JAMES LAWRENCE TURNER, **Plaintiff** **v.** **CAROL BROWNER, ADMINISTRATOR,** **U.S. ENVIRONMENTAL PROTECTION AGENCY,** **Defendant.**	)	**Civil Action No.** **3-96 CV2859-P**

PLAINTIFF'S BRIEF IN SUPPORT OF

RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES James Lawrence Turner, Plaintiff, and files this his *Brief in Support of Renewed Motion for Partial Summary Judgment*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record in this cause in accordance with the Rules of Civil Procedure by certified mail, return receipt requested, this _____ day of _____, 1999.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAMES LAWRENCE TURNER, **Plaintiff**	)	
v.	)	**Civil Action No. 3-96 CV2859-P**
CAROL BROWNER, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, **Defendant.**	)	

PLAINTIFF'S BRIEF IN SUPPORT OF

RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES James Lawrence Turner, Plaintiff, and files this his *Brief in Support of Renewed Motion for Partial Summary Judgment*, and in support thereof would show this Honorable Court the following:

I. INTRODUCTION

Plaintiff James Lawrence Turner, a GS-14 employee in the Region 6 (Dallas) Office of Regional Counsel of the United States Environmental Protection Agency (EPA) asserts in the instant case two causes of action. In his first cause of action he seeks compensatory damages based on his claim that he, a Caucasian male, was discriminated against by Defendant on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-5 and 2000e-16 ("Title VII") when Defendant failed to promote him to the positions of either Chief, Legal Branch, Compliance Assurance and Enforcement Division, or Senior Associate Regional Counsel for Counseling. The successful candidates for both of those positions were Black males. Plaintiff also seeks compensatory damages for intentional

discrimination in violation of Title VII pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a ("1981a"). Plaintiff's second cause of action asserts that Defendant's Affirmative Employment Program (AEP) is in violation of the Fifth Amendment of the United States Constitution, and seeks injunctive and declaratory relief.

Pursuant to the Court's Summary Judgment Briefing Schedule dated February 19, 1997, Defendant filed a Motion for Partial Summary Judgment on May 2, 1997, and Plaintiff filed his Motion for Summary Judgment on May 8, 1997. By Memorandum Opinion and Order filed April 2, 1998 this Court ruled that Defendant's Motion for Partial Summary Judgment should be denied, and that Plaintiff's Motion for Summary Judgment should be denied "at this time." (Opinion and Order, p. 1). The Court considered Plaintiff's Motion for Summary Judgment on his Title VII claim under the standards set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) and concluded that while Plaintiff had met his burden of establishing a prima facie case, Defendant had articulated a legitimate, non-discriminatory reason for her action in not promoting Plaintiff, and that Plaintiff had not shown that the reasons proffered by Defendant were merely a pretext for discrimination. The Court then addressed Plaintiff's Fifth Amendment claims. The Court rejected Defendant's argument that Plaintiff's Fifth Amendment claim was preempted by Title VII, and found that Plaintiff has standing to challenge the AEP on constitutional grounds. The Court found that it must analyze the AEP under a "strict scrutiny" analysis as required by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). However, the Court denied Plaintiff's Motion for Summary Judgment on his Fifth Amendment claim on the ground that the Motion did not specifically attack the 1996 AEP that was in place at the time he filed his lawsuit (Memorandum Opinion at p. 15).

This Motion seeks Partial Summary Judgment on Plaintiff's Fifth Amendment claim. It seeks a declaration that the AEP in effect in 1996 is violative of the Fifth Amendment, and an injunction proscribing Defendant from continuing in effect the unconstitutional affirmative action program that continues to be employed by the EPA. As will be demonstrated below, the AEP in place at the time Plaintiff filed his lawsuit cannot survive the "strict scrutiny" mandated by *Adarand*. Defendant cannot identify a "compelling government interest" justifying the AEP, much less prove that their race-conscious employment program was motivated by one.(1) Defendant's inability to demonstrate the existence of a "compelling government interest" renders any examination of the "narrowly tailored" prong of the *Adarand* analysis unnecessary.

II. STATEMENT OF FACTS

Many of the facts relevant to this Motion have already been set forth in the parties' earlier submissions, and in the Court's Memorandum Opinion and Order. Therefore, this Memorandum will not burden the Court with a repetition of those facts, and will set forth only such additional facts as are necessary for the consideration of this Motion.

The 1996 Affirmative Action Plan

The document constituting the 1996 AEP bears the title "Affirmative Employment Program Plan for Minorities and Women - FY 1996 Update and FY 1995 Accomplishment Report,"(2) and bears the date "April 1996." It consists of 91 pages plus four one-page attachments. Its opening section describes its "Purpose" as follows:

> II. PURPOSE: The FY 1995 Affirmative Employment Program Plan Accomplishment Report for

> Minorities and Women and FY 1996 Plan Update presents EPA's progress in improving the employment and advancement opportunities for women and minorities. The report also documents the status of significant program objectives directed towards achieving work force representations as previously outlined in EPA's Multi-Year (FY 1987-FY 1994) Affirmative Employment Plan. (Exh. 1, App. I at A 00007).

Thus, the AEP in place in 1996, which the Court has held is the proper subject for Plaintiff's Fifth Amendment challenge, is a continuation and update of the EPA's ongoing Affirmative Employment efforts, and should be examined in the context of those efforts. In the opening section, the "Numerical Objectives" of the AEP are set forth:

> VII. NUMERICAL OBJECTIVES: Numerical objectives are set when, after a thorough workforce analysis, a manifest imbalance or conspicuous absence of minorities and/or women still exists.(3) Since professional and administrative positions make up over 80% of the Agency's total work force, the major focus of affirmative employment efforts is in these two occupational categories. (Exh. 1, App. I at A 00008).

A significant portion of the 1996 Plan (as well as previous Plans) is taken up with charts, graphs, and narrative descriptions of the composition of the EPA workforce,(4) broken down in excruciating detail by numerous factors including: race, national origin,(5) gender, GS level, "occupation" and "PATCO(6) category." For example, it discloses that during FY 1995, the EPA employed four American Indian/Alaskan Native females in Occupational Series 1301 (Physical Scientist) which constituted 0.21% of the Physical Scientists employed by EPA, and that EPA employed nine Hispanic males in Series 1320(Chemist) which constituted 1.42% of the Chemists employed by EPA. (Exh. 1, App. I at A 00039). The AEP also compares these percentages to the National (U.S.) Civilian Labor Force (CLF). Thus, the four American Indian/Alaskan Native females in Occupational Series 1301 (Physical Scientist) who constituted 0.21% of the EPA's complement of Physical Scientists, are compared with the CLF percentage of 0.20%, and the nine Hispanic males in Series 1320(Chemist) which constituted 1.42% of the EPA's complement of Chemists were compared with the CLF percentage of 2.10%. (Exh. 1, App. I at A 00039).

The AEP also contains charts showing "Accomplishments By PATCO Category" which break out the composition of each occupation by race and gender for FY 94 and FY 95, set out the representation of each race and gender in each occupation carried out to hundredths of a percent, and set forth the percentage change from FY 94 to FY 95, also carried out to hundredths of a percent. Thus, for example, in FY 94, Black female Environmental Engineers constituted 3.46% of the total Environmental Engineers at EPA, while in FY 95 they constituted 3.42%, which the chart dutifully notes constituted a .04% decrease in their representation, and that in FY 94, Hispanic female Auditors constituted 2.12% of the Auditors at EPA, while in FY 95 they constituted 1.81% of the Auditors, a decline of 0.31%. (Exh. 1, App. I at A 00042).

Another portion of the AEP is a narrative section in which the data set forth in the charts and graphs is used to make a "Comparative Analysis of CLF and EPA Workforce in Major Professional Series." (Exh. 1, App. I at A 00011). According to the AEP, in FY 95, 46.9% of the EPA workforce was in professional positions. (Exh. 1, App. I at A 00009). The balance of the EPA workforce was in "Administrative," "Technical," "Clerical," and "Other" positions.(7) This "Comparative Analysis" states that "underrepresentation has been eliminated for several targeted groups...black men and woman [sic],

Hispanic men and women, and Asian Pacific men and women." (Exh. 1, App. I at A 00011). It continues:

> The analysis describes the level of underrepresentation for each targeted group by job series and the specific number of hires required to eliminate this underrepresentation in comparison with the National Civilian Labor Force professional index. (Exh. 1, App. I at A 00011) (emphasis added).

The Comparative Analysis then addresses the "underrepresentation" in each of nine professional categories, and sets forth the specific number of hires by race and/or gender needed to eliminate this "underrepresentation" in each of these categories. For example, for the "Auditors" series, the AEP states that "the EPA should hire four white women, one Hispanic man, seven Asian men and one each American Indian men [sic] and women [sic]"; for the "Physical Scientists" series "EPA needs to bring 45 white women, one black woman, eight Hispanic men, 31 Asian men and one American Indian man on board"; and for the "Accountants" category "we need to hire 11 white women, two Hispanic men, four Asian men, and one American Indian man." (Exh. 1, App. I at A 00011).(8)

The AEP also identified a "Problem/Barrier" with regard to "specific occupational categories and higher grade levels (GS/GM 13-15)," which covers the positions Plaintiff unsuccessfully sought. The plan asserted that "targeted group members are not being selected at an acceptable rate," and that there should be a "staff of selecting officials who make appropriate target group selections." (Exh. 1, App. I at A 00021).

In addition, racial hiring needs are also set forth in the "Work Force Statistical Charts" which state with numerical exactitude the "Number of professional [administrative] staff needed to eliminate underrepresentation." (Exh. 1, App. I at A 00047 (all EPA), A 00092 (headquarters)).

The same type of racial analysis also appears in the "Affirmative Employment Program for Minorities and Women - Accomplishment Report" and "AEP Plan Update" prepared annually by EPA's Region 6 (Dallas), which covers the same Fiscal Year - 1996 - as the EPA's "Agency-wide" AEP. (Exh. 2, App. I at A 00107 to A 00150). That Report provides the same type of job-by-job racial breakouts as the EPA's overall report, including identification of the "# [of minorities or women] needed to achieve parity" with the Civilian Labor Force. (Exh. 2, Attachment 3, App. I at A 00133-4).

The EPA's obsession with race was not limited to mere accumulation of data and exhortations to its managers to be conscious of those data. Apparently believing that this amassing, analyzing, dissection and reporting of racial data, along with the specific enumeration of the precise number of minorities in each job category that need to be hired or promoted in order to meet precise numerical targets was not, by itself, sufficient to meet its affirmative action goals, EPA went well beyond the mere compiling and reporting of this information on alleged disparities in the racial composition of its workforce. It set in place a system designed to inject racial considerations into virtually every hiring decision made at EPA. For example, at page 13 the AEP laments that:

> Program officials who make personnel decisions regarding hiring, promotions, training, and recognition are not assuming responsibility for achieving positive results in affirmative employment. (Exh. 1, App. I at A 00018)

To remedy this deficiency, the AEP establishes as an "Action Item":

> Include manager's progress in meeting specific affirmative employment goals and objectives when evaluating their performance against their critical performance elements. (Id.) (Emphasis added).

This "Action Item" was already in place in the performance standards for Walter L. Sutton, EPA Deputy Regional Counsel who was the selecting official in the two promotions at issue in this action. In order for Mr. Sutton to receive a rating of "Outstanding" for FY 95 (the period covered by the AEP, and the period encompassing the selection decisions involving Mr. Turner at issue herein) he had to:

> Recruit quality staff which meets EEO/Affirmative Action goals... [and which] include a percentage of women and minorities which equals or is greater than EEO/Affirmative Action goals and objectives. (Exh. 3, App. I at A 00162) (emphasis added).

EPA thus made it abundantly clear that in order for an EPA manager to succeed, he/she had to, at an absolute minimum, cleave strictly to the precise numerical quotas set forth in EPA's AEP, and any minority/female hiring over and above those quotas would be all to his/her good.

Mr. Sutton's performance goals were written before the 1995 AEP was authored, and the demands set forth therein were consistent with EPA policy that predated FY1995, and prevailed long after. For example, in the FY 1994 AEP, EPA unabashedly states:

> The Administrator has established that..."Where underrepresentation exists, especially [sic] in managerial, supervisory and SES positions, at least 52 percent of placement opportunities will be directed to minorities and women." (Exh. 4, App. I at A 00228).

It is hard to conceive of a more clearly stated hiring/promotion quota. The FY 1994 AEP also seeks to impose on managers the requirement of achieving "specific affirmative employment goals and objectives" upon pain of a negative performance review. (Exh. 4, App. I at A 00194). And it contains the same detailed numerical comparison of the EPA's workforce against the Civilian Labor Force data. (*See, e.g.* Exh. 4, App. I at A 00276). Region 6's AEP Plan Update for FY 1995, which accompanied its FY 1994 AEP Accomplishment Report, continues the tone set by the EPA's national FY AEP:

> e. In rating senior managers on their critical performance standard which includes EEO performance, the Regional Administrator will take into consideration each Division's status in reducing underrepresentation of women, minorities and disabled persons, both for the Division and for the Region; senior managers will take the same into consideration in rating their respective managers and supervisors. (Exh. 5, App. II at A 00418) (emphasis added)

This directive originated at the top. In a memorandum dated October 14, 1994 Defendant Browner stated:

> The degree of effort expended to further the goals of the Civil Rights Program and the results attained will be factors in evaluations and performance ratings. (Exh. 6, App. II at A 00449)

The Region 6 FY 95 Update of the AEP also contemplated public chastisement of those managers who failed to meet the goals of the AEP:

> Each Division Director should be prepared at that time [quarterly senior staff briefings] to give an account on the steps taken during the quarter to achieve the overall goal, or the rationale as to why opportunities were missed. (Exh. 5, App. I at A 00417) (emphasis added)

Other examples of the injection of race into EPA personnel practices included the awarding of monetary performance bonuses for meeting "diversity" goals (Exh. 7, App. II at A 00453); bestowing awards for "hiring specific goals toward underrepresentation" (Exh. 8, App. II at A 00464), requiring the sign-off by the Region 6 EEO Officer on all personnel selections, requiring every selecting official in Region 6 to sign a certificate for each selection that he/she understands AEP goals and objectives (Exh. 8, App. II at 00465-6), considering Affirmative Action goals in every personnel selection (Exh. 9, App. II at A 00478) and requiring the review by the Regional Administrator of each selection at the GS-13, 14 and 15 level to "ensure that each selecting supervisor has reviewed and understands the Regional AEP goals and objectives." (Exh.10, Admission 37, App. II at A 00484).

One racial group did not, however, receive any scrutiny of its underrepresentation in the EPA workforce, much less any action to correct that underrepresentation. The "Work Force Statistical Charts" appearing at pages 31 through 34 of the 1996 AEP show a consistent underrepresentation of white males in the EPA's PATCO categories and occupational categories (Exh. 1, App. II atA 00037-40). Yet, notwithstanding the EPA's stated goal to create an EPA workforce that "looks like America" (Exh. 11, App. II at A 00486) and Administrator Browner's goal of having a workforce that "mirrored what society looked like" (Exh. 12, App. II at A 00491-3), EPA's "diversity" programs make no provision for correcting the underrepresentation of this segment of American society in the EPA's workforce. (Exh.13, App. II at A 00503-5; Exh. 8, App. II at A 00463 and A 00467; *see also*, Exh. 14, Admission 14, App. II at A 00512-3 ("EPA admits that there is no EPA or EPA Region 6 white employees or male employees special emphasis programs because neither of these groups is targeted under the EPA AEP")). Thus, it is hardly clear that EPA's purported "mirror America" goal -- which, of course, is not a "compelling governmental interest" in any event -- was its real goal. Rather, at least in operation, its goal appears to have been to bestow benefits upon of a favored class of persons - a class consisting of any persons who were not white males.

This racial regime did not end with the 1996 AEP. AEP's for succeeding years for Region 6[(9)] continued to amass and report the same data, in the same format, as the AEP's for prior years.[(10)] Other reports and documents also plainly reflect the fact that EPA has adhered to the racial goals and quotas contained in the 1996 AEP and prior AEP's. For example, Exhibit 18, "4710 Equal Employment Opportunity Program Assessment, 1996 Edition" (June 18, 1996) (App. II at A 00607-672) asks whether minorities and women are "receiving promotions that are reflective of their workforce population representation," and whether "performance standards for managers prescribe specific actions to be attained in the EEO program?" (Exh. 18, App. II at A 00639-40) The racial collating of the EPA's workforce is also displayed in "National Workforce Profile Report (August 1998)" which reveals such minutiae as the average amount of performance awards broken out by race and ethnicity. (Exh. 19, App. II at A 00701-5).

The coercion of managers to achieve diversity goals has also continued. In a September 29, 1997 e-mail to all EPA employees on the subject of "Minority Action Plans," Defendant again reiterated her unsubtle warnings to managers that the success of their careers depended upon meeting these goals by announcing the following "initiative":

> HOLDING SENIOR LEADERSHIP ACCOUNTABLE - The development of clear, distinct mechanisms for holding senior leadership accountable (in the Senior Executive rating and recognition process) for the recruitment, development, and maintenance of a diverse workforce. We will also provide positive incentives for offices to pursue these goals. The Agency's senior management team must demonstrate that it is ultimately their responsibility to ensure fairness,

equal opportunity, and full participation for all employees. (Exh. 20, App. II at A 00709).

The second sentence's reference to "also provid[ing] positive incentives" is particularly chilling in that it starkly contrasts with and highlights the fact that the preceding language of that paragraph is a not-so-subtle threat of negative consequences. The same message was conveyed in a June 18, 1998 "All Employees" e-mailed memorandum :

> [T]he Agency has completed a draft accountability model to hold political, SES, and other senior managers accountable for achieving improvements in diversity, fairness and equal opportunity. It is also important that senior managers develop open communication and regular dialogue with employees on workforce diversity concerns. Therefore, we have directed the Agency's senior managers to monitor and measure progress against their plans and to communicate this progress to employees throughout the course of the year. (Exh. 21, App. II at A 00712).

Not surprisingly, these accountability standards continue to be reflected in the performance standards for EPA's managers, just as they were in Walter Sutton's. (*See, e.g.*, Exh. 22, App. II at A 00717, 719-20; Exh. 23, App. II at A 00724; Exh. 24, App. II at A 00726-7; Exh. 25, App. II at A 00729-32).

III. ARGUMENT

The Summary Judgment Standard

In its Memorandum Opinion and Order at pages 6-7, the Court fully set forth the standard to be applied to summary judgment motions, and therefore it will not be repeated here.

Plaintiff is Entitled to Declaratory and

Injunctive Relief on His Fifth Amendment Claim

In its April 1998 Opinion, this Court recognized that, under the holding in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the EPA's 1996 AEP must meet and survive the "strict scrutiny" test. That is, it must serve a compelling governmental interest and be narrowly tailored to achieve that interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). This requirement flows from the principle reiterated by the Fifth Circuit in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996) that:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and "racial discriminations are in most circumstances irrelevant and therefore prohibited..."

78 F.3d at 940 *quoting Hirabayshi v. United States*, 320 U.S. 81, 100 (1943). Because of the disfavor with which the Supreme Court views racial classifications:

> any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.

Adarand, 515 U.S. at 224.

Strict scrutiny is intended to "'smoke out' illegitimate uses of race" by seeking to determine that the government actor's true goal is "important enough to warrant use of a highly suspect tool [and] ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493 (plurality opinion). This "highly suspect tool" may only be used to remedy the present effects of past discrimination in the same governmental entity which is seeking to use racial classifications. *Hopwood*, 78 F.3d. at 948-49. *See also Croson*, 488 U.S. at 493:

> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.

Defendant's employment program plainly uses racial categories. The fact that an affirmative action program may lack "hard quotas" but rather merely sets "goals" or aspires to a workforce that approaches proportional representation or eliminates "underrepresentation" does not render it any less violative of concepts of Equal Protection.

> The very term "underrepresentation" necessarily implies that if such a situation exists, the station is behaving in a manner that falls short of the desired outcome.
>
> * * *
>
> [W]e do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such, they can and surely will result in individuals being granted a preference because of their race.

Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 352, 354 (D.C. Cir. 1998); *see also, Monterey Mechanical Co. v. Wilson*, 125 F.3d at 710-13; *Bras v. California Public Utilities Commission*, 59 F.3d 869, 874 (9th Cir. 1995) (affirmative action programs "are not immunized from scrutiny because they purport to establish 'goals' rather than 'quotas'."); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513 (10th Cir. 1994).

Defendant's program cannot survive "strict scrutiny"for any number of reasons. First, remedying the continuing effects of past discrimination is simply not the reason that EPA has adopted the AEP's with their racial classifications. Indeed, EPA cannot identify a determination, either by EPA or any other body, judicial or otherwise, that there has been <u>any</u> past discrimination in need of remediation at EPA that could justify its racial classifications. EPA's Director of the Office of Civil Rights from 1994 to 1997, Dan J. Rondeau so acknowledged in his deposition. (Exh. 25, App. II at A pp738-41). According to Mr. Rondeau, the purpose of the AEP's was to improve EPA's "profile." (*Id.*). Thus, even assuming *arguendo* that there <u>was</u> past discrimination at EPA (which there most certainly was not), Defendant's scheme must fall because any such past discrimination "did not actually precipitate the use of race." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996).

Second, achieving a goal of "diversity," which appears to be EPA's sole justification for its racial classifications and hiring and promotion policies, without any of the requisite showing of past discrimination, is clearly not a compelling governmental interest that satisfies the strict scrutiny standard. *Lesage v. State of Texas*, 158 F.3d 213, 221 (5th Cir. 1998); *Messer v. Meno*, 130 F. 3d 130, 137 (5th Cir. 1997) ("Diversity programs, no matter how well-meaning, are not constitutionally permissible absent a specific showing of prior discrimination"); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d at 354 ("We do not think diversity can be elevated to the 'compelling' level [in the context of the FCC's equal employment opportunity regulations]").(11) Nor can reliance on claims of general societal discrimination justify racial classifications and discrimination. *Croson*, 488 U.S. at 498; *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 275 (1986); *Hopwood*, 78 F.3d at 950; *Messer*, 130 F.3d at 136; *Podberesky v. Kirwan*, 38 F.3d 147, 155 (4th Cir. 1994).

Third, even if, contrary to fact, EPA actually had a legitimate remedial goal, a simple numerical recitation showing underrepresentation of minorities, which is the sole factual underpinning for the EPA's race conscious policies, would fall far short of the required showing of "egregious and pervasive discrimination" that would warrant the "serious measure[s]." of race-conscious decision-making. *Dallas Fire Fighters Ass'n v. City of Dallas, Tex.*, 150 F.3d 438, 441 (5th Cir. 1998), *cert. den.* ____ U.S. ____,67 U.S.L.W. 3409 (March 29, 1999). In *Dallas Fire Fighters*, the Court concluded:

> In light of the minimal record evidence of discrimination in the DFD, however, we perforce must conclude that the City is not justified in interfering with the legitimate expectations of those warranting promotion based upon their performance...

Dallas Fire Fighters, 150 F.3d at 441. *See also, People Who Care v. Rockford Bd. Of Educ.*, 111 F.3d 528, 534 (7th Cir. 1997) (since only "intentional discrimination" can be remedied through racial preferences, neither "statistical disparities" nor the employer's "failure to reach its self-imposed hiring goals" could support racial preferences); *Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir. 1994) (en banc) (rejecting argument that city can use racial preferences to counteract unintentional racially disparate impact of promotional examination), *citing Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc), *cert. denied*, 510 U.S. 908 (1993).

The numbers utilized in the AEP's are woefully inadequate to form a basis for defending defendant's racial classifications and preferences. EPA's 1996 national AEP has only broad occupational categories such as "attorney" and "auditor." (*See, e.g.* Exh. 1, App. I atA 00038-9). The Region 6 AEPs do not provide even that level of detail, limiting their occupational categories to "Professional," "Administrative," and "Other." (*See, e.g.* Exh. 2, App. I at A 00133-45).

In order to justify affirmative action, a public employer must demonstrate "gross statistical disparities" between the proportion of minorities hired by the public employer and the proportion of minorities ready, willing and able to do the work. *Croson*, 488 U.S. at 501; *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1565 (1994); *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1010 (6th Cir. 1992). Defendant cannot make a such a showing. First, statistics from the entire civilian labor force hardly reflect those ready and willing to work for EPA. *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1287 (5th Cir. 1994). "Actual applicant flow figures are the preferred method by which to measure an employer's hiring practices and performance." *Id.* Moreover, EPA's own comparison to CLF figures, do not even approach a "gross statistical disparity."

Finally, even if the EPA's numbers did rise to the level required by *Croson*, which they manifestly do not, at best they would raise a rebuttable presumption, *United Black Firefighters*, 976 F.2d at 1011, a presumption that is rebutted by the fact that EPA has only existed since 1970, and can point to no policy or practice of discrimination which could have led to the so-called "disparities."

The cases discussed above make it clear beyond cavil that the oppressive and pervasive counting, classifying and sorting of persons by race and ethnicity that Defendant has been engaging in is a clear, indeed stunning, assault on the principles of Equal Protection guaranteed by the Fifth Amendment to the Constitution. Defendant has not offered, nor could she offer, any legal justification for her violation of the rights of Mr. Turner, and all other persons who are of his same racial and ethnic class. It is respectfully submitted that Mr. Turner, is entitled to a declaration from this Court that the Affirmative Employment Plan that was in place at EPA violates of the Equal Protection principles of the Fifth Amendment, and an injunction prohibiting Defendant from continuing her illegal and unconstitutional use of race as a factor in personnel decisions.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment should be granted, this Court should enter a Declaratory Judgment that Defendant's 1996 AEP is unconstitutional, and Defendant should be enjoined from continuing to implement such unconstitutional programs.

PLAINTIFF'S BRIEF IN SUPPORT OF

RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

APPENDIX VOLUME I

Exhibit 1 (App. I at A 00001-105), "Affirmative Employment Program Plan for Minorities and Women - FY 1996 Update and FY 1995 Accomplishment Report"

Exhibit 2 (App. I at A 00106-150), "Affirmative Employment Program for Minorities and Women - Accomplishment Report" and "AEP Plan Update" (dated February 9, 1996)

Exhibit 3 (App. I at A 00151-172), "Performance Agreement, Appraisal, and Certification for Supervisors, Managers, and Executives" for Walter L. Sutton (October 1, 1994 through September 30, 1995)

Exhibit 4 (App. I at A 00173-384), "Affirmative Employment Program Plan for Minorities, Women, And People with Disabilities, FY 1994 Plan Update And FY 1993 Accomplishment Report" (dated April 1994)

PLAINTIFF'S BRIEF IN SUPPORT OF

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APPENDIX VOLUME II

Exhibit 5 (App. II at A 00385-447), "Affirmative Employment Plan Highlights, FY 94 Accomplishment

Report, FY 95 Update" (dated May 1995)

Exhibit 6 (App. II at A 00448-9), Memorandum from Carol Browner to all employees (dated October 14, 1994)

Exhibit 7 (App. II at A 00450-4), Excerpts from the oral deposition of Stephen Gilrein (March 16, 1999)

Exhibit 8 (App. II at A 00455-471), Excerpts from the videotaped oral deposition of Nellie Roblez, volume II (January 27, 1999)

Exhibit 9 (App. II at A 00472-481), Excerpts from the oral deposition of Irma Womack (January 27, 1999)

Exhibit10 (App. II at A 00482-4), Excerpts from *Defendant's Responses to Plaintiff's First set of Requests for Admissions*, Admission 37 (March 31, 1999)

Exhibit 11 (App. II at A 00485-6), Letter from Kenneth F. Dawsey, Office of Administration and Resources Management, United States Environmental Protection Agency

Exhibit 12 (App. II at A 00487-495), Excerpts from the oral deposition of William Finister (January 13, 1999)

Exhibit13 (App. II at A 00496-509), Excerpts from the oral deposition of Jerry Clifford (January 28, 1999)

Exhibit14 (App. II at A 00510-513), Excerpts from *Defendant's Responses to Plaintiff's First set of Requests for Admissions*, Admission 14 (March 31, 1999)

Exhibit 15 (App. II at A 00514-558), "Affirmative Employment Program for Minorities and Women, Accomplishment Report and AEP Update, FY 1997" (dated May 5, 1997)

Exhibit 16 (App. II at A 00560-603), "Affirmative Employment Plan for Minorities and Women, FY 1997 Accomplishment Report and Annual Update for FY 1998"

Exhibit 17 (App. II at A 00604-5), Affidavit of Jennifer L. Gabel

Exhibit 18 (App. II at A 00606-672), "4710 Equal Employment Opportunity Program Assessment, 1996 Edition" (June 18, 1996)

Exhibit 19 (App. II at A 00673-706), "National Workforce Profile Report (August 14,1998)"

Exhibit 20 (App. II at A 00707-10), E-mail from Browner to all EPA employees on the subject of "Minority Action Plans" (dated September 29, 1997)

Exhibit 21 (App. II at A 00711-14), E-mail from Browner to all employees (dated June 18, 1998)

Exhibit 22 (App. II at A 00715-21), Excerpts from job description and performance rating documents for Laurie King from 1999 and FY 1995

Exhibit 23 (App. II at A 00722-24), Excerpts from job description and performance rating documents for Charles Faultry for 1999

Exhibit 24 (App. II at A 00725-27), Excerpts from job description and performance rating documents for

David Neleigh for 1999

Exhibit 25 (App. II at A 00728-32), Excerpts from job description and performance rating documents for William Gallagher for 1999 and FY 1995

Exhibit 26 (App. II at A 00733-743), Excerpts from the oral deposition of Dan Rondeau

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1. The burden of proving a "compelling government interest" is always on the government. *Adarand,* 515 U.S. at 224; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997).

2. Attached hereto as Exhibit 1 (App. I at A 00001 through A00105).

3. The term "manifest imbalance" derives from Title VII cases, and is not applicable to cases such as the instant case which involves a Constitutional challenge. In those cases, the review is under the "strict scrutiny" standard. *Hopwood v. Texas*, 78 f.3d 932, 940 (5th Cir. 1996), *cert. den.* ___ U.S. ___, 116 S.Ct. 2581 (1996); *Peightal v. Metropolitan Dade County,* 26 F.3d 1545, 1552 (11th Cir. 1994); *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 437 (10th Cir. 1990); *Keller v. Prince Georges County,* 827 F.2d 952, 963 (4th Cir. 1987). The AEP also uses the term "manifest imbalance" in assessing the numbers of minorities and women in the "upper grade levels and in supervisory positions." (Exh. 1, App. I at A 00022). The positions unsuccessfully sought by Plaintiff were "upper level" and "supervisory" positions.

4. The AEP analyzes EPA's workforce on an "Agency-wide" basis at pages 1 through 53, and also for EPA's "Headquarters" workforce at pages 54 through 91.

5. Hereinafter the term "race" will include both race and national origin.

6. The acronym PATCO, which is used throughout the AEP to describe occupational categories, stands for "Professional, Administrative, Technical, Clerical and Other." (Exh. 1, App. I at A 00009)

7. The AEP does not contain a "Comparative Analysis" of the EPA workforce in these positions.

8. The exact same type of analysis is repeated for EPA Headquarters staff at pages 57-8 of the AEP. (Exh. 1, App. I at A 00064-5).

9. *See*, Exhibit 15, "Affirmative Employment Program for Minorities and Women, Accomplishment Report and AEP Update, FY 1997" (dated May 5, 1997), App. II at A 00515-558; Exhibit 16, "FY 1997 Affirmative Employment Program (AEP) Plan Accomplishment Report and Annual Update for FY 1998 for Minorities and Women" (dated March 5, 1998), App. II at A 00560-603.

10. AEP's for EPA nation-wide were requested of Defendant in Plaintiff's Request for Production 1, and in subsequent correspondence with Defendant's counsel. No such documents have been produced. (Exh. 17, App. II at A 00605).

11. Indeed, to Plaintiff's knowledge, no one has ever seriously tried to justify race-conscious employment programs by invoking an interest in "diversity." Rather, that defense is employed in an educational context, where achieving "diversity" was considered by some to be part of a university's academic freedom. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.).