No. 84-1340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

WENDY WYGANT, *et al.*,
Petitioners,

v.

JACKSON BOARD OF EDUCATION, *et al.*,
Respondents.

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

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae, pursuant to the written consents of the parties.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership

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[1] Their consents have been filed with the Clerk of the Court.

consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. In addition, nearly all of EEAC's members are subject to the affirmative action requirements under Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14303 (1967) and 43 Fed. Reg. 46501 (1978). Finally, many of EEAC's members are signatories to collective bargaining agreements, Title VII settlements, conciliation agreements, consent decrees and other voluntary plans or programs which provide varying forms of remedial relief or affirmative action benefitting persons or groups covered by Title VII and other federal and state equal employment statutes, regulations and orders.

Most of EEAC's member representatives are charged with corporate responsibility for compliance with federal, state and local nondiscrimination laws. As equal employment officers, they must attempt to determine not only their company's nondiscrimination and affirmative action obligations, but also the nature and extent of any remedial relief which may be neces-

sary as well as the potential liability which these obligations might create to nonminority employees and applicants.

While EEAC members are private corporations and therefore not necessarily subject to the same constraints as public sector employers, EEAC's members are concerned about the potential impact that this Court's decision could have on the ability of employers to respond practically and responsibly to allegations that minorities or women may be underrepresented in their workforces. Whether or not such underrepresentation is caused by the employer's discrimination, it makes employers potential targets of discrimination suits filed by members of protected groups or by federal and state equal employment enforcement agencies. Such suits often are framed broadly, and the scope of the employer's potential liability may be difficult to ascertain prior to class certification hearings, discovery, trial on the merits, or post-trial remedial proceedings. Consequently, employers often face the practical necessity of exploring ways to avoid such suits, either through settlements or consent decrees, or by voluntary affirmative action to eliminate such underrepresentation.

Accordingly, employers are concerned that a decision in this case could limit unduly their flexibility in avoiding or resolving discrimination claims, particularly in light of this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). EEAC members would view with great concern any limitation on the ability of employers to adopt voluntary policies consistent with *Weber* and designed to eliminate workforce underutilization of protected group members. At the same time, it is clear from *Weber*

that, absent a finding of discrimination, race-based preferential treatment cannot be required of employers who do not wish voluntarily to adopt such policies.

Because of its interest in such issues, EEAC has participated in numerous other cases involving issues relating to the nature and scope of the equal employment and affirmative action obligations of employers. *See, e.g., Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984); *Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Weber*, 443 U.S. 193; *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Because the instant case arises in the public sector context, where different standards may well apply, and because there is no firm consensus among its members regarding the appropriate scope and nature of affirmative action efforts, EEAC takes no position on the merits of the controversy before the Court. Rather, this brief is designed to highlight certain concerns of private employers and to attempt to ensure that those concerns are taken into account by the Court in deciding this case.

STATEMENT OF THE CASE

This case involves a challenge under the Equal Protection Clause of the Constitution[2] to the provisions of a collective bargaining agreement that re-

[2] The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, Section 1.

sulted in the layoff of certain white teachers employed in the Jackson, Michigan Public Schools while minority teachers with less seniority were retained.

In November 1971, 15.9 percent of the student body of the Jackson Public Schools was minority, whereas 8.3-8.5 percent of the faculty was minority (Appendix to the Petition for Certiorari at 21a). Prior to the fall of 1972, the collective bargaining agreement between the Jackson Board of Education ("the Board") and the Jackson Education Association ("JEA") provided for layoffs on the basis of seniority, that is, a "last-hired, first-fired" system. *Id.* In January 1972, a poll of public school teachers indicated that 96 percent of Jackson teachers favored a layoff system based on strict seniority. *Id.* at 22a.

In the fall of 1972, *id.*, a contract was reached between the Board and the JEA that adopted a goal of having "at least the same percentage of minority racial representation of each individual staff as is represented by the student population of the Jackson Public Schools." *Id.* In addition, the agreement altered the previous layoff provision as follows:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that *at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* (Emphasis added).

Pursuant to the new layoff provision, non-minority petitioners herein were laid off in favor of minorities with less seniority who were retained. Petition-

ers filed suit in federal court alleging that their layoffs violated the Equal Protection Clause; Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*; 42 U.S.C. §§ 1981, 1983 and 1985; and various state laws.

In a decision reported at 546 F.Supp. 1195 (E.D. Mich. 1982), the district court upheld the constitutionality of the layoff provision.[3] Relying on this Court's decision in *Weber*, 443 U.S. 193, and the Sixth Circuit's decision in *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), the court initially held that a judicial finding of discrimination was not required before a public sector employer could adopt a voluntary affirmative action plan that gives preferential treatment to minorities. *Id.* at 1199-1200.

In addressing the layoff provision at issue, the district court observed that in order to adopt a preferential layoff plan, "there must be some evidence that minority teachers have not enjoyed the same representation on the faculty of the Jackson Public Schools as have white teachers." *Id.* at 1200. The court acknowledged that this requirement of previous underrepresentation ordinarily is determined by comparing the percentage of minorities in the employ-

[3] The court dismissed the plaintiff's Title VII counts because they had not alleged that the administrative prerequisites of Title VII had been fulfilled, *see* 42 U.S.C. § 2000e-5(f)(1), nor had they received a right-to-sue letter. 546 F.Supp. at 1203. The court also held that its finding that the layoff provisions did not violate the Constitution precluded the petitioner's claims under 42 U.S.C. §§ 1981, 1983 and 1985. *Id.* Having dismissed the petitioner's federal claims, the court declined to assert jurisdiction over the state law claims and dismissed them as well. *Id.* at 1203-04.

er's workforce with the percentage of minorities in the relevant labor market. *Id.* at 1201. Declining to adopt this comparison, however, the court stated that:

> [I]n the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of role-models. *Id.* at 1201.

Comparing the percentage of minority students (15.9 percent in 1971) to the percentage of minority faculty members (8.3-8.5 percent in 1972), the court concluded that this constituted a "substantial" and "chronic" underrepresentation sufficient to permit a voluntary affirmative action plan to protect minority teachers from the effects of layoffs. *Id.* Stating that the test for judging whether a particular affirmative action plan is constitutional is "one of reasonableness," *id.*, the court found that the layoff provision was "substantially related" to the objective of remedying past discrimination and was constitutional. *Id.* at 1201-02.

The Court of Appeals, in a decision reported at 746 F.2d 1152 (6th Cir. 1984), affirmed the district court decision, adopting in large measure the opinion of the lower court.[4] In an opinion concurring in the

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[4] The petitioners did not appeal the dismissal of their Title VII claims to the Sixth Circuit. Accordingly, the Title VII claims were not before the Sixth Circuit nor are they before this Court.

result, Judge Wellford noted with regard to the comparison used by the lower court to demonstrate an underrepresentation of minority teachers that:

> Had the plaintiffs in this case presented data as to the percentage of qualified minority teachers in the relevant labor market to show that defendant Board's hiring of black teachers over a number of years had equaled that figure, I believe this court may well have been required to reverse . . . *Id.* at 1160.

In addition, Judge Wellford noted that "[u]nderrepresentation, then, of minority teachers as found by [the district court judge] based on a student minority ratio was simply improper under *Oliver* [*v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983)] and *Hazelwood* [*School District v. United States*, 433 U.S. 299 (1977)]." *Id.* at 1161.

SUMMARY OF ARGUMENT

Because this case involves a public sector employer and thus could be decided based on the requirements of the Equal Protection Clause of the Fourteenth Amendment without necessarily implicating Title VII or private employers, EEAC takes no position on the merits of the issue before the Court. Rather, this brief is intended to advise the Court of the concern of private employers that any decision in this case not limit or narrow the ability of private employers to refrain from or to engage in voluntary affirmative action that is consistent with this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

This Court clearly indicated that its decision in *Weber* applied to voluntary plans by *private* employers, and did not resolve the issue of the ap-

propriate scope of affirmative action under the Fourteenth Amendment. A number of factors make this case an inappropriate vehicle for defining the permissible nature of affirmative action that private employers may engage in under Title VII. First, there is no Title VII issue before the Court. Second, the parties have not argued that this case provides a vehicle for any cutback on the flexibility afforded private employers by *Weber*. Finally, the lower courts relied in this case on a comparison between the percentage of minority students and minority teachers in order to find that minority teachers were underrepresented in the Jackson schools. While EEAC takes no position on whether such a comparison ever can serve as a justification for providing racial preferences in public sector employment, it urges the Court not to disturb the well-established principle that where liability is sought to be based on statistical comparisons, such comparisons must be to those persons in the relevant labor market who possess the requisite skills required by the job. *See Hazelwood School District v. United States*, 433 U.S. 299 (1977).

The flexibility provided to private employers by *Weber* has served as a means not only for employers to limit their potential liability, but also as a means of effectuating the purposes of nondiscrimination laws by enabling them to increase the job opportunities of minorities and women. Accordingly, it is submitted that the Court should take particular care to ensure that its decision under the Constitution in this public sector case does not impinge on the ability of private employers to undertake voluntary affirmative action measures where they desire to do so.

ARGUMENT

THIS COURT SHOULD EXERCISE CARE TO ENSURE THAT A DECISION IN THIS PUBLIC SECTOR CASE DOES NOT IMPINGE ON THE ABILITY OF PRIVATE EMPLOYERS TO UNDERTAKE REASONABLE AND VOLUNTARY AFFIRMATIVE ACTION WHERE THEY DESIRE TO DO SO.

A. This Case Provides An Inappropriate Vehicle To Define Or Reexamine The Proper Nature And Scope Of Voluntary Affirmative Action Measures Available To Private Employers Under *Weber*.

As noted above in the statement of interest of the amicus curiae, EEAC takes no position on the merits of the issue before the Court in the instant case. EEAC recognizes that this case, involving a public employer, could be decided strictly on the requirements of the Equal Protection Clause of the Fourteenth Amendment without necessarily having implications for Title VII or private employers. Both the district court and the court of appeals below, however, relied on and applied this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), which held that *private* employers could undertake certain voluntary affirmative action measures consistent with Title VII. Accordingly, this brief is designed to apprise the Court of the concern of private employers that any decision in this public sector case not operate to limit or narrow the ability of *private* employers to refrain from or to engage in reasonable and voluntary affirmative action that is consistent with *Weber*.

In *Weber*, 443 U.S. at 208-09, this Court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, does not prohibit private, voluntary race-conscious affirmative action efforts that were

designed to eliminate a manifest imbalance in an employer's workforce, were temporary in nature and did not unnecessarily trammel the interests of nonminority employees. In doing so, the Court expressly noted that "[s]ince the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 200. Rather, the question before this Court in *Weber* was "the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan." *Id.* (emphasis in original).

The Court reinforced in a number of instances in its opinion that its decision applied only to voluntary plans by *private* employers.[5] In holding that Congress in enacting Title VII did not intend to forbid all private voluntary race-conscious affirmative action plans, the Court noted that:

> Title VII could not have been enacted into law without substantial support from legislators in

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[5] *See, e.g., id.*, at 210 ("the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by *private* parties") (emphasis added); *id.* at 204 ("[W]e cannot agree with respondent that Congress intended to prohibit the *private* sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve") (emphasis added); *id.* at 204 (The provisions of Title VII "cannot be interpreted as an absolute prohibition against all *private,* voluntary race-conscious affirmative action efforts") (emphasis added); *id.* at 208 ("Title VII's prohibition . . . against racial discrimination does not condemn all *private,* voluntary, race-conscious affirmative action plans") (emphasis added).

> both Houses who traditionally resisted federal regulation of *private* business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." *Id.* at 206 (emphasis added), *quoting* H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963), U.S. Code Cong. & Admin. News 1964, p. 2391.

Recently, in *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576, 2590 (1984), this Court again cautioned that "[w]hether the City, a public employer, could have [unilaterally adopted an affirmative action program] without violating the law is an issue we need not decide." The dissent of Justice Rehnquist (joined by Justice White and the Chief Justice) from the denial of certiorari in *Bushey v. N.Y. Civil Service Comm'n*, 105 S.Ct. 803 (1985), also indicated that the ability of a public employer to adopt a voluntary affirmative action plan or program may be governed by different standards than those governing private employers. In *Bushey*, Justice Rehnquist commented on the lower court's "unexplained extension of *Weber* to allow voluntary affirmative action by State employers." *Id.* at 805. In addition, Justice Rehnquist noted that "the express reservation of the question in *Weber* [of a public employer's ability to adopt voluntary affirmative action plans] suggests that a public employer may fare differently in this regard from a private employer. . . ." *Id.*

Despite this Court's admonitions that the same standards that were applied to private employers in *Weber* might not be applicable in a public sector case, a number of lower courts have applied *Weber* to public

sector claims brought under the Constitution. In fact, both the district court and the court of appeals below relied on *Weber* in holding that the layoff provision at issue herein was constitutional. The district court stated that "*Weber* stands for the proposition that Title VII does not require a judicial finding of employer discrimination before a *private* sector employer may adopt an affirmative action plan." 546 F.Supp. at 1195 (emphasis added). Relying on the Sixth Circuit's previous decision in *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), the district court stated that that case "extended this particular holding of *Weber* to public sector employers and to alleged Constitutional violations." *Id.* Since there was no Title VII claim before the court because the plaintiffs had neither exhausted their administrative remedies nor received a right-to-sue letter, the court applied *Weber* to the remaining constitutional claims and held the layoff provision to be constitutional.

In *Weber*, this Court stated that "[w]e need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans." 443 U.S. at 208. While the instant case may provide an appropriate vehicle to determine the permissible scope of affirmative action plans that may be undertaken by *public* employers consistent with the Equal Protection Clause of the Fourteenth Amendment, it is submitted that this Court should expressly note that its decision does not affect the scope of permissible affirmative action that may be engaged in by *private* employers under Title VII and consistent with *Weber*.

A number of factors unique to this case make this a particularly inappropriate vehicle for spelling out

the permissible nature and breadth of affirmative action that *private* employers may engage in under Title VII. First, as noted above, there is no Title VII issue before this Court. Since *Weber* involved a *statutory* interpretation of Title VII, its precise scope for private employers should not be addressed or implicated in a case involving only equal protection claims.

Second, the parties have not argued that this case provides a vehicle for any cutback on the flexibility afforded private employers by *Weber*. Accordingly, it is submitted that this Court should take care that its decision in this case neither expressly nor impliedly operates to lessen the protection that *Weber* presently affords private employers.

An additional aspect that makes this case unique is that the lower courts relied on a comparison between the percentage of minority students and minority teachers in order to find that minority teachers were underrepresented in the Jackson schools. In doing so, the lower courts placed heavy emphasis on the importance of teachers as role models for minority students in the educational context. *See* 546 F. Supp. at 1201 and 747 F.2d at 1157. These concerns have limited relevance to private employment practices and EEAC takes no position on whether such a "role model" argument ever can serve as a justification for providing racial preferences in employment.

Whether or not this comparison satisfies constitutional standards as a justification for the use of racial preferences in the affirmative action context, the Court should not undercut the import of prior decisions where liability is sought to be based, in whole or in part, on the use of statistics. In such cases, this Court and the lower courts nearly uniformly have

required that comparisons be between the percentage of minorities (or women) in an employer's workforce and the percentage of minorities (or women) with the requisite skills in the relevant labor market. *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 584-85 (1979); *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 n.13 (1977); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977); *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974); *Paxton v. United Nat. Bank*, 688 F.2d 552, 564 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Rivera v. City of Wichita Falls*, 665 F.2d 531, 540-41 (5th Cir. 1982); *Ste. Marie v. Eastern R. Ass'n*, 650 F.2d 395, 401-02 (2d Cir. 1981).

In *Hazelwood*, this Court, in rejecting a similar argument that a comparison between Hazelwood's teacher workforce and its student population could establish a prima facie case under Title VII, stated that:

> There can be no doubt in light of the *Teamsters* case, that the District Court's comparison of Hazelwood's teacher workforce to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.

433 U.S. at 308 (footnote omitted.) Accordingly, in deciding the propriety of the "role model" argument in the affirmative action context, this Court should take care not to disturb the well-established principle

that where liability is sought to be based on statistical comparisons, such comparisons must be to those persons in the relevant labor market possessing the requisite skills required by the job.

B. The Flexibility That *Weber* Provides To Private Employers Should Not Be Impinged By A Decision In This Public Sector Case.

Following this Court's decision in *Weber*, a substantial number of private employers have entered into various forms of voluntary affirmative action agreements or plans. Others have continued to be equal opportunity employers without adopting employment preferences based on race or sex. Moreover, virtually all of EEAC's members would agree that private employers should not be compelled to use such preferences without their concurrence. The flexibility provided to employers by *Weber* serves a number of important purposes that are consistent with the objectives underlying Title VII. First, such voluntary plans or programs are consistent with the notion, long recognized by the courts, that voluntary compliance is the preferred means of eliminating employment discrimination. *See, e.g., W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981); *Weber*, 443 U.S. at 203-04; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). In addition, these voluntary plans are consistent with the principle under Title VII that employers are required to "self-examine and self-evaluate their employment practices and to eliminate, so far as possible, the last vestiges of their discriminatory prac-

tices." *Teamsters*, 431 U.S. at 364, *quoting Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

A second practical effect of *Weber* is that it has enabled employers, if they choose, to respond practically and responsibly to concerns that minorities and women may be underrepresented in their workforces. Whether or not such underrepresentation may have been caused by an employer's discrimination, it makes employers potential targets of persons protected by Title VII (and other state and federal equal employment statutes and regulations), or of federal or state equal employment enforcement agencies. Thus, employers often may be faced with the practical need to attempt to avoid such suits through the adoption and implementation of voluntary affirmative action plans.

The dilemma faced by employers in attempting to take affirmative steps to assure equal employment opportunity without unnecessarily interfering with the employment rights and opportunities of non-minority employees has been recognized by a number of courts. This dilemma was addressed by Judge Wisdom in his dissenting opinion in the Fifth Circuit decision in *Weber*, 563 F.2d at 230, where he stated that:

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy

> is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay (citation omitted).

Justice Blackmun, in his concurring opinion in *Weber*, *supra*, 443 U.S. at 210, in commenting on Judge Wisdom's "tightrope" argument, acknowledged the predicament which employers and unions face:

> If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

See also Bratton v. City of Detroit, 704 F.2d 878, 884 n. 18 (6th Cir.), *vacated and remanded*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 703 (1984); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 967-68 (8th Cir. 1981).

Thus, *Weber*, until now, has served as a way for employers to avoid "walk[ing] a high tightrope without a net beneath them." It has provided a flexible means not only for employers to limit their own liability, but also as a means of effectuating the purposes of Title VII and other federal and state nondiscrimination laws, orders and regulations by enabling them to increase the job opportunities available to minorities and women. Accordingly, it is submitted that this Court should take particular care to ensure and should expressly state that its decision under the Constitution in this public sector case does not impinge on private employers' ability to undertake reasonable and voluntary affirmative action

measures. Any further definition of the appropriate nature and scope of voluntary, race-conscious affirmative action efforts that legally may be undertaken under Title VII by private employers should await future cases where the Title VII issue is presented squarely in a private sector case.

CONCLUSION

For the foregoing reasons, EEAC takes no position on the merits of this case, but respectfully submits that this Court should exercise care to ensure that any decision in this case does not impinge on the ability of private employers to undertake reasonable and voluntary affirmative action consistent with this Court's decision in *Weber*, while at the same time not compelling employers to take such action over their objection.

Respectfully submitted,

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