EQUAL PROTECTION CLAUSE—TITLE VII AND NEW JERSEY LAW AGAINST DISCRIMINATION—GOVERNMENT REGULATIONS THAT ESTABLISH "GOALS" FOR PROPORTIONAL MINORITY REPRESENTATION, EXERT ADMINISTRATIVE PRESSURE TO MEET THOSE GOALS, AND HOLD OUT THE POSSIBILITY OF AUDIT OR SANCTION FOR FAILURE TO MEET SUCH GOALS, MAY ENCOURAGE REVERSE DISCRIMINATION AND THUS VIOLATE EQUAL PROTECTION AND STATUTORY EMPLOYMENT DISCRIMINATION LAWS—*Schurr v. Resorts International Hotel, Inc.*, 196 F.3d 486 (3d Cir. 1999).

In July 1993, Karl Schurr and Ronald Boykin applied for employment as technicians at Resorts International Hotel ("Resorts"). *See Schurr v. Resorts International Hotel, Inc.*, 196 F.3d 486, 490 (3d Cir. 1999). Resorts' management officials determined that Schurr and Boykin were equally qualified for the job. *See id.* Acting pursuant to Resort's affirmative action plan, the management officials hired Boykin rather than Schurr. *See id.* Resorts officials testified that they believed that the minority hiring preference was mandated by the New Jersey Casino Control Commission, as well as by Resorts' affirmative regulations of the action plan. *See id.* at 493.

The Resorts managers who made the hiring decision "believed that Resorts was obligated to hire the minority candidate if one of the two qualified applicants for a position was a minority and Resorts had failed to meet state goals in the relevant [job] category." *Id.* at 490. The technician position at Resorts was classified as "underutilized" because Resorts had failed to meet the Commission's affirmative action goals for this job category. *See id.* The minority employment goal set by the Commission was 25%, while the actual percentage of minority technicians at Resorts had fallen to 22.25%. *See id.* Consequently, Boykin was hired. *See id.*

Schurr subsequently filed a reverse discrimination complaint against both Resorts and the Chairman of the Casino Control Commission. *See id.* at 491. Pursuing claims for monetary damages against Resorts, Schurr alleged that the casino's minority hiring preference violated Title VII and other employment discrimination statutes. *See id.* at 499. In contrast, Schurr's sole claim against the Chairman of the Casino Control Commission alleged a constitutional violation and sought only declaratory and injunctive relief. *See id.* at 495. The District Court of New Jersey granted the summary judgment motions filed by the Commission Chairman and Resorts, but denied the summary judgment motion filed by Schurr. *See id.* at 491. The Third Circuit Court of Appeals reversed, holding that defendant Resorts had unlawfully discriminated against Schurr in violation of Title VII, the New Jersey Law Against Discrimination, and 42 U.S.C. § 1981. *See id.* at 498-99.

Resorts relied upon its affirmative action plan to justify the decision to hire the minority applicant over Schurr. *See id.* at 497. The Third Circuit analyzed Resorts' affirmative action plan under the Title VII standards set forth in

United Steelworkers v. Weber, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). *See id.* at 497. The first prong of this standard can be satisfied only if the affirmative action plan was enacted for a remedial purpose, such as remedying discrimination or eliminating a "manifest imbalance in traditionally segregated job categories." *See id.* (quoting *Weber*, 443 U.S. at 207-08). All parties agreed that Resorts' affirmative action plan was not adopted to remedy any past or present discrimination in the casino industry. *See id.* at 497-98. In fact, since the inception of legalized casino gaming in New Jersey, the Casino Control Commission has required casinos to adopt these affirmative action employment goals. *See id.* at 498. The court found that there had never been any manifest imbalance or segregation in any relevant job category at Resorts. *See id.* Consequently, since Resorts' affirmative action plan clearly failed the remedial purpose prong of the *Weber* test, the court did not address the second prong of that test, which prohibits the plan from "unnecessarily trammel[ing] the interests of [non-minority] employees." *Id.* at 498 n.13 (quoting *Weber*, 443 U.S. at 207-08).

The conclusion that Resorts' affirmative action plan was invalid under Title VII was dispositive on all of Schurr's statutory discrimination claims. In the Third Circuit, the standard for assessing the validity of affirmative action plans under §1981 "is identical to the standard developed in Title VII cases." *Id.* at 498-99. The court held that the same reasoning and result would apply under the New Jersey Law Against Discrimination. *See id.* at 498. Thus, Resorts could not rely upon the affirmative action plan to justify its race-based decision not to hire Schurr. *See id.* at 498-99. Directing summary judgment for Schurr on his Title VII, NJLAD and §1981 claims, the court remanded the case for an assessment of damages. *See id.*

While criticizing the lower court's reasoning, the Court of Appeals affirmed summary judgment for the Commission Chairman, thereby dismissing Schurr's equal protection claim. *See id.* at 495-96. The court held that Schurr had failed to demonstrate the requisite likelihood of imminent future injury necessary to support his prayer for prospective declaratory and injunctive relief. *See id.* The court noted that Schurr has since obtained, and now holds, full time employment as an engineer at another casino. *See id.* Moreover, there was no evidence that Schurr had ever been rejected for any other casino position.

Although the decision in *Schurr* did not assess the constitutionality of the Casino Control Commission regulations, the opinion discussed the point at which goal-based affirmative action regulations might create constitutionally-suspect racial classifications. *See Schurr*, 196 F.3d at 494-95. The affirmative action regulations at issue in *Schurr* neither established hard quotas nor explicitly required any race-based hiring preferences. *See id.* at 493. Nevertheless, the court concluded that the New Jersey Casino Control Commission's regulatory scheme, which requires and monitors goal-based affirmative action in the casino industry, had "the practical effect of encouraging (if not outright com-

pelling) discriminatory hiring." *Id.* at 494. The Third Circuit emphasized that the regulatory scheme established employment diversity goals for the industry, monitored each casino's compliance with these goals, and provided the threat of sanctions for a casino licensee's failure to demonstrate good faith efforts to achieve diversity. *See id.* at 493. Consequently, the regulatory scheme affected concrete employment decisions such as "which of two equally qualified job candidates will be hired." *Id.*

ANALYSIS

The Court of Appeals' summary judgment against Resorts is straightforward and non-controversial. The casino admitted that its hiring decision was race-based. *See id.* at 493. Therefore, the dispositive liability issue was the validity of Resorts' affirmative action plan. *See id.* at 493. Resorts' plan could not survive Title VII analysis because it was not enacted for the remedial purpose of correcting past discrimination or eliminating a "manifest imbalance in traditionally segregated job categories." *Id.* at 497 (quoting *Weber*, 443 U.S. at 207). The Casino Control Commission's regulatory scheme governing affirmative action predated the inception of legalized casino gaming in New Jersey, and thus, was not based on any finding of discrimination in the casino industry. *See id.* at 498. Rather, the manifest purpose of these casino regulations was to prospectively ensure "a balanced representation of employees at all levels of the work force . . . ." N.J.A.C. 19:53-1.1(a). Absent any evidence of prior discrimination or significant imbalances in the racial composition of its workforce, the two percent under-representation of minority technicians at Resorts could not justify the casino's race-based decision not to hire Schurr. *See id.* at 490.

The Third Circuit also displayed sound reasoning in its summary judgment dismissal of Schurr's constitutional claim against the Chairman of the Casino Control Commission, which sought only prospective equitable relief. Unlike claims for retrospective damages, actions seeking forward-looking injunctive or declaratory relief must meet the additional standing burden of demonstrating a likelihood of imminent future injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *Lyons v. Los Angeles*, 461 U.S. 95, 105 (1983).

The court's actual holdings in *Schurr*, as outlined above, were clear, well reasoned, and sufficient to resolve all of the plaintiff's causes of action. Nevertheless, Judge Mansmann, writing for the court in *Schurr*, embarked on a causation analysis that raised more questions than it answered. This dicta, and the unusual context in which it was delivered, has only added more confusion to the already volatile area of regulatory affirmative action law. For many commentators and practitioners, the most interesting or alarming aspect of *Schurr* will be its equal protection implications and the opinion's quotation and adoption of strong anti-affirmative action language from *Lutheran Church-*

Missouri Synod v. FCC, 141 F.3d 344, (D.C. Cir.), *reh'g denied*, 154 F.3d 487 (D.C. Cir.), *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998).

In *Lutheran Church*, the Court of Appeals for the District of Columbia invented a new "encouragement" standard for determining when a facially neutral affirmative action regulation effectively functioned as a suspect racial classification. *See Lutheran Church*, 141 F.3d at 354. Under this novel standard, "it is the fact of encouragement, [rather than a purpose of encouraging discrimination], that makes th[e] regulation a racial classification." *Lutheran Church*, 154 F.3d at 492 (denial of rehearing).

Judge Mansmann's opinion in *Schurr* block-quoted and affirmatively cited the *Lutheran Church* opinion's discussion of when employment goals may coercively encourage reverse discrimination. *See Schurr*, 196 F.3d at 494-95. The first block-quoted paragraph states that a regulation containing the term "under-representation" necessarily implies an emphasis for outcome equality over non-discrimination, which pressures regulated employers "to maintain a workforce that mirrors the racial breakdown of their metropolitan statistical area." *Schurr*, 196 F.3d at 494 (quoting *Lutheran Church*, 141 F.3d at 352). The following paragraph demonstrates the Court's absolute conclusion that all employment goals constitute suspect classifications:

> Although it was urged that . . . "goals" should be treated differently than obligatory set asides . . . we 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 towards meeting the numerical target. As such, they can and surely will result in individuals being granted a privilege because of their race.

Id. (quoting *Lutheran Church*, 141 F.3d at 354).

Taken out of context, this quoted language might imply that the Third Circuit has adopted the *Lutheran Church* holding that any governmental monitoring of a regulated employer's workforce, for proportional representation, is presumptively unconstitutional. *See Schurr*, 196 F.3d at 494-95. Furthermore, the extensive discussion of *Lutheran Church* in *Schurr* may send regulatory agencies throughout the circuit scrambling to eliminate equal protection warning flags such as diversity reporting requirements, numerical employment goals, and the monitoring of "under-representation." However, this would be an over-reaction. When read in context, the discussion of *Lutheran Church* in *Schurr* does not, in fact, imply that the Third Circuit would adopt the flawed reasoning of the *Lutheran Church* equal protection analysis.

There is no reason to believe that the Third Circuit would ignore the unwavering line of Supreme Court cases, which held that a discriminatory purpose rather than a mere awareness of disproportionate effect is required to trig-

gers strict scrutiny. Instead, *Schurr* addressed Casino Control Commission regulations in the context of the causation requirement of standing, as opposed to an equal protection context. Causation analysis, unlike equal protection, turns on effect rather than intent. *See Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (holding that injury, which resulted from the coercive effects of environmental regulation of third parties, was "fairly traceable" to the governmental defendant). Notably, the block quote in *Schurr* ended mid-paragraph, quoting the discussion of the effects of affirmative action regulation from *Lutheran Church*, but omitting the conclusion that these effects triggered strict scrutiny. *See Schurr*, 196. F.3d at 494-95 (quoting *Lutheran Church*, 141 F.3d at 351-52, 354). Finally, the equal protection jurisprudence of *Lutheran Church* is inconsistent with the Title VII analysis in *Schurr*. Thus, the quotation of language from *Lutheran Church*, for the limited purpose of causation analysis, does not imply that the Third Circuit has adopted the radical, equal protection jurisprudence of *Lutheran Church*.

The *Lutheran Church* decision is controversial because the court invoked strict scrutiny analysis based upon the incidental side-effects resulting from affirmative action regulation. The Court of Appeals for the District of Columbia Circuit denounced race-conscious governmental regulations, which encourage employers to "aspire to a workforce that attains, or at least approaches, proportional representation." *Schurr*, 196. F.3d at 494 (quoting *Lutheran Church*, 141 F.3d at 352). However, the *Lutheran Church* approach is fundamentally inconsistent with Title VII and many other anti-discrimination laws, which require "employers to ensure that their selection processes do not result in an unjustifiable discriminatory impact on African-American candidates." *Allen v. Alabama State Bd. of Educ.*, 164 F.3d 1347, 1353 (11th Cir. 1999) (affirmatively citing Judge Tatel's dissent from the denial of rehearing *en banc* in *Lutheran Church*, 154 F.3d at 502). Statistical analysis and subsequent monitoring are necessary for evaluating the success of affirmative outreach programs and identifying the artificial barriers, which lead to disparate impact discrimination. Notably, some courts have distinguished a government agency's purely voluntary monitoring of its own recruitment process from the regulatory monitoring of private licensees in both *Lutheran Church* and *Schurr*. *See Sussman v. Tanoue*, 39 F. Supp.2d 13, 26 (D.D.C. 1999). In fact, these courts do not apply strict scrutiny to voluntary (non-regulated) affirmative action because it lacks the coercion which leads to discriminatory effects. *See id.*; *See also Safeco Ins. Co. v. City of White House*, 191 F.3d 675, 692 (6th Cir. 1999) (noting that the applicability of strict scrutiny often turns on the coercive effects of regulation and factual distinctions such as "whether the administering agency has enforcement or disciplinary power over the party making the hiring decision"). However, this notion that strict scrutiny is implicated by discriminatory effects, rather than discriminatory purpose, cannot be reconciled with the Supreme Court's Equal Protection precedents. *See*

Hernandez v. New York, 500 U.S. 352, 359-60 (1991); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979); *Washington v. Davis*, 426 U.S. 229, 239 (1976).

In *Washington v. Davis*, the Court held that government action is not subject to heightened scrutiny "solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race." *Feeney*, 442 U.S. at 260 (citing Davis, 426 U.S. at 239). Similarly, in *Feeney*, the Court upheld an absolute veterans' preference in civil service hiring and promotion where over 98% of the veterans where male. *See id.* at 270. The practical effect of the veteran's preference was that it excluded women from the more prestigious civil service jobs in Massachusetts. *See id.* at 263-71. Nevertheless, the Court held that the existence of disparate impact, even substantially disparate impact, does not show the purposeful discrimination required to trigger heightened scrutiny. *See id.* at 273-74. The Court acknowledged that the Massachusetts legislature undoubtedly understood that because most veterans were male, the preference would benefit males while disadvantaging females. *See id.* at 278. However, the mere knowledge of such a collateral consequence does not furnish an adequate basis to infer a discriminatory purpose. *See id.*

Finally, in *Hernandez v. New York*, a criminal defendant raised an equal protection challenge to a prosecutor's use of peremptory challenges to exclude four Spanish-speaking jurors. *See Hernandez*, 500 U.S. at 356. The prosecutor exercised these peremptory strikes on the theory that bilingual jurors might have difficulty accepting the interpreter's translation of Spanish-language testimony. *See id.* at 356-57. After acknowledging that the prosecutor's actions had a disproportionate effect on Hispanic jurors, the Court upheld the conviction. *See id.* at 362, 72. In a concurring opinion, Justice O'Connor noted that "[a]n unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent; the disproportionate effects of state action are not sufficient to establish such a violation." *Id.* at 372-73 (O'Connor, J., concurring).

The *Lutheran Church* decision ignored the critical distinction between discriminatory intent and disparate impact. The court reasoned that hiring "goals" must be treated like "hard quotas" because either technique encourages regulated private employers "to hire with an eye towards meeting the numerical target." *Schurr*, 196 F.3d at 494 (quoting *Lutheran Church*, 141 F.3d at 354). From this premise, the *Lutheran Church* court concluded, rather radically, that because employment goals can result in race-based preferences, they must be subjected to strict judicial scrutiny. *See Lutheran Church*, 141 F.3d at 354. Consequently, disproportionate impact alone can require strict scrutiny and thus, constitute a violation of the Constitution.

Other Circuits have rejected the *Lutheran Church* court's conclusion that facially-neutral affirmative action regulations, designed to reduce the disparate

exclusion of minorities, automatically create constitutionally suspect racial classifications when race-conscious regulations have a disproportionate effect on non-minorities. *See Haydon v. County of Nassau*, 180 F.3d 42, 50 (2d Cir. 1999); *Raso v. Lago*, 135 F.3d 11, 16-17 (1st Cir.) *cert. denied*, 119 S.Ct. 44 (1998). While the Supreme Court has never defined the terms "racial classification" or "suspect classification," circuit courts limit the definitions to classifications intended to preferentially benefit or burden individuals based upon their group membership. *Raso*, 135 F.3d at 16-17. Thus, while the census may "classify" people by their race, the taking of a census is not constitutionally suspect. Similarly, requiring a census of all job applicants, and then using that data to enforce neutral anti-discrimination laws does not create constitutionally suspect racial classifications.

The *Lutheran Church* decision has been characterized by civil rights leaders and commentators as an extreme anti-affirmative action ruling which attacks the concept of diversity while abandoning the ideal of ever attaining a truly level playing field. *See* Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1396-99 (1998). If, as *Lutheran Church* implies, the burden of proving intentional discrimination has been lifted from reverse discrimination plaintiffs, and the disparate effects of facially neutral government action are now enough to sustain one particular type of equal protection claim, then the court has abandoned the Fourteenth Amendment's concept of "equal protection of the laws."

However, the *Schurr* opinion does not imply that the Third Circuit would strictly scrutinize all government regulations which establish and monitor the diversity goals of regulated employers. For example, consider the Title VII analysis in *Schurr*, in which the court held that Resort's affirmative action plan was legally deficient due to the complete absence of any past discrimination or significant racial imbalance in either the casino industry or the specific job category. *See Schurr*, 196 F.3d at 497-98. However, the court noted that under its interpretation of the Title VII standard, "[e]vidence that a manifest imbalance existed either before or after Resorts enacted its plan would have sufficed." *Id.* at 498 n.12. This approach is consistent with the original spirit of Title VII, and the statute's goal of "remedy[ing] the segregation and underrepresentation of minorities that discrimination has caused in our nation's workforce." *Id.* at 498 (quoting *Taxman v. Board of Educ.*, 91 F.3d 1547, 1556 (3d Cir. 1996)). Although this affirmative action analysis concerned Title VII rather than equal protection, it stands out in stark contrast to the *Lutheran Church* court's contemptuous treatment of the "notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation." *Id.* at 494 (quoting *Lutheran Church*, 141 F.3d at 352). It is theoretically possible for the Third Circuit to read Title VII this liberally, while simultaneously reading the Equal Protection Clause so narrowly that merely establishing employment goals or monitoring under-representation is presump-

tively unconstitutional. However, it is unlikely that the Third Circuit would adopt this unusual dichotomy. Therefore, *Schurr* suggests that the Third Circuit's constitutional scrutiny of regulatory affirmative action programs will be more moderate and forgiving than the D.C. Circuit's approach in *Lutheran Church*.

Finally, *Schurr* arises under a rather unique factual and regulatory environment. The New Jersey Supreme Court has noted that the Casino Control Commission's broad powers and extraordinarily pervasive regulatory scheme control every facet of casino operations. *See Knight v. Margate*, 86 N.J. 374, 380-81 (1981). The Commission's regulatory scheme is easily distinguishable from other, less onerous, affirmative action programs. The Commission maintains two offices at Resorts, which are staffed with investigators at all times, twenty-four hours a day. It would be hard to imagine a more intensive or coercive regulatory presence.

Many regulatory plans include some facially-neutral, data collection and monitoring requirement, designed to evaluate the employer's personnel policies to ensure that they do not inadvertently screen-out any underrepresented group. *See Lutheran Church*, 154 F.3d at 496 (Edwards, C.J. dissenting from denial of rehearing *en bank*). This includes white males, if they happen to be underrepresented in any job category. *See id.* However, the Casino Control Commission's regulatory plan has an additional reporting requirement that is not facially neutral. If a casino fills an underutilized position with a white male applicant, it must file quarterly reports documenting its compliance with the affirmative action plan and its good faith efforts to meet the numerical "goals." *See Schurr*, 196 F.3d at 489-90. The casino can avoid this reporting requirement by refusing to hire any white males in underutilized job categories. The dicta in *Schurr*, which criticized this aspect of the Commission's plan, would not apply to most affirmative action regulations. Thus, the causation dicta in *Schurr*, which quotes *Lutheran Church*, should not have any implications outside of the unique facts and context of that case.

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