

Nos. 97-1783 & 97-1784 (consolidated)

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

JAMES MCNAMARA, et al.	)	Appeal from the United States District
	)	Court for the Northern District of
Plaintiff-Appellants,	)	Illinois, Eastern Division
	)	
v.	)	No. 93 C 1098
	)	Judge Suzanne B. Conlon
CITY OF CHICAGO, et al.	)	
	)	No. 93 C 3028
	)	Judge James Holderman
Defendants-Appellees.	)	

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**BRIEF AMICUS CURIAE OF  
CHICAGO LAWYERS' COMMITTEE FOR  
CIVIL RIGHTS UNDER LAW, INC.  
IN SUPPORT OF DEFENDANTS-APPELLEES**

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Clyde E. Murphy  
Cynthia A. Wilson  
CHICAGO LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS UNDER LAW, INC.  
100 North LaSalle Street Suite 600  
Chicago, Illinois 60602  
(312) 630-9744

Jeffrey W. Sarles  
*Counsel of Record*  
Timothy S. Bishop  
MAYER, BROWN & PLATT  
190 South LaSalle Street  
Chicago, Illinois 60603  
(312) 782-0600

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**RULE 26.1 STATEMENT**

The undersigned, counsel of record for amicus Chicago Lawyers' Committee for Civil Rights Under Law, Inc., furnishes the following list in compliance with Circuit Rule 26.1:

(1) The full name of the amicus represented by the undersigned in this case is the Chicago Lawyers' Committee for Civil Rights Under Law, Inc.

(2) The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. has neither a parent corporation nor any stockholders which are publicly held companies owning 10% or more of its stock.

(3) The only law firm whose attorneys have represented the amicus in this case is Mayer, Brown & Platt.

Dated: September 24, 1997

Respectfully submitted,

CHICAGO LAWYERS' COMMITTEE FOR  
CIVIL RIGHTS UNDER LAW, INC.

By: \_\_\_\_\_  
One of Its Attorneys

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## INTEREST OF THE AMICUS CURIAE

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. ("Chicago Lawyers' Committee") was founded in 1969 as a cooperative effort of most of Chicago's major law firms to ameliorate poverty and discrimination by providing legal assistance to the poor and members of minority and other disadvantaged groups seeking equal access to employment, public accommodations, housing, and quality education. The Chicago Lawyers' Committee focuses its efforts on civil rights cases and projects that will benefit the community at large. Since its inception, the Chicago Lawyers' Committee has enlisted the *pro bono* services of many hundreds of attorneys from Chicago law firms in addressing a wide range of legal problems, including employment discrimination. The Chicago Lawyers' Committee has a strong interest in seeking racial discrimination eliminated and, where appropriate, remedied with voluntary affirmative action efforts by private and governmental actors.

The Chicago Lawyers' Committee has a particular interest in remedying discrimination in public safety agencies. These vitally important agencies interact with the public on a daily basis, and the Chicago Lawyers' Committee long has been involved in litigation directed at ending discrimination in such agencies. In 1973, the Chicago Lawyers' Committee filed a lawsuit on behalf of a number of Latino and African American clients against the Chicago Police Department, alleging discrimination in hiring and promotions. That case, *Camacho v. City of Chicago*, No. 73 C 1252, eventually was consolidated with two other cases, including *United States v. City of Chicago*, No. 73 C 2080. The later case lasted several decades and resulted in various findings of discrimination against the City. The Chicago Lawyers' Committee most recently participated as amicus in *Erwin v. Daley*, 92 F.3d 521 (7th Cir. 1996), which involved challenges to affirmative action promotions in the Chicago Police Department.

## SUMMARY OF ARGUMENT

The City presented a strong basis in evidence for its need to employ affirmative action to remedy discrimination in Chicago Fire Department (“CFD”) hiring and promotions. Indeed, the district court found that the City presented “overwhelming evidence” that “establishes” decades of intentional discrimination by the CFD. However, the City was not required to satisfy the district court’s higher standard of “establishing discrimination by overwhelming evidence” in order to show its compelling interest in its affirmative action plan. So long as it satisfied the governing “strong basis in evidence” standard, its affirmative action plan should be upheld.

In addition to remedying the effects of past discrimination, the City has a compelling interest in the operational effectiveness of the CFD. Racial diversity is essential for obtaining the trust and cooperation of all sectors of the population, including minority communities, necessary for the operational effectiveness of public safety agencies. Firefighters interact with the public not only at times of great crisis, but also through fire prevention programs, post-fire investigations, and rescue operations. Decades of racial discrimination in hiring and promotions by the CFD alienated minorities and undermined the ability of firefighters to function effectively. The City thus had a compelling interest in eradicating the continuing effects of that discrimination in order to promote an effective fire department.

Contrary to plaintiffs’ contention, municipalities may employ race-conscious measures to remedy the continuing effects of discrimination, whether intentional or unintentional, and whether or not the discriminatory acts occurred prior to March 1972, when the Equal Employment Opportunity Act (“EEO Act”) made Title VII applicable to state and local governments. In this case, the record demonstrates that the City’s pre-EEO Act discrimination was intentional and thus

was unlawful irrespective of the applicability of Title VII. But even if it were unintentional, the legislative history of the EEO Act establishes that Congress intended to create a remedy for the continuing effects of all pre-1972 racial discrimination by local governments, and the Supreme Court has held that Title VII reaches pre-EEO Act discrimination by a local government so long as that discrimination continued after enactment. Because the CFD's racial discrimination began well before — and continued well after — March 1972, the City's voluntary affirmative action to overcome the continuing effects of its pre-EEO Act discrimination clearly was justified.

### **ARGUMENT**

#### **THE CITY'S USE OF AN AFFIRMATIVE ACTION PROGRAM FOR FIRE DEPARTMENT PROMOTIONS SERVED A COMPELLING GOVERNMENTAL INTEREST**

##### **A. The City Presented A Strong Basis In Evidence For Its Use Of Affirmative Action In Fire Department Promotions.**

To pass legal muster, race-conscious programs of a governmental body must serve a compelling governmental interest. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995). The district court held that the CFD's challenged 1987 affirmative action program for promotions to the rank of captain served the City's compelling interest in remedying past discrimination, finding that the City presented "overwhelming" evidence that "establishes" decades of intentional discrimination by the CFD. 959 F. Supp. 870, 876 (N.D. Ill. 1997). Your amicus agrees that the record compels such a finding. However, this Court should make clear that the City was not bound to meet such a high standard. That is, the City was not required to "establish" that it had intentionally discriminated by "overwhelming" evidence in order to show its compelling interest in race-conscious remediation. Rather, so long as it had a "strong basis in

evidence” to believe that underrepresentation of minorities in the captains’ rank was rooted in such discrimination, it constitutionally could implement its affirmative action plan.

The Supreme Court held in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), that, to meet constitutional standards, a municipality’s implementation of a race-conscious program requires “a ‘strong basis in evidence for its conclusion that remedial action was necessary.’” *Id.* at 500, quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality op.). This standard has been uniformly adopted by the federal circuits. *E.g.*, *Ensley Branch, N.A.A. C.P. v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994); *Edwards v. City of Houston*, 37 F.3d 1097, 1108, 1113 (5th Cir. 1994), vacated on reh’g en banc on other grounds, 78 F.3d 983 (5th Cir. 1996); *Brunet v. City of Columbus*, 1 F.3d 390, 406 (6th Cir. 1993), cert. denied, 510 U.S. 1164 (1994); *Stuart v. Roache*, 951 F.2d 446, 450 (1st Cir. 1991), cert. denied, 504 U.S. 913 (1992). This Court used slightly different language in *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir.) (en banc), cert. denied, 510 U.S. 908 (1993), stating that local governments must furnish “convincing evidence” that challenged affirmative action programs targeted the effects of unlawful discrimination. *Id.* at 897. However, the Court supported that language with a citation to *Croson*, showing that it was not departing from the *Croson* “strong basis” standard, and it further indicated its adherence to that standard by determining that the City in that case had not shown the proper purpose of its program “strongly enough” to dismiss without a trial. *Id.* Moreover, the Supreme Court plurality in *Wygant* used the terms “strong basis in evidence” and “convincing evidence” interchangeably. See 476 U.S. at 277.

A showing of a “strong basis in evidence” is in the nature of “a prima facie case” of unlawful discrimination. *Croson*, 488 U.S. at 500; *Stuart*, 951 F.2d at 450. Thus, a

governmental body need not prove “actual discrimination” to support the constitutionality of a race-conscious program, but need show only “a firm basis for believing that remedial action is required.” *Wygant*, 476 U.S. at 286 (O’Connor, J., concurring). See also *Ensley Branch, N.A.A.C.P.*, 31 F.3d at 1565; *Brunet*, 1 F.3d at 406. This prima facie case, or “strong basis in evidence,” may rest on appropriate statistical evidence, as well as on varying amalgams of historical and anecdotal evidence. See *Croson*, 488 U.S. at 503; *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1556 (11th Cir. 1994) (holding that “evidence of a statistical disparity [in fire department’s racial composition] constituted the requisite ‘strong basis in evidence’ mandated by *Croson*”); *Ensley Branch, N.A.A.C.P.*, 31 F.3d at 1565; *Stuart*, 951 F.2d at 452.

Of course, plaintiffs challenging an affirmative action program retain the ultimate burden of proving the illegitimacy of the program. *Wygant*, 476 U.S. at 277 (plurality op.); *id.* at 293 (O’Connor, J., concurring); *Cygnar v. City of Chicago*, 865 F.2d 827, 837 (7th Cir. 1989). Thus, plaintiffs must “rebut” the prima facie “strong basis” with evidence that the purpose of the City’s program was non-remedial. *Donaghy v. City of Omaha*, 933 F.2d 1448, 1459 (8th Cir. 1991), cert. denied, 502 U.S. (1992). In the face of the City’s case of discrimination, it was not sufficient for plaintiffs to hypothesize or speculate about possible legitimate explanations for some or all of the minority underrepresentation occurring at the captains’ rank. Rather, they had to “demonstrate” such contentions to meet their evidentiary burden (*Wygant*, 476 U.S. at 277) and thereby “rebut” the strong showing made by the defendant (*Stuart*, 951 F.2d at 452); see also *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1245 (7th Cir. 1980).

Based on these established principles, the City was not required to present “overwhelming” evidence to “establish” that all of the minority underrepresentation was the result of past intentional discrimination. So long as it had a strong basis for believing that a race-based promotion policy was required to overcome the effects of past discrimination in CFD hiring and promotions, it was constitutionally justified in implementing that policy. And once the City demonstrated its “strong basis,” it was not required to refute every possible theoretically legitimate explanation for minority underrepresentation at the captains’ rank. If the City had to do so, its burden would be equivalent to requiring findings of “actual discrimination,” the standard rejected in *Wygant*, 476 U.S. at 286. Rather, plaintiffs were required to rebut the City’s showing of a “strong basis” with sufficient and competent evidence.

The City more than fulfilled its “strong basis” requirement. As the district court found, the record is replete with statistical and historical evidence that the CFD intentionally discriminated against blacks and Hispanics from the 1950s until at least 1979. 959 F. Supp. at 873. The record also demonstrates that this history of intentional discrimination left a legacy of significant minority underrepresentation in the CFD’s upper ranks. In 1987, when the CFD adopted the affirmative action plan at issue, the proportion of minority officers (particularly at the rank of captain and higher) remained significantly lower than the proportion of qualified minority persons in the applicant pool. *Id.*; Def. Exhs. 58, 61, 63, 64. Because no special skills are required to become an entry level firefighter, the stepping-off point for CFD promotions, see Def. Exhs. 10-14; *Peightal*, 26 F.3d at 1554, past intentional discrimination in hiring and promotions is the only plausible basis for this underrepresentation at the upper ranks. Further, the fact that the Department of Justice charged, and the City itself ultimately concluded, that the CFD’s hiring

and promotion tests in the 1960s and 1970s were invalid and discriminatory, itself provides a “strong basis” for believing that such discrimination was prevalent. In the face of this record, plaintiffs offered not a single piece of evidence suggesting that this underrepresentation of minorities was attributable to anything other than intentional discrimination. They may *theorize* that some of the minority underrepresentation resulted from conduct that was not intentional, but they did not make even a half-hearted attempt to support such a theory with *evidence*. Plaintiffs’ failure to rebut the City’s showing of a “strong basis” requires rejection of their claim that the City’s affirmative action plan lacked a compelling interest.

In sum, the district court’s holding that the City “established” its past discrimination with “overwhelming evidence” was justified by the record. But the district court set the bar too high. The City was required only to show a “strong basis in evidence” for believing that it had discriminated to justify its adoption of an affirmative action program for promotions to the rank of captain. Even if there were any doubt about its satisfaction of the district court’s elevated standard, the City easily satisfied the proper “strong basis in evidence” standard.

**B. Public Safety Agencies Have A Compelling Governmental Interest In Racially Diverse Upper Ranks.**

As discussed in the preceding section, the district court properly found that the challenged fire department promotion plan addressed the City’s compelling interest in remedying the continuing effects of past discrimination. 959 F. Supp. at 874. It is well established that race-conscious remedies are “permissible to rectify past discrimination.” *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996), cert. denied, 117 S. Ct. 949 (1997). But such rectification is not the only compelling interest that may authorize use of a race-conscious program. *Id.* at 919; see also

*Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert v. City of Richmond*, 648 F.2d 925, 928 (4th Cir. 1981), cert. denied, 454 U.S. 1145 (1982). Other interests may qualify, so long as they are “truly powerful and worthy.” *Wittmer*, 87 F.3d at 918. One such truly powerful and worthy interest is the need of public safety agencies to be operationally effective.

As discussed below, Congress, the courts, and scholars have concluded that public safety agencies, including fire departments, become more operationally effective as they become more racially diverse and representative. Thus, where race-conscious remedies are designed to improve the operational effectiveness of such agencies, they are constitutionally valid, so long as they are narrowly tailored to achieve that end. Accordingly, this Court may and should uphold the City’s 1987 captains’ affirmative action program, not only because it is needed to remedy the effects of past discrimination, but also because it increases the effectiveness of the CFD in carrying out its vital public functions.

A racially diverse work force often is critical to the effective functioning of governmental agencies. Congress passed the EEO Opportunity Act, 86 Stat. 103 (1972), which made Title VII applicable to state and local government agencies, in part because of “the importance that these agencies play in the daily lives of the average citizen,” from “local law enforcement to social services.” S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971), reprinted in *Legislative History of the Equal Employment Opportunity Act of 1972* (Comm. Print 1972) (“*EEO Legislative History*”) 410, 419. Congress concluded that the exclusion of minorities from government “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.” *Id.* Accordingly, courts recognize that “[t]he rewards of attaining racial diversity in the workplace are particularly

great where the employer is a governmental entity.” *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983).

The correlation between racial diversity and operational effectiveness is especially marked with respect to those agencies entrusted with the public safety. Congress recognized that problems associated with racial discrimination in employment are “particularly acute” and have “the most deleterious effect” in “governmental activities which are most visible to the minority communities.” H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971), reprinted in *EEO Legislative History* 61, 77. Firefighters, for example, are highly visible and important public employees. They interact with the public at times of great crisis, when trust and cooperation often mean the difference between life and death. Moreover, in between crises, they spend much of their time on preventive measures that similarly require a close working relationship with a broad stratum of the public, activities that can easily be undermined by antagonism based on race. As one court put it, “unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most.” *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 977 (1st Cir. 1982), vacated on other grounds, 461 U.S. 477 (1983).

These considerations have led the courts to conclude that an operational need for a diverse work force provides a compelling justification for race-conscious remedial programs in police and other law enforcement agencies. “Operational need” refers to a public safety body’s “need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves.” *Barhold v. Rodriguez*, 863 F.2d

233, 238 (2d Cir. 1988). In *United States v. Paradise*, 480 U.S. 149 (1987), a plurality of the Supreme Court based its decision to uphold an affirmative action promotion plan for Alabama state troopers on the ground that longstanding and pervasive discrimination “created a profound need and a firm justification for the race-conscious relief ordered by the District Court.” *Id.* at 167.<sup>1</sup> See also *Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981) (upholding constitutionality of race-based police promotion program based on “the operational needs of an urban police department serving a multi-racial population” to have a diverse officer corps), cert. denied, 454 U.S. 1145 (1982); *Bratton v. City of Detroit*, 704 F.2d 878, 889, vacated on reh’g on other grounds, 712 F.2d 222 (6th Cir. 1983), cert. denied, 464 U.S. 1040 (1984); *Detroit Police Officers’ Ass’n v. Young*, 608 F.2d 671, 695 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981).

The greater diversity in police ranks as the result of affirmative action programs has had a remarkable impact on police effectiveness. An increase in the percentage of black officers on the Atlanta police force (from 29.9 percent in 1975 to 47.2 percent in 1985) led to “a corresponding improvement in police relations with black citizens.” W. Marvin Dulaney, *Black Police in America* 90 (Indiana U. Press 1996). And the presence of a black police chief in Houston “reduce[d] the acrimonious charges of police brutality and abuse that had plagued the department.” *Id.* at 94. Moreover, many innovative police programs, such as team policing, police storefront offices, and community policing, resulted from the infusion of black leadership

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<sup>1</sup> Justice O’Connor later noted in *Adarand* that, despite their several opinions, all nine Justices in *Paradise* agreed that the pervasive and systematic discriminatory conduct at issue justified a race-based remedy. 515 U.S. at 236.

in urban police departments in recent years. These improvements often were suggested by minority citizens who previously had stood aloof from the police. *Id.* at 102.

Similar considerations apply with regard to non-police public safety agencies. In *Wittmer*, this Court upheld the constitutionality of a racial preference given to a black applicant for a boot camp officer position. The Court found that there was a compelling need for such a preference “because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp.” 87 F.3d at 920. Similarly, a California appellate court held that an affirmative action program for corrections officers promoted “the compelling interest of this state in the proper management of its correctional system.” *Minnick v. California Dept. of Corrections*, 157 Cal. Rptr. 260, 269 (App. 1979), cert. dismissed, 452 U.S. 105 (1981). See also *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988) (remanding to determine whether an “operational need” for a balanced workforce justified a race-based transfer and reassignment policy for parole officers).

Fire departments share in the compelling need of other public safety agencies to present a representative and diverse face to the public. Firefighters depend on cooperation with the public at life-critical moments, for example, when putting out a fire or rescuing a person entrapped by smoke or responding to an emergency call. As one court concluded in upholding an affirmative action program based on a fire department’s “operational needs,” increased racial balance in the fire department resulted in an “enhanced ability to prevent and fight fires.” *Van Aken v. Young*, 541 F. Supp. 448, 459-460 (E.D. Mich. 1982), aff’d, 750 F.2d 43 (6th Cir. 1984); accord *Beecher*, 679 F.2d at 977 (upholding fire department’s affirmative action program, where otherwise there would be poor “fire protection for those who need it most”); see also *Zamlen v.*

*City of Cleveland*, 686 F. Supp. 631, 641 (N.D. Ohio 1988) (city’s Safety Director sought “to have a personnel force reflective of Cleveland’s population” because it “enhances the division’s ability to function within the community”), *aff’d*, 906 F.2d 209 (6th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991).

This Court can take judicial notice that firefighters interact with the public on a daily basis, through fire safety programs, fire inspections, arson investigations, and emergency services. See Charles Sasser & Michael Sasser, *Last American Heroes: Today’s Firefighters* (Pocket 1994) (describing multifarious tasks performed by firefighters). According to the National Fire Protection Association, fire department emergency service calls increased nationally from about 5 million in 1980 to about 9.2 million in 1994. Cited in Steve Delsohn, *The Fire Inside: Firefighters Talk About Their Lives* 227 (Harper Collins 1996). And service calls in Chicago increased from 91,508 in 1985 to 170,586 in 1995. Martin, *New fire chief is challenged*, Chi. Trib., Sept. 22, 1997, sec. 2, p. 3. Such public interaction, often at times when decisive action is mandated, requires the constant exercise of discretion by CFD officers and a corresponding need for trust and cooperation by the citizenry. Moreover, fire prevention education is a primary activity of urban fire departments and fundamental to their success. See Malcolm Getz, *The Economics of the Urban Fire Department* 62 (Johns Hopkins 1979) (an “efficient fire department is lean on fire suppression effort and aggressive in the use of fire prevention”). To be successful, such education must reach all sectors of the population, an effort less likely to succeed if certain sectors are not fairly represented among those doing the reaching out. See *Van Aken*, 541 F. Supp. at 460 (fire prevention “depend[s] heavily on the public support and cooperation which result only from public respect and confidence”) (citation omitted).

As the record in this case makes clear and the district court found, the CFD had a long history of discriminatory hiring and promotional practices. As a result, minorities were vastly underrepresented in the CFD's upper ranks. Simply discontinuing its discriminatory practices would have perpetuated this severe racial imbalance for many decades. As discussed above, courts and independent studies consistently have concluded that an urban public safety agency rarely can function effectively if racial minorities are not fairly represented in its composition and leadership because they have difficulty securing the trust and cooperation of the community they are supposed to serve and protect. Here, the City adopted its affirmative action plan in part because it believed that it could not operate effectively without racially diverse leadership. Specifically, without an increase in minority representation in its upper ranks, the CFD would be unable to obtain and maintain the "trust and cooperation of the community it serves." Def. Exh. 6 at 4.

The record reflects historical distrust between Chicago's minority communities and what until recently was a white-dominated and white-run fire department. This distrust was grounded in the fact that black firefighters traditionally were provided with inferior equipment, even though they were located in areas where fire calls were frequent and fires often deadly. *E.g.*, Tr. 567-68, 604-05, 876. And just as police abuses have sparked urban riots in many cities, perceived insensitivity by white firefighters led to riots on Chicago's west side in the mid-1960s. Those riots broke out after a young African American woman was killed by a pole which had been struck by a fire truck. Tr. 609, Def. Grp. Exh. 107. That truck was based in a firehouse staffed solely by white firefighters that had been the target of protests by residents of the predominantly black community. *Id.* at 874-875; Tr. 212, 924, 996; Def. Grp. Exh. 107. These riots illustrate the

consequences of excluding minorities from a critical and visible public safety agency like the CFD and treating them like second-class citizens.

Moreover, there is substantial evidence in the record demonstrating that the racial composition of the CFD has substantial impact on its ability to garner the trust and cooperation of minority communities to fulfill its mission. For example, after the 1965 riots, the CFD designated Engine 9 to travel the west side, dropping one black firefighter at each of the all-white firehouses, in order “to show the people in the community that there were some black firefighters.” Tr. 539, 338-40. And the CFD put on a facade of integration with “showpiece” integrated snorkel squads (called “freedom wagons” by former Commissioner Quinn), in an attempt to win minority support. See Tr. 376-77, 464. These efforts represent an early acknowledgment that race-conscious remedies were required to overcome widespread minority alienation from and hostility to the CFD.

It is noteworthy that over the past decade, when the CFD’s minority composition increased from roughly 18 to 30 percent, see Martin, *New fire chief, supra*, measures of the CFD’s operational effectiveness improved dramatically. See Schmid, *Area’s fire response stacks up*, Chi. Sun-Times, Sept. 21, 1997, p. 1 (CFD’s alarm response time is among the best in the nation). And the benefits resulting from greater minority representation in the CFD extend well beyond the minority community. All Chicago residents and property owners are likely to gain from improved fire prevention and fire fighting effectiveness. See Getz, *The Economics of the Urban Fire Department*, at 7 (fire protection in one community brings benefits to adjoining communities). The widespread preservation of life and property sure to result from an operationally improved fire department must qualify as a compelling governmental interest.

**C. The City’s Affirmative Action Program Properly Targeted Continuing Effects Of Discrimination — Intentional Or Not — That Occurred Prior To The Date That Title VII Became Applicable To Municipalities.**

Plaintiffs contend that the CFD may not employ race-conscious means to remedy discriminatory effects resulting from unintentional discriminatory conduct that took place before 1972, when Congress amended Title VII to make it applicable to state and local governments. Pl. Br. 47. This Court in *Billish v. City of Chicago*, 989 F.2d 890, 897 (7th Cir.) (en banc), similarly suggested that, for conduct occurring prior to 1972, only intentional discrimination by a municipality, that is, an equal protection violation, would be remediable. Even if that conclusion were correct, the City’s program unquestionably was directed at unconstitutional conduct, because the district court found that the CFD had *intentionally* discriminated against racial minorities from long before 1972 until at least 1979, 959 F. Supp. at 873, and the record firmly supports that finding, e.g., Tr. 73, 206, 240-41, 493-95, 569, 939-40. However, the view expressed by plaintiffs here and by this Court in *Billish* is *not* correct.

Plaintiffs’ argument represents a cramped understanding of what Congress sought to accomplish through the EEO Act. Congress extended Title VII to state and local governments in part because “*past* discriminatory practices are maintained through *de facto* segregated job ladders, invalid selection techniques, and stereotypical misconceptions.” S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971), reprinted in *EEO Legislative History*, at 419 (emphasis added). As Senator Harrison Williams, chairman of the Labor and Public Welfare Committee and sponsor of the Senate bill, explained, the EEO Act was designed to implement a recent report of the United States Commission on Civil Rights, which called for state and local governments to adopt programs that

would ensure “that the continuing effects of *past* discriminatory practices are undone,” and to “bring about whatever changes in minority utilization are necessary to undo the effects of *past* discrimination.” 118 Cong. Rec. 1816-18 (1972), reprinted in *EEO Legislative History*, at 1117-20 (emphasis added). Thus, Congress’s focus was on remedying the continuing effects of *past* discrimination. It would make no sense, then, to limit a municipality’s ability to voluntarily remedy discrimination only to conduct occurring *after* the amendments took effect. And because there is no reason to think that Congress was concerned with the continuing effects only of prior *intentional* discrimination, it would make no sense to limit the voluntary remedial reach of Title VII to constitutional violations.

The only case that plaintiffs cite in support of their argument is *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977). But the Supreme Court in *Hazelwood* said only that a public employer that “made *all* its employment decisions in a wholly nondiscriminatory way” after March 1972 would be immune from Title VII liability. *Id.* at 309 (emphasis added). The Court continued:

This is not to say that evidence of pre-Act discrimination can never have any probative force. Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decisionmaking process had undergone little change.

*Id.* at 309-310 n. 15.

The Court later addressed this issue more directly in *Bazemore v. Friday*, 478 U.S. 385 (1986). In *Bazemore* (a *per curiam* decision, in which all nine Justices joined Justice Brennan’s concurring opinion on the Title VII issue), black employees and the United States sued the North Carolina Agricultural Extension Service and several counties, alleging a pattern and practice of

discriminatory pay disparities between blacks and whites, in violation of Title VII. The court of appeals upheld the district court's finding of no discrimination, reasoning that the Extension Service was under no obligation to eliminate any such salary disparity that had its origin prior to the effective date of the EEO Act. The Supreme Court rejected this position:

[T]hat the Extension Service discriminated with respect to salaries prior to the time it was covered by Title VII does not excuse perpetuating that discrimination after the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute.

*Id.* at 395. Accordingly, the Court unanimously held that a race-based pay disparity continuing after 1972 was “a wrong actionable under Title VII, *regardless of the fact that this pattern was begun prior to the effective date of Title VII*. The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated.” *Id.* (emphasis added). Based on *Bazemore*, then, Title VII would permit (indeed, would require) a city to remedy continuing discriminatory effects emanating from pre-EEO Act discrimination.

Other federal courts have agreed that local governments may employ race-conscious remedies to address the effects of unintentional discriminatory conduct that occurred prior to the EEO Act. See *United States v. City of Chicago*, 549 F.2d 415, 436 (7th Cir. 1977) (“even though Title VII did not become applicable to the City until 1972, the court had an obligation to correct the present consequences of discriminatory conduct that occurred before that date”); *Detroit Police Officers*, 608 F.2d at 689; *Van Aken*, 541 F. Supp. at 457 (upholding fire department's affirmative action plan and rejecting contention that pre-EEO Act discrimination was not relevant); see also

*Gonsalves v. J.F. Fredericks Tool Co.*, 964 F. Supp. 616, 620 (D. Conn. 1997) (based on *Bazemore*, discriminatory acts occurring prior to effective date of ADA, though not actionable, may have “probative force” at trial).

The above case law — none of which was mentioned by this Court in *Billish* — demonstrates that a municipality may voluntarily undertake an affirmative action plan to overcome the effects of unintentional discrimination that occurred prior to March 1972, at least where its discrimination continued after that date. In this case, the record is clear that the City’s discrimination continued, as the district court found, “until at least 1979.” 959 F. Supp. at 873. Even after the 1974 consent decree, the City maintained its discriminatory employment practices by refusing to hire or promote *any* firefighters, despite having an operational need for more firefighters, vacancies in the CFD’s upper ranks, and sufficient budgetary resources. Tr. 221-22, 285, 292, 769, 821. And only after entering into the *Albrecht* consent decree in 1980 did the City begin to halt its discriminatory practices. Tr. 109-10, 117. Thus, Title VII fully authorized the City to take into account discriminatory effects resulting from the CFD’s pre-EEO Act discrimination (whether intentional or not) when it developed its affirmative action plan. As the record demonstrates and the district court found, those discriminatory effects — particularly an officer corps that remains overwhelmingly white — continue to plague the CFD. Accordingly, the concern expressed in *Billish* — that pre-EEO Act unintentional discrimination was “lawful when engaged in” — was misplaced. The only support cited by the *Billish* Court was what it acknowledged as “dicta” from three Supreme Court opinions. See *Billish*, 989 F.2d at 897, citing to *Croson*, 488 U.S. at 500, *Wygant*, 476 U.S. at 289 (O’Connor, J., concurring), and *Regents*

of *Univ. of Calif. v. Bakke*, 438 U.S. 265, 307 (1978). However, none of the three opinions discuss or even raise that issue, in dicta or otherwise.

Furthermore, even if the City had no Title VII liability for pre-1972 unintentional conduct, that does not mean that it lacked a compelling interest in *voluntarily* remedying such conduct. A danger of liability is far from the only reason to remedy discriminatory effects. See *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring). As this Court stated in *Wittmer*, "It is not as if the rectification of past discrimination had a logical or equitable priority over other legitimate goals that discrimination might serve." 87 F.3d at 919. And as the Sixth Circuit ruled in *Detroit Police Officers*, "discriminatory acts which might not give rise to legal liability may nonetheless be sufficient to justify a voluntary remedial affirmative action plan. . . . When the question is what a public employer *may* do rather than what it *must* do, evidence of pre-Act discrimination is relevant to the propriety of ostensibly remedial racial preferences." 608 F.2d at 689 (emphases in original). In fact, this Court in *Wittmer* effectively recognized that voluntary remediation of conduct for which a governmental body would not bear liability may be constitutionally appropriate. 87 F.3d at 919. And a majority of the Court in *Croson* (Chief Justice Rehnquist, Justices O'Connor and White, and the three dissenting Justices) agreed that a governmental body may take affirmative action against the effects of racial discrimination by a private entity even where the governmental body was merely a "passive participant" in the discrimination. 488 U.S. at 492. Here, even if its past discrimination had been unintentional, the City was far more than a passive participant. Moreover, wholly apart from remedying past discrimination, the City has, as discussed in section B, a distinct interest in fostering integration in its leadership in order to attain and maintain community confidence in the CFD.

This Court therefore should reject plaintiffs' contention, and the suggestion in *Billish*, that a municipality may not employ race-conscious means to combat the continuing effects of pre-EEO Act unintentional discrimination. By doing so, it will faithfully adhere to the U.S. Supreme Court's ruling in *Bazemore* and the intent of Congress when it amended Title VII in 1972, and will align itself as well with persuasive case law in the other federal courts.

**CONCLUSION**

For the foregoing reasons, the judgment of the district court should be affirmed.

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Respectfully submitted,

CHICAGO LAWYERS' COMMITTEE FOR  
CIVIL RIGHTS UNDER LAW, INC.

By: \_\_\_\_\_  
One of Its Attorneys

Clyde E. Murphy  
Cynthia A. Wilson  
CHICAGO LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS UNDER LAW, INC.  
100 North LaSalle Street Suite 600  
Chicago, Illinois 60602  
(312) 630-9744

Jeffrey W. Sarles  
*Counsel of Record*  
Timothy S. Bishop  
MAYER, BROWN & PLATT  
190 South LaSalle Street  
Chicago, Illinois 60603  
(312) 782-0600