JUSTIFYING AFFIRMATIVE ACTION IN K–12 PRIVATE SCHOOLS

Sharon Hsin-Yi Lee

This Comment examines the consequences of using identical rules to govern affirmative action in both private employers and private schools. It explores accepted legal justifications for private affirmative action, focusing on whether they are internal or external to the defendant. In light of developments in Equal Protection Clause jurisprudence, the Supreme Court’s dicta in Johnson v. Transportation Agency private K–12 schools—to justify their affirmative action policies with external racial imbalances. This rule most effectively allocates the incentives and means of private schools to remedy racial disparities. In addition, the affirmative action permitted under this rule benefits society more than currently legal affirmative action in private employers and private colleges.

INTRODUCTION

If so, is it legal for the school to exclusively or primarily admit students of that racial group to better achieve its mission? In reality, the answer to the second question determines the answer to the first because a school that cannot exclusively or primarily admit students of a particular racial group would be severely limited in its efforts to improve that group’s educational achievement.

Although the decision was overturned en banc by the Ninth Circuit,1 a three-judge panel in Doe v. Kamehameha Schools (Kamehameha II) set forth an approach to answering the above questions.2 The panel essentially held that the Kamehameha Schools, a private school system, can never use a racial preference, a Native Hawaiian3 preference, to exclusively achieve?

* J.D. Candidate, UCLA School of Law, 2007; B.S., B.A., University of California-Berkeley 2004. My deepest appreciation goes to Michele Gustafson, Professor Robert Jones, Professor Adam Winkler, and Nicole Dooley for their time and insights. I dedicate this Comment to my parents, Ling-Tsuey and Ming-Dar Lee, for their love and support.
1. Doe v. Kamehameha Schs. (Kamehameha III), 470 F.3d 827, 829 (9th Cir. 2006) (holding that the Kamehameha Schools’ admissions policy was valid under 42 U.S.C. § 1981).
2. 416 F.3d 1025 (9th Cir. 2005).
3. Although there is general controversy as to whether Native Hawaiians should be treated as a race by law, the Kamehameha Schools conceded that their Native Hawaiian preference was a racial preference. , 416 F.3d at 1047.
The Kamehameha Schools have operated since 1887 “as the charitable legacy of Princess Bernice Pauahi Bishop, the last direct descendant of King Kamehameha I.” Private and nonsectarian, the Kamehameha Schools’ mission is “to fulfill Pauahi’s desire to create educational opportunities in perpetuity to improve the capability and well-being of people of Hawaiian ancestry.” To further its mission, the Kamehameha Schools have preferentially admitted students of Hawaiian ancestry for over 118 years. For its K–12 schools, the Kamehameha Schools’ admissions policy is implemented in a two-part process: the applicant first demonstrates his academic qualifications and then completes the Ethnic Ancestry Survey.

John Doe had sought to be admitted but was denied admission to the Kamehameha Schools twice. Each time he had met the academic standards and acknowledged that he possessed no aboriginal blood. Doe consequently filed suit against the Kamehameha Schools. He alleged that the Schools’ admissions policy violated 42 U.S.C. § 1981, the relevant part of which protects a person’s right to “make and enforce contracts” free from racial discrimination. The district court granted summary judgment in favor of the Schools and other defendants because “the admissions policy constituted a valid race-conscious remedial affirmative action program.” Doe appealed.

Because the Kamehameha Schools “employ[ed] an express racial classification,” the Ninth Circuit panel determined that the Schools’ admissions

5. Kamehameha II, 416 F.3d at 1027.
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All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

In Runyon v. McCrory, 427 U.S. 160 (1976), the Supreme Court determined that the right of admission to a private school fell under § 1981’s right to “make and enforce contracts.”
15. Kamehameha II, 416 F.3d at 1029.
16. Id. at 1027.
policy constituted a prima facie case of intentional race discrimination.\textsuperscript{17} In response, the Kamehameha Schools argued “that its policy constituted a valid affirmative action plan rationally related to redressing present imbalances in the socioeconomic and educational achievement of native Hawaiians, producing native Hawaiian leadership for community involvement, and revitalizing native Hawaiian culture.”\textsuperscript{18} However, the panel reasoned that an affirmative action policy justifies a racial preference only when it satisfies three requirements\textsuperscript{19} advanced by the Supreme Court in \textit{United Steelworkers of America v. Weber}.\textsuperscript{20}

Seeing “no basis for a different rule regarding a plan’s alleged violation of §1981 in the context of private education,” the panel determined that the Kamehameha Schools’ racial preference was designed to deny admission to all students possessing no aboriginal blood so long as a sufficient number of qualified Native Hawaiians sought admission.\textsuperscript{21} It reasoned that the Schools’ policy effectively created an absolute bar to the attendance of those not descended from the Hawaiian race\textsuperscript{22} and consequently failed the second prong of the Ninth Circuit’s \textit{Weber} rule.\textsuperscript{23}

Although the panel did not make this clear, it effectively held that a private school’s affirmative action policy must: (1) respond to a manifest imbalance in its student population, (2) not create an absolute bar to the admission of the non-preferred race or unnecessarily trammel the rights of the non-preferred race, and (3) do no more than is necessary to achieve a balance in its student population.\textsuperscript{24} Case law in the private employment context provides that a manifest imbalance exists if there is a much smaller percentage of the preferred racial group in the private employer’s population than the surrounding population.\textsuperscript{25} Extending the panel’s logic of identically treating affirmative action policies in private employment and private education, a manifest imbalance would exist only if there was a

\begin{itemize}
\item \textsuperscript{17} Id. at 1039. The prima facie case of intentional race discrimination created a presumption that the Kamehameha Schools had engaged in intentional discrimination.
\item \textsuperscript{18} Doe v. Kamehameha Schs. (\textit{Kamehameha II}), 416 F.3d 1025, 1039–40 (9th Cir. 2005).
\item \textsuperscript{19} Id. at 1040–41.
\item \textsuperscript{20} 443 U.S. 193 (1979).
\item \textsuperscript{21} \textit{Kamehameha II}, 416 F.3d at 1040–41.
\item \textsuperscript{22} Id.; cf. id. ("We are persuaded that these general principles [for testing the validity of an affirmative action plan] may be rationally applied in the context of private education, with certain modifications to account for the differences of context.").
\item \textsuperscript{23} Although a student not of Native Hawaiian ancestry was admitted in 2003, the Ninth Circuit determined that his admission was by accident rather than by design. at 1040 n.8.
\item \textsuperscript{24} at 1041.
\item \textsuperscript{25} Johnson v. Transp. Agency, 480 U.S. 646, 631–32 (1987) (reasoning that a manifest imbalance can be determined through “a comparison of the percentage of minorities or women in the employer’s work force with the percentage in the area labor market or general population . . . in analyzing jobs that require no special expertise”).
\end{itemize}
much smaller percentage of the preferred racial group in the private school’s population than in the surrounding population.

The Ninth Circuit panel did not address whether the Kamehameha Schools’ admission policy would have been valid if it had created a significant rather than an absolute bar to the attendance of people who are not some part Native Hawaiian.27 However, the consequence of importing the rule from private employment to private education, without change, is that the Kamehameha Schools almost certainly would not be able to use Native Hawaiian admissions preference because there is no manifest internal imbalance to justify it. The percentage of Native Hawaiians in the Kamehameha Schools’ population is virtually 100%,28 whereas the percentage of Native Hawaiians in Hawaii is 9.4%.29 Thus, applying identical rules to determine the legality of affirmative action in private employment and private education would likely handicap the Kamehameha Schools’ ability “to fulfill Pauahi’s desire to create educational opportunities in perpetuity to improve the capability and well-being of people of Hawaiian ancestry.”30

Avoiding this outcome, the Ninth Circuit’s decision reasoned “that we should use a standard for evaluating remedial racial preferences by wholly private primary and secondary schools that is akin to that used in Title VII employment cases, but that takes into account the inherently broad and societal focus of the educational endeavor.”31 Applying this reasoning to the imbalance prong of the test, the Ninth Circuit held that the “external focus of the educational mission renders unnecessary the requirement of proof of a ‘manifest imbalance’ within a particular school.”32 Instead, “a private school must demonstrate that specific, significant imbalances in educational achieve-

27. , 416 F.3d 1025, 1041–42 (9th Cir. 2005) (“Even if we assumed that some, limited racial preferences might be appropriate in order for the Schools to advance its mission, an absolute bar on the basis of race alone exceeds any reasonable application of Weber, Rudebusch, and the cases that followed in their wake.”).
28. A student not of Native Hawaiian ancestry was admitted in 2003. Id. at 1040 n.8.
30. , note 7.
31. Doe v. Kamehameha Schs. ( ), 470 F.3d 827, 842 (9th Cir. 2006). The most relevant section of Title VII of the Civil Rights Act of 1964, 42 U.S.C. for the issue at hand is § 2000e-2(a), which provides:
   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.
32.
ment presently affect the target population” in “the community as a whole” to justify a remedial racial preference.33

Of significance, however, is that other circuits may find the implicit logic of the Ninth Circuit panel more sound than that of the Ninth Circuit. In fact, that was the position of five dissenting judges in .34 These judges concluded that neither the text of § 1981 nor Title VII jurisprudence “explain why we must create a special standard for primary and secondary educational contract cases.”35 Thus far, no other circuit has had the opportunity to decide what rule governs the legality of affirmative action in private education. However, almost every circuit’s rule for affirmative action in private employment is like the Ninth Circuit’s in that they require an affirmative action policy to be justified by an imbalance within the employer’s workforce, or in other words, an “internal imbalance.”36 Some circuits, however, have indicated a willingness to justify affirmative action policies with imbalances external to the employer.37

This Comment sets aside the question of whether a private school should be able to use a racial preference to admit students of an academically underachieving racial group.38 Instead, it contends that K–12 private schools, including the Kamehameha Schools, should be able to admit students of an academically underachieving racial group. Such affirmative action most effectively allocates private schools’ incentives and means to remedy racial disparities. It also confers greater benefits and fewer burdens on society than forms of affirmative action.

33. at 860–62.
34. at 862. The dissent interprets the majority’s decision as applying to all “primary and secondary education contract cases,” citing Taxman v. Bd. of Educ. of Twp. of Piscataway, Cunico v. Pueblo Sch. Dist. No. 60, Weber Id Taxman Cunico employees students Kamehameha III

See infra


A. Supreme Court Cases

United Steelworkers of America v. Weber
Johnson v. Transportation Agency

Weber    Johnson

See Lex K. Larson, Employment Discrimination
Employment Discrimination
Justifying Affirmative Action

, the Kaiser Aluminum & Chemical Corporation plant in Gramercy, Louisiana, had a skilled craftworker population that was 1.83% black, while the local labor force was 39% black.43 The Gramercy plant agreed to select new craft trainees on a seniority basis, with the proviso that at least 50% of new craft trainees were to be black until the percentage of its black skilled craftworkers was commensurate with the percentage of blacks in the local labor force.44 The most senior black trainee had less seniority than several white production workers whose bids for admission were rejected, including the plaintiff who instituted the action.45

The Supreme Court did not "define in detail the line of demarcation between permissible and impermissible affirmative action plans," but concluded "that the adoption of the Kaiser-USWA plan . . . falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."46 In reaching this conclusion, the Court first reasoned that "the purposes of the [affirmative action] plan mirror those of [Title VII]."47 These purposes were "to break down old patterns of racial segregation and hierarchy" and "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."48 The Court’s second reason for upholding the Kaiser-USWA plan was that "the plan does not unnecessarily trammel the interests of the white employees" because the plan: (1) "does not require the discharge of white workers and their replacement with new black hires," (2) does not "create an absolute bar to the advancement of white employees," and (3) "is a temporary measure."49

In , the Santa Clara County Transportation Agency voluntarily adopted an affirmative action plan with the long-term goal of attaining a work force whose composition reflected the proportion of minorities and women in the area labor force.50 Towards this end, the plan permitted the consideration of gender as a factor when promoting qualified applicants within a traditionally segregated job classification in which women had been significantly underrepresented.51 The plan did not set aside a specific number of positions for minorities or women but required that shortrange goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions.52 A female employee, Diane

44. at 199.
45. at 208–09.
46. at 208.
47. at 208.
48. , 443 U.S. at 208 (internal citation omitted).
51. at 620–21.
52. at 622.
Joyce, was promoted to a Skilled Craft Worker job classification over a male employee, Paul Johnson. Both employees had been rated as well qualified for the job, but Johnson had received a seventy-five on his interview and Joyce had received a seventy-three.53

In reviewing the employment decision at issue in this case, the Supreme Court first examined whether the decision was made pursuant to a plan prompted by concerns similar to those of the employer in and then determined whether the effect of the plan on males and whites was comparable to the effect of the plan in.54 The Supreme Court upheld the validity of the Agency’s plan under Title VII because, first, the “consideration of the sex of applicants for Skilled Craft jobs was justified by the existence of a ‘manifest imbalance’ that reflected underrepresentation of women in ‘traditionally segregated job categories’” and, second, the Agency Plan did not “unnecessarily trammel[ ] the rights of male employees or create[ ] an absolute bar to their advancement.”55

B. Proper Justifications for Private Affirmative Action56

Weber Johnson

See infra See infra See, e.g.

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Id.
Id.
Id.

See infra See infra See, e.g.
Schurr v. Resorts International

Schurr, the defendant was Resorts, a casino licensee in Atlantic City, New Jersey. As a casino licensee, the defendant was regulated by the state’s Casino Control Commission pursuant to the Casino Control Act. The Casino Control Act required casino licensees to improve the representation of “women and minorities in . . . EEOC job categories in which the casino licensee is below the applicable employment goals” set by the Commission. In addition, casino licensees were required to develop an Equal Employment and Business Opportunity Plan to meet applicable employment goals set by the Commission and as a prerequisite to obtaining a casino license. The Commission stated that the purpose underlying the Casino Control Act and similar regulations was “to ensure that the job creation which would accompany casino developments would benefit all segments of the population” in Atlantic City, which had a large minority population.

Karl Schurr, a white male, sought employment as a light and sound technician at Resorts. Resorts’ director of show operations and stage man-

fra Appendix, but case law in these circuits have set forth this requirement. See, e.g., Dallas Fire Fighters Ass’n v. City of Dallas, 150 F.3d 438, 442 (5th Cir. 1998) (reasoning that manifest imbalance in the employer’s rank of deputy chief satisfied the first prong of Weber); Bennett v. Arrington, 20 F.3d 1525, 1537 (11th Cir. 1994) (“determining whether a manifest imbalance exists that would justify race-conscious decision-making by the employer involves a comparison of the percentage of minority employees in that job” with either “the percentage of minorities in the general area labor market” or “the labor market who possess that special skill or training”); Aiken v. City of Memphis, 9 F.3d 461, 473 (6th Cir. 1993) (reasoning that statistics comparing defendant’s labor force with county population and defendant’s job categories with defendant’s other job categories established a manifest imbalance for Title VII); Hammon v. Barry, 826 F.2d 73, 77–78 (D.C. Cir. 1987) (finding no manifest imbalance by comparing the percentage of blacks in the employer’s relevant department with the percentage of blacks in the area labor force); Janowiak v. Corp. City of South Bend, 836 F.2d 1034, 1039 (7th Cir. 1987) (finding no manifest imbalance where employer did not proffer any evidence of past discrimination nor a statistical comparison “between the relevant qualified area labor pool and the employer’s workforce”); Stock v. Universal Foods Corp., 817 F.Supp. 1300, 1306–07 (D. Md. 1993) (showing racial imbalance in the workforce tends to establish that the affirmative action plan is substantially related to a remedial purpose); Bertoncini v. City of Providence, 767 F.Supp. 1194, 1201–02 (D. R.I. 1991) (“In deciding whether the kind of imbalance that exists justifies taking race or gender into account, . . . a comparison of the percentage of minorities or women in the employer’s work force with the percentage in the area labor market or general population is appropriate.”) (internal citation omitted).

62. Id. at 490.
63. Id. at 488.
64. Id. at 489 (internal citation omitted).
65. Id.
66. Schurr, 196 F.3d at 498.
67. Id. at 490.
tion in the casino industry or in the technician job category; the plan was not put in place as a result of any manifest imbalance or in response to a finding that any relevant job category was or ever had been affected by segregation.\textsuperscript{75}

The Third Circuit concluded that the “absence of any reference to or showing of past or present discrimination in the casino industry [was] fatal” to the validity of the affirmative action plan.\textsuperscript{76} The court’s reasoning suggests that even if there had been no discrimination within the Resorts’ technician jobs, a manifest imbalance may have existed if there had been discrimination in the casino industry or in the technician job category generally.

In \textit{Frost v. Chrysler Motor Corporation} Chrysler had “adopted a Marketing Investment [P]rogram [("MIP") to enable it to place dealerships in those areas in which it ha[d] found no private investors with sufficient capital to open a dealership.”\textsuperscript{78} Mary Frost, a white female, applied for the Edmond Dodge dealership, which was part of MIP, but was rejected at a time when she was the only qualified applicant.\textsuperscript{79} An interim manager ran the dealership until a black male was selected as the dealer six months

\begin{itemize}
\item [\textsuperscript{68}] Id.
\item [\textsuperscript{69}] Id.
\item [\textsuperscript{70}] Id. at 488.
\item [\textsuperscript{71}] Schurr v. Resorts Int’l Hotel, Inc., 196 F.3d 486, 490 (3d Cir. 1999).
\item [\textsuperscript{72}] Id. at 496.
\item [\textsuperscript{73}] Id.
\item [\textsuperscript{74}] Id. at 497.
\item [\textsuperscript{75}] Id. at 497–98.
\item [\textsuperscript{76}] See id. at 498.
\item [\textsuperscript{77}] 826 F.Supp. 1290 (W.D. Okla. 1993).
\item [\textsuperscript{78}] Id. at 1291.
\item [\textsuperscript{79}] Id. at 1292, 1294.
\end{itemize}
Frost filed suit against Chrysler, claiming racial discrimination under § 1981. Chrysler contended that it rejected Frost’s application for the Edmond Dodge dealership pursuant to its affirmative action policy but failed to produce evidence showing that a racial imbalance existed with respect to people qualified for MIP. Consequently, the Tenth Circuit district court held that Chrysler’s affirmative action plan was invalid:

While it is true that [an employer] may justify the adoption of an affirmative action plan without showing a conspicuous imbalance among its own employees, [the employer] must show a conspicuous imbalance in the particular job category. In this case, Chrysler is attempting to remedy a conspicuous imbalance in one job category (privately capitalized dealership owners) by implementing an affirmative action plan in another (MIP dealers).

The court proceeded to state that an employer “may justify the adoption of an affirmative action plan without showing a conspicuous imbalance among its own employees.”

In sum, Schurr and Frost indicate the receptivity of the Third and Tenth Circuits to justifying private affirmative action with external imbalances.

**Using External Imbalances To Justify Affirmative Action in Private Schools**

1. **No Definitive Resolution by the Supreme Court**

   Johnson Weber

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Id.  
Id.  
Frost  
Id.  
Id.  
See  

Runyon v. McCrory  
Runyon
Weber

Johnson

require
de facto

not

permit

Teamsters v. United States

Id.
Weber

See Weber

Weber Johnson

See Weber Johnson

See Kamehameha III
2. Supreme Court Dicta in Weighed Against Equal Protection Case Law

Johnson

Johnson Weber

Wygant v. Jackson Board of Education

Wygant Weber

Id.
Id.
Id.
Id.

Johnson
Id.
Johnson


Reynolds v. City of Chicago

Hunter v. Regents of the University of California

Johnson

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Johnson

Schurr v. Resorts Int’l Hotel, Inc.
Chrysler Motor Corp

supra

Taxman v. Board of Education

Grutter v. Bollinger

Taxman

See, e.g.
B. Policy in Support of Using External Imbalances To Justify Affirmative Action in K–12 Private Schools

1. Most Effective Allocation of Incentives and Means To Remedy Social Disparities

cf.
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<th>School</th>
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<th>Admissions Policy</th>
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12 Schools Differently than Other Private Entities Under § 1981

a. Comparing the Benefits and Burdens of Affirmative Action in K–12 Private Schools
See Integration, Affirmative Action, and Strict Scrutiny N.Y.U.

The Key to College Access: Rigorous Academic Preparation in Preparing for College: Nine Elements of Effective Outreach

How.

Karl L. Alexander & Doris R. Entwisle, Achievement in the First 2 Years of School: Patterns and Processes


See, e.g., supra Kamehameha II

\textit{Id.}
b. Comparing Affirmative Action in K–12 Private Schools to Currently Permitted Forms of Affirmative Action

Conclusion


# Appendix: Survey of Rules Governing Affirmative Action Plans

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<tr>
<th>First Circuit</th>
<th>Plan's Justifications</th>
<th>Plan's Limitations</th>
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<td>· Eliminating a manifest racial imbalance</td>
<td>· Being a temporary measure</td>
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<td>· Not maintaining racial balance</td>
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<td>· Not unnecessarily trammeling the interests of the white employees</td>
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<td>· Not creating an absolute bar to the advancement of white employees</td>
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<td>· “[R]emedy[ing] a history of discrimination resulting in a workforce imbalance”</td>
<td>· Being temporary in nature</td>
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<td>· Being narrowly tailored to achieve its goal</td>
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<td>· Not unnecessarily trammeling the rights of third parties</td>
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The court looks to “whether there is a history of discrimination resulting in a workforce imbalance, whether the plan is temporary in nature, whether it is narrowly tailored to correct the imbalance, and the extent to which it affects the rights of third parties.”

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129. Petitti v. New England Tel. & Tel. Co., No.CIV.A.85-3951-Z, 1988 WL 82231, at *5 (D. Mass. 1988) (“[T]he validity of such a plan turns on three issues: (1) whether the plan was ‘justified by a manifest imbalance that reflected under-representation of women in traditionally segregated job categories’; (2) ‘whether the . . . [p]lan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement’; and (3) whether the plan was intended to attain, rather than maintain, a balanced work force.”) (internal citations omitted).

130. Patrolmen’s Benevolent Ass’n v. City of New York, 74 F.Supp. 2d 321, 338 (S.D.N.Y. 1999) (citation omitted), 310 F.3d 43 (2d Cir. 2002); Bushey v. N.Y. State Civil Serv. Comm’n, 733 F.2d 220, 227-28 (2d Cir. 1984), 469 U.S. 1117 (1985) (permitting affirmative action plan under Title VII “when[ ] the job category in question is ‘traditionally segregated’” and when the plan does not “unnecessarily
"Title VII’s prohibition against racial discrimination is not violated by affirmative action plans which, first, have purposes that mirror those of the statute and second, do not unnecessarily trammel the interests of the [non-minority] employees.”

For an affirmative action plan to have purposes that mirror those of the statute, the purposes must be remedial, like remedying the segregation and underrepresentation of minorities that discrimination has caused in the nation’s workforce. However, for an affirmative action to be remedial, it must be designed to correct a manifest imbalance in traditionally segregated job categories, which in turn, is a remedial purpose that mirrors those of the statute.

- Correcting a manifest imbalance in traditionally segregated job categories, which in turn, is a remedial purpose that mirrors those of the statute
- Being designed to achieve its goal
- Not unnecessarily trammeling the interest of the non-minority employees

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131. 74 F.Supp. 2d at 338.
132. 773 F.2d at 228.
134. , 196 F.3d at 497; , 91 F.3d at 1557.
An employer’s voluntary affirmative action plan is not a violation of Title VII if (1) its purpose is similar to that of Title VII, namely to ‘break down old patterns’ of discrimination; (2) the plan does not ‘unnecessarily trammel’ the rights of those outside the group that it is designed to protect; and (3) it is designed to eliminate a manifest racial or sexual imbalance.”

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<th>gated job categories.135</th>
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Sixth Circuit

“... stands for the general proposition that voluntary affirmative action is proper if it is reasonable under all of the circumstances.” A plan is reasonable if, like the plan in , it: (1) is temporary; (2) is not intended to maintain racial

| Reasonable goal under all the circumstances |
| Reasonable goal under all the circumstances |
| Being temporary |
| Not maintaining a racial balance |
| Not unnecessarily trammeling the interests of white employees by causing whites to be dismissed or absolutely barring |

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135. , 196 F.3d at 497; , 91 F.3d at 1556.
136. Smith v. Va. Commonwealth Univ., 84 F.3d 672, 676 (4th Cir. 1996); Messer v. Meno, 936 F.Supp. 1280, 1293 (W.D. Texas 1996), , 130 F.3d 130 (5th Cir. 1997); Lilly v. City of Beckley, W.Va., 797 F.2d 191, 194 (4th Cir. 1986) (“[T]est drawn from [ ] inquires whether the plan contains safeguards necessary to avoid trammelling the rights of non-minorities, whether the plan is designed to remedy past discrimination, and whether the plan is temporary.”).
137. This is considered to be a purpose similar to that of Title VII in the Fifth Circuit.
balance but simply to eliminate a conspicuous racial imbalance in traditionally segregated job categories; and (3) “d[oes] not ‘unnecessarily trammel’ the interests of white employees because it d[oes] not cause any whites to be dismissed and d[oes] not absolutely bar whites from advancement.”

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Ninth Circuit
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