

**In the
Supreme Court of the United States**

October Term, 1997

Board of Education of the Township of Piscataway, *Petitioner*,

v.

Sharon Taxman, *Respondent*.

On Writ of *Certiorari to the United States Court of Appeals for the Third Circuit*

***Brief Amicus Curiae of the ACLU of New Jersey, The National
Employment Lawyers Association, The Rainbow Push Coalition,
Americans United For Affirmative Action, and The People For The
American Way***

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INTEREST OF THE AMICI CURIAE¹

Amici curiae are public interest organizations committed to the preservation of voluntary affirmative efforts to promote diversity in education and employment. Because this case addresses the important question of whether non-remedial affirmative action plans are legal under Title VII, its proper resolution is a matter of vital concern to the amici and their members. A description of the individual amici is contained in the attached Appendix.

STATEMENT OF THE CASE

In May 1989, petitioner Board of Education of the Township of Piscataway (Board) decided to eliminate a position in the Business Education Department of the Piscataway High School. *Taxman v. Piscataway Township Bd. of Educ.*, 91 F.3d 1547, 1551 (3d. Cir. 1996). New Jersey law required the Board first to look to the teacher with the least amount of seniority, but in this case the two most junior teachers, Sharon Taxman and Debra Williams, were hired on the same day and thus had equal seniority. *Ibid.* After considering a host of factors, the Board also determined that the two teachers were equally qualified in every relevant respect. *Ibid.* Rather than flip a coin to break the tie, the Board made a discretionary decision to rely on its affirmative action plan, which provided that "when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended." *Id.* at 1550 (quoting the Board's affirmative action policy). This was the only time since the plan was adopted twenty years ago that it has been applied to a layoff decision. *Id.* at 1575 (Sloviter, J., dissenting).

The Board accordingly retained Williams, who is Black, and laid off Taxman, who is White. At the time of the layoff, Williams was the only Black teacher in the Business Department, but Black teachers were not underrepresented in the Piscataway School District as a whole. *Id.* at 1550-51. The Board justified its decision not as a remedial measure, but on the ground that a diverse faculty provides educational benefits to students. *Id.* at 1551-52.

The United States filed suit under Title VII against the Board, and Taxman intervened, asserting claims under both Title VII and the New Jersey Law Against Discrimination (NJLAD), N.J. Stat. Ann. 10:5-12(a). *Id.* at 1552. The United States District Court for the District of New Jersey found the Board liable under both Title VII and the NJLAD and awarded damages to Taxman; a jury awarded additional damages to Taxman under the NJLAD for emotional distress. *Ibid.*

The court of appeals, sitting en banc, affirmed the district court's judgment in an 8-4 decision. Citing the decisions in *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987), and *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the court held that an affirmative action plan is valid under Title VII only if it has a purpose that mirrors those of the statute and does not unnecessarily trammel the interests of non-minority employees. *Id.* at 1550. The Board's policy failed the first prong of this test, the court held, because it did not have a remedial purpose. *Id.* at 1556-60. The policy failed the second prong because it was, in the court's view, too unstructured, not sufficiently temporary, and because it was applied in a layoff context. *Id.* at 1564-65

SUMMARY OF ARGUMENT

The court of appeals erred in construing Title VII to preclude all voluntary, non-remedial affirmative action plans. The court's broad holding would prohibit any non-remedial consideration of race (or gender) in employment decisions, even when utilized in a manner narrowly tailored to satisfy a compelling interest -- that is, even when constitutional. The court's decision rests on an overly broad reading of *Weber and Johnson*, and

an unduly narrow reading of the purposes of Title VII. Neither Weber nor Johnson established a litmus test for assessing affirmative action plans, and neither indicated that Title VII flatly prohibits all non-remedial affirmative action. Moreover, the courts ruling that even constitutional affirmative action plans are prohibited by Title VII if non-remedial is counter to the views expressed by every member of this Court in Johnson.

Amici submit that a non-remedial affirmative action plan should be upheld pursuant to Title VII if it satisfies one of two tests: (1) the purpose of the plan is consistent with the purposes of Title VII and the plan does not unduly interfere with the rights of non-minority employees; or (2) the plan otherwise satisfies constitutional standards -- e.g., the plan is narrowly tailored to achieve a compelling interest. An affirmative action plan that promotes faculty diversity and is narrowly tailored meets both tests.

Promoting faculty diversity is consistent with the purposes of Title VII. Pursuing a diverse faculty would further one of Congress expressed goals in extending Title VII to schools: to break down "existing misconceptions and stereotypical categorizations" among students, in order to prevent "future patterns of discrimination." S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971). That Title VII permits non-remedial considerations of race to promote faculty diversity and integration is further demonstrated by the Emergency School Aid Act, which was enacted two months after Title VII was extended to schools and which contemplates race-conscious employment decisions designed to protect minority faculty members. Allowing a school board to pursue a diverse faculty is also consistent with Title VII's goal of preserving management prerogatives, which here takes on added importance in light of this Nation's abiding commitment to local control over education.

Promoting faculty diversity is also a compelling interest. There is remarkable consensus among courts, educators, and social scientists that a diverse faculty enhances the educational experience of students. A diverse faculty prepares students for citizenship in a pluralistic society, exposes students to a wider range of ideas and mores, and teaches students to respect and live in harmony with those who are different from themselves. An affirmative action policy that seeks to achieve such compelling educational goals should not be completely barred by Title VII.

The Board's action in this case, finally, was sufficiently tailored to avoid unnecessarily trammeling the rights of non-minority employees. The Board's educationally sound decision to retain the only Black teacher in the Business Department surely enhanced faculty diversity and should not be second-guessed by the judiciary, particularly given this Court's oft-expressed reluctance to interfere with the educational decisions of local school boards. Furthermore, the Board minimized the effect of its affirmative action policy on other employees in a number of ways, including the fact that it considered race only as a "plus" among other factors and only to break a rare tie between two equally qualified candidates.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN CONSTRUING TITLE VII TO PROHIBIT ALL VOLUNTARY, NON-REMEDIAL AFFIRMATIVE ACTION PLANS.

The precise question presented by this case is whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, prohibits a local school board from considering race in deciding which of two equally qualified teachers should be laid off, where the school board has a bona fide belief that students would derive an educational benefit from a more diverse faculty. The court of appeals, in a strikingly broad ruling, did not simply answer this question in the negative. Rather, the court of appeals held that Title VII flatly prohibits any and all voluntary, non-remedial affirmative action plans. *Taxman*, 91 F.3d at 1550. "[A] non-remedial affirmative action plan," the court concluded, "even one with a laudable purpose, cannot pass muster." *Ibid*; see also *id.* at 1563. Under this ruling, a non-remedial affirmative action plan that is perfectly tailored to satisfy the most compelling interest -- and is therefore constitutional -- would nonetheless violate Title VII. As explained below, the courts holding is incorrect as a matter of law.²

Before examining the legal underpinnings of the court's decision, however, it is instructive to "pause to consider the implications" of the court's holding. See *United States v. Lopez*, 514 U.S. 549, ___, 131 L. Ed. 2d 626, 641 (1995). Under the court of appeals reasoning, Title VII would prohibit an affirmative action plan that advanced even the most compelling operational need. For example, a number of courts have upheld, as constitutionally permissible, the non-remedial use of race to achieve a diverse police force, on the ground that diversity among officers can be essential to effective law enforcement, especially against the backdrop of racial unrest or within a racially diverse community. See, e.g., *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981), cert.

denied, 454 U.S. 1145 (1982); *Detroit Police Officers Assn v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981). Under the reasoning of the court of appeals, however, such employment decisions, based on the judgment and expertise of local law enforcement agencies as to how best prevent and solve crimes, would be illegal. Indeed, law enforcement agencies would presumably be barred from considering race even if they were hiring an undercover agent to infiltrate a gang, all of whose members were of the same race. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 314 (1986) (Stevens, J., dissenting).

Prison officials would also be barred from ever using race as a factor in employment decisions, even where it is demonstrated that a more diverse staff is necessary for the success of the institutions mission. As Chief Judge Posner concluded in a recent decision, the consideration of race in hiring a prison employee may, in certain limited circumstances, be justified by a compelling institutional need. *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 949 (1997). The court thus upheld as constitutional the decision of a prison boot camp warden to hire a black lieutenant based on a demonstrable institutional need, supported by expert evidence, for a more diverse security staff. *Id.* at 919-20. If the decision below is sustained, however, this eminently reasonable employment decision would be prohibited by Title VII.

The consequences of the court of appeals ruling, of course, are not limited to employment decisions involving race. The ruling would also bar any and all affirmative attempts to achieve a workforce that is diverse with respect to gender, religion, or national origin, regardless of the institutional or societal importance of a diversified staff. Thus, a relatively new law firm that must lay off one associate, and must choose between two, equally qualified attorneys, with equal seniority, one of whom is a man and the other of whom was the first and only female associate ever hired by the firm, could not consider gender in its decision. See *Taxman*, 91 F.3d at 1577 (Lewis, J., dissenting). Likewise, a nursing school making a tenure decision, which had to choose between equally qualified professors, one of whom was the first male professor in the history of the school, could not consider gender (and the educational benefit of breaking down stereotypical categorizations) in its decision. Cf. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 729-30 (1982) (excluding males from nursing school "tends to perpetuate the stereotyped view of nursing as an exclusively womans job").

In short, "[o]ne could cite countless examples of the significant and ultimately counterproductive effects" of the court of appeals interpretation of Title VII. *Taxman*, 91 F.3d at 1578 (Lewis, J., dissenting). The deleterious consequences of the courts interpretation, in turn, shed some light on its plausibility. Amici submit that Congress did not intend, in either enacting Title VII or in extending it to public institutions and schools, to so intrude upon management prerogatives as to prohibit all voluntary efforts to achieve a diverse workforce, even where a diverse staff would enhance or ensure the attainment of a compelling operational need. The court of appeals decision to the contrary rests upon a misreading of this Courts decisions in *Weber* and *Johnson* and a cramped view of the purposes of Title VII.

A. The Court of Appeals Decision Rests on An Overly Broad Reading of *Weber And Johnson* And An Unduly Restrictive Reading Of Title VII's Purposes.

Title VII, 42 U.S.C. § 2000e-2(a), makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin." In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court established an analytical framework to determine when Title VII has been violated. If a plaintiff can establish a *prima facie* case of discrimination, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for its action. *Id.* at 802. The plaintiff then bears the ultimate burden of proving that the employers proffered reason is a pretext. *Id.* at 804; see also *St. Marys Honor Center v. Hicks*, 509 U.S. 502 (1993).

Like all other Title VII cases, those involving affirmative action plans are analyzed pursuant to the *McDonnell Douglas* framework. See, e.g., *Johnson*, 480 U.S. 616; *Weber*, 443 U.S. 193. The plaintiff must first establish a *prima facie* case of discrimination; if the plaintiff is successful, the employer must "articulate a nondiscriminatory rationale for its decision." *Johnson*, 480 U.S. at 626. In doing so, the employer can rely on "[t]he existence of an affirmative action plan [to] provide[] such a rationale." *Ibid.* It remains the burden of the plaintiff to "prove that the employers justification is pretextual and the plan is invalid." *Ibid.* The Title VII plaintiff, therefore, bears the ultimate burden of establishing the invalidity of an affirmative action plan. *Ibid.*

This Court has twice considered the legality of affirmative action plans under Title VII, and in both cases the Court sustained the programs. *Johnson*, *supra*; *Weber*, *supra*.³ In *Weber*, the Court held that a voluntary

affirmative action plan, adopted by a private employer and a union and designed to remedy the historical exclusion of Blacks from skilled craft positions, did not violate Title VII. The Court upheld the affirmative action plan on the ground that "[t]he purposes of the plan mirror[ed] those" of Title VII, in that both the plan and Title VII sought "to break down old patterns of racial segregation and hierarchy" and to open up employment opportunities traditionally closed to Blacks. *Weber*, 443 U.S. at 208. The plan, the Court continued, also did "not unnecessarily trammel the interests of the white employees." *Ibid*.

The Court in *Weber* also rested its holding, it bears recalling, on the language of the statute. Section 703(j) of Title VII states that nothing in the statute "shall be interpreted to require any employer . . . 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" in order to better balance a workforce. (Emphasis added) This Court reasoned that, particularly in light of the statutes legislative history, the use of the solitary term "require" in § 703(j) revealed an intent not to prohibit voluntary, race-conscious affirmative action. *Weber*, 443 U.S. at 205-06. As the Court persuasively explained, if Congress intended to prohibit all affirmative action, it could easily have indicated in § 703(j) that Title VII would neither require nor permit racially preferential integration efforts. *Id.* at 206-07.

Eight years after *Weber*, in *Johnson*, the Court upheld an affirmative action plan that allowed gender to be considered, among other factors, in promoting employees into jobs in which women were significantly underrepresented. Relying on *Weber*, the Court concluded first that the plan was "justified by the existence of a manifest imbalance that reflected underrepresentation of women in traditionally segregated job categories." *Johnson*, 480 U.S. at 631 (quoting *Weber*, 480 U.S. at 631); see also *id.* at 637. The Court next concluded that the plan did not "unnecessarily trammel [] the rights of male employees or create[] an absolute bar to their advancement." *Id.* at 637-38.

The court of appeals erred by mistaking the rationales utilized in *Weber* and *Johnson* for litmus tests, and by construing the purposes of Title VII too narrowly. The court thus read *Weber* and *Johnson* to require that every affirmative action plan must "mirror" the purposes of Title VII in order to be valid under that statute, and further concluded that Title VII has only two purposes, neither of which would support a non-remedial affirmative action plan. *Taxman*, 91 F.3d at 1550, 1556-57.⁴ The court explicitly rejected the argument that a non-remedial affirmative action plan that is narrowly tailored to satisfy a compelling interest -- and thus is constitutional -- should also be deemed legal under Title VII, even if it cannot be said that the compelling interest served by the plan "mirrors" the purposes of Title VII. The court stated simply that "[w]hile the Supreme Court may indeed at some future date hold that an affirmative action purpose that satisfies the Constitution must necessarily satisfy Title VII, it has yet to do so." *Id.* at 1560.

The courts reasoning is flawed. First, *Weber* and *Johnson* did not purport to create universal tests by which every affirmative action plan under Title VII must be evaluated, nor did either case indicate that Title VII only permits remedial affirmative action plans. On the contrary, the Court in *Weber* explicitly acknowledged that it was not creating a general rule to determine which affirmative action plans are legal under Title VII. "We need not today define in detail," the Court stated, "the line of demarcation between permissible and impermissible affirmative action plans." 443 U.S. at 208. Although the Court in *Johnson*, when faced with another remedial affirmative action plan, understandably applied the criteria from *Weber*, it did not attempt to draw the line left undefined in *Weber*. Indeed, Justice O'Connor criticized the majority in *Johnson* for following an "ill-defined approach to affirmative action by public employers" and giving "insufficient guidance to courts and litigants." 480 U.S. at 648 (O'Connor, J., concurring). Justice Stevens, in turn, emphasized in his concurrence that *Johnson* did "not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups." *Id.* at 642 (Stevens, J., concurring).

Second, and relatedly, the court of appeals refusal to recognize that an affirmative action plan that is constitutional also complies with Title VII is contrary to the views of every Justice in *Johnson*. The majority in *Johnson* indicated that Title VII imposes fewer constraints on affirmative action plans than does the Constitution. 480 U.S. at 628 n.6 ("The fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which that employer must contend was not intended to extend as far as that of the Constitution."). Justice O'Connor, in her concurring opinion, and Justice Scalia, in his dissenting opinion (joined by the Chief Justice and in relevant part by Justice White) disagreed, and argued instead that Title VII and the Constitution impose the same limitations upon affirmative action. See *id.* at 649 (O'Connor, J., concurring); *id.* at 664, 669 (Scalia, J., dissenting). The court of appeals, however, has effectively ruled that Title VII imposes greater limitations upon affirmative action than does the Constitution, as its holding

would bar a non-remedial affirmative action plan that is narrowly tailored to satisfy a compelling interest. This ruling is contrary to the majority, concurring, and dissenting opinions in *Johnson* and must therefore be rejected.

B. A Voluntary, Non-Remedial Affirmative Action Plan Should Be Upheld If It Complies With The Criteria Established In *Weber and Johnson* Or Otherwise Satisfies Constitutional Standards.

The question remains as to the proper analysis that this Court should utilize to assess non-remedial affirmative action plans. *Amici respectfully submit that a non-remedial affirmative action plan should be deemed legal under Title VII if it satisfies either one of two tests. First, drawing from the principles articulated in Weber and Johnson, a plan should be upheld if it is consistent with the purposes of Title VII and does not unduly interfere with the rights of non-minority employees. See Taxman, 91 F.3d at 1550 (citing Weber, 443 U.S. at 208). This, of course, was the test utilized by the court of appeals. Ibid. While amici disagree that this is the only relevant test, and disagree with the courts application of the test in this case, they agree with the court of appeals that an affirmative action plan that satisfies the criteria established by Weber and Johnson must be upheld under Title VII.*

An affirmative action plan should also be upheld if it satisfies constitutional standards -- e.g., if it is narrowly tailored to satisfy a compelling interest. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1988). *That strict scrutiny, or a less exacting standard, should be added to the analytical framework for assessing affirmative action under Title VII flows from this Courts opinion in Johnson. As described above, the majority in Johnson indicated that Title VII imposes fewer restraints on affirmative action than does the Constitution, see 480 U.S. at 627 n. 6, whereas Justice OConnor in her concurrence, see id. at 649, and Justice Scalia in his dissent, see id. at 664-65, suggested that the constitutional and statutory standards are identical (at least with regard to public employers). It follows that an affirmative action plan that survives constitutional scrutiny must therefore satisfy Title VII. To be sure, the majority opinion in Johnson intimates that the statutory standard might not be as rigorous as the constitutional one, id. at 627 n.6, and amici are by no means contending that a non-remedial affirmative action plan must satisfy the Constitution in order to be upheld under Title VII. At the very least, however, a constitutional affirmative action plan should not be struck down under Title VII.*

In addition to flowing logically from *Johnson*, the principle that a constitutional affirmative action plan is legal under Title VII is also consistent with this Courts holding in *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, five Justices agreed that Title VI, 42 U.S.C. § 2000d, which was enacted at the same time as Title VII and prohibits "discrimination" in federally funded programs, only prohibits discrimination in violation of the Fifth and Fourteenth Amendments. See *id.* at 281-87 (Powell, J.); *id.* at 328-55 (Brennan, White, Marshall, and Blackmun, JJ.). Thus, an affirmative action plan that is constitutional would not violate Title VI. Although members of this Court disagreed in *Johnson* as to whether Title VII imposes fewer restrictions on affirmative action than Title VI, see 480 U.S. at 627 n.6 and *id.* at 664-65 (Scalia, J., dissenting), no Justice suggested that Title VII imposes greater restrictions than Title VI, and there appears to be no authority to support such an interpretation.

As the remainder of this Brief demonstrates, an affirmative action plan that promotes faculty diversity and is narrowly tailored satisfies both of the proposed tests. Promoting faculty diversity is consistent with the purposes of Title VII and is also a compelling interest; faculty diversity is therefore a legitimate goal for an affirmative action policy. The Boards specific policy should be upheld in this case, in turn, because it was sufficiently tailored to promote faculty diversity without unduly trammeling the rights of non-minority employees.

II. PROMOTING FACULTY DIVERSITY TO IMPROVE THE EDUCATION PROVIDED TO STUDENTS IS CONSISTENT WITH THE PURPOSES OF TITLE VII.

The court of appeals concluded that Title VII had only two purposes. The first was "to end discrimination on the basis of race, color, religion, sex or national origin," and the second was "to remedy the segregation and underrepresentation of minorities that discrimination has caused in our Nations work force." 91 F.3d at 1557. From this brief examination of two of Title VIIs undeniable purposes, the court was "convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute." *Ibid.* *This conclusion, based on a cramped reading of Title VIIs purposes, is incorrect.*

A. Promoting Faculty Diversity Is Consistent With Title VII's Purpose Of Preventing Future Discrimination By Combating "Misconceptions And Stereotypical Categorizations."

The legislative history of the 1972 amendments to Title VII, which extended Title VII to state employers and to public and private schools, reveals a legislative purpose consistent with the affirmative action plan in this case. That history indicates that Congress was concerned not only with the effects of discrimination upon potential employees, but also with the effect that the exclusion of minorities from public positions has upon the communities served by public institutions, and upon the ability of those institutions to operate effectively.

For example, Congress explained that Title VII should be extended to local law enforcement agencies because the exclusion of minorities from police forces "not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government." S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971). Simply eliminating discrimination against minority recruits would not necessarily cure this problem, as it stems from the very absence of minority police officers, not the cause of that absence. A non-remedial affirmative action plan, by contrast, which diversified the police force, would directly alleviate the "mistrust" and "alienation" caused by a racially homogenous force, and thus would be consistent with an expressed goal of Title VII. Cf. *Talbert*, 648 F.2d at 931-32; *Detroit Police Officers Assn*, 608 F.2d at 695-96.

In a similar vein, Congress indicated its concern with the impact that excluding minorities from school faculties has upon the education provided to students. Thus, in explaining the need to extend Title VII to schools, Congress acknowledged the importance of combating stereotypes and misconceptions among students in order to prevent future discrimination:

It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.

S. Rep. 415, 92d Cong., 1st Sess. 12 (1971).

An affirmative action plan that seeks a diverse faculty would directly address Congress concern that schools combat misconceptions and stereotypical categorizations based on race or gender. Consider, for example, a school that took gender into account in choosing a qualified woman to teach vocational courses such as carpentry and auto repair, or in choosing a qualified man to teach secretarial skills. Surely such a school, and such a faculty, would help to break down "existing misconceptions and stereotypical categorizations" and would thereby help prevent "future patterns of discrimination." *Ibid.* *A racially and ethnically diverse faculty would accomplish the same goal. An affirmative action plan that promotes faculty diversity, accordingly, is consistent with one of the expressed purposes of Title VII. See, e.g., Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 910 (3d Cir. 1984), cert. denied, 469 U.S. 1107 (1985) (concluding that the legislative history of the 1972 amendments to Title VII "shows special concern for improving the education of students through diversified staff"); *Vaughns v. Board of Educ. of Prince Georges County*, 742 F. Supp. 1275, 1307 (D. Md. 1990) (holding that "the goal of providing to school children a . . . diverse learning environment is clearly a legitimate one under Title VII. Congress, in enacting Title VII, hardly intended that such a purpose could be illegitimate."), affd, 977 F.2d 574 (4th Cir. 1992), cert. denied, 506 U.S. 1051 (1993).

That Title VII was not intended to prohibit all non-remedial affirmative action with regard to faculty is also indicated by the fact that, in the same year that Congress extended Title VII to schools, it also enacted the Emergency School Aid Act ("ESAA" or "Act"), 20 U.S.C. §§ 3191-3207 (Supp. V. 1981) (repealed 1982). See, e.g., *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (reference to other statutes as interpretive aides "makes the most sense when the statutes were enacted by the same legislative body at the same time"). A primary purpose of ESAA was "to encourage the voluntary elimination, reduction or prevention of minority group isolation" in public schools. *Board of Educ. v. Harris*, 444 U.S. 130, 132-33 (1979) (quoting ESAA); see also *Kromnick*, 739 F.2d at 910.

Section 706(a)(ii) of ESAA provided that school districts were eligible for federal funds if they voluntarily sought "to eliminate or reduce minority group isolation," regardless of whether that isolation occurred from de facto or de jure segregation. See *Harris*, 444 U.S. at 132. Section 706(d)(1)(B) of the Act, in turn, rendered school districts ineligible for funds if in the process of seeking to reduce minority group isolation, they had in

effect a policy, procedure or practice which resulted "in the disproportionate demotion or dismissal of . . . personnel from minority groups." This condition was not linked to any history of discrimination on the part of the schools involved in ESAA programs. Under the terms of ESAA, therefore, a school district that had never discriminated against minority teachers, nor had such a deficit of minority teachers as to create a manifest imbalance, would nonetheless be ineligible for funds if a racially neutral policy resulted in the disproportionate dismissal of minority teachers. See Harris, 444 U.S. at 147-48 (observing that ESAs "ineligibility rules . . . focus on actualities, not on history, on consequences, not on intent" (emphasis added)).

The court of appeals interpretation of Title VII should be rejected because it renders Title VII and ESAA inconsistent: whereas ESAA would require a race-conscious layoff policy if necessary to avoid a disparate impact on minority teachers, Title VII would prohibit such a policy, at least in the absence of prior discrimination or a manifest imbalance among employees. Given that ESAA and the Title VII amendments were passed two months apart by the same Congress, and that there is no indication that Congress meant in enacting ESAA to repeal by implication that portion of the Title VII amendments relating to schools, this Court must construe the statutes "to be in harmony if reasonably possible." See 2B N. Singer, *Sutherland on Statutes and Statutory Construction* § 51.02, at 122 (5th ed. 1992); see also *Watt v. Alaska*, 451 U.S. 259, 266-267 (1981). *The most sensible way to reconcile the two statutes is to reject the court of appeals interpretation of Title VII and acknowledge that Title VII does not prohibit all non-remedial voluntary efforts to promote a well-integrated and diverse faculty.*

B. Allowing School Boards The Discretion To Assemble A Diverse Faculty Is Consistent With Title VII's Purpose Of Preserving Management Prerogatives.

Allowing a local school board affirmatively to pursue a diverse faculty in order to improve the quality of education provided to its students is also consistent with another purpose of Title VII: to ensure that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." *Weber*, 443 U.S. at 206 (quoting H.R. Rep. 914, 88th Cong., 1st Sess. 29 (1963)). *This concern is especially strong in the education context, in light of this nations deep and abiding commitment to local control in this area.*

"No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 723 (1974) ("*Milliken I*"). *The importance of preserving state and local control over education against either judicial or congressional encroachment, provided that such control is exercised constitutionally, is a consistent theme that courses through this Courts varied opinions regarding public schools. See, e.g., Lopez*, 514 U.S. at ____, 131 L. Ed. 2d at 641 (education is an area "where States have historically been sovereign,"); *id.* at 653 (Kennedy, J. concurring) (education is an area "to which States lay claim by right of history and expertise"); *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995); *id.* at 113 (O'Connor, J. concurring) (citing *Lopez*); *Hazelwood School Dist. v. Kuhlmeir*, 484 U.S. 260, 273 (1988); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n. 9 (1985); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).⁵

Significantly, in acknowledging the broad power of local school authorities, this Court has recognized that local school boards possess the authority to adopt voluntary steps to improve the racial balance of schools:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities.*

Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 16 (1971) ("*Swann I*") (emphasis added); see also *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("*Swann II*") (reaffirming that school boards have sufficient authority to "conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements"). *This Court has thus consistently endorsed voluntary measures by school districts to improve the racial balance among their students, see, e.g., McDaniel v. Barresi*, 402 U.S. 39, 41-42 (1971), and struck down measures that would limit a school districts power to implement race-conscious remedies, see, e.g., *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); *Swann II*, 402 U.S. at 45.

As a matter of education policy, seeking a diverse faculty is surely as legitimate a goal as seeking a racially balanced student body. "In the context of public education, it is quite obvious that a school board may

reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white faculty." *Wygant*, 476 U.S. at 315 (Stevens, J., dissenting). Indeed, as explained below, promoting a diverse faculty is a compelling state and institutional interest. There is no evidence that Congress, in extending Title VII to schools in 1972, meant to intrude upon the discretion of local school boards to pursue this unquestionably legitimate educational policy. See *Taxman*, 91 F.3d at 1577 (Scirica J., dissenting).

When this Nation's strong commitment to local control over education is considered together with Congress' expressed concern that Title VII help break down "existing misconceptions and stereotypical categorizations," it becomes implausible to conclude that Congress intended Title VII to restrict local school boards from pursuing an education policy designed to eliminate misconceptions and stereotypes based on race or gender. That implausibility is amplified when one considers that the same Congress that extended Title VII to schools also enacted ESAA which, as described above, implicitly encouraged race-conscious employment practices among schools seeking to integrate their student bodies. The court of appeals was therefore incorrect in holding that an affirmative action policy intended to achieve a diverse faculty is inconsistent with the purposes of Title VII. See *Taxman*, 91 F.2d at 1563.

III. PROMOTING FACULTY DIVERSITY IS A COMPELLING STATE INTEREST.

A. A Diverse Faculty Enhances The Education Provided To Students.

The majority and dissent in *Taxman* agreed upon one issue: the importance and value of diversity in an educational setting. See 91 F.3d at 1561 (stating that "the benefits flowing from diversity in the educational setting are significant indeed"); *id.* at 1572-74 (Sloviter C.J., dissenting) (discussing cases from this Court and others that champion the educational benefits of a diverse school); *id.* at 1576-77 (Scirica, J., dissenting) (reaffirming wisdom of *Bakke*'s recognition of the value of diversity to the educational process); *id.* at 1577 (Lewis, J., dissenting) (noting that we should be mindful of the thoughtful "efforts which, in seeking to achieve pluralism and diversity, have helped define and enrich our offices and institutions"). The consensus among these various opinions for the court of appeals is not surprising, as it can scarcely be doubted that a school that is diverse, in its student body and its faculty, creates an environment which is not only conducive to learning but is itself educational.

This Court recognized over forty years ago in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), that education is a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." Attending a school with a diverse student body and faculty helps accomplish these compelling goals by preparing children "for citizenship in our pluralistic society." *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., dissenting); see also *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) ("it is not too much to say that the Nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples" (internal quotation omitted)). As Justice Powell stated nearly twenty years ago: "It is essential that the diverse peoples of our country learn to live in harmony and mutual respect. This end is furthered when young people attend schools with diverse student bodies." *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 485 n. 5 (1979) (Powell, J., dissenting); see also *Seattle School District No. 1*, 458 U.S. 457 (same); *Booker v. Board of Educ. of City of Plainfield*, 45 N.J. 161, 170 (1965) (same).

These same essential ends are also furthered when young people attend schools with a diverse faculty:

For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine ongoing learning process.

Wygant, 476 U.S. at 315 (Stevens, J. dissenting); see also *id.* at 288 & n. * (O'Connor, J., concurring); *Penick*, 443 U.S. at 461; *Zaslowsky v. Board of Educ. of Los Angeles City*, 610 F.2d 661, 664 (9th Cir. 1980) (noting that enhancing "the educational opportunities available to the students by achieving better racial balance in the teaching faculty throughout the district . . . is an educational objective which has been well recognized and approved by the Supreme Court").

Evidence from educators and social scientists confirms the views expressed by members of this Court: a diverse faculty enhances the education provided to students. See generally the discussion and sources cited in Brief of *Amici Curiae American Council on Education, et al., Parts I-II*. Indeed, educators have explained that the presence of a diverse teaching faculty is key to the excellence of an educational institution. See, e.g., Yolanda T. Moses, *Quality, Excellence, and Diversity*, in Daryl G. Smith, et al., (eds.), *Studying Diversity in Higher Education 15* (1994). Research documents that a diverse teaching faculty tends to broaden the range of what is taught and how it is taught; provides support for students from diverse backgrounds; and helps enhance student academic achievement. *Ibid*; see also Sylvia Hurtado, *Linking Diversity and Educational Purpose: How the Diversity of the Faculty and Student Body May Impact the Classroom Environment and Student Development 6-8* (paper presented at Harv. Univ. Civ. Rights Proj. Conf. on Diversity and Higher Ed., May 9, 1997); V. Wendell Hylton, Ed.D. and Elaine P. Witty, Ed.D., *Improving Academic Achievement of Minority Students*, in *The Virginia Principal* (September 1991). Considered together, the views expressed by the court of appeals, members of this Court, educators, and social scientists form an impressive consensus that a diverse faculty offers significant educational benefits.

B. Promoting Faculty Diversity Constitutes One Of The Exceptional Instances Where The Consideration Of Race Or Gender Is Legitimate.

Although this Court has on a number of occasions extolled the educational value of diversity, it has never had the opportunity to determine whether the promotion of faculty diversity is a compelling state interest. The Court came closest to addressing the issue in *Wygant*, which struck down an affirmative action plan that gave preferential protection against layoffs to minority teachers on the ground that the proffered justification for the plan -- protecting role models for minority students -- was not sufficiently compelling. 476 U.S. at 274-76 (Powell, J., joined by Burger, C.J., Rehnquist, J., and O'Connor, J.); *id.* at 288 (O'Connor, J., concurring); *id.* at 295 (White, J., concurring).⁶ Even though the plurality opinion in *Wygant* did not mention faculty diversity, Justice O'Connor in her concurrence was careful to point out that "the goal of providing role models discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty." *Id.* at 288 n.*. Because the latter had not been offered in support of the layoff plan, Justice O'Connor found it unnecessary "to discuss the magnitude of that interest or its applicability in this case." *Ibid.*

Justice O'Connor did observe, however, that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently compelling, at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Ibid.* (citing, *inter alia*, Justice Powell's opinion in *Bakke*, 438 U.S. at 311-315). The four dissenting Justices, in turn, would have upheld the layoff plan on the ground that it promoted faculty diversity. See *id.* at 286 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.); *id.* at 315 (Stevens, J., dissenting). As Chief Justice Souter concluded below, it thus appears that "five justices in *Wygant* . . . approved in general terms the concept that the educational benefit derived from diversity in the classroom can constitute an acceptable justification for affirmative action." *Taxman*, 91 F.3d at 1573.

Despite this general endorsement of the educational value of diversity, whether faculty diversity is a compelling state interest remains an open question. And candor compels recognition of the fact that "[m]odern equal protection doctrine" has thus far only recognized one compelling interest that would justify affirmative action: "remedying the effects of racial discrimination." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting). It does not follow, however, that remedying prior discrimination is the only possible compelling justification for an affirmative action plan. See, e.g., *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring); *Wittmer*, 87 F.3d at 919 (Posner, C.J.). As Justice O'Connor was careful to explain for the Court in *Adarand*, moreover, the point of using strict scrutiny to assess affirmative action is not to strike down all affirmative action plans, but rather "to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." 515 U.S. at 228; see also *id.* at 237 ("we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact" (internal quotation omitted)).

Amici submit that promoting faculty diversity is, like promoting diversity among a police force, one of the exceptional circumstances where race (or gender) may be used legitimately in employment decisions. See *Metro Broadcasting*, 497 U.S. at 601-02 (Stevens, J., dissenting). The use of race or gender in this setting is legitimate because, as described above, a diverse faculty can greatly enhance the education provided to students. A diverse faculty exposes students to "ideas and mores" as varied as "this Nation of many peoples," *Bakke*, 438 U.S. at 312 (opinion of Powell, J.); it helps break down stereotypes based on race or gender; and it helps

prepare students, through firsthand experience, "for citizenship in our pluralistic society." *Estes*, 444 U.S. at 451 (Powell, J., dissenting). Title VII should not operate as an absolute bar to the pursuit by local school authorities of such compelling educational goals, and the court of appeals ruling to the contrary should therefore be rejected.

IV. THE SCHOOL BOARDS POLICY WAS SUFFICIENTLY TAILORED TO AVOID UNDUE INTERFERENCE WITH THE RIGHTS OF NON-MINORITY EMPLOYEES.

That the goal of promoting a diverse faculty is legitimate under Title VII does not end the inquiry. The question remaining is whether the Boards particular action in this case should be sustained. The court of appeals concluded that, regardless of the validity of the Boards goal, its policy was deficient because it unnecessarily trammelled non-minority interests. *Taxman*, 91 F.3d at 1564 (citing *Weber*, 443 U.S. at 208).² *The policy failed in three respects, according to the court. First, it did not sufficiently define the degree of racial diversity sought among the faculty at Piscataway High School. Ibid. Second, it lacked a timetable and thus did not appear to be a temporary measure. Ibid. And third, it was applied in the context of a layoff, which the court concluded necessarily imposes too severe a burden to justify even the most laudable affirmative action plan. Ibid.*

The courts criticisms of the Boards policy miss their mark. First, the failure of the Board to specify a diversity target should not render its policy invalid. The degree of faculty diversity that provides the best educational environment, as Chief Judge Sloviter explained, is "essentially an educational decision." *Id.* at 1575. *In this instance, the Board concluded that it would be better for the educational environment at Piscataway High School if the Business Department did not consist entirely of White teachers. Respondent should have the opportunity on remand, as do all Title VII plaintiffs, to prove that this justification is simply a pretext. See Johnson*, 480 U.S. at 626. *But this Court, especially in light of its repeated reluctance to interfere with the local control of schools, see supra Part II B, should not second-guess this facially sound educational judgment.*

The fact that the Board focused on the Business Department rather than the entire school, moreover, is consistent with *Johnson*. *In Johnson*, this Court explained that the relevant comparison, for assessing the need for an affirmative action plan, is between employees in a particular job within a company and those in the labor force who are trained to do that particular job. 480 U.S. at 631-32. *It is consistent with that approach to focus on the Business Department, in light of the fact that high school teachers -- including Williams and Taxman -- are usually certified to teach in specific subject areas or particular departments. Resp. Br. in Opp. 2. It also makes sense to focus on particular departments, such as a business department, when the point of promoting a diverse faculty is to break down stereotypical assumptions about the abilities or proclivities of persons of a particular race or gender.*

Second, the lack of a specified end date for the policy does not mean, as the court of appeals concluded, that the policy "is an established fixture of unlimited duration." *Taxman*, 91 F.3d at 1564. *Quite the contrary: the policy was only applied once since its adoption twenty years ago, and it has since been revised. Resp. Br. in Opp. 6. The plan approved by this Court in Johnson, moreover, also lacked an "explicit end date." Johnson*, 480 U.S. at 639. *This Court nonetheless upheld the plan in part because it took a "flexible, case-by-case approach," which "merely authorize[d] that consideration be given to affirmative action concerns when evaluating qualified applicants." Id.* at 638. *In this sense, the Court noted, the affirmative action plan resembled the "Harvard Plan," described approvingly in Justice Powells opinion in Bakke*, 438 U.S. at 316-319, which considered race along with other criteria in determining admissions to the college. *The Boards approach in this case was similar: race was merely one of a number of factors considered by the Board in determining which of two equally qualified candidates should be laid off, and was only utilized in this rare circumstance where necessary to break an otherwise complete tie among the candidates. Cf. Johnson*, 480 U.S. at 656 (O'Connor, J. concurring) (noting with approval, as did the majority opinion, that petitioners "sex was simply used as a plus factor" in the contested hiring decision).

Finally, the court of appeals again went too far in holding that no affirmative action plan can be used in the context of a layoff. See *Taxman*, 91 F.3d at 1564. *It is generally true that a layoff imposes a more concentrated and severe burden on the affected employee than do other employment decisions, such as the refusal to hire or the denial of a promotion. But this Court has never held that the use of layoffs to accomplish affirmative action goals is always forbidden, see Wygant*, 476 U.S. at 293 (O'Connor, J., concurring), and this case demonstrates the wisdom of such restraint. *Here, had the Board not relied on its affirmative action policy, it would have flipped a coin to decide which of the candidates to lay off; Taxman thus had only a fifty-percent chance of*

retaining her job. It cannot be said, therefore, that the plan interfered with Taxmans "legitimate firmly rooted expectation" to remain employed. See Johnson, 480 U.S. at 638.

When all aspects of the Boards policy are considered together, it becomes clear that the Board sought in numerous ways to "minimize the effect of [its policy] on other employees." *Johnson, 480 U.S. at 640. The policy could not be applied to lay off a teacher with more seniority and thus applied only in the very rare circumstance where a decision had to be made between two teachers with exactly the same seniority. Taxman, 81 F.3d at 1551. Even when it could be applied, it remained within the Boards discretion to rely or not rely on the policy to make a decision; here, the Board relied on it only after determining that -- as will rarely occur -- its two candidates were equally qualified in every respect. The policy, finally, was applied to layoffs on one occasion in twenty years. Id. at 1551-52. It is hard to conceive of a less intrusive affirmative action policy.*

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

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APPENDIX

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of New Jersey is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. *In particular, the ACLU has participated in many cases involving affirmative action and in many involving Title VII of the Civil Rights Act of 1964.*

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 2,000 lawyers who litigate and counsel individuals, employees, and applicants in labor, employment and civil rights disputes. NELA has appeared before this Court as *amicus curiae* in a number of cases, including several involving Title VII. *The Rainbow PUSH Coalition, founded and headed by Rev. Jesse L. Jackson, Sr., is a diverse and multicultural coalition that advocates in favor of a wide range of progressive public policy issues, including affirmative action in education.*

Americans United for Affirmative Action is a national, non-profit organization, founded by Martin Luther King III, whose growing membership is committed to educating the public on the importance of maintaining affirmative action programs and the principles of equal opportunity in employment, contracting, and education. People for the American Way (People For) is a non-partisan, education-oriented citizens organization established to promote and protect civil and constitutional rights. Founded in 1980, People For has over 300,000

NOTES

1 Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, *its members*, or *its counsel* made a monetary contribution to the preparation or submission of this brief.

2 The court of appeals approached this case as presenting the broad question of whether a non-remedial affirmative action plan is ever lawful under Title VII. As Chief Judge Sloviter argued in dissent, it is highly questionable whether the case actually presents this question, or "is even about affirmative action at all," for at least two reasons. *Taxman*, 91 F.3d at 1567 (Sloviter, C.J., dissenting). First, the case does not involve a situation where a preference was granted to an applicant deemed somewhat "less qualified" over someone deemed "more qualified," but rather involves two teachers deemed equally qualified in every relevant respect. *Ibid.* Second, although the affirmative action plan was referenced by the Board in making its decision to retain Williams instead of Taxman, this was the first and only time in twenty years that the plan was relied upon in a layoff situation; the Board itself indicated that it was not at all bound to rely on the plan; and the district court found that there was no likelihood "that the conduct at issue would recur." *Id.* at 1575. Amici curiae accordingly believe that it would not be inappropriate to dismiss the writ of certiorari as improvidently granted and to await a case involving an employer with more commitment to an actual affirmative action plan. Dismissing the writ might also be appropriate in light of the fact that the NJLAD ruling, which supports all of the damages awarded in this case, see *Pet. App. 85a*, is not before this Court and arguably constitutes an independent and adequate state ground for the judgment. See *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 291-95 (1982). Amici will assume for purposes of this Brief, however, that the writ will not be dismissed and that the Court will address the broad question of whether any non-remedial affirmative action plan is legal under Title VII.

3 It perhaps goes without saying that the validity of neither Johnson nor Weber is at issue in this case. Neither party in the case has requested that those precedents be reconsidered. Stare decisis concerns, moreover, which are always stronger in statutory cases than constitutional ones, see, e.g., *California v. F.E.R.C.*, 495 U.S. 490, 499 (1990); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989), counsel strongly against revisiting those precedents, as does an interest in the stability of a rule of law that has been relied upon for the nearly twenty years since Weber was first decided, see *Planned Parenthood v. Casey*, 505 U.S. 833, 854-61 (1992); see also *Johnson*, 480 U.S. at 648 (O'Connor, J., concurring) (arguing against the reconsideration of Weber). Finally, Congress' failure to amend Title VII in light of either Weber or Johnson is undeniably significant in light of Congress' obvious and continued willingness to amend the statute when it disagrees with this Court's interpretive rulings. See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 244, 250-51 (1994) (listing the Court decisions, including several interpreting Title VII, to which the Civil Rights Act of 1991 responded); *Johnson*, 480 U.S. at 629 n.7.

4 The court's narrow interpretation of Title VII's purposes is discussed *infra*, at Section II.

5 Congress itself has also acknowledged the primacy of local and state authorities over education and has acted to limit its own authority in this area. See, e.g., 20 U.S.C. § 1232a (providing that no federal educational program shall be construed to authorize "any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution"); 29 U.S.C. § 1572 (containing similar prohibition with regard to federal labor projects).

6 Justice Powell's opinion in *Bakke*, 438 U.S. at 312-315, also addressed the importance of diversity in an educational setting. Justice Powell concluded that "the interest of diversity is compelling in the context of a university's admissions program," based on the value of diversity to the educational process and the university's First Amendment right of academic freedom. *Id.* at 312-14. Amici believe that Justice Powell's observations regarding the educational value promoted by a diverse student body apply with equal force to a diverse faculty, but they recognize that the context of a university's admissions program is quite different from the context of a high school faculty. Cf. *Taxman*, 91 F.3d at 1562. Thus, while *Bakke* is generally instructive and supportive of the use of race to achieve diversity in an educational setting, it is important to emphasize that the validity of Justice Powell's conclusions in *Bakke* are not at issue in this case. The continued validity of using race, gender,

ethnicity or religion in university admissions is a distinct "issue of great national importance," Texas v. Hopwood, 116 S. Ct. 2581 (1996) (Ginsburg, J., op. respecting denial of cert.), which should first be subject to thorough briefing by the parties and review by the lower courts.

7. The court only addressed whether the plan "unnecessarily trammel[ed]" the interests of non-minority employees and did not assess whether it was narrowly tailored. However, as the court's reliance on *Wygant, an equal protection case, demonstrates, the two inquiries are substantially the same, and amici will treat them as such for purposes of this Brief. See Taxman, 51 F.3d at 1564; see also Wygant, 476 U.S. at 287 (O'Connor, J. concurring) (observing that the entire Court agreed that an affirmative action plan satisfies the Constitution if it, inter alia, does "not impose disproportionate harm, or unnecessarily trammel the rights, of innocent individuals")*.

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995)

Board of Educ. v. Harris,
444 U.S. 130 (1979)

Booker v. Board of Educ. of City of Plainfield,
45 N.J. 161 (1965)

Brown v. Board of Education,
347 U.S. 483 (1954)

California v. F.E.R.C.,
495 U.S. 490 (1990)

City of Mesquite v. Aladdin's Castle,
455 U.S. 283 (1982)

Columbus Bd. of Educ. v. Penick,
443 U.S. 449 (1979)

Detroit Police Officers' Ass'n v. Young,
608 F.2d 671 (6th Cir. 1979), *cert. denied,*
452 U.S. 938 (1981)

Erlenbaugh v. United States,
409 U.S. 239 (1972)

Estes v. Metropolitan Branches of Dallas NAACP,
444 U.S. 437 (1980)

Hazelwood School Dist. v. Kuhlmeir,
484 U.S. 260 (1988)

Johnson v. Transp. Agency, Santa Clara County,
480 U.S. 616 (1987) *passim*

Kromnick v. School Dist. of Philadelphia,
739 F.2d 894 (3d Cir. 1984), *cert. denied,*
469 U.S. 1107 (1985)

Landgraf v. USI Film Products,
511 U.S. 244 (1994)

McDaniel v. Barresi,
402 U.S. 39 (1971)

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973)

Metro Broadcasting, Inc. v. FCC
497 U.S. 547 (1990)

Milliken v. Bradley,
418 U.S. 717 (1974)

Mississippi University for Women v. Hogan,
458 U.S. 718 (1982)

Missouri v. Jenkins,
515 U.S. 70 (1995)

New Jersey v. T.L.O.,
469 U.S. 325 (1985)

North Carolina State Bd. of Educ. v. Swann,
402 U.S. 43 (1971)

Patterson v. McLean Credit Union,
491 U.S. 164 (1989)

Planned Parenthood v. Casey,
505 U.S. 833 (1992)

Regents of Univ. of California v. Bakke,
438 U.S. 265 (1978) *passim*

Richmond v. J.A. Croson Co.,
488 U.S. 469 (1988)

San Antonio Indep. School Dist. v. Rodriguez,
411 U.S. 1 (1973) 19 St.

Mary's Honor Center v. Hicks,
509 U.S. 502 (1993)

Swann v. Charlotte-Mecklenberg Bd. of Educ.,
402 U.S. 1 (1971)

Talbert v. City of Richmond,
648 F.2d 925 (4th Cir. 1981), *cert. denied*,
454 U.S. 1145 (1982)

Taxman v. Piscataway Township Bd. of Educ.,
91 F.3d 1547 (3d. Cir. 1996) *passim*

Texas v. Hopwood,
116 S.Ct. 2581 (1996)

United States v. Lopez,
514 U.S. 549, ___, 131 L.Ed 626 (1995)

United Steelworkers v. Weber,
443 U.S. 193 (1979) *passim*

Vaughns v. Board of Educ. of Prince George's County,
742 F. Supp. 1275 (D. Md. 1990), *aff'd*,
997 F.2d 574 (4th Cir. 1992), *cert. denied*,
506 U.S. 1051 (1993)

Washington v. Seattle School Dist. No. 1,
458 U.S. 457 (1982)

Watt v. Alaska,
451 U.S. 259 (1981)

Wittmer v. Peters,
87 F.3d 916 (7th Cir. 1996), *cert. denied*,
117 S.Ct. 949 (1997)

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986) *passim*
Zaslowsky v. Board of Educ. of Los Angeles City,
610 F.2d 661 (9th Cir. 1980)

STATUTES

Civil Rights Act of 1964,
42 U.S.C. § 2000a et seq:
Tit. VI, 42 U.S.C. § 2000d
Tit. VII, 42 U.S.C. § 2000e-2 *passim*
Tit. VII, 42 U.S.C. § 703(j)
20 U.S.C. § 1232a
29 U.S.C. § 1572

Emergency School Aid Act,
20 U.S.C. §§ 3191-3207 (Supp. V. 1981) (repealed 1982)

New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-12(a)

LEGISLATIVE MATERIALS

H.R. Rep. 914, 88th Cong., 1st Sess. 29 (1963)

S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971)

S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971)

OTHER

2B N. Singer, Sutherland on Statutes and Statutory Construction
§ 51.02 (5th ed. 1992)

*Sylvia Hurtado, Linking Diversity and Educational Purpose: How the Diversity of the Faculty and Student Body May Impact the Classroom Environment and Student Development*6-8 (paper presented at Harv. Univ. Civ. Rights Proj. Conf. on Diversity and Higher Ed., May 9, 1997)

V. Wendell Hylton, Ed.D. and Elaine P. Witty, Ed.D., *Improving Academic Achievement of Minority Students, in The Virginia Principal, Virginia Association of Secondary School Principals: Serving Middle Level and High School Administrators, September 1991*

Yolanda T. Moses, *Quality, Excellence, and Diversity*, in Daryl G. Smith, et al. (eds.), *Studying Diversity in Higher Education* 15 (1994)