of exceptional public importance, they are proper for review by the full Court, sitting en banc.

A. THE BOARD'S ONE-TO-ONE RACIAL QUOTA FOR PROMOTING POLICE SERGEANTS TO THE RANK OF LIEUTENANT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

It is well settled that "all legal restrictions which curtail the rights of a single racial group are immediately suspect" and that "courts must subject them to the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216 (1944). See, e.g., Shelley v. Kraemer, 334 U.S. 1, 22 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938). That a governmental classification, such as the Board's racial quota for promotions, works to the detriment of all non-black police sergeants rather than a "discrete and insular minorit[y]" (United States v. Carolene Products Company, 304 U.S. 144,

152 n.4 (1938)), is without constitutional significance. 2/ "[I]t is the individual who is entitled to judicial protection against classification based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group . . . ." University of California Regents v. Bakke, supra, 438 U.S. at 299 (opinion of Powell, J.); see, e.g., Shelley v. Kraemer, supra, 334 U.S. at 22 ("[R]ights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."); McCabe v. Atchison, T.& S.F.R. Co., 235 U.S. 151, 161-162 (1914). And, if the Equal Protection Clause creates "personal rights," "guaranteed to the individual," its safeguards "cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." University of California Regents v. Bakke, supra, 438 U.S. at 289-290 (opinion of Powell, J.). Accordingly, when a person is classified by government on the basis of race or ethnic origin, "the burden he is asked to bear on that basis [must be] precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background." Id. at 299; see Shelley v. Kraemer, supra; Missouri ex rel. Gaines

2/ As Justice Powell observed in Bakke, discreteness and insularity have "never been invoked in [Supreme Court] decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny." University of California Regents v. Bakke, supra, 438 U.S. at 290 (opinion of Powell, J.).

v. Canada, supra, 305 U.S. at 351; Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) (plurality). 3/

Application of this standard to the facts of this case compels the conclusion that the Board's one-to-one racial quota for promotions to the rank of lieutenant impermissibly infringes the equal protection rights of non-black police sergeants.

1. The Board's Promotion Quota Cannot be Justified as a Measure Necessary to Remedy the Effects of the City's Past Discrimination

As the panel correctly noted: "The existence of illegal discrimination justifies the imposition of a remedy that will make persons whole for injury suffered on account of unlawful . . . discrimination." Slip Op. at 12, quoting Fullilove v. Klutznick, supra, 448 U.S. at 497 (Powell, J., concurring). This is true even though such "make whole" measures may incidentally impinge on the interests of innocent third parties. "When effectuating a limited and properly tailored remedy to

3/ We submit that the panel in this case, and the court in Young, erred in concluding that "[a] different [equal protection] analysis must be made when the claimants are not members of a class historically subjected to discrimination." Slip Op. at 11, quoting Detroit Police Officers Ass'n v. Young, supra, 608 F.2d at 697. See also Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981), cert. denied, ___ U.S. ___ (1982). In addition to the reasons discussed in text, supra, we note that few discrete racial classes have not been "historically subjected to discrimination." As Justice Powell observed in Bakke, "the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals." University of California Regents v. Bakke, supra, 438 U.S. at 295 (opinion of Powell, J.). Thus, "[t]here is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not." Id. at 296.

cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." Fullilove v. Klutznick, supra, 448 U.S. at 484, citing Franks v. Bowman Transportation Co., 424 U.S. 747, 777 (1976); Albemarle Paper Co., v. Moody, 422 U.S. 405 (1975). That the class of victims is defined by race is but a concomitant of the fact that the defendants' unlawful behavior was defined by race.

We submit that the compelling government interest of curing the effects of past racial discrimination will justify a class-based infringement of the legitimate interests and expectations of innocent third parties only to the extent necessary to restore proven discriminatees to the position they would have occupied in the absence of the discrimination. The right to be free of unlawful racial discrimination in employment belongs to individuals, not groups. E.g., Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978) (Title VII); Shelley v. Kraemer, supra (Constitution). In order fully to vindicate these individual rights, courts should fashion remedies designed to ensure that the identifiable victims of unlawful racial discrimination are restored to their "rightful places" in the employer's work force. The legitimate "rightful place" claims of identifiable discriminatees warrant imposition of a remedy calling for a "sharing of the burden" by those innocent incumbent employees whose "places" are the product of, or at least enhanced by, the employer's discrimination.

Persons who have not been victimized by the employer's discriminatory practices, however, have no claim to "rightful places" in the employer's workplace. And any preferential treatment accorded to nondiscriminatees -- or to discriminatees beyond those measures necessary to make them whole -- necessarily deprives innocent incumbent employees of their "rightful places." Accordingly, as between nonvictims of the unlawful discrimination and innocent third parties, "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." University of California Regents v. Bakke, supra, 438 U.S. at 308-309 (opinion of Powell, J.). 4/

In this case, the one-to-one promotion quota imposed by the Board clearly embraces and benefits nonvictims as well as victims of defendants' past unlawful discrimination in promotions and thus accords racially preferential treatment to persons having no "rightful place" claim to promotion priority vis-a-vis non-black officers. Because government has no compelling interest in according such preferential treatment to nondiscriminatees at the expense of innocent third parties,

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4/ We thus disagree with the court's conclusion in Young that preferential treatment need not be limited to individual victims of discrimination. Detroit Police Officers Ass'n v. Young, supra, 608 F.2d at 694. See also Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981), cert. denied, ___ U.S. ___ (1982). We therefore urge that Young be overruled by the en banc Court.

the Board's one-to-one promotion quota is unconstitutional. 5/

Noting that "[t]he record establishes a pattern of mistreatment in the form of outright discrimination by white officers against black citizens as well as more subtle discrimination in the handling of complaints and investigations," the panel held that the Board's one-to-one promotion quota was justified by the need to "redress . . . this injury to the to the black population as a whole." Slip op. at 31. 6/ Plainly, the Board's promotion quota in no way served to redress the DPD's past mistreatment of members of the black community. The quota compensated no one for injuries caused

5/ The Supreme Court's decision in Fullilove v. Klutznick, supra, does not lead to a contrary result. In that case the Court rejected a constitutional challenge to a federal law requiring that at least 10% of federal funds for local public works projects be set aside for contracts with "minority business enterprises." Administrative and legislative findings that minority businesses had been excluded from significant participation in government construction contracts were held sufficient to justify this exercise of Congress' remedial authority. 448 U.S. at 456-472 (plurality). The plurality opinion emphasized that the administrative program contained sufficient procedural safeguards to provide reasonable assurance (1) that application of racial or ethnic criteria would be narrowly limited to accomplishing Congress' remedial purposes by restricting preferential treatment to those businesses actually disadvantaged as a result of prior discrimination and (2) that misapplications of such criteria would be promptly and adequately remedied administratively. See id. at 486-489. Moreover, the plurality stressed that the Court was deciding only a facial challenge to the MBE provision and that any equal protection claims arising out of the specific awards that "cannot be justified . . . as a remedy for present effects of identified prior discrimination . . . must await future cases." Id. at 486. In sum, then, the plurality in Fullilove left no doubt that the MBE provision, which "press[ed] the outer limits of Congressional authority," would not have passed constitutional muster had it been based solely on the contractor's race rather than on the contractor's status as a victim of discrimination in government construction contracting. See id. at 473, 490.

6/ This remedial theory was neither argued by defendants nor discussed by the district court.

by discriminatory treatment, whether "subtle" or "outright;" nor did it operate to punish, through dismissal or other disciplinary action, the police officers engaging in discriminatory behavior. To the extent that the panel viewed the desegregation of Detroit's "white-dominated police force" as essential to elimination of the DPD's discriminatory practices against blacks (see slip op. at 31 n.44), it is clear that this objective can be attained by restoring identifiable victims of the Department's racially discriminatory hiring and promotion practices to their rightful places on the force and by instituting nondiscriminatory, race-neutral hiring and promotion criteria. Accordingly, the Board's one-to-one racial quota for promoting police sergeants to the rank of lieutenant is not "necessary" to promote the State's interest in redressing the injury to the black community caused by the Department's discriminatory practices. See University of California Regents v. Bakke, supra, 438 U.S. at 305 (opinion of Powell, J.); In re Griffiths, 413 U.S. 717, 721-722 (1973).

2. The Board's Racial Quota for Promotions Is Not Justified by the "Operational Needs" of the Detroit Police Department

While the panel found it unnecessary to address defendants' claim that "effective law enforcement required that the [DPD] at all ranks roughly reflect the population which it serves" (483 F. Supp. at 995), 7/ the district court accepted the contention, holding that the DPD's "operational needs" constituted

7/ Defendants urged that proportional racial representation in all ranks in the police department

(Cont'd on p. 14)

an independent justification for the Board's imposition of the one-to-one promotion quota for lieutenants. Noting that "the Department was overwhelmingly white through the mid-1970's" and that "the Department reflected the prejudices of the white society" (id. at 997), the district court observed that, "[g]iven the history of racial tensions in Detroit, black officers were far more likely to relate well to the black community" (id. at 999). Accordingly, the district court concluded that in light of the "history of antagonism between the Department and the black community, the affirmative action plan was a necessary response to what had been an ongoing city crisis." Id. at 1000.

As plaintiffs pointed out below, defendants' "operational needs" justification for its racially discriminatory promotion quota boils down to the argument that only black officers can effectively police black citizens and only black lieutenants can effectively supervise black officers. 8/ Not only is this proposition based on a facially offensive and false stereotype,

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7/ (Cont'd from p. 13)

> 1) helped the police solve crime by fostering citizen support for the department, 2) improved safety of police officers, 3) reduced riots, brutality, citizen complaints and demonstrations, 4) fostered equal treatment of citizens, 5) provided role models for young black officers, and 6) helped to accomplish necessary police duties such as undercover work or crowd control in black neighborhoods. 483 F. Supp. at 995.

8/ The defendants' error, and that of the district court as well, lies in the dual assumption that police officers who are white will not treat black citizens fairly and that black citizens will neither trust nor cooperate with white officers.

(Cont'd on p. 15)

it is analytically unsound. If accepted as an adequate justification for racial discrimination in employment by municipal police departments, the district court's reasoning -- that "black officers [are] far more likely to relate well to the black community" -- would likewise justify similar racial classifications for teachers, social workers -- indeed, virtually any type of government employee.

The courts have, of course, flatly rejected such reasoning in analogous contexts. For example, in Smith v. Board of Education, 365 F.2d 770 (8th Cir. 1966), the defendant school board argued that it could validly prefer white school teachers for white pupils because "rapport between teacher and pupil . . . may be unattainable where they are of different races and this difference affects attitudes, personal philosophies and prejudices." Id. at 781. The court of appeals, through then Circuit Judge Blackmun, rejected the argument in unequivocal terms:

> [I]n this day race per se is an impermissible criterion for judging either

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8/ (Cont'd from p. 14)

The district court reasoned that "[i]t is one thing to verbally or physically abuse a black citizen or prisoner in front of a group of fellow white officers" and "quite another to do the same thing in front of some black officers." 483 F. Supp. at 998. The district court failed to note, however, that it is "quite another thing" also to commit such abuse in the presence of fellow white officers who are intolerant of such conduct. The district court commented further that "[i]t is very difficult to mistreat blacks if one knows that the commanding officer is black." Id. To state it more accurately, such mistreatment is very unlikely if the commanding officer, whatever his race, is known not to countenance such behavior. The court simply failed to take into account the race-neutral solutions, mandated by the Constitution, which would effectuate the City's valid interests. See text, infra, at 18.

> an applicant's qualifications or the district's needs. And this applies equally to considerations described as environment or ability to communicate or speech patterns or capacity to establish rapport with pupils when these descriptions amount only to euphemistic references to actual or assumed racial distinctions. . . . It is now too late for a school board to assume that it may objectively regard all supposed racial differences in order to avoid its obligation to employ teachers in accord with constitutional standards. Id. at 782.

Nor does the constitutional command of equal protection permit the denial or restriction of individual equal protection rights for the purpose of calming or avoiding hostility on the part of a particular community or group of citizens within the community. In a variety of contexts, the Supreme Court has squarely rejected contentions that bowing to popular prejudices, even to avoid the possibility of racial unrest, can constitute a sufficient justification for abridging the equal protection rights of individuals. In Buchanan v. Warley, 245 U.S. 60 (1917), the court unanimously invalidated an ordinance barring blacks from acquiring residences in predominately white neighborhoods and barring whites from acquiring residences in predominately black neighborhoods. The Court stated:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution. Id. at 81.

See, e.g., Watson v. Memphis, 373 U.S. 526, 535-536 (1963) (rejecting claim that gradual "facility-by-facility" desegregation of municipal parks was "necessary to prevent interracial

disturbances, violence, riots, and community confusion and turmoil"); Cooper v. Aaron, 358 U.S. 1, 16 (1958) ("[L]aw and order are not . . . to be preserved by depriving . . . Negro children of their constitutional rights.") Even in the prison context, where racial unrest is often intense and the threat of violence ever present, the Supreme Court has indicated that the Fourteenth Amendment does not permit prison officials to make blanket celling classifications according to race to accommodate the prejudices of inmates or to prevent racial conflict presumed to be inevitable. See Lee v. Washington, 390 U.S. 333 (1968) (per curiam). The governing principle of these cases was best stated by Justice White: "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held. Surely the promise of the Fourteenth Amendment demands more than nihilistic surrender." Palmer v. Thompson, 403 U.S. 217, 260-261 (1971) (White, J., dissenting).

We recognize that the governmental interest in effective law enforcement may, with respect to certain narrow and limited race-conscious employment practices, satisfy the heavy burden which the Fourteenth Amendment imposes on governmental classifications based on race. Such practices might include, for example, selecting or assigning individual police officers on the basis of race in order to infiltrate racially exclusive subversive groups (e.g., Ku Klux Klan, Black Panthers) or to

conduct undercover investigations in racially identifiable areas of the community.

The Board's racially discriminatory promotion quota for lieutenants, however, clearly is not a "necessary" means for effectuation of such important law enforcement interests. See University of California Regents v. Bakke, supra, 438 U.S. at 299 (opinion of Powell, J.); Missouri v. Canada, supra, 305 U.S. at 351. Nor is it necessary for the maintenance of the public peace or the furtherance of the city's other asserted interests. The legitimate interests asserted by the City can be achieved through the application of race-neutral measures designed to reassure black citizens that the days of racial discrimination in the DPD and racially motivated abuses by police officers are past. Defendants could begin by (1) dismissing or disciplining officers guilty of racially discriminatory conduct within or without the DPD, (2) restoring victims of employment discrimination to their rightful places in the DPD, and (3) adopting nondisciminatory employment practices. The defendants failed to establish that a race-neutral solution is not feasible.

B. THE DISTRICT COURT ERRED IN INCORPORATING THE PROMOTION QUOTA INTO A JUDICIAL DECREE

Assuming the correctness of the district court's conclusion that the DPD's past conduct constituted violations of Title VII and the Fourteenth Amendment, we agree with Judge Merritt's conclusion that the district court erred in incorporating the Board's voluntary (previously) affirmative action

plan into a mandatory court order, enforceable by the full panoply of judicial powers and changeable only with the district court's consent. Cf. System Federation v. Wright, 364 U.S. 642, 651 (1961) (litigant cannot "purchase from a court of equity a continuing injunction"). In addition to the objection articulated by Judge Merritt, however, we submit that ordering implementation of the one-to-one promotion quota contained in the Board's plan (1) exceeded the limits of the district court's statutory remedial authority, (2) constituted an inequitable infringement on the interests of innocent nonblack employees, and (3) violated the equal protection guaranties of the United States Constitution.

1. A Court's Statutory Remedial Authority To Order Specific Affirmative Relief Is Limited to Those Measures Necessary To "Make Whole" Actual Victims of Employment Discrimination

(a) The district court's statutory remedial authority in these cases is governed by Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g). That section expressly prohibits courts from ordering specific affirmative relief for persons who were not actual victims of the defendant's unlawful employment practice. And, as to proven discriminatees, a court's remedial authority is limited to placing them in the position they would have occupied but for the defendant's unlawful discrimination. The Board's promotion quota, now part of a judicial decree, requires the preferential promotion of officers on the basis of race without regard to whether the preferred black officers have been

the actual victims of unlawful racial discrimination in promotions. Entry of a judicial remedial order requiring such relief exceeded the limits of the district court's statutory remedial authority.

Section 706(g) authorizes federal courts to grant injunctive relief prohibiting employment practices violating Title VII and to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). Such affirmative equitable relief can be granted, however, only in favor of actual victims of discrimination, as the final sentence of Section 706(g) makes clear:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.

That this congressional directive was intended to confine a court's equitable remedial authority to restoring discriminatees to the place they would have occupied but for the discrimination is amply reflected in the provision's legislative history. Section 706(g), as originally crafted in the House Judiciary Committee, prohibited a court from ordering affirmative equitable relief for anyone refused employment or advancement or suspended or discharged for

"cause." Vaas, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431, 438 (1966). In an amendment introduced on the House floor by Congressman Celler, Chairman of the House Judiciary Committee and the Member responsible for introducing H.R. 7152, the word "cause" was replaced by the phrase for "any reason other than discrimination on account of race * * *" to ensure that only actual victims of the prohibited types of discrimination would be eligible for affirmative equitable relief. See 110 Cong. Rec. 2567 (1964) (Rep. Celler); id. at 2570 (Rep. Gill) (provision intended to "limit orders under this act to the purposes of this act"). Responding to arguments that "seriously misrepresent[ed] what [Title VII] would do," Congressman Celler advised his colleagues that a court order could be entered only on proof "that the particular employer involved had in fact, discriminated against one or more of his employees because of race * * *." Id. at 1518. "Even then," assured Celler, "the court could not order that any preference be given to any particular race, * * *, but would be limited to ordering an end to discrimination." Id.

In the Senate, the provision was not changed. In an interpretive memorandum -- characterized by the Supreme Court as one of the "authoritative indicators" of the meaning of Title VII (American Tobacco Co. v. Patterson, 50 U.S.L.W. 4364, 4367 (U.S. April 5, 1982)) -- Senators Clark and Case, the bipartisan "captains" responsible for explaining and defending Title VII in the Senate debate, described the provision's

intended effect as follows: "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section [706(g)]." 110 Cong. Rec. 7214 (1964). Explanatory statements by Senators Humphrey and Kuchel, bipartisan floor managers on the entire Civil Rights bill, were equally clear. 9/

9/ Senator Humphrey stated with respect to permissible relief under title VII (110 Cong. Rec. 6549 (1964)):

> The relief * * * would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of back pay. * * * No court order can require [such affirmative relief] * * * for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of the section [706(g)] * * *.
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> [T]here is nothing in it that will give any power * * * to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.

See also id. at 11848 (Senator Humphrey). Senator Kuchel remarked as follows (id. at 6563):

> If the court finds that unlawful employment practices have indeed been committed as charged, then the court may enjoin the responsible party from engaging in such practices and shall order the party to take that affirmative action, such as the reinstatement or hiring of employees, with or without back pay, which may be appropriate.
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(Cont'd on p. 23)

Thus, both the language 10/ and the legislative history 11/ of Section 706(g) leave no doubt that courts are authorized,

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9/ (Cont'd from p. 22)

> Only a Federal court could [issue orders], and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. * * * But the important point * * * is that the court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.

10/ A further indication in the language of Section 706(g) that Congress intended to limit affirmative equitable relief to actual victims of discrimination is contained in the sentence requiring that an award of back pay be offset by any "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against * * *." 42 U.S.C. 2000e-5(g) (emphasis added).

11/ Congressional consideration of Section 706(g) during deliberations on the 1972 amendments to Title VII fully supports the interpretation compelled by the provision's language and 1964 history. The House and Senate passed two differing versions of Section 706(g) in 1972. The House bill (H.R. 1746) left the 1964 provision largely unchanged, except for the addition of a provision limiting back pay awards. See 117 Cong. Rec. 31979-31980, 32113 (1971). The Senate-passed bill (S. 2515) eliminated from Section 706(g) the final, limiting sentence contained in the 1964 Act. See 118 Cong. Rec. 4944-4946 (1972). The bill that emerged from the House-Senate conference, however, restored to Section 706(g) the final sentence explicitly confining the scope of judicial equitable authority under Title VII to identifiable victims of unlawful discrimination. S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess. 5-6, 18-19 (1972). H.R. Conf. Rep. No. 92-899, 92d Cong., 2d Sess. 5-6, 18-19 (1972). Additionally, the Conference version of Section 706(g) included new language, borrowed from the Senate bill, making clear that discriminatees are entitled not only to the specific types of relief expressly mentioned in the section, but also to "any other equitable relief as the court deems appropriate." Id. at 5-6. The section-by-section analysis of the conference bill explained that "the scope of relief under [Section 706(g)] is intended to make the victims of unlawful discrimination whole, * * * [which] requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have

(Cont'd on p. 24)

upon finding a violation of Title VII, to order affirmative equitable relief only on behalf of individual victims of the discrimination.

(b) "[T]he scope of the district court's remedial powers under Title VII is determined by the purposes of the Act." Teamsters v. United States, 431 U.S. 324, 364 (1977). Section 706(g)'s prohibition on the granting of affirmative equitable relief to nondiscriminatees is wholly consistent with -- indeed, complements -- the central congressional purposes of Title VII,

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11/ (Cont'd from p. 23)

been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972) (Senate); id. at 7565 (House); See also note 13, infra. This "make victims whole" congressional understanding is precisely the interpretation accorded Section 706(g) by the Supreme Court in every case in which it has directly addressed the permissible scope of judicial remedial authority under Title VII. See Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Some appellate courts construing Section 706(g) have mistakenly sought to attach interpretative significance to unsuccessful amendments to Title VII offered by Senator Ervin in 1972. See EEOC v. AT&T, 556 F.2d 167, 174-77 (3rd Cir. 1977); United States v. Intern. Union of Elevator Const., 538 F.2d 1012, 1019-1020 (3d Cir. 1976). Those amendments, however, did not seek to alter Section 706(g). Indeed, it is clear from the language of the amendments (118 Cong. Rec. 1662, 4917) and from their sponsor's explanations (id. at 1663-1664, 4917-4918) that neither amendment was in any way concerned with the remedial authority of courts. To the contrary, the amendments would merely have extended to all federal executive agencies, particularly the Office of Federal Contract Compliance, Section 703(j)'s prohibition against requiring employers to engage in racially preferential hiring in order to rectify racial imbalance in their work forces. See ibid. As the Supreme Court recognized in United Steelworkers v. Weber, supra, 443 U.S. at 205 n.5, Section 703(j) speaks only to substantive liability under Title VII, not to the scope of judicial remedial authority, which is governed solely by Section 706(g). And, as the Court observed in Teamsters (431 U.S. at 354 n.39), "[t]he views of members of a later Congress, concerning different sections of Title VII, * * * are entitled to little if any weight."

which, as the Supreme Court has often observed, are "to end discrimination * * * [and] to compensate the victims for their injuries." Ford Motor Co. v. EEOC, 50 U.S.L.W. 4937, 4940 (U.S. June 28, 1982) (emphasis added); see, e.g., Teamsters v. United States, supra, 431 U.S. at 364. In this latter connection, "the purpose of Title VII [is] to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 418; see, e.g., Myers v. Gilman Paper Corp., 544 F.2d 837, 856 (5th Cir. 1977), cert. dismissed, 434 U.S. 801 (1977) (judicial remedies under Title VII governed by "rightful place" doctrine, under which "courts are to grant affirmative relief to give discriminatees the opportunity to achieve positions that would have been theirs absent discrimination"). Section 706(g) thus requires a court "to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination and hiring." 12/ Franks v. Bowman Transportation Co., supra, 424 U.S. at 764 (emphasis added; footnote omitted); 13/ accord Teamsters v. United States, supra, 431 U.S. at 364.

12/ The Supreme Court has also often recognized that the ability of courts to order affirmative equitable relief such as back pay and constructive seniority also advances Title VII's other central objective -- ending discrimination -- by "providing a "'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 their discriminatory practices." Teamsters v. United States, supra, 431 U.S. at 364, quoting Albemarle Paper Co. v. Moody, supra, 422 U.S. at 417-418. See also Ford Motor Co. v. EEOC, supra, 50 U.S.L.W. at 4939-4940.

13/ In Franks the Supreme Court thoroughly canvassed Title VII's legislative history, relying particularly on the 1972

(Cont'd on p. 26)

Class-based retroactive seniority and back pay awards for identifiable victims of illegal hiring discrimination are clearly within this mandate, as held by the Supreme Court in Franks v. Bowman Transportation Co., supra, and Albemarle Paper Co. v. Moody, supra. In so ruling, however, the Court made clear that judicial authority under Section 706(g) to order affirmative equitable relief extends only to actual victims.

Franks involved a claim of unlawful discrimination by a class of black nonemployee applicants who unsuccessfully sought employment as over-the-road truck drivers. Finding

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13/ (Cont'd from p. 25)

amendments to Section 706(g). The section-by-section analysis accompanying the Conference Committee Report on the 1972 amendments emphatically confirms the "make whole" purpose of Title VII: "[T]he scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, * * * restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972) (emphasis added), quoted in Franks v. Bowman Transportation Co., supra, 424 U.S. at 764, and Albemarle Paper Co. v. Moody, supra, 422 U.S. at 421. Moreover, "[t]he Reports of both Houses of Congress indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." Franks v. Bowman Transportation Co., supra, 424 U.S. at 764 n.21. See also note 11, supra.

Additionally, Section 706(g) was originally modelled on Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), which directs the Board to order, on finding an unfair labor practice, "'affirmative action including reinstatement of employees with or without back pay.'" Albemarle Paper Co. v. Moody, supra, 422 U.S. at 419 n.11. Decisions construing this provision make clear that "the thrust of 'affirmative action' redressing the wrong incurred by an unfair labor practice is to make 'the employees whole, and thus restor[e] the economic status quo that would have obtained but for the company's wrongful [act].'" Franks v. Bowman Transportation Co., supra, 424 U.S. at 769, quoting NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969). See also Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197-198 (1941) ("only actual losses should be made good"); NLRB v. Dodson's Market, Inc., 553 F.2d 617 (9th Cir. 1977).

that the employer had unlawfully discriminated in the hiring, transfer, and discharge of employees, the district court ordered the employer to give priority consideration to class members for over-the-road jobs, but declined to award back pay or constructive seniority retroactive to the date of individual application. The court of appeals reversed the district court's ruling on back pay, but affirmed its refusal to award retroactive seniority.

In holding that federal courts are authorized under Section 706(g) to award retroactive seniority, the Supreme Court stressed that such an award, as well as any other type of affirmative equitable relief, can only be made to restore actual victims of unlawful discrimination to their "rightful place." The defendant was entitled to an opportunity on remand "to prove that a given individual member of [the] class * * * was not in fact discriminatorily refused employment as an OTR driver in order to defeat the individual's claim to seniority relief as well as any other remedy ordered for the class generally." 424 U.S. at 773 n.32.

This understanding of the statute was reaffirmed in Teamsters v. United States, supra. There the defendant trucking company was found to have excluded blacks and Hispanics from the position of over-the-road truck driver. The seniority system in the employer's collective-bargaining agreements provided that an incumbent employee who transferred to an over-the-road position was required to forfeit the competitive seniority he had accumulated in his previous position (company seniority) and to start at the bottom of

the over-the-road drivers' seniority list. After affirming the district court's finding of liability under Title VII, the court of appeals held that all black and Hispanic incumbent employees were entitled to bid for future over-the-road jobs on the basis of their accumulated company seniority. The court further held that each class member filling such a job was entitled to an award of retroactive seniority on the over-the-road driver's seniority list dating back to the class member's "qualification date" -- the date when (1) an over-the-road driver position was vacant and (2) the class member met or could have met the job's qualifications.

In the Supreme Court, the employer contended that a grant of retroactive "qualification date" seniority to non-applicants was contrary to the "make whole" purpose of Title VII and would constitute an impermissible racial preference. Noting that the district court's remedial authority under Title VII "is determined by the purposes of the Act" (431 U.S. at 364), the Supreme Court held that affirmative equitable relief can be awarded only to actual victims of the employer's discrimination -- that is (1) those who applied and were discriminatorily rejected and (2) those who were deterred from applying by the employer's discriminatory practices and would have been discriminatorily rejected. Id. at 364-371. Accordingly, the case was remanded to the district court for determinations "with respect to each specific individual" as to "which of the minority employees were actual victims of the company's discriminatory practices." Id. at 371-372. Only these victims were entitled to preferential consideration

for vacant over-the-road positions and to retroactive seniority. 14/

In the instant case, the Board's racially preferential promotion quota operates to prefer black officers without regard to whether they had actually been discriminatorily denied promotions in the past and thus were in a position to assert "rightful place" claims to promotion priority vis-a-vis other officers. In this respect, therefore, the district court's order incorporating the promotion quota for lieutenants is legally indistinguishable from the remedial orders condemned in Franks and Teamsters. 15/ Thus, the district court's decree exceeds the limits on judicial remedial authority expressed in the language and legislative history of Section 706(g) and recognized by the Supreme Court in both Teamsters and Franks.

2. The District Court's Decree Contravenes Traditional Equitable Principles Regarding Appropriate Remedial Relief and the Legitimate Interests of Third Parties

Even if district courts were not expressly prohibited under Section 706(g) of Title VII from ordering race-conscious promotion priority for nonvictims of discriminatory promotion

14/ Similarly, in Ford Motor Co. v. EEOC, supra, 50 U.S.L.W. at 4941, the Supreme Court rejected an interpretation of Title VII that "would not merely restore [the alleged discriminatees] to the 'position where they would have been were it not for the unlawful discrimination,' * * * it would catapult them into a better position than they would have enjoyed in the absence of discrimination." See discussion, infra, at 31-32. Surely persons who cannot even claim to be discriminatees are entitled to no more.

15/ Like the orders overturned in Franks and Teamsters, the district court's order does not include a procedure affording "rightful place" relief to black officers able to sustain the burden of proving entitlement to such treatment as actual victims of promotion discrimination. Rather, the decree provides for race-conscious promotion preferences on a wholesale basis until a certain racial balance is reached, which is precisely the type of relief rejected in Franks and Teamsters.

practices, judicial imposition of the one-to-one promotion quota would violate fundamental principles of equitable relief. As the Supreme Court noted in Los Angeles Department of Water & Power v. Manhart, supra, 435 U.S. at 709, "the basic policy of [Title VII] requires that [courts] focus on fairness to individuals rather than fairness to classes." Accordingly, in crafting equitable relief under Title VII, courts must consider the legitimate interests of "innocent third parties." Ford Motor Co. v. EEOC, supra, 50 U.S.L.W. at 4942. Indeed, even in a case (unlike this one) in which the victims of unlawful employment discrimination have been identified and their rightful place determined, a court is "faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." Teamsters v. United States, supra, 431 U.S. at 372.

In Franks, the impact of an award of retroactive competitive seniority on innocent incumbent employees moved some Members of the Supreme Court to criticize the majority's ruling that identifiable victims of unlawful employment discrimination are, in essence, presumptively entitled to such an award. See Franks v. Bowman Transportation Co., supra 424 U.S. at 780-781 (Burger, C.J., concurring in part and dissenting in part); id. at 781-799 (Powell, J., concurring in part and dissenting in part). When a discriminatee is awarded affirmative "rightful place" relief, such as retroactive competitive seniority or promotion priority, however, he is merely being returned to the position he would have occupied but for the discrimination -- the position now

occupied by a non-minority incumbent because of the discrimination. Thus, while awarding affirmative "rightful place" relief to a discriminatee will inevitably alter the employment expectations of some incumbent employees, their expectations are, at least to some extent, born of unlawful discrimination. These equitable considerations simply do not obtain, however, when affirmative equitable relief is ordered for a nondiscriminatee, as the Supreme Court expressly recognized last Term in Ford Motor Co. v. EEOC, supra.

The Court in Ford Motor Co. held that an employer charged with hiring discrimination under Title VII can toll the continuing accrual of back pay liability under Section 706(g) by unconditionally offering the claimant the job allegedly denied. The Court rejected the argument that the employer must also offer constructive seniority retroactive to the date of the alleged discrimination, for such a rule would "encourage[ ] job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination." 50 U.S.L.W. at 4942 (emphasis added). Noting the importance of seniority in allocating benefits and burdens among employees, the Court concluded that the "large objectives" of Title VII do not require innocent employees "to carry such a heavy burden." Ibid.

In the instant case, the promotion priority bestowed by the one-to-one quota is not limited to officers who were discriminatorily denied promotions by the DPD. The district court's decree therefore requires innocent non-black police

officers to surrender their legitimate promotion expectations to black officers who have no "rightful place" claim to promotion priority. We submit that, as recognized in Ford Motor Co., the balance of competing interests in these circumstances weigh against judicially imposing racially based promotion relief that will benefit nondiscriminatees at the expense of other innocent employees.

3. Judicial Imposition of the Promotion Quota Violates the Constitution's Equal Protection Guaranties

As we have demonstrated, judicial approval of the promotion quota at issue exceeded the district court's statutory remedial authority and constitutes an inequitable infringement on the rights of innocent non-black candidates for lieutenant. Of course, if the Court agrees with either of our previous points, it need not address the constitutional questions raised by judicial imposition of the promotion quota. We submit that entry by the district court of the order violates the equal protection rights of those otherwise eligible non-black officers who are excluded from consideration for promotion to the supervisory positions set aside for blacks. 16/

The constitutional issue presented by judicial entry of the Board's promotion quota focuses not on the "broad remedial powers of Congress" or the policy choices of a legislative or administrative body, but rather on the "limited remedial powers

16/ This Court has frequently countenanced employment quotas and other race-conscious remedies in employment discrimination cases, see, e.g., EEOC v. Detroit Edison, 515 F.2d 301, 317 (6th Cir. 1975); United States v. Masonry Contractors Ass'n of Memphis, Inc., 497 F.2d 871, 877 (6th Cir. 1974), but has not expressly addressed the constitutional issue raised here.

of a federal court." Fullilove v. Klutznick, supra, 448 U.S. at 483. It is well established that judicial action is no less subject to the constraints of the Constitution's equal protection guaranties than is legislative action. See Shelley v. Kraemer, supra; Ex parte Virginia, 100 U.S. 339 (1879). And equal protection analysis under the Due Process Clause of the Fifth Amendment is the same as that under the Fourteenth Amendment. E.g., Buckley v. Valeo, 424 U.S. 1, 93 (1976).

We submit that, in the context of judicial remedial action, the only government interest implicated in this case is that of curing the effects of past discrimination. And, as we have previously discussed, supra at 9-13, this compelling government interest will justify a class-based infringement of the legitimate employment interests and expectations of innocent third parties only to the extent necessary to restore proven discriminatees to the position they would have occupied in the absence of the discrimination. Because the Board's promotion quota clearly embraces and benefits non-victims as well as victims of defendants' past unlawful discrimination in promotions and thus accords racially preferential treatment to persons having no "rightful place" claim to promotion priority vis-a-vis non-black officers, its incorporation into the district court's remedial decree was inconsistent with the Constitution's guarantee of equal protection. 17/

17/ The applicability of constitutional protections is a principal distinction between the instant case and United

Conclusion

For the foregoing reasons, the United States respectfully requests that the suggestion for a rehearing en banc be granted and the case be restored on the docket as a pending appeal. We note that on April 18, 1983, the Supreme Court heard oral argument in Beecher v. Boston Chapter, NAACP (Nos. 82-185, 82-246, 82-259), which raises issues concerning the extent of judicial remedial authority in employment discrimination cases. Accordingly, should this Court decide to grant the United States' suggestion for a rehearing en banc, it may wish to postpone scheduling full briefing until the Supreme Court has rendered its decision in Beecher.

Respectfully submitted,

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17/ (Cont'd from p. 33)

Steelworkers v. Weber, supra. In Weber, the Court held that Title VII's substantive provisions did not prohibit a provision in a collective-bargaining agreement that reserved for black employees 50 percent of the openings in certain craft training programs. Since the collective-bargaining agreement was not embodied in a judicial decree, the Title VII question presented here was not implicated. In addition because the Weber agreement did not involve state action, the admissions quota there, standing alone, did not raise an equal protection question. Id. at 200. Nor did the Weber case raise a question regarding judicial authority to enforce such an agreement among private parties. See Shelley v. Kraemer, supra; Hurd v. Hodge, 334 U.S. 24 (1948).

CERTIFICATE OF SERVICE

I, Mark R. Disler, certify that on April 29, 1983, I served copies of the foregoing Motion of the United States to Intervene as a Party Appellant and for Leave to File Suggestion of Rehearing En Banc in Excess of the Page Limit, and Suggestion of Rehearing En Banc by mailing copies thereof, postage prepaid, to the following counsel of record:

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