No. 99-1858

# In the Supreme Court of the United States

FRATERNAL ORDER OF POLICE, LODGE NO. 20,
PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION


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## QUESTION PRESENTED

Whether the district court abused its discretion in remedying discrimination based on race in filling two positions by awarding full make-whole relief to each of the 35 claimants who competed for the two positions.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 195 F.3d 1292. The opinion of the district court (Pet. App. 22-32) is unreported.

### JURISDICTION

The court of appeals entered its judgment on November 17, 1999. A petition for rehearing was denied on February 11, 2000 (Pet. App. 62-63). The petition for a writ of certiorari was filed on May 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. In 1975, the United States filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against the City of Miami, various City officials, and several police officer unions, including petitioner Fraternal Order of Police. Pet. App. 3. The complaint alleged that defendants were engaged in practices that discriminated against black, Hispanic, and female individuals with respect to employment opportunities and conditions of employment. *Ibid.* The United States and the City agreed to settle the case, and, in 1977, the district court approved a consent decree over petitioner's objections. *Ibid.* The decree required the City to establish promotion goals for blacks, Hispanics, and women. *Id.* at 3 & n.1.

At the time the decree was entered, the City's civil service rules required it to promote persons in strict rank order from an eligibility roster that was based on the results of a promotional test. Pet. App. 4. When the United States objected to that method of promotion, the City adopted a method of promotion known as the "Rule of Eight." *Ibid.* Under that rule, the City Director of Personnel Management certifies eight possible candidates for each vacant position. The first five candidates are selected in rank order based on the results of the test. The Director also has discretion to certify the three highest scoring members of the groups protected by the consent decree. *Ibid.* In addition, under Rule 8.7 the Director may certify up to three additional candidates if special qualifications are required. *Id.* at 4-5. The selecting official then chooses from among the certified candidates based on an interview and other subjective factors. *Id.* at 5.

In 1981, the court of appeals vacated the consent decree in part, holding that the portion of the decree that affected petitioner could not be enforced absent petitioner's consent. Pet. App. 5. In 1983, the district court entered a new consent decree to which petitioner consented. *Ibid.*

2. In 1992, the police chief requested the Director to issue a certification list to fill 16 police lieutenant vacancies. Pet. App. 6. The police chief requested the certification of additional black candidates in accordance with Rule 8.7, explaining that black supervisors were needed to blend into certain neighborhoods in which drug operations occurred. *Ibid.* At that time, two of the 29 lieutenants were black. *Ibid.* The Director certified three black candidates pursuant to Rule 8.7, and each of those candidates was selected. *Id.* at 7. Even if the Rule 8.7 procedure had not been used, each of the candidates would have been eligible for consideration under the Rule of Eight. *Ibid.* The use of Rule 8.7, however, made it possible to certify three additional minority candidates under the Rule of Eight. One of those minority candidates was selected. *Ibid.* If Rule 8.7 had not been invoked, that candidate would not have been eligible for consideration under the Rule of Eight. *Ibid.*

In 1992, the City filled five sergeant vacancies. Pet. App. 7. Before filling those vacancies, the police chief requested the Director to certify several Creole-speaking persons under Rule 8.7. *Ibid.* The Director certified two such persons, one black and one Hispanic. Neither would have been eligible for consideration absent Rule 8.7. *Ibid.* The police chief selected the black Creole speaker over the Hispanic Creole speaker for one of the positions. *Ibid.*

In 1993, petitioner filed two contempt motions relating to the 1992 promotions to lieutenant and sergeant. Pet. App. 8. Petitioner alleged that the City had used Rule 8.7 as a pretext for filling lieutenant and sergeant positions on the basis of race. *Ibid*. Based on a joint statement of undisputed facts, the district court granted petitioner's motion for contempt. *Ibid*. The court found that the request for lieutenant candidates who could blend into predominantly black neighborhoods and the request for sergeant candidates who could speak Creole were pretexts for discrimination based on race. *Id*. at 8-9. The court found that, as a result of those requests, the City had filled one lieutenant position and one sergeant position on the basis of race. *Id*. at 9. The court then ordered full make-whole relief to the 23 lieutenant and 12 sergeant candidates who were bypassed in favor of the two candidates who obtained positions as a result of the City's special certification rule. *Id*. at 9-10. In particular, the court awarded all 35 persons full backpay, retroactive seniority, a $15,000 lump sum pension, and a promotion. *Id*. at 10-11. That remedy would cost the City approximately $9 million. *Id*. at 18.

3. The court of appeals vacated and remanded, Pet. App. 1-21, holding that the district court's award of full make-whole relief to each member of the class was excessive. *Id.* at 2. The court noted that the purpose of "make-whole" relief is to "'recreate the conditions and relationships that would have been had there been no' unlawful discrimination." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 372 (1977) (quoting *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 769 (1976)). The court found that, in the absence of discrimination, only one of the 23 lieutenant candidates and only one of the 12 sergeant candidates who were

not promoted would have received a promotion. Pet. App. 13. Because it is "difficult, if not altogether impossible" to determine which of those candidates would have been promoted, the court explained, a classwide remedy is appropriate. *Ibid.* The court emphasized, however, that a classwide remedy must avoid providing a windfall to the class at the employer's expense. The court concluded that the district court's remedial order ran afoul of that principle. *Id* at 15. The court explained that the district court's remedy treated each member of the class as having a 100% chance of receiving a promotion in the absence of discrimination, when each lieutenant candidate stood only a one in 23 chance and each sergeant candidate stood only a one in 12 chance of promotion. *Ibid.*

The court held that the appropriate remedy in this case was to award each member of the class a proportional share of the monetary value of the promotion for which he or she was eligible. Pet. App. 15. Thus, the court directed that each certified lieutenant not selected for promotion should receive a one-twenty-third share, and each certified sergeant not selected for promotion should receive a one-twelfth share, of the value of the promotion. *Id.* at 15-16. The court noted that such an approach is consistent with binding Fifth Circuit precedent and with the approach adopted in other circuits. *Id.* at 16-17. The court distinguished the decision in *Taxman* v. *Board of Education* 91 F.3d 1547 (3d Cir. 1996), cert. granted, 521 U.S. 1117, cert. dismissed, 522 U.S. 1010 (1997), on the ground that the "probability of retention" of the teacher who was laid off in that case was fifty percent, which was "closely approximate to a more likely than not standard." Pet. App. 16 n.5.

**ARGUMENT**

Petitioner contends that the court of appeals erred in holding that the district court abused its discretion when it remedied discrimination in the filling of two positions by awarding full make-whole relief to 35 persons. That contention is without merit and does not warrant review.

1. The decisions of this Court establish that, in fashioning a remedy for employment discrimination, a district court should attempt to "'recreate the conditions and relationships that would have been had there been no' unlawful discrimination." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 372 (1977) (quoting *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 769 (1976)). Thus, when a court can identify the person who would have received a position in the absence of discrimination, an award of full make-whole relief to that person is ordinarily appropriate. *Franks*, 424 U.S. at 764-766.

In some circumstances, however, it may be impossible to determine who would have received a position in the absence of discrimination. For example, when there is a single vacancy, and a class of persons has been excluded from consideration for that vacancy on the basis of race, it may be impossible to reconstruct which member of the class would have received the position in the absence of discrimination. The courts of appeals have adopted a uniform approach for dealing with that problem. That approach is to award each of the persons bypassed a pro rata share of the value of the promotion that reflects each person's likelihood of having received the promotion. *Dougherty* v. *Barry*, 869 F.2d 605, 614-615 (D.C. Cir. 1989); *Ingram* v. *Madison Square Garden Ctr., Inc.*, 709 F.2d 807, 812

(2d Cir.), cert. denied, 464 U.S. 937 (1983); *Hameed* v. *International Ass'n of Bridge Workers*, 637 F.2d 506, 519-521 (8th Cir. 1980); *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 452-454 & n.7 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977); *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1055-1056 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976). That approach does not perfectly replicate the conditions that would have existed in the absence of discrimination. But it avoids the inequities of the other alternatives. Denying all relief would ignore the equities of those who may have suffered from discrimination and would reward the employer's discrimination. On the other hand, granting full make-whole relief to each member of the class would provide a windfall to the class and would amount to a punitive sanction against the employer.

The court of appeals in this case correctly followed the pro rata approach. The district court found that the City discriminated on the basis of race in filling one lieutenant position and one sergeant position. But it could not determine which of the 23 lieutenant candidates who were bypassed would have received that promotion in the absence of discrimination. Nor could it determine which of the 12 sergeant candidates who were bypassed would have received that promotion in the absence of discrimination. In those circumstances, the court of appeals correctly held that each of the 35 candidates should receive a pro rata share of the value of the two promotions, and that the district court had abused its discretion in awarding full make-whole relief to all 35.

The facts of this case dramatically illustrate why pro rata relief is appropriate and full make-whole relief is excessive. Even though the City's discrimination affected only two positions, having a value of approxi-

mately $516,000, the district court's make-whole relief would cost the City approximately $9 million. Pet. App. 18 & n.6. As the court of appeals explained, that award "amounts to an unfair and sweeping windfall to the officer class," *id.* at 18, and "is so excessive as to be punitive," *id.* at 20. Moreover, as the court of appeals concluded, "the district court's award of thirty-five retroactive promotions, where absent the City's discrimination only two additional promotions would have been available, could radically restructure the City's police force by creating many more lieutenants and sergeants than the City sought fit to create under its own promotion policies." *Ibid.*

2. Petitioner contends that the decision below conflicts with the Third Circuit's decision in *Taxman* v. *Board of Education*, 91 F.3d 1547 (1996), cert. granted, 521 U.S. 1117, cert. dismissed, 522 U.S. 1010 (1997). There is, however, no such conflict. In *Taxman*, a school system used race, rather than its ordinary practice of flipping a coin, as the basis for laying off one teacher rather than another. The court of appeals upheld an award of full backpay, even though the teacher subjected to discrimination would have had only a 50% chance of retaining her job in the absence of discrimination. *Id.* at 1565-1566. The court of appeals reasoned that, "[w]hile Taxman cannot be returned to the position that she held prior to her layoff—one of virtually precise equality with Williams in terms of the factors relevant to the decision—she can be returned to a position of financial equality with Williams through a one hundred percent backpay award." *Id.* at 1565. The court therefore concluded that an award of full backpay "most closely approximates the conditions that would have prevailed in the absence of discrimination." *Id.* at 1565-1566. The court also emphasized that, since Tax-

man had a 50% chance of retaining her job, the school board could not carry its burden of showing by a preponderance of the evidence that Taxman would have received something less than a full backpay award if her race had not been taken into account. *Id.* at 1566.

The circumstances that justified a full backpay award in *Taxman* are not present here. In *Taxman*, one discrimination claimant was competing for one job. In contrast, in this case, 35 discrimination claimants were competing for two jobs. In *Taxman*, the evidence supported a finding that the teacher subjected to discrimination would have retained her job (because the employer could not show by a preponderance of evidence that—as one of two claimants—she would not). In this case, by contrast, the evidence supports no such finding; instead it supports the finding that each lieutenant candidate claiming discrimination had only a one in 23 chance of receiving a promotion, and each sergeant candidate claiming discrimination had only a one in 12 chance of receiving a promotion. Thus, while awarding full backpay in *Taxman* approximated the conditions that would have existed in the absence of discrimination, awarding full make-whole relief to each of the 35 persons claiming discrimination in this case would provide a huge windfall to the class of claimants and unfairly penalize the employer. *Taxman* is therefore inapposite here.

Petitioner also contends that the decision below conflicts with the Fifth Circuit's decisions in *U.S. Steel*, 520 F.2d at 1055-1056, and *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 262 n.152 (1974), cert. denied, 439 U.S. 1115 (1979) because those decisions recognize that district courts possess wide discretion to fashion appropriate relief. In *U.S. Steel*, however, the court of appeals specifically commended the use of pro

rata shares in those instances in which it could not be determined which member of a class of claimants would have received a position in the absence of discrimination. 520 F.2d at 1055-1056. *Pettway* similarly suggested pro rata shares as an appropriate remedy where individualized determinations are impossible. 494 F.2d at 263 & n.154. While those cases make clear that a district court has discretion to select other "reasonable alternatives," *U.S. Steel*, 520 F.2d at 1056, neither case provides support for the excessive and punitive remedy adopted by the district court in this case. To the contrary, in both cases, the court of appeals emphasized that any remedy must avoid providing a "windfall to the class at the employer's expense." *Id.* at 1055; *Pettway*, 494 F.2d at 262 n.152. The court of appeals in this case faithfully followed that principle.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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