No. 96-679

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1997

PISCATAWAY TOWNSHIP BOARD OF EDUCATION,
Petitioner,

v.

SHARON TAXMAN,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF *AMICI CURIAE* OF THE INDEPENDENT WOMEN'S FORUM AND THE CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The Independent Women's Forum ("IWF") is a nonprofit, nonpartisan organization founded by women in 1992. IWF is national in scope and many of its members reside in New Jersey. IWF fosters public education and debate about legal, social and economic policies, particularly those affecting women and families. IWF supports policies that promote

[1] No counsel for any party had any role in authoring this brief, and no person or entity other than the named *amici* and their counsel made any monetary contribution to its preparation or submission.

individual responsibility, limited government and economic opportunity.

The Center for Equal Opportunity ("CEO") is a private, nonprofit research institution. It is dedicated to the idea that America is, and should be, one Nation and that all citizens should be treated equally. CEO is a nationwide organization with many supporters residing in New Jersey. CEO works to protect the civil rights of all Americans.

IWF, CEO, and their members and supporters have a vital interest in ensuring that Title VII is interpreted consistently with its text, and that the Court clarify any purported ambiguities in the application of Title VII. Accordingly, IWF and CEO respectfully submit this *amici curiae* brief to bring to the Court an analysis that may not be presented by any of the parties.

Petitioner and respondent have consented to the filing of this brief *amici curiae*.

STATEMENT

The Court granted *certiorari* in this case to answer the question, "Does Title VII of the Civil Rights Act of 1964, as amended, permit employers to take race into account for purposes other than remedying past employment discrimination?"

That is a broad question, and one of great national importance. The Court should use this case as an appropriate vehicle to make clear, beyond further dispute or risk of misinterpretation, that Title VII is to be interpreted in accordance with its plain terms, to forbid race-based decisionmaking in employment.

SUMMARY OF ARGUMENT

Petitioner fired Mrs. Taxman because of her race. Petitioner seeks to justify that race-based employment decision by its pursuit of "diversity." Petitioner ignores the text of Title VII and instead relies on the Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). That petitioner believes that under *Weber* its conduct comports with Title VII demonstrates the need for the Court to revisit *Weber*.

Weber was a fundamentally flawed decision in which the Court explicitly disregarded the clear text of Title VII. Under *Weber*, Title VII affords different protections to different Americans, based solely on their race. Principles of *stare decisis* would be best served if the Court restores the statutory text and overrules *Weber*.

Moreover, the Court should explicitly reject petitioner's "diversity" rationale. The race-based decisionmaking approved in *Weber* was ostensibly remedial; the pursuit of "diversity" has no connection to remedial purposes. Allowing employers to pursue non-remedial objectives such as "diversity" would result in an endless regime of race-based decisionmaking and, in the case of governmental employers, pose a greater and inevitable risk of constitutional violations. The Court thus should refuse to distort Title VII by recognizing a "diversity" exception that has no support whatever in the statute.

The Court should affirm the *in banc* decision of the Court of Appeals below, overrule *Weber*, and reaffirm the race-neutral principles embodied in Title VII.

ARGUMENT

I. THE THIRD CIRCUIT'S *IN BANC* DECISION SHOULD BE AFFIRMED

It is undisputed that petitioner fired respondent, Mrs. Taxman, from her job because she is white. *E.g.*, Brief for Petitioner ("Pet. Br.") at 2-3. It is also undisputed that, in basing the decision to fire Mrs. Taxman on her race, petitioner was not attempting to remedy past discrimination or to eliminate any "manifest imbalance" in petitioner's workforce. *Id.* at 2 n.3 ("There was no evidence that the Board had ever discriminated against black employees, or that they were underrepresented in the professional staff as a whole when compared with their availability in the relevant labor market."). Rather, petitioner decided to use race as a "plus factor" in the firing decision, *id.* at 3, solely in order to maximize "diversity" among its faculty. *Id.*

Petitioner's conduct, and its attempt to justify its race-based firing before this Court, cannot be squared with the plain language of Title VII, which prohibits the "discharge" of "any individual . . . because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a). Petitioner does not attempt to argue that the conduct at issue satisfies the language of Title VII -- language that, remarkably, is never even quoted or discussed in petitioner's brief.

Instead, petitioner argues that it determined for itself that "racial diversity in its faculty was essential" and thereby acquired a license to discriminate, without regard to the prohibitions of Title VII. Pet. Br. at 5. Petitioner thus arrogates to itself the authority to determine the scope of Title VII, whenever a few social scientists endorse the utility of discrimination in

pursuit of some purportedly "essential" purpose. That outrageous proposition has no support whatever in the statute Congress enacted.[2]

Petitioner's similar argument, that Title VII imposes no restrictions on race-based decisionmaking for government actors beyond those already found in the Constitution (*id.* at 11), would render the 1972 amendments to Title VII meaningless surplusage. In the 1972 amendments, Congress extended Title VII's prohibitions, without change, to government actors. Under petitioner's view, Congress thereby performed a meaningless act, because the Constitution already prohibited governmental discrimination. The Court should avoid a construction that denies significance to a statutory amendment. *E.g.*, *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (statutes must be construed, if possible, to give "some operative effect" to "every word" chosen by Congress).[3]

Petitioner also argues that if Title VII were interpreted to mean what it says, to erect an "absolute

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[2] In any event, petitioner's argument that its own conclusions can be invoked to rewrite Title VII is unavailing. Petitioner "failed to introduce any evidence to show that promoting diversity . . . was necessary to further any compelling educational objective." Brief for the United States at 8.

[3] At a minimum, were the Court to adopt this argument, it should make clear that *only* those programs that satisfy the Constitution also satisfy Title VII. That is evidently the view of the United States. *See*, *e.g.*, Brief for the United States at 28 ("Title VII permits race to be used for any purpose that is sufficiently 'compelling' to satisfy equal protection standards, as long as the means chosen to further that purpose are narrowly tailored."). Even under this approach, petitioner's conduct still violated Title VII -- as the United States has belatedly recognized.

statutory bar to race conscious action," it could prevent "a covered institution from remedying, or even ending, unconstitutional discrimination against minorities." Pet. Br. at 12. That argument is irrelevant to this case, because petitioner admits it was not attempting to "remedy" unconstitutional discrimination; the argument is also wholly wrong. A "bar" on race-based decisionmaking is precisely what Congress enacted in Title VII, and giving the statute its full weight will in no way constrain employers from "ending" any ongoing discrimination; rather, ending such ongoing discrimination would be fully consistent with, and indeed required by, the statute. Nor does Title VII prohibit remedies for those who have suffered from race discrimination. Providing such traditional remedies does not involve "race conscious action." *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring) ("In such a context, the white jobholder is not being selected for disadvantageous treatment because of his race, but because he was wrongly awarded a job to which another is entitled.").

Consequently, petitioner's arguments should be rejected, and the *in banc* decision of the Court of Appeals should be affirmed.

II. RACE-BASED DECISIONMAKING IS PROHIBITED BY TITLE VII

A. The Court Should Revisit *Weber*

Petitioner's arguments in this case are direct descendants of the Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). Indeed, in arguing that would-be discriminators should be allowed to determine for themselves whether the use of race is sufficiently "important" in a given context to be

permissible under Title VII, petitioner primarily relies on *Weber* and its progeny, *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616 (1987), in which the Court extended *Weber* to public employers and applied *Weber* to vitiate Title VII's prohibition on sex discrimination. *E.g.*, Pet. Br. at 7, 9-11.

Thus, this case demonstrates the necessity for the Court to revisit and confront *Weber*. Much confusion over the proper construction of Title VII, and much divisive litigation and bad-faith resort to race-based decisionmaking, are directly traceable to *Weber*. Indeed, that petitioner could ever have concluded that the race-driven firing of Mrs. Taxman comported with Title VII under *Weber* demonstrates the necessity for this Court to clarify its Title VII jurisprudence.

The fundamental error of *Weber* was its disregard of the statutory text. Title VII provides in part:

> It shall be an unlawful employment practice for an employer -- (1) 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 individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). The Court, prior to *Weber*, interpreted the statute in accordance with its plain terms. For example, in *McDonald v. Santa Fe Trail*

Transp. Co., 427 U.S. 273 (1976), Justice Marshall wrote for the Court:

> Title VII of the Civil Rights Act of 1964 prohibits the discharge of "any individual" because of "such individual's race." Its terms are not limited to discrimination against members of any particular race. Thus . . . we described the Act in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), as prohibiting "[d]iscriminatory preference for *any* [racial] group, *minority or majority*."

Id. at 278-79 (footnotes and citation omitted; brackets and emphases in original); *accord Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978). If the Court had adhered to the plain reading of the statutory text enunciated in *McDonald* and the Court's other cases, the application of Title VII to race-based decisionmaking would have proven to be as straightforward as the congressional authors intended, and as its plain language demands.

Unfortunately, in *Weber* the Court rejected *McDonald*'s construction of the statute. 443 U.S. at 201-02. The Court held that private employers may in some instances engage in race discrimination that favors minorities without violating Title VII. The Court concluded that "[i]n this context" the words of the statute could not be given their literal meaning, but would be "read against the background of the legislative history of Title VII and the historical context from which the Act arose." *Id.* at 201. That judicial "reading" gave rise to a meaning directly contrary to the statutory text, and led the Court, explicitly, to ignore the intent of Congress and to fashion an exception to Title VII's prohibition of racial

discrimination that has no support in the statute. *E.g.*, *id.* at 208 (Title VII, despite its express terms, permits racial discrimination as long as the discrimination "mirror[s]" the purposes of the statute and "does not unnecessarily trammel the interests" of those employees who are discriminated against); *id.* at 209 (Blackmun, J., concurring) (exceptions to be read into Title VII based on "considerations, practical and equitable, only partially perceived, if perceived at all," by the enacting Congress); *cf. id.* at 252 (Rehnquist, J., dissenting) (Title VII "too clearly prohibit[s] such racial discrimination to admit of any doubt"); *see also Johnson*, 480 U.S. at 647 (O'Connor, J., concurring) (*Weber* construed Title VII "to permit what its language read literally would prohibit").

Title VII under *Weber* affords different statutory protections to different Americans, based solely on their race. Implicit in *Weber*'s version of Title VII is that discriminatory programs that benefit minorities -- or at least some minorities -- may comport with Title VII, but that such programs that benefit whites are always prohibited. *See Weber*, 443 U.S. at 202-04.

The *Weber* Court went even further, and invited the creation of additional exceptions to Title VII, stating "[w]e need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans." *Id.* at 208. "In effect, *Weber* held that the legality of intentional discrimination by private employers against certain disfavored groups or individuals is to be judged not by Title VII but by a judicially crafted code of conduct, the contours of which are determined by no discernible standard, aside from . . . the divination of congressional 'purposes' belied by the face of the statute and by its legislative history." *Johnson*, 480 U.S. at 670-71 (Scalia, J., dissenting).

B. Principles Of *Stare Decisis* Do Not Support Preservation Of The Highly Flawed *Weber* Decision

The Court should overrule *Weber*. *Weber* was wrongly decided, and the Court's *stare decisis* jurisprudence does not counsel that *Weber* be preserved.

It is of course a truism that the Court should not lightly overturn a prior decision, and the suggestion is not lightly made. As set forth below, however, *Weber* represented a stark departure from the Court's prior interpretation of Title VII, has been criticized from the outset, and has been undercut by subsequent decisions of this Court.

As Justice Kennedy has written for the Court, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quotation marks and citation omitted). The Court has repeatedly demonstrated its willingness to overrule prior decisions "where the necessity and propriety of doing so has been established." *Id.* *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 232-33 (1995) (opinion of O'Connor, J.) (collecting instances in which the Court overruled erroneous decisions). As Justice O'Connor explained in the constitutional case of *Adarand*, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error . . . ." *Id.* at 231.

Here, the "intrinsically sounder" reading of Title VII is that set forth in the Court's pre-*Weber* decisions,

and most notably in *McDonald*. That case gave full effect to the words of Title VII, and to the statute's broad prohibition of racially discriminatory actions. *See also, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" in Title VII); *Manhart*, 435 U.S. at 708 (Title VII's "focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class."); *Furnco Constr.*, 438 U.S. at 579 ("It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce.") (emphasis in original).

Weber was a startling and unjustified departure from that weight of earlier precedent, as Members of this Court have recognized. *E.g.*, *Weber*, 443 U.S. at 220, 221 n.1 (Rehnquist, J., dissenting) (*Weber* is a "dramatic . . . switch in this Court's interpretation of Title VII" and "[o]ur statements in *Griggs* and *Furnco Construction*, patently inconsistent with today's holding, are not even mentioned, much less distinguished, by the Court"); *Johnson*, 480 U.S. at 642-43 (Stevens, J., concurring) ("Prior to 1978 the Court construed the Civil Rights Act of 1964 as an absolute blanket prohibition against discrimination which neither required nor permitted discriminatory preferences for any group, minority or majority."); *id.* at 672-73 (Scalia, J., dissenting) ("*Weber* was itself a

dramatic departure from the Court's prior Title VII precedents").[4]

Moreover, *Weber*'s flaws have been evident from the very moment of its inception -- and not only in the views of the dissenters. Remarkably, the fifth vote in *Weber* came from Justice Blackmun, who, as noted above, based his construction of Title VII on "considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress." 443 U.S. at 209 (Blackmun, J., concurring). Justice Blackmun also confessed that "I share some of the misgivings expressed in Mr. Justice Rehnquist's dissent . . . concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today . . . ." *Id.* In other words, Justice Blackmun acknowledged *at the time* that

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[4] *Weber* was also a dramatic departure from a large body of precedent involving the very act of statutory construction. *E.g.*, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187 & n.33 (1978); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977). Subsequent case law has implicitly rejected *Weber*'s loose approach to statutory construction. *E.g.*, *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 261 (1993) ("vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration.") (emphasis in original); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99 (1991) ("Congress could easily have shifted 'attorney's fees and expert witness fees,' or 'reasonable litigation expenses,' as it did in contemporaneous statutes; it chose instead to enact more restrictive language, and we are bound by that restriction."); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[w]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms'").

the result in *Weber* was likely contrary to the intent of Congress as reflected in the text of Title VII.[5]

Weber has been repeatedly criticized by individual Justices. In *Johnson*, even though none of the parties asked the Court to overrule *Weber* and the issue was not briefed before the Court, *five* Justices indicated that they believed *Weber* was wrongly decided. *See* 480 U.S. at 657 (White, J., dissenting) (*Weber* "is a perversion of Title VII. I would overrule *Weber* and reverse the judgment below."); *id.* at 670-74 (Scalia, J., joined by Rehnquist, C.J., dissenting) (*Weber* should be "reconsider[ed] and overrul[ed]"); *id.* at 644 (Stevens, J., concurring) (adhering to *Weber* as "an authoritative construction" of Title VII, even though *Weber* "is at odds with my understanding of the actual intent of the authors of the legislation"); *id.* at 647-48 (O'Connor, J., concurring) (*Weber* to be followed as precedent in light of fact that no party had asked *Weber* to be overruled, even though *Weber* interprets Title VII "to permit what its language read literally would prohibit" and even though in *Weber* and *Johnson* "the Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public

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[5] Should the Court choose to look beyond the unambiguous statutory text to the legislative history, *Weber* fares no better, as noted by Justice Blackmun. Justice Marshall in *McDonald* cited the "uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans.'" 427 U.S. at 280 (citation omitted). *See also Weber*, 443 U.S. at 230-52 (Rehnquist, J., dissenting) (analyzing Title VII's legislative history at length and concluding that "Congress fully understood what it was saying and meant precisely what it said.").

employers despite the limitations imposed by the Constitution and by the provisions of Title VII").[6]

It is also significant to the *stare decisis* analysis that *Weber*'s impact on Title VII is fundamentally untenable, because it undermines the text and reads into the statute a race-based classification. As a result of *Weber*, Title VII has been transformed from a straightforward prohibition of race-based decisionmaking, into a far more indefinite statute that prohibits race-based decisionmaking favoring only some racial groups under some uncertain circumstances. Had Congress set out to enact such a discriminatory statute *ab initio*, the Court would have struck it down as unconstitutional. As Justice Kennedy stated for the Court in *Romer v. Evans*, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." 116 S. Ct. 1620, 1628 (1996). Consequently, the Court should not preserve a precedent that reads into Title VII provisions that even Congress lacked the constitutional power to enact. Indeed, the Court traditionally interprets statutes to *avoid* such constitutional problems, not to *create* them. *E.g.*,

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[6] Scholarly commentators have also been critical of *Weber*. *E.g.*, Bernard D. Meltzer, "The *Weber* Case: The Judicial Abortion Of The Antidiscrimination Standard In Employment," 47 U. Chi. L. Rev. 423, 465 (1980) (discussing the color-blind intent of Title VII and opining that the *Weber* decision "legitimated a new form of racism"); Henry J. Abraham, "Some Post-*Bakke*-and-*Weber* Reflections On 'Reverse Discrimination,'" 14 U. Rich. L. Rev. 373, 384-86 (1980) (concluding that the result in *Weber* is contrary to Title VII).

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

In *Patterson*, another case involving *stare decisis* in the context of a civil rights statute, the Court identified three factors as particularly relevant to the *stare decisis* analysis: subsequent developments in the law; whether the challenged precedent is a "positive detriment to coherence and consistency in the law"; and whether the precedent is "inconsistent with the sense of justice." 491 U.S. at 173-74. Each of these *Patterson* factors militates in favor of overruling *Weber*.

Subsequent developments in the law demonstrate that *Weber* is aberrational. In the years since *Weber* was decided, this Court has repeatedly restricted the use of race-based classifications. *E.g.*, *Adarand*, 515 U.S. 200 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *Croson*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Other Courts of Appeals, like the Third Circuit in this case, have similarly refused to approve race-driven programs. *E.g.*, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991).[7]

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[7] To the extent the Court wishes to consider congressional *inaction*, the failure of Congress explicitly to overturn *Weber* by legislation is not determinative of the *stare decisis* analysis. For example, in *Patterson*, 491 U.S. at 175 n.1, the Court stated that "[i]t does not follow, however, that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it," citing Justice Scalia's dissent in *Johnson*, 480 U.S. at 671-72 -- where, significantly, Justice

[Footnote continued on next page]

The second factor identified by the Court in *Patterson* is whether the challenged precedent "may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision . . . or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws . . . ." 491 U.S. at 173 (citations omitted). As an initial matter, *Weber*'s rejection of the statutory text is obviously a detriment to coherence and consistency in the law. *See, e.g.*, *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting) (reliance on *Weber* "is a demonstration not of stability and order but of the instability and unpredictable expansion which the substitution of judicial improvisation for statutory text has produced"). The effect of *Weber* (and of *Johnson*) has been to

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[Footnote continued from previous page]

Scalia argued that *Weber* should be overturned. *See also Hubbard v. United States*, 514 U.S. 695, 711, 713 (1995) (opinion of Stevens, J.) (that "Congress has not seen fit to overturn the holding" in a statutory case does not preclude a later overruling by the Court).

Moreover, here Congress did speak -- and speak clearly -- in its original enactment of Title VII, and it is far from obvious how Congress could have made its intent any clearer. *See Johnson*, 480 U.S. at 657 (Scalia, J., dissenting) (Title VII embodies "a clarity which, had it not proven so unavailing, one might well recommend as a model of statutory draftsmanship"). Indeed, the burden of the "congressional inaction" argument falls here on the proponents of race-based decisionmaking, as Congress has conspicuously failed to amend Title VII to comport with *Weber*. *Cf.* Nelson Lund, "The Law Of Affirmative Action In And After The Civil Rights Act Of 1991: Congress Invites Judicial Reform," 6 Geo. Mason L. Rev. 87 (1997) (arguing that Congress, in enacting the Civil Rights Act of 1991, implicitly rejected *Weber*).

encourage the institutionalization of race- and sex-based preferences in the private sector, despite the statutory command to the contrary.

Weber by its own terms was never intended to create a *permanent* exception to Title VII, or to weave race-based decisionmaking into the Nation's social fabric on any widespread or long-term basis. The race-conscious action approved by the Court in *Weber* was intended to be both limited and temporary -- indeed, those limitations were the linchpin of the Court's decision. *See* 443 U.S. at 208. In direct disregard of the Court's careful limitation on such programs, however, petitioner here fired Mrs. Taxman in 1989, pursuant to an "affirmative action" policy *adopted in 1975*. Petitioner's reliance on *Weber* to justify its discrimination against Mrs. Taxman demonstrates that the Court's instructions -- that *Weber*-type discrimination be used only in narrow settings and only for a limited period -- have been ignored by those bent on infusing every decision in American life with racial considerations.

Moreover, with respect to public employers like petitioner, reliance on such preferences is flatly at odds not only with Title VII and with our Nation's civil rights laws more generally, but also with the constitutional command of equal protection. *E.g.*, *Shaw*, 509 U.S. at 643 ("Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'") (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *United States v. Virginia*, 116 S. Ct. 2264, 2276 (1996) (sex classifications "may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women") (citation omitted).

The Court has emphasized that the scope of permissible race-based decisionmaking under the Constitution is quite narrow. Thus, overruling *Weber* will have little disruptive impact on any legitimate governmental affirmative action programs. Similarly, because *Weber* approved race-conscious programs only in limited and temporary settings, overruling *Weber* should have little effect on private employers' *legitimate* employment programs.[8]

The final factor in the *stare decisis* analysis identified in *Patterson* is whether the challenged precedent, having been "tested by experience," proves to be "inconsistent with the sense of justice or with the social welfare" and, in particular, "with our society's deep commitment to the eradication of discrimination

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[8] To be sure, Justice Stevens stated in his concurrence in *Johnson* that *Weber* was "an important part of the fabric of our law." 480 U.S. at 644. Since Justice Stevens wrote that concurrence, however, the problems inherent in *Weber* have only grown and, as shown above, other developments in the law have undercut *Weber* in ways that could not have been definitively anticipated at the time *Johnson* was decided.

Petitioner's *amici* urge that "[i]t is far too late to initiate a new jurisprudence under Title VII which would prohibit any consideration of race, ethnicity or gender in non-remedial contexts" and that affirmance of the Third Circuit "would require the dismantling of thousands of diversity-based affirmative action programs undertaken voluntarily by organizations both public and private." Brief *Amici Curiae* of NOW Legal Defense and Education Fund, *et al.*, at 11, 2. As shown above, however, it is *Weber* that represented a "new jurisprudence," and a return to the statutory text will restore, not destroy, the fabric of the law. Moreover, at least since this Court's decision in *Croson*, the "public organizations" invoked by the NOW *amici* have been on notice that "diversity-based affirmative action programs" are likely unlawful.

based on a person's race or the color of his or her skin." 491 U.S. at 174 (citations omitted). Obviously, *Weber* fails any test that turns on "the sense of justice" or "the eradication of discrimination." As Mrs. Taxman's experience in this case exemplifies, and as the Nation's own history demonstrates, there is no justice in race discrimination; and *Weber* has fostered, not eradicated, race discrimination in the American workplace.

In *Adarand*, 515 U.S. at 227-31, the Court overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), another precedent that -- like *Weber* -- had expanded the use of race in decisionmaking. In deciding to overrule *Metro Broadcasting*, the Court recognized that *Metro Broadcasting* was aberrational, and adhered to a more rigorous analysis of race-based programs. The parallels between *Metro Broadcasting* and *Weber* are numerous and obvious. Indeed, *Weber* is even more objectionable than *Metro Broadcasting*: where *Metro Broadcasting* upheld a racial classification that Congress had actually enacted, *Weber* imposed a racial classification on a statute that, by its terms, precluded the use of race. Thus, the Court's considered decision to overrule *Metro Broadcasting* counsels strongly in favor of a similar decision with respect to *Weber* in this case.

Under the Court's *stare decisis* principles, the flawed *Weber* decision should be overruled. Consequently, the sooner that *Weber* is explicitly rooted out of the law, the better the purposes of *stare decisis* -- stability, coherence, and predictability -- will be served.

III. IN ANY EVENT, *WEBER* SHOULD NOT BE EXTENDED TO PETITIONER'S "DIVERSITY" RATIONALE

A. The Court Should Resolve The Question On Which It Granted Certiorari

At the same time that the United States urges affirmance of the Third Circuit's *in banc* decision, it also asks the Court to leave the door open for further inevitable litigation on the very issue presented by this case: does Title VII permit employers to use race in employment decisions? Much of the government's brief on the merits is little more than a rehash of its earlier disagreement with the Court's decision to grant certiorari. *Compare*, *e.g.*, Brief for the United States at 7 ("This case . . . does not provide a suitable vehicle for resolving that extraordinarily broad issue" of whether non-remedial race-based decisionmaking is precluded by Title VII), *with* Brief for the United States on Petition for a Writ of Certiorari at 8 ("This case, however, is not an appropriate vehicle for resolving that issue.").

The United States in effect asks the Court to issue a decision good for this case only, but to leave for another day entirely whether "diversity" measured by race -- the justification for discrimination invoked by petitioner *in this case* -- comports with Title VII. The United States is not even prepared to foreclose the use of a racial criterion in the layoff context, arguing merely that petitioner here "did not satisfy the heavy burden of justification necessary to permit race-conscious layoffs" -- suggesting that some other petitioner, in some other case, *might be able* to carry that burden. Brief for the United States at 17-18.

The Court need not, and should not, wait for that future case. Delay will only ensure further harm, and further illegitimate, race-based decisions. The Court has already rejected the view of the United States on whether this case merited review, and the Court should similarly reject the United States' fallback position that the only issue in this case is petitioner's failure of proof, and that no legal principles are at stake. The history of the Court's modern decisions in the civil rights area demonstrates the need for the Court to speak clearly and with precision, and to restore the text of Title VII.

B. The "Diversity" Rationale Does Not Justify Discrimination In Violation Of Title VII

Neither *Weber* nor *Johnson* approved of any version of the "diversity" rationale on which petitioner purports to rely. Indeed, as petitioner concedes, "the justification proffered and approved in *Weber* for the particular practice at issue was to remedy past employment practices," and "[i]n *Johnson* the affirmative action at issue, like that in *Weber*, was adopted to redress the consequences of past employment practices . . . ." Pet. Br. at 9. Thus, for petitioner's discriminatory practices to be approved, the Court would have to *expand* the reach of *Weber*.

As demonstrated above, *Weber* should be overruled. *A fortiori*, it should not be expanded. Moreover, expanding *Weber* to include racial "diversity" would be another great step away from the text of Title VII. Unlike the practices at issue in *Weber*, race-driven decisions in the service of "diversity" -- or any other explicitly non-remedial objective -- not only violate the statute's text, but are also contrary to even the loosest reading of the statute's purpose.

Under the "diversity" rationale, race is *not* invoked in decisionmaking as a counter-measure to correct for a prior and improper reliance on race. Rather, as Mrs. Taxman's experience demonstrates, the pursuit of "diversity" requires employers, governments and college admissions officers *to inject race* into settings where it would otherwise be absent. "Diversity" programs are by their very nature "timeless in their ability to affect the future," *Wygant*, 476 U.S. at 276, and "would support indefinite use of racial classifications," *Metro Broadcasting*, 497 U.S. at 614 (O'Connor, J., dissenting), and are thus contrary to Title VII -- even under *Weber*.

The pursuit of non-remedial objectives also poses a greater risk of violating the Constitution, which requires that any race-based decisionmaking by government satisfy the "strictest judicial scrutiny," and limits the use of race to instances that are "narrowly tailored" to serve a "compelling governmental interest." *Adarand*, 515 U.S. at 224, 235. "Diversity" has never been recognized by the Court as a "compelling interest" sufficient to satisfy strict scrutiny. As Justice O'Connor -- who authored the Court's opinion in *Adarand* -- stated in dissent in *Metro Broadcasting*, "[m]odern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination." 497 U.S. at 612. *See also id.* (concluding that the FCC's "diversity" rationale was "clearly not a compelling interest" because it was "too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications"); *id.* at 632 (Kennedy, J., dissenting) (criticizing "the use of racial classifications . . . untied to any goal of addressing the effects of past race discrimination"); *Croson*, 488 U.S. at 493 (plurality opinion) (race classifications must be "strictly reserved for remedial

settings"); *id.* at 524-25 (Scalia, J., concurring). The United States has conceded that notions of "diversity" are very problematical under the Constitution. *See, e.g.*, Brief for the United States at 18 n.1.

In his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell, writing only for himself, advanced the view that "diversity" can be a compelling interest for purposes of constitutional analysis, but Justice Powell's "diversity" *dicta* was *not* part of the Court's holding in *Bakke*. As the Court of Appeals for the Fifth Circuit accurately concluded, "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case." *Hopwood*, 78 F.3d at 944.

Moreover, even for Justice Powell, "diversity" was not merely a code word for "proportional representation" or "racial balance." *See Bakke*, 438 U.S. at 307 (opinion of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."); *id.* at 315 (a university admissions program focused solely on race "would hinder rather than further attainment of genuine diversity").

In light of this Court's teaching in *Croson* and other cases, the lower courts have also rejected the notion that "diversity" satisfies the high constitutional standard. *E.g.*, *Hopwood*, 78 F.3d at 944, 945 ("Indeed, recent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny"; racial classifications for the sake of diversity "may promote improper racial stereotypes, thus fueling racial hostility"); *Podberesky v. Kirwan*, 956 F.2d 52, 55 (4th Cir. 1992) ("Because of the danger of stigmatic

harm, classifications based on race, understandably, must be reserved for remedial settings"); *Milwaukee County Pavers,* 922 F.2d at 422 ("The whole point of *Croson* is that disadvantage, diversity, or other grounds for favoring minorities will not justify governmental racial discrimination . . . only a purpose of remedying discrimination against minorities will do so.").

The "diversity" rationale is, to a large extent, the discredited "role model" justification under another name. As with the "role model" theory, "diversity" is tightly bound to notions of "underrepresentation" -- again, wholly unrelated to any notion of past discrimination -- and the Court has rejected arguments that race-conscious programs are permissible to address perceived "underrepresentation." *E.g.*, *Croson*, 488 U.S. at 503-04; *Metro Broadcasting*, 497 U.S. at 614 (O'Connor, J., dissenting) (rejecting "role model" rationale because it "would allow distribution of goods essentially according to the demographic representation of particular racial and ethnic groups" and rejecting "diversity" rationale on similar ground that "[l]ike the vague assertion of societal discrimination, a claim of insufficiently diverse broadcasting viewpoints might be used to justify equally unconstrained racial preferences, linked to nothing other than proportional representation of various races") (citing *Croson*, 488 U.S. at 498, 505-06, 507, and *Wygant*, 476 U.S. at 276). "Diversity" also implicates notions of "racial balancing" that the Court has repeatedly rejected. *E.g.*, *Croson*, 488 U.S. at 507; *Johnson*, 480 U.S. at 639; *see also Bakke*, 438 U.S. at 307 (opinion of Powell, J.) ("[T]o assure . . . some specified percentage of a particular group merely because of its race or ethnic origin . . . is discrimination for its own sake.").

Non-remedial rationales like "diversity" can also be used against minorities and women, as well as in their favor. If "groups" can be "underrepresented," then obviously "groups" can also be "overrepresented." *See Metro Broadcasting*, 497 U.S. at 614-15 (O'Connor, J., dissenting) ("role model" rationale "could as readily be used to limit the hiring of teachers who belonged to particular minority groups"). The United States has recognized as much. Statement of President Clinton at Press Conference, 30 Weekly Comp. Pres. Doc. 2099, 1994 WL 577202, at *11 (Oct. 21, 1994) (speaking with respect to this case) (supporting race-driven firing in pursuit of diversity "[a]s long as it runs both ways, or all ways" and hypothesizing that such racial firings could properly occur "if there were only one white teacher on the faculty in a certain area and there were two teachers, they were equally qualified, and the school board or the school administrator decided to keep the white teacher also to preserve racial diversity").

In an attempt to avoid these problematic features of the "diversity" rationale, petitioner suggests, for example, that "minority and female workers" will presumptively embody different "personal experiences" of value in the workplace, Pet. Br. at 25, and that personal interactions in settings where "diversity" reigns "diminish the atmosphere of racial tension fostered by a lack of understanding and led [sic] to better race relations," *id.* at 30 (footnote omitted). Petitioner reveals the inherent contradiction of arguing that overt or covert race discrimination "diminishes the atmosphere of racial tension" by arguing -- incredibly -- that the policy that led to Mrs. Taxman's race-based firing "contributes to the morale and sensitivity of white teachers." *Id.*

These sociological arguments obviously have nothing to do with the requirements of Title VII, or with the Constitution. Justice O'Connor, in her dissent in *Metro Broadcasting*, made plain that "[s]ocial scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." 497 U.S. at 602. Moreover, petitioner's vision of "diversity" uses race as a proxy for other qualities -- such as different viewpoints -- that it purports to value. Race is a dangerous and inexact proxy for "other, more germane bases of classification," *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) (citation omitted), and its use as such a proxy by government is forbidden. *See also United States v. Virginia*, 116 S. Ct. at 2276 ("Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications.").

Petitioner argues that its use of race was essentially benign, as a mere "plus factor" or "tie-breaker" among otherwise equally well-qualified candidates. *E.g.*, Pet. Br. at 3, 2. There are at least three fatal flaws with that argument. First, for both constitutional and statutory purposes, the presence of a multitude of purported "factors" in the analysis would be irrelevant, as long as race was the factor that was *dispositive* in the ultimate decision. Second, as the United States observed in its brief at the petition stage, "[i]n the real world, however, that kind of tie rarely, if ever, occurs," Brief of the United States on Petition for a Writ of Certiorari at 18, and thus supposed racial "tie-breaking" is almost always raw racial preference in disguise. Third, even when race is used as a "tie-breaker" the result is precisely the type of unfair and

unjustifiable discrimination that was inflicted on Mrs. Taxman. Characterizing racial discrimination as "tie-breaking" is simply a dishonest effort to sugarcoat the ugly, divisive and unlawful reality of race preferences.

Petitioner's position, moreover, would engender endless litigation to ascertain its outer boundaries. As long as the proponents of race-based decisionmaking could come up with a new label that had not been explicitly addressed and foreclosed by the courts, employer-sanctioned race discrimination would continue, all in contempt of the statute and of the underlying constitutional principle of equal protection.

As demonstrated by this case, the propensity to use race in allocating jobs and educational opportunities has given rise to a form of "massive resistance," in which the clear command of the law and of this Court's decisions is ignored, and discriminatory programs are entrenched and defended, one by one, until the last possible appeal or procedural maneuver is exhausted.[9]

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[9] Thus, in *Hopwood v. Texas*, the State of Texas sought certiorari review in this Court to preserve a race-driven admissions program that it had elsewhere conceded violated the Constitution. *See, e.g., Texas v. Hopwood,* 116 S. Ct. 2581, 2582 (1996) (opinion of Ginsburg, J.) (noting that the State of Texas had conceded that its admissions program used race in an unconstitutional manner). Similarly, proponents of race-based decisionmaking seek to block the enforcement of California's Proposition 209, making the unlikely argument that enacting principles of non-discrimination into state law violated the federal Constitution's guarantee of equal protection. *E.g., Coalition for Economic Equity v. Wilson,* 110 F.3d 1431 (9th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3177 (U.S. Aug. 29, 1997) (No. 97-369).

The pursuit of "diversity" defined by race has no logical end. *E.g.*, *Metro Broadcasting*, 497 U.S. at 614 (O'Connor, J., dissenting) (diversity rationale "would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcasting spectrum continues to reflect that mixture"). Most personnel decisions, whether on the job site or in the hiring hall or in the admissions committee, can tend to increase or decrease some abstract measure of "diversity." If the Court were to read "diversity" into Title VII, the result would be an endless regime of race-based decisionmaking. Clearly, that is not what the authors of Title VII envisioned; it is also not what the authors of the Constitution envisioned.

CONCLUSION

The Court should affirm the *in banc* decision of the Court of Appeals for the Third Circuit, overrule *Weber*, and hold that "diversity" is not a permissible basis for race-based decisionmaking under Title VII.

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