IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS and BETTY DEFUNIS, his wife; MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,
Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JAMES G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Washington

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 42(3), the Chamber of Commerce of the United States of America now moves the Court for leave to file the attached brief as amicus curiae in the above-entitled cause and shows:

1. Consent to the filing of a brief in this cause by the Chamber of Commerce of the United States of America, as amicus curiae, was obtained from Petitioners, but was refused by Charles Odegaard, Respondent herein.

2. The applicant, the Chamber of Commerce of the United States of America, has an interest in this case in that:

(a) The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

(b) In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in civil rights cases which focused on significant labor relations issues. *E.g.*, *Geduldig* v. *Aiello*, S.Ct. Docket No. 73-640, *cert. granted*, —— U.S. —— (1973); *Alexander* v. *Gardner-Denver Co.*, S. Ct. Docket No. 72-5847, *cert. granted*, 410 U.S. 925 (1973); *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Dewey* v. *Reynolds Metal Co.*, 402 U.S. 689 (1971); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

(c) The present case is of major importance to the Chamber's members because this Court's decision on the question whether state supported institutions of higher education may give special consideration to minority applicants in order to achieve a more representative student body will necessarily bear on employers' ability or duty to take "affirmative action" to increase their employment of "underrepresented" minorities. This is particularly so in view of the function served by the University of Washington Law School in the process of qualifying persons for employment in the legal profession.

Because American industry will be affected however this Court decides the present case, the Chamber considers it imperative that this Court be made aware of the various contexts in which employers may be called upon to consider race in order to avoid or eliminate discrimination.

3. The applicant believes that the following relevant facts, considerations, and questions of law have not been, and will not be, adequately presented by the parties:

(a) While employers may engage in "affirmative action" in part to make a personal contribution to resolving what is surely one of the nation's most compelling economic and social problems, frequently such action is produced by a prudent response to one or more of the following factors:

(i) The requirement that Federal contractors commit themselves to "goals and timetables" for increasing their employment of minorities in those job categories in which they are being "underutilized," 41 C.F.R. §§ 60-2.10, 2.12; *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), and the com-

mitments to hire and/or promote minorities according to a prescribed ratio which government agencies insist upon in order to resolve issues of employment discrimination.

(ii) The burden of disproving discrimination which courts impose when presented with statistics showing a disproportionately low employment of minorities, *Parham* v. *Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971), *compare McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 805 n. 19 (1973); *Stone* v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972); or a disproportionately high rejection rate for such groups, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

(b) As the result of such considerations, many employers have now adopted "affirmative action" programs and are giving special consideration to race and ethnic background in their employment decisions. They are doing so on the advice of counsel that appellate courts have not yet significantly modified governmental demands or lower court orders that have found employment discrimination on the basis of gross underrepresentation of minority groups, and that require the employment of minorities in a certain ratio to overcome past discrimination. *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972); *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). Employers engaging in affirmative action programs are of course aware —and concerned—that some of their actions may constitute discrimination in reverse, but they are also aware that in the reported judicial and admin-

istrative decisions, the majority group worker has to date seldom been upheld when he complains that affirmative action programs have violated his rights to equal opportunity. *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); *DeFelice* v. *Philadelphia Board of Education*, 306 F. Supp. 1345 (E.D.Pa. 1969).

(c) The present case provides a timely opportunity for this Court to reassess developments in the law of equal protection and nondiscrimination as they affect the related problems of professional school admissions and employment. While a decision of this Court regarding the admissions policies of state educational institutions under the equal protection clause of the Fourteenth Amendment would not be controlling in subsequent cases involving Federal equal employment opportunity laws, it will of necessity be given considerable weight. That is, both courts and administrative agencies would follow the logic of a constitutional decision here, as the precedents in equal protection and discrimination cases have largely merged. Therefore, a decision in this case as to whether, and if so to what extent, race may be taken into account in selecting among applicants for professional schools will substantially control the answers to similar issues involving employment itself. Moreover, any attempt to limit such an effect by confining the Court's opinion to the facts of this case might well produce inconsistent lower court decisions in this troublesome constitutional area where the basic rights of minority and nonminority individuals must be reconciled.

4. In light of the substantial impact on American employers which the Court's decision in this case inevitably will have, and the complexity of the issues involved, the Chamber urges the Court to grant this Motion, not-

withstanding the delay incurred in the preparation of the brief amicus curiae. In addition, the grant of this motion will not result in any delay in the Court's consideration of the case, in that the brief contemplated by the motion will be filed in advance of the time in which Respondents' brief is required to be filed.

Wherefore, it is respectfully submitted that this Court should grant leave for the filing of the attached brief by the Chamber of Commerce of the United States of America, as amicus curiae, in this case.

Dated this 1st day of February, 1974.

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On Writ of Certiorari to the Supreme Court of the State of Washington

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in civil rights cases which focused on significant labor relations issues. *E.g.*, *Geduldig* v. *Aiello*, S.Ct. Docket No. 73-640, *cert. granted*, —— U.S. —— (1973); *Alexander* v. *Gardner-Denver Co.*, S.Ct. Docket No. 72-5847, *cert. granted*, 410 U.S. 925 (1973); *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Dewey* v. *Reynolds Metal Co.*, 402 U.S. 689 (1971); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

INTRODUCTION

A constitutional decision in the instant case will have far-reaching effect on American industry. Accordingly, the Chamber respectfully presents its views on the constitutional impact of a decision here on the employer-employee relationship. Whether state supported institutions of higher education may give special consideration to minority applicants in order to achieve a more representative student body will necessarily bear on employers'

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[1] A motion for leave to file this brief amicus curiae has been made to the Court pursuant to Supreme Court Rule 42(3).

ability or duty to take "affirmative action" to increase their employment of "underrepresented" minorities.[2] This is particularly so in view of the function served by the University of Washington Law School in the process of qualifying persons for employment in the legal profession.

Employers engage in "affirmative action" to make a personal contribution to resolving what is surely one of the nation's most compelling economic and social problems; however, such action may also reflect a prudent response to one or more of the following factors:

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[2] There can be no doubt that the development of equal employment opportunity law under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under Executive Order 11246 has been significantly affected by concepts first enunciated in equal protection cases involving education, voting, or other civil rights. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (citing Gaston County v. United States, 395 U.S. 285 (1969), re educational disadvantage and voting standards); Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (citing Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969), *aff'd*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971), and Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), re the appropriateness of color conscious remedial action in public school employment and in public housing matters); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) (citing Alabama v. United States, 304 F.2d 583 (5th Cir.), *aff'd mem.*, 371 U.S. 37 (1962), re the significance of statistical evidence showing that blacks had not served on juries in areas in which blacks constituted a substantial part of the population); Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (citing Louisiana v. United States, 380 U.S. 145 (1965), and other cases, re facially neutral standards in voting registration as perpetuating past discrimination).

Now that Title VII has been made applicable to the employment practices of state and local governments by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (March 24, 1972), the need for consistency in the principles applicable to public and private employers is even more apparent. *See* Cleveland Bd. of Educ. v. LaFleur, —— U.S. ——, 42 U.S.L.W. 4186, 6 FEP Cases 1253, 1256 n.8 (January 21, 1974).

1. The requirement that Federal contractors commit themselves to "goals and timetables" for increasing their employment of minorities in those job categories in which they are being "underutilized," [3] and the commitments to hire and/or promote minorities according to a prescribed ratio which government agencies insist upon in order to resolve issues of employment discrimination.[4]

2. The burden of disproving discrimination which courts impose when presented with statistics showing a disproportionately low employment of minorities [5] or a disproportionately high rejection rate for such groups.[6]

Employers resisting pressure to be race conscious often face a massive if not insurmountable burden to justify their selection practices if they are seen as barriers to the employment of minorities, even though there is no basis for questioning his good faith.[7] Moreover, a failure to be race-conscious may give rise to litigation in which

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[3] 41 C.F.R. §§ 60-2.10, 2.12. *See also* Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971).

[4] Seligman, *How "Equal Opportunity" Turned into Employment Quotas*, FORTUNE, March 1973, at 160, 161-62.

[5] Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). *Compare* McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 805 n.19 (1973); Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972).

[6] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[7] ". . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) [emphasis in original].

preferential remedies are imposed,[8] and may disqualify an employer from Federal contract work.[9]

Accordingly, many employers have now adopted "affirmative action" programs and are giving special consideration to race and ethnic background in their employment decisions.[10] They are doing so on the advice of counsel that appellate courts have not yet significantly modified governmental demands or lower court orders that have found employment discrimination on the basis of underrepresentation of minority groups, and that require the employment of minorities in a certain ratio to overcome past discrimination.[11]

Employers engaging in affirmative action programs are of course aware—and concerned—that some of their actions may constitute discrimination in reverse, but they are also aware that in the reported judicial and administrative decisions, the majority group worker has to date seldom been upheld when he complains that affirmative action programs have violated his rights to equal opportunity.[12]

The efforts of Federal equal employment opportunity officials to provide guidance have been of limited value.

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[8] ". . . [W]hile quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not." United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408, 413 (2d Cir. 1973).

[9] 41 C.F.R. § 60-2.2; Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Edgely Air Products, Inc., HEW Docket No. CC-1, CCH Empl. Prac. Guide ¶ 2774.20 (March 23, 1971).

[10] Seligman, *supra*, note 5.

[11] *See* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969).

[12] *See* Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); DeFelice v. Philadelphia Bd. of Educ., 306 F.Supp. 1345 (E.D. Pa. 1969).

These have consisted largely of attempts to fashion a semantic distinction between demands for employment preferences founded upon lawful goals and those which are regarded as unlawful quotas. For example, as part of a joint policy statement issued by the Department of Justice, EEOC, the Civil Service Commission, and the Office of Federal Contract Compliance it was explained that:

> Any system which requires that consideration of relative abilities and qualifications be subordinated to considerations of race, religion, sex or national origin in determining who is to be hired, promoted, etc., in order to achieve a certain numerical position has the attributes of a quota system which is deemed to be impermissible. . . .
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> A goal, on the other hand, is a numerical objective, fixed realistically in terms of the number of vacancies expected and the number of qualified applicants available in the relevant job bracket. . . .
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> * * * *
>
> While determinations of relative ability should be made to accord with required merit principles where there has been a history of unlawful discrimination, *an employer should be expected to meet the goals if there is an adequate pool of qualified applicants from the discriminated against group* from which to make the selection, and if the employer does not meet the goal, he has the obligation to justify his failure.[13]

While it is of some comfort to know that federal policy disapproves of efforts to force employers to prefer less

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[13] *Memorandum—Permissible Goals and Timetables in State and Local Government Employment Practices*, March 23, 1973, at 3-5. [Emphasis added.]

The critical issue presented by the emphasized language in this policy statement is its implication that "where there has been a history of unlawful discrimination"—however that is determined—an employer must prefer minimally qualified minority applicants over better qualified non-minority applicants in order to meet his "goals."

qualified applicants in the absence of a "history of unlawful discrimination," this does not provide meaningful assurance that the demands on employers for consideration of race will be restricted to those limited instances when it may be appropriate. Instead, compliance officials often assume past discrimination from the mere underrepresentation of minorities, subject qualification standards to unrealistically heavy challenges, and insist that employers hire and promote minorities in disproportionately large numbers to "catch up" for past deficiencies.[14]

The present case provides a timely opportunity for this Court to reassess developments in the law of equal protection and nondiscrimination as they affect the related problems of professional school admissions and employment. It presents a situation where racial considerations resulted in minority individuals being selected over the Petitioner, who rated higher on the basis of reasonable, and unchallenged, qualification standards. Moreover, while the action taken by the Respondents could not be justified on the basis of admitted past discrimination, it was clearly designed to help remedy the national underrepresentation of minority law students and lawyers.

While a decision of this Court regarding the admissions policies of state educational institutions under the equal protection clause of the Fourteenth Amendment would not be controlling in subsequent cases involving Federal equal employment opportunity laws, it will of

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[14] Malbin, *Employment Report/Agency Differences Persist Over Goals and Timetables in Nondiscrimination Plans,* NATIONAL JOURNAL REPORTS, Sept. 22, 1973, at 1400. This article also indicates that universities have been subject to similar pressures from officials dispensing Federal financial assistance to higher education as to faculty selection and student admission. *See also, Lau* v. *Nichols,* —— U.S. ——, 42 U.S.L.W. 4165 (January 21, 1974), holding that a school district's failure to rectify the English language deficiency of 1,800 students of Chinese ancestry violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.,* as interpreted by the administrative regulations promulgated thereunder, 45 C.F.R. Part 80.

necessity be given considerable weight. That is, both courts and administrative agencies would follow the logic of a constitutional decision here, as the precedents in equal protection and discrimination cases have largely merged.[15] This is exemplified by recent decisions judging the validity of selection standards, where the courts have required public and private employers to provide similar showings of job relatedness to justify the use of tests having a significantly disparate effect on minority applicants.[16] Therefore, a decision in this case as to whether, and if so to what extent, race may be taken into account in selecting among applicants for professional schools will substantially control the answers to similar issues involving employment itself. Moreover, any attempt to limit such an effect by confining the Court's opinion to the facts of this case might well produce inconsistent lower court decisions in this troublesome constitutional area where the basic rights of minority and non-minority individuals must be reconciled.

Accordingly, the Chamber urges that in deciding the claim of Marco DeFunis the Court consider the following issues:

1. May consideration of race in selections among qualified individuals ever be compelled?

2. May voluntary consideration of race in selections among qualified individuals ever be justified?

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[15] *See* note 2, *supra*, and the Preamble to OFCC's Proposed Revision of Sex Discrimination Guidelines, 41 C.F.R. Part 60-20, 38 Fed. Reg. 35336 (Dec. 27, 1973), in which OFCC indicated its recognition of the need for judicial guidance, particularly from this Court, in order to assure a reasonable degree of consistency in the enforcement of the various Federal equal employment opportunity laws.

[16] Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972). It is worth noting that in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 808 n.14 (1973), this Court utilized cases arising under 42 U.S.C. § 1981 in assessing a claim under Title VII.

SUMMARY OF ARGUMENT

I. One should never be required to grant preferential consideration on the basis of race among qualified individuals except as part of a judicially approved remedy for past discrimination. Even in the limited context of a remedial order granting preferences based upon race, such a remedy should be considered appropriate only to the extent that it minimally restricts the opportunities of qualified non-minority applicants.

II. In the absence of a judicially approved remedy for past discrimination, one should not be required to grant preferential consideration to minorities, solely on the basis that they are statistically underrepresented. Nevertheless, so long as discrimination may constitutionally be presumed from the statistical underrepresentation of minorities, one should be able to consider race voluntarily in order to avoid such presumptions. Therefore, in making selections from among applicants whose relative qualifications cannot be differentiated on the basis of justifiable selection standards, it should be permissible to consider race in order to prevent the disproportionately low selection of members of identifiable racial groups.

ARGUMENT

As discussed above, employers and educators are constantly confronted with obligations to increase their workforce utilization of minorities. In some cases, this is the result of direct remedial orders of federal or state courts,[17] or State Fair Employment Practices commissions.[18] In others it is attributable to the efforts of fed-

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[17] *E.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[18] *E.g.*, Bay Shore Fire Dept. v. State Division of Human Rights, —— App. Div. 2d ——, —— N.Y.S. 2d ——, 5 FEP Cases 955 (App. Div. N.Y. 1973).

eral [19] or state [20] agencies regulating those who do business with or receive assistance from the government. Emphasis on increased minority utilization may well reflect self-imposed moral and social commitments and sound business and public relations objectives.[21] Indeed, the great bulk of American industry is moving in the direction of affirmative action voluntarily, and not as the result of compulsion (since most employers are not government contractors and have not been found guilty of past discrimination). What this group needs is guidance as to the constitutional propriety of their affirmative action activities.

In any of these contexts, there are essentially two levels of analysis for determining whether "preferences" are appropriate. The first encompasses those situations where the employer is ordered or "persuaded" [22] into granting a preference to members of identifiable racial groups. The second focuses on preferences which are granted voluntarily in an effort to reduce a current workforce disparity so that an employer will not be faced with judicial presumptions of discrimination or possible government contract ineligibility.[23]

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[19] *E.g.* Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d. Cir.), *cert. denied,* 404 U.S. 854 (1971).

[20] *E.g.,* Associated General Contractors v. Altshuler, —— F.2d ——, 6 FEP Cases 1013 (1st Cir. 1973).

[21] *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1117-18 (1971).

[22] Such persuasion often occurs in the context of EEOC efforts to resolve complaints of discrimination by "informal methods of conference, conciliation and persuasion" under Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), and in attempts to resolve pending litigation with other federal and state enforcement agencies.

[23] An analysis of selection preferences frequently raises questions about the devices used to measure applicant qualifications. However, in the instant case the selection or measurement standards

I. Preferences May Never Be Compelled Among Qualified Applicants on the Basis of Race Except as Part of a Judicially Approved Remedy for Past Discrimination.

Nothing in Federal law—constitutional or statutory—suggests the need or appropriateness of subordinating qualification standards to racial considerations in order to achieve equal opportunity except as part of a carefully devised judicial remedy for past discrimination. Indeed, in the landmark case of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court stated, in construing Title VII of the Civil Rights Act of 1964:

> Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origin. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant.[24]

In *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), for example, the court was faced with a set of facts in which the defendant employed eleven blacks during the relevant three year period, all of whom were assigned to jobs as porters. During the same period, the defendant hired sixty whites, all but three of whom were assigned to jobs of rank above that of porter.[25]

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used to define qualifications were not challenged as to their relevancy to the "employment" in question.

[24] 401 U.S. at 431. It has been held that while the specific restrictions of Section 703(j), 42 U.S.C. § 2000e-2(i), are not applicable to Executive Order 11246, actions under the Executive Order must conform to the prohibitions in Title VII against racial discrimination, however benign the purpose. Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). *See also* cases cited in note 2, *supra*, as to the interaction of equal protection and Title VII precedents.

[25] 451 F.2d at 444.

Nonetheless, the court found the weight of the evidence to indicate that the statistical imbalance did not result from racial discrimination, but rather from a demonstrable intent and practice of hiring the best qualified applicant for each job. The court thus concluded that no violation of Title VII had been proven, and that therefore no remedy was statutorily available:

> Although Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act, it certainly did not desire to melt job qualifications having no racially discriminatory ingredient or controlling pre-Act antecedent. In light of Title VII's legislative history, ascribing such an altruistic yet impractical purpose to that legislative body would surely be erroneous—"reverse discrimination" of the most blatant sort.[26]

Even when the question of preferences for minority applicants arises in the context of equally qualified minority and non-minority applicants,[27] the reminder seems

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[26] 451 F.2d at 445.

[27] A threshold definitional problem concerns the meaning of the term "equally qualified". Increasing attention is being given to the elusiveness of reliable and accurate merit rankings of job applicants, *e.g.*, Note, *Constitutionality of Remedial Minority Preferences in Employment*, 56 MINN. L. REV. 842, 856 (1972), and the consequent relevance and importance of additional subjective elements in the selection of employees from among a group of applicants at least minimally qualified in an objective sense. (But subjective evaluations of minority candidates by non-minority raters are themselves suspect, see Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), even where the employer's intent to provide equal opportunity is recognized.) In addition, while "the number of relevant qualities in which men may differ is so large that in real life employment situations, equality of job applicants is relatively rare," Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. L. REV. 363, 370-71 (1966), differences in test scores frequently may be immaterial because those differentials are so minor as to be indistinguishable from the point of view of predicting job success, or because

applicable that Federal law does not command a preference simply because of minority origin [28]—a result that may be considered to occur if decisions among qualified applicants include race as a controlling factor. However, in making selections employers often face a dilemna. If they continue color-blind hiring among equally qualified applicants and it results in a proportion of minority employees substantially below the percentage of minorities in the particular geographic area, or the ratio of minority applicants, they could be found ineligible for government contracts [29] and some courts would hold that a presumption of discrimination has been created which requires positive rebuttal.[30]

Without exception, the lower courts that have sanctioned mandatory preferences that dictate the admission or employment of minority individuals notwithstanding

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present-day testing techniques have a sufficiently large margin of error to preclude precise predictions. The EEOC Guidelines, 29 C.F.R. § 1607.5(c), for example, permit a 5% margin of error in statistical confidence, a level that itself has been said to be "a desirable goal and not a prerequisite to test validation." United States v. Georgia Power Co., 474 F.2d 906, 915 and n.11 (5th Cir. 1973). Moreover, a numerical ranking of applicants may not be possible due to the particular unquantifiable requirements of a specific job. Accordingly, "equally qualified" as used herein refers to applicants (1) whose objective qualifications are either approximately identical or whose differences have not reliable significance; or (2) whose relative qualifications cannot be adequately demonstrated.

[28] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). This requirement appears to be applicable to Executive Order 11246 as well. *See,* Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, *cert. denied,* 404 U.S. 854 (1971).

[29] 41 C.F.R. § 60-2.2.

[30] *E.g.,* Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972) (demographic disparity); Western Addition Community Organization v. Alioto, 340 F.Supp. 1351, 1352 (N.D. Cal. 1972) (pass rate disparity); Note, *Employment Discrimination: Statistics & Preferences Under Title VII,* 59 VA. L. REV. 463, 467-72 (1973).

better or equally qualified non-minority applicants, have done so on facts decidedly different from those presented in the instant case.[31] The principal distinguishing factor is that in each of those cases, the preference was created as part of a *judicial remedy* for what was found to have been past discrimination. Such a finding may result, for example, out of an overt discriminatory incident or practice,[32] or out of policies which, while not overtly discriminatory, result in total or near total exclusion.[33] In such a case, the courts have ruled that Section 703(j) of the Civil Rights Act of 1964 [34] does not prohibit the creation of a preferential hiring pool to fill a specified percentage of job vacancies that would include all qualified members of the group found to have been the target

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[31] *See, e.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); United States v. Ironworkers Local 86, 433 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Central Motor Lines, Inc., 338 F.Supp. 532 (W.D.N.C. 1971).

[32] *E.g.*, United States v. Central Motor Lines, Inc., 338 F.Supp. 532 (W.D.N.C. 1971).

[33] *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[34] 42 U.S.C. § 2000e-2(j) (1970):

> 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 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 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.

of past discrimination,[35] regardless of whether particular individuals placed in that pool were the subjects of such discrimination.

In such cases the courts have generally provided that the remedial hiring ratios imposed are to be met as long as enough "qualified" minority applicants are available in the labor force. While the decisions do not concede that the orders will require the employment of less qualified applicants—and in some cases suggest the contrary[36] —such a result might be deemed to be sanctioned under most of these orders absent comment from the Court, because they direct that blacks be hired in a proportion substantially in excess of that which the minority population constitutes in the local labor force.[37]

Carter v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972), provides a useful example of the operation of such reasoning. There, the district court found that the total absence of minority persons from the fire department of a large city with a minority population of 6.44% resulted from discriminatory hiring practices and procedures. The remedial plan adopted by the Eighth Circuit, *en banc*, rejected the concept of an absolute preference for qualified minority applicants, which, in the court's view, "would operate as a present infringement on those non-minority group per-

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[35] *E.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Porcelli v. Titus, 431 F.2d 1254 (3rd Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[36] *E.g.*, Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[37] In *Carter*, for example, the "one of every three" hiring ratio is grossly disproportionate to the minority percentage of the work force (6.44%). Similarly, in *United States* v. *Ironworkers Local 86*, 315 F.Supp. 1202, 1247 (D. Wash. 1970), *aff'd*, 433 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971), in an area with a black population of 7 percent, various unions were ordered to "insure a minimum participation by blacks in the building trades' apprenticeship programs of 30 percent of each class, or 7 new apprentices . . . per year, which ever is greater."

sons who are equally or superiorly qualified for the fire fighter's positions." [38] It did, however, permit the use of a ratio whereby "one out of every theree persons hired by the Fire Department would be a minority individual who qualifies until at least 20 minority persons have been so hired." [39] The court's premise was that such relief was both necessary and reasonable "as a method of presently eliminating the effects of *past* racial discriminatory practices and in making meaningful in the immediate future the constitutional guarantees against racial discrimination." [40]

Thus, the Court drew a distinction which the Chamber urges here, that in order to remedy past discrimination a court can require conduct which could not be constitutionally compelled absent judicial approval. As the *en banc* opinion in *Carter* makes clear, however, even by way of fashioning a judicial remedy, an absolute preference for a limited number of minorities was considered improper and the disproportionate preference established was not to remain in effect until minorities became a proportionate part of the employers' work force.[41]

The Chamber recognizes that circumstances sometimes exist in which past discrimination has been so pervasive and in which the validity of current qualification standards as applied to minorities is so much in doubt that the imposition of a remedial order designed to achieve a measure of proportional representation may be the most

[38] 452 F.2d at 330.

[39] 452 F.2d at 331.

[40] 452 F.2d at 331 [Emphasis added].

[41] In *Carter* the ratio is to be removed when the minority participation in the employer's work force reaches approximately 50% of the minority percentage in the local labor force. See also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971) ("The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."); United States v. Household Finance Corp., 4 EPD ¶ 7680 (N.D. Ill. 1972).

appropriate means of eliminating discrimination in the short run. However, even with the limitations adopted by the Eighth Circuit in *Carter*, the effect such a remedy might produce on qualified non-minority persons causes the Chamber to believe that such remedies must be considered at the constitutionally questionable outer edge of permissible action to eradicate past discrimination. Certainly the use of mandatory and disproportionately high preferences should not be permitted in a case which lacks the stark facts of *Carter*, such as where a finding of discriminatory effect results from what amounts to an irrebuttable presumption of discrimination based on the imbalance in the employers' work force in comparison to the demographic breakdown of the population at large.[42] Such a situation would fall rather clearly within, and be prohibited by, the principle that "while quotes merely to obtain racial balance are forbidden, quotas to correct past discriminatory practices are not."[43] Where no specific finding of discrimination has been made, the imposition of a preference in the form of "goals" or quotas, even on government contractors,[44] to correct "underutilization" of minorities would be questionable in the absence of judicial approval; where the facts prove no more

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[42] Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970). *See also* Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). This Court's language in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 805 n.19 (1973), however, indicates a more tempered view of presumptions arising from statistical data, as does the recent decision in *Cleveland Bd. of Educ.* v. *LaFleur*, —— U.S. ——, 41 U.S.L.W. 4186, 6 FEP Cases 1253 (January 21, 1974), in which this Court indicated its disapproval of irrebuttable presumptions. Cf. Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972) (minority work force of 8% in a geographic area with a 25% minority population is within the "zone of reasonableness" and therefore does not create a prima facie case of discrimination).

[43] United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408, 413 (2d Cir. 1973).

[44] As required by 41 C.F.R. § 60-2.

than statistical underutilization such relief represents a constitutionally forbidden quota or preference merely to obtain racial balance.

The Chamber respectfully requests this Court to clarify the circumstances under which a remedy like that in *Carter* may be appropriate to correct past discrimination or to assure future non-discrimination.[45] Moreover, the limits that should be observed in framing such orders also needs elucidation, e.g., at what point does the employment ratio ordered become so disproportionate that its impact on non-minorities become excessive? At what point does minority employment become sufficient to call for removal or restriction of the disproportionate preference?

What the decisions in *Carter* and similar cases fail to acknowledge is that preferential consideration of race for employment purposes is not necessarily supported by the equal protection or Title VII precedents of this Court. Although the Court has approved of consideration being given to race in formulating remedies for discrimination in certain contexts,[46] it is also clear that the cases which have directed such corrective action to be taken *would not deprive any non-minority persons of access to the right or resources in question,* but merely comprised a reorganization of the manner or degree of utilization of the right to be protected—as in rearranging school assignments for students or faculty in formerly segregated school systems.[47]

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[45] Merely finding that the Respondents have engaged in constitutionally forbidden conduct could well result in continued approval of *Carter*-type remedies by courts in circumstances in which they are appropriate.

[46] *See, e.g.*, McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[47] McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

While an analysis of the permissible bounds for preferential *remedial* action would clarify the continuing obligations of educators or employers, the present case represents a clear example of impermissible action. In the case at bar, the Respondents have instituted a preference in favor of minority individuals in the absence of any judicially approved resolution of complaints of past discrimination at the University of Washington Law School. To the contrary, all that can be pointed to in support of the preference is a vague notion of "historical underrepresentation" in the legal profession. Clearly that does not present even an adequate "rational basis" for such affirmative action.[48] Whatever the intention behind such action, the preference of a lesser qualified individual over a better qualified person on the basis of race under these circumstances runs counter to the Fourteenth Amendment.

II. Race May Be Given Limited Consideration In Voluntary Efforts to Improve the Employment Opportunities of Underrepresented Groups.

As indicated above, consideration of race in choosing among qualified applicants should not be compelled in the absence of a prior judicial finding of discrimination.[49] However, employers and others engaged in selecting applicants must be *allowed* to take race into account to the extent necessary to avoid having presumptions of racial discrimination erected against them. Such presumptions of discrimination have been made by courts where mi-

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[48] *See* Cleveland Bd. of Educ. v. LaFleur, —— U.S. ——, 42 U.S. L.W. 4186, 6 FEP Cases 1253 (Jan. 21. 1974).

[49] More specifically, the Chamber submits that the regulations issued under Executive Order 11246 requiring that contractors commit themselves in the absence of findings of discrimination to increasing their employment of minorities in categories when they are underutilized, 41 C.F.R. § 60-2, are inconsistent with the Fifth Amendment obligations of the Federal Government to the extent they limit the employment opportunities of non-minority individuals.

norities were not a substantially proportionate part of the employer's work force when compared to the racial composition of apparently qualified applicants [50] or of the local area.[51] Whether, and to what extent, these presumptions were properly made are some of the questions the Chamber asks this Court to evaluate in considering the instant case.[52]

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[50] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[51] See cases cited note 5, *supra.*

[52] Presumptions of discrimination based on statistical disparities—and the race consciousness they compel—should also be examined by this Court in terms of its declaration in *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225, 236 (1969), that not even public school faculties need be racially balanced. Apparantly Congress had the same view before it adopted the nonpreference provision of Section 703(j). As stated in an interpretative memorandum presented by Senators Clark and Case, the Senate floor managers of Title VII:

> There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, 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. It must be emphasized that discrimination is prohibited as to any individual.
>
> *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 (April 8, 1964) [Emphasis added].

In the Chamber's opinion it should be recognized that to the extent that statistical underutilization creates a presumption of racial discrimination, defensive racial consciousness by employers is inevitable and will at times adversely affect the opportunities of nonminorities. Perhaps the best way to minimize such impact is for the Court to provide further guidance to lower courts in the circumstances under which a disparity is not sufficient to warrant a presumption of discrimination. Cf. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 805 n.19 (1973); Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972); United States v. Chesterfield County School District, —— F.2d ——, 6 FEP Cases 447 (4th Cir. 1973), at n.5.

Clearly, to the extent employers must answer for such disparities and do not have validation for their selection devices which will withstand judicial scrutiny,[53] they must be permitted to take steps to assure that the disparity does not continue in new selections.

In addition, there are a range of other actions which employers or educators should be able to undertake voluntarily to increase the opportunities of minorities. These would include special recruiting activities to generate an increased flow of minority applicants for merit consideration, or the development of training or remedial education programs aimed at increasing the ability of previously disadvantaged persons to compete on an equal basis with other applicants. The key factor which distinguishes these efforts from impermissible hiring or admission preferences is that while these programs would confer a differential benefit on minorities as a class, they would not require selecting lesser or equally qualified minorities on the basis of race, at the expense of competing non-minority applicants. In essence, they would constitute preparation for realistic competition on the basis of job-related qualifications.

What the Chamber urges, then, is that the Court consider the effects that its ruling in this case inevitably will have on subsequent interpretations of the duties and permissible acts of both educational institutions and employers.

In the Chamber's view, the Court should reject the notion that a public institution, or a private employer, can be compelled to give preference to a lesser or equally qualified minority applicant over a non-minority appli-

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[53] *E.g.* United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

cant solely because of their respective races, except where the class of which the minority is a member was the target of an identifiable discriminatory policy or practice, where there has been judicial finding to that effect, and where a short-term preference is necessary to correct the substantial exclusion of that minority group and will not be a bar to non-minority applicants.

It should be impermissible to require an institution or employer to give consideration to race in selecting from qualified applicants where there has been no judicially approved finding of or remedy for discrimination. However, so long as it is constitutionally proper for courts to create a presumption of discrimination from evidence of statistical disparity in the selection of minority applicants, voluntary consideration of race should be permitted to the extent necessary to avoid continued disparities in selections from among those whose relative qualifications cannot be differentiated on the basis of justifiable selection standards. In addition, there must be a range of permissible recruiting and remedial education or training activity which enables educators and employers to take steps to increase the availability and ultimate utilization of qualified minority individuals in schools and jobs.

CONCLUSION

Transposing these considerations to the case before the Court, the Chamber submits that the decision of the Supreme Court of Washington should be reversed. Respondents have voluntarily decided to institute a preference in favor of lesser-qualified individuals where there has been no finding of past discrimination and where indeed the evidence appears to indicate the contrary.[54] Affirmance on these facts would preface a major retreat from fundamental concepts of equal protection, non-discrimination and individual merit.

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[54] Compare, *e.g.*, Defendant's Exhibit 7 (1969-70 minority enrollment at University of Washington Law School was approximately 2.2 percent [8 of 356]); *with* 1970 census figures for the State of Washington (black population of 2.1 percent).