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No. 84-1999

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LOCAL NUMBER 93, I.A.F.F., AFL-CIO, PETITIONER

v.

VANGUARDS OF CLEVELAND, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMUCUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a consent judgment in an action brought under Title VII of the Civil Rights Act of 1964 against a public employer may award racial preferences in promotions to persons who are not the actual victims of ~~discrimination~~ the employer's past discrimination.

2. Whether a consent judgment may be entered over the objection of an intervenor of right ~~who is bound by the decree.~~ whose legitimate interests are adversely affected by the terms of the consent judgment.

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No. 84-1999

LOCAL NUMBER 93, I.A.F.F., AFL-CIO, PETITIONER

v.

VANGUARDS OF CLEVELAND, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., prohibits, inter alia, racial discrimination in employment. The Attorney General is responsible for enforcement of Title VII where, as here, the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5(f)(1). This Court's resolution of the issues presented in this case will accordingly have a substantial effect on the Attorney General's enforcement responsibilities. The federal government, which is the nation's largest employer, is also subject to the requirements of Title VII, 42 U.S.C. 2000e-16. Federal agencies are currently involved as parties (in one case, as a plaintiff and in the other case as a defendant) in cases posing similar questions that are before this Court. (See page ___, notes _____, infra.

We urge Supreme Court review in this case, because in our judgment the issues are posed here in a particularly clear form free from distracting complexities.

STATEMENT

In 1980, the Vanguards of Cleveland ("Vanguards"), an association of black and Hispanic firefighters employed by the City of Cleveland, brought a class action in the United States District Court for the Northern District of Ohio, alleging that the Cleveland Fire Department had discriminated in promotions, in violation of the Thirteenth and Fourteenth Amendments, 42 U.S.C. 1981 and 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. The complaint charged the City with using unfair written tests and seniority points, manipulating retirement dates with respect to the dates on which promotion eligibility lists expired, and failing to hold promotional examinations since April 1975 (Complaint, ¶ 15). The complaint also alleged that blacks and Hispanics were underrepresented in the ranks of lieutenant and above (ibid.). The complaint sought a declaratory judgment, an injunction prohibiting the continuation of discriminatory practices, and the institution of a hiring and promotion program for blacks and Hispanics (id. at 6-7).

Shortly after the complaint was filed, the parties began negotiations. In 1981, petitioner (Local Number 93, I.A.F.F., AFL-CIO, the collective bargaining representative of all of the Cleveland firefighters) successfully moved for intervention of right under Fed. R. Civ. P. 24(a(2)). Petitioner alleged that "[p]romotions based upon any criteria other than competence, such as a racial quota system," would be discriminatory and would deprive the city's residents of "the best possible fire fighting force" (Pet. App. A3).

In November 1982, the Vanguards and the City reported to the court that they had reached a tentative settlement, but this agreement was rejected by a vote of 88% of the membership of Local 93. The Vanguards and the city then negotiated a settlement to which Local 93 strongly objected. ~~This agreement fundamentally altered~~

~~the basis for promotions contained in the collective bargaining agreement between petitioner and the city and in the civil service rules.~~ The collective bargaining agreement between the city and petitioners, as well as ~~and the~~ civil service rules, provided ~~for~~ that promotions were to be made primarily on the basis of test scores, with extra points granted for seniority. Under the proposed settlement, however, a ~~strong~~ preference was given to any "minority" (i.e., black or Hispanic) firefighter who passed the promotional exams, regardless of whether he or she was the actual victim of proven discrimination. During the first stage of the decree, approximately 50% of all promotions were to go to minority candidates. The city was ordered to certify lists of those eligible for promotion based on the last exam and to make a large number of promotions no later than February 10, 1983. Pet. App. A33-A34. In making these promotions, the city was required to pair the highest ranking minority and non-minority candidates on the lists (id. at A34). _/ The second stage was to begin after certification of the eligible lists based on the next exam and was to continue until December 1987. The settlement set statistical "goals" to be achieved during this period for each rank and ~~provided for~~ required that minority candidates ~~to~~ be promoted "out of eligible list rank," if necessary ~~in order~~ to achieve these goals. _/ Pet. App. A35-A36.

The district court entered this agreement as a "consent" judgment while expressly acknowledging that petitioner did not consent (Pet. App. A31). The court purported to retain exclusive

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_/ If there were not enough eligible minority firefighters to fill the 33 lieutenant slots reserved for minority candidates, the unfilled slots were to be given to non-minorities. In that event, all future appointments to the rank of lieutenant from the next eligible list were to go to minority firefighters until the "shortfall" was made up. Pet. App. A34.

_/ For the period following the 1984 exam, the goals were as follows: 20% for assistant chief; 10% for battalion chief; 10% for captain; 23% for lieutenant. Pet. App. A35.

For the period after the 1985 exam, the following goals were imposed: 20% for ranks above lieutenant and 25% for the rank of lieutenant. Id. at A35-A36.

jurisdiction over any attempt by petitioner or any other party to enforce, modify, amend, or terminate the decree (id. at A38). The court also provided that the decree was to supersede any conflicting provisions of state or local law (id. at A37).

Petitioner appealed, but a sharply divided panel of the Sixth Circuit affirmed (Pet. App. A1-A28), holding that "the district court did not abuse its discretion in finding that the consent decree was fair, reasonable and adequate" (id. at A10). In support of this conclusion, ~~the court of appeals cited a variety of factors.~~ The ~~court~~ panel majority first noted that there had been past discrimination by the fire department and that minorities were statistically underrepresented in the department's higher ranks (ibid.). ~~The court then stated that "[t]he affirmative action remedy * * * is, in our opinion, fair and reasonable to non-minority firefighters" (ibid.).~~ The ~~court~~ panel majority ~~did not expressly explain the basis for this opinion but did note~~ also emphasized that non-minority firefighters would not be fired and were not absolutely barred from promotion (id. at A11). Finally, the court ~~also~~ observed (ibid.) that the city was not required to promote unqualified minority firefighters, that the percentage "goals" were subject to modification under certain circumstances, and that the plan was scheduled to remain in effect for a limited period.

The court of appeals held (Pet. App. A12) that the Court's decision in Firefighters Local Union No. 1784 v. Stotts, No. 82-206 (June 12, 1984), had "no effect" on this case for two reasons. First, the court of appeals noted (Pet. App. A13) that ~~in this case seniority rights were less substantially affected than~~ in Stotts. ~~"In Stotts, the court of appeals stated (Pet. App. A13),~~ "the district court's action had the direct effect of abrogating a valid seniority system to the detriment of non-minority workers." In this case, the court of appeals observed, seniority had previously provided only "a slight advantage in the promotional process," and under the "consent" decree seniority was still used

because the language and reasoning of ... Stotts ... indicate that the consent decree in the present case should be governed 5 - by the principles applicable to court-ordered relief rather than those applicable to purely voluntary actions" (Pet App. A20-A21).

in ranking eligible candidates within the minority and non-minority categories (id. at A13).

Second, according to the court of appeals, ~~concluded that the present case was "beyond the pale of Stotts altogether" (Pet. App. A13), because "[i]n Stotts, the decree was essentially coercive and [was] consensual in name only," whereas "[i]n the present case, the decree reflects voluntary action and must be analyzed as a voluntary action case" (id. at A19-A20).~~ Accordingly, the court of appeals ~~then~~ concluded that a ~~Title VII~~ consent decree, because the "reflects voluntary action" (Pet App. A), may ~~grant~~ order relief that could not be awarded if the case had been adjudicated by the court on the merits (Pet. App. A18-A19)

Judge Kennedy dissented. She first explained (Pet. App. A21) that under Stotts "if the present case had gone to trial and the plaintiffs had proven a pattern or practice of discrimination in promotions in violation of Title VII, the District Court could not have ordered relief equivalent to the provisions of the consent decree." She interpreted Stotts to mean that "when fashioning relief for a violation of Title VII a court [is] limited to making whole those found to have been victims of past discrimination" (Pet. App. A20). Preferential relief may not be given, she stated (ibid.), "based merely on membership in the disadvantaged class."

Judge Kennedy also disputed the panel majority's view that the present case does not involve an abrogation of seniority rights. She concluded that here, as in Stotts, "[t]he consent decree * * * in effect gives minority firefighters superseniority over all non-minority firefighters." ~~for promotion purposes. She also observed (id. at A22-A23) that Stotts applies even when seniority is not affected. Stotts, she noted (ibid.), relied on the policy of Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), "which is to provide make-whole relief only to those who have been the actual victims of discrimination" (Stotts, slip op. 16-17).~~

Judge Kennedy noted (Pet App. A23) that "the Court in both Stotts and Teamsters [v. United States, 431 U.S. 324 (1977)] relied on § 706(g) of Title VII, which limits the relief may be ordered to remedy ... tion."

"clearly provide make-whole-relief to those who have not been victims of illegal discrimination" (Pet App A23) and thus

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Having found that the quota relief at issue in this case could not have been awarded had the case gone to trial, Judge Kennedy concluded, in reliance on Stotts and System Federation No. 91 v. Wright, 364 U.S. 642 (1961), that this relief could not be awarded in a consent decree. She explained (Pet. App. A26), ~~that does~~ "does not make it any less an order," enforceable through contempt proceedings if necessary. That the parties to a case agree to entry of a court order,

~~a consent decree cannot be equated with a mere contract (ibid.):~~

> ~~Any failure to comply with the decree is~~ enforceable through contempt proceedings, rather than a suit for breach of contract. The District Court retains continuing jurisdiction to interpret and modify the decree. The decree also affects the rights of the firefighters' union and non-minority firefighters. A non-minority firefighter could challenge the city's voluntary actions on equal protection or Title VII grounds, but is foreclosed from collaterally challenging a court decree. Under Ohio's public employees collective bargaining law, effective April 1984 (after the consent decree was entered), voluntary changes in the city's promotion policy might be subject to collective bargaining with a certified representative. Ohio Rev. Code §§ 4117.01-.23. A city could avoid its duty to bargain by seeking adoption of a ~~consent decree.~~

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~~She concluded (id. at A28): "Since the power to enter a consent decree purporting to enforce a statute is drawn from that statute, it is incongruous to approve a consent decree that goes far beyond the scope of relief permissible under the statute."~~

Was Kennedy dissent adequately used?

DISCUSSION

This case presents recurring questions of pressing importance regarding the type of relief permitted in Title VII suits and the use and misuse of consent decrees in public law litigation. It is one of a series of post-Stotts lower court decisions upholding quota relief cases, the most recent of which ~~the court~~ candidly acknowledged ~~avowed~~ (Deveraux v. Geary, No. 84-2004 (1st Cir. June 24, 1985), slip op. 18): "This is a difficult and sensitive area in which we and the other circuits could be mistaken in our reading of current precedents [i.e., Stotts]."

In this case, the lower courts ~~approved~~ entered a "consent" decree ~~awarding benefits solely on the basis of race or ethnic background and not because the beneficiaries were the actual~~ past employees ordering that some ~~employees~~, who were not victims of employment discrimination, be promoted over other employees who were not beneficiaries of discrimination, solely on the basis of race. Insert C

victims of discrimination. We understand this Court's decision in Stotts to have disapproved such relief, but in upholding the decree in this case, the court of appeals gave Stotts what we regard as an overly narrow interpretation. This decision is merely representative of a large and rapidly growing body of lower court precedent that essentially limits Stotts to its facts. These decisions impair the rights of innocent individuals. They not only ratify the maintenance in force of old judgments which are a source of fresh deprivations, but they sanction as well the entry of new judgments that are fundamentally flawed and may have to be overturned, a process that may occasion considerable disruption for all concerned. To rectify this situation and prevent these consequences, prompt review by this Court is warranted.

This case also presents important questions regarding consent decrees. In this case and in other cases, the lower courts have endorsed the strange doctrine that a union that intervenes of right in employment discrimination litigation to protect its rights and those of its members may not resist the entry of a "consent" decree that binds the union and its members. These cases are a bitter complement to the doctrine that a union and non-minority employees who do not intervene in an employment discrimination case are barred from "collaterally" challenging the decree in any subsequent proceeding. Ashley v. City of Jackson, Mississippi, No. 82-1390 (Oct. 11, 1983) (Rehnquist and Brennan, J.J., dissenting from the denial of certiorari).

Finally, this case is an appropriate vehicle for resolving the uncertainty that now exists about the degree to which relief in a consent judgment must conform to the remedial provisions of the statute under which suit is brought. Because of importance of consent decrees in a wide variety of cases, elucidation of this difficult question is much needed.

insofar as application of the system would decrease the proportion of black ~~in those job categories~~ employees.

1. ~~We urge as a point of departure Judge Kennedy's interpretation of Stotts. When a court adjudicates a Title VII claim and finds that discrimination has been proven, the court in fashioning relief is "limited to making whole those found to have been victims of past discrimination. Relief [may] not be given based merely on membership in the disadvantaged class." Pet. App. A20 (Kennedy, J., dissenting).~~

In Stotts, the district court modified a Title VII consent decree over the objection of the ~~employer, the~~ City of Memphis, ~~The effect of this modification was to disturb a bona fide seniority system, and~~ to prohibit the City from following its seniority system in determining who must be laid off & as a result, some "non-minority employees with more seniority than minority employees were laid off or demoted in rank" (slip op. 4). This Court reversed. The Court first held (slip op. 10-12) that the modification ~~went beyond~~ merely enforced the agreement of the parties as reflected in the consent decree, ~~and thus had to be tested against the standards for awarding relief in adjudicated Title VII cases.~~ The Court then concluded (slip op. 12-20) that the ~~decree awarded~~ layoff quota was a type of relief "that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed" (slip op. 16). Relying on Teamsters v. United States, 431 U.S. 324 (1977), Franks v. Bowman Transportation Co., 424 U.S. 947 (1976), ~~Section 706(g) of Title VII, and the legislative history of that enactment,~~ [1] the Court held that it ~~was~~ was improper under Section 706(g) of Title VII for the court to award protection against lay-offs because of mere membership in the disadvantaged class. [2] ~~The court observed (slip op. 16-17) that the policy of Section 706(g) "is to provide make-whole relief only to those who have been actual victims of discrimination."~~ The unambiguous meaning of Stotts, in our view, is that a court in a Title VII suit may not ~~award~~ order

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[1] ~~In addition to the portions of the legislative history cited in Stotts,~~ see also 110 Cong. Rec. 1618, 5094, 5423, 6563, 7207 ~~(1964)~~.

Noting that it was "highly unlikely that the City would purport to bargain away non-minority rights under the then-existing seniority system."

[2] Section 706(g) provides, in pertinent part: "No order of the court shall require * * * the hiring, reinstatement, or promotion of an individual as an employee * * * if such individual * * * was refused employmen

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preferential equitable relief to non-victims at the expense of innocent third parties. Five (however,) courts of appeals have commented -- one in dicta -- on the meaning of Stotts, and without exception they have given it a constricted interpretation. See Pet. App. A12-A20; Deveraux v. Geary, No. 84-2004 (1st Cir. June 24, 1985), slip op. 8-19; Turner v. Orr, 759 F.2d 817 (11th Cir. 1985); _/ EEOC v. Local 638, 753 F.2d 1172, 1186 (2d Cir. 1985), cert. pending, No. 84-1656; _/ Diaz v. AT&T, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985) (dicta); ~~Van Aken v. Young, 750 F.2d 43, 45 (6th Cir. 1984) (dicta); Wygant v. Jackson Board of Education, 746 F.2d 1152, 1157-1158 (6th Cir. 1985) (dicta), cert. granted, No. 84-1390 (April 15, 1984); _/ Kromnick v. School District of Philadelphia, 739 F.2d 894, 911 (3d Cir. 1984) (dicta), cert. denied, No. 84-606 (Jan. 7, 1985); Grann v. City of Madison, 738 F.2d 786, 795 n.5 (7th Cir. 1984) (dicta), cert. denied, No. 84-304 (Oct. 15, 1984).~~ As the First Circuit acknowledged may be the case

moved to FN

~~Supreme Court~~ We

_/ In Turner, which involves a consent decree entered into by the Air Force, ~~the government~~ intends to file a petition for certiorari and to ask that ~~its~~ the petition be held pending disposition of the present case. We suggest this disposition of Turner because we believe that ~~it~~ presents a less ~~appropriate~~ attractive vehicle than the present case for addressing the prevalent lower court interpretations of Stotts and the application of Stotts to consent decrees. Turner involves a dubious interpretation of a consent decree applied to require what we believe to be inappropriate relief to a single employee and arises in the peculiar context of federal employment. See 759 F.2d at 824 n.2; 42 U.S.C. 2000e-16. ~~Although we believe that Stotts is fully applicable to cases involving federal employment and that the court's error there is a mirror of the wholesale errors committed in this case, these features of Turner diminish its utility as a vehicle for resolving the important questions that have arisen following Stotts.~~

the case, while certworthy,

_/ In EEOC v. Local 638, supra, cert. pending, No. 84-1656, the Commission will be filing a response contending that the Second Circuit misinterpreted Stotts and asking that the petition in that case be held pending disposition of the present case. Neither the Commission nor the United States urges that the Court review the decision in that case because of its factual and procedural complications, including the fact that the remedial issue is presented in the context of a contempt proceeding.

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_/ ~~Although~~ Wygant is limited to claims under the Fourteenth Amendment and presents no Title VII issues. See U.S. Br. as Amicus Curiae at 3 & n.5. However, if our position on ~~interpretation of the~~ Equal Protection Clause is correct, the relief awarded in the present case is unconstitutional. See especially U.S. Br. at 26-30. (We are serving copies of our brief in Wygant on the parties in this case.) Thus, while we urge the Court to grant the petition in this case and set it for argument ~~for~~ with Wygant, the Court should at a minimum hold this case (as well as Turner and Local 638) pending its decision in Wygant.

issue raised in Wygant

(Deveraux v. Geary, slip op. 18), we submit that the courts of appeals have indeed misapprehended the import of Stotts, and intervention by this Court is needed.

While the courts of appeals have found numerous grounds for distinguishing and limiting Stotts, _/ two such grounds are employed most frequently. First, every court that has addressed the question has held that Stotts does not apply to consent decrees. Pet. App. A13-A20; Deveraux v. Geary, slip op. 14; Turner v. Orr, 759 F.2d at 824; Van Aken v. Young, 750 F.2d at 45. We will discuss this question below (see pages , infra). In addition, six courts of appeals, including the Sixth Circuit in the present case, have held that Stotts applies only when seniority rights are affected. Pet. App. A13; Turner v. Orr, 759 F.2d at 824; EEOC v. Local 638, 753 F.2d at 1186; Diaz v. AT&T, 752 F.2d at 1360 n.5; Van Aken v. Young, 750 F.2d at 45; Kromnick v. School District of Philadelphia, 739 F.2d at 911; Grann v. City of Madison, 738 F.2d at 795 n.5. See also Massachusetts Ass'n of Afro-American Police v. Boston Police, Civ. A. No. 78-529-Mc (May 28, 1985), slip op. ; NAACP v. Detroit Police Officers Ass'n, 591 F. Supp. 1194, 1202-1203 (E.D. Mich. 1984); Vulcan Pioneers v. N.J. Dept. of Civil Service, 588 F. Supp. 732 (D.N.J. 1984).

In the present case seniority rights were in fact affected by the decree (see Pet. App. A21-A22) (Kennedy, J., dissenting), and in any event this limitation to seniority rights is unsound. The pivotal issue in Stotts was the type of relief that a court may award in a Title VII suit. The statutory provision that speaks directly to this question is Section 706(g), which

_/ In addition to the decisions limiting Stotts to contested cases involving seniority rights, there are decisions indicating that Stotts applies only when no statutory violation has been found or conceded (Deveraux, slip op. 14; EEOC v. Local 638, 753 F.2d at 1186)), only when the relief adversely affects identified innocent third parties (Turner v. Orr, 759 F.2d at 824)), and only when the relief is retrospective (EEOC v. Local 638, 753 F.2d at 1186).

Indeed, as the Court ~~has~~ expressly stated in Stotts, Section 706(g) empowers federal courts in Title VII cases "to provide make-whole relief only to those who have been actual victims of illegal discrimination." Slip op. 16-17 (emphasis added).

broadly governs all relief in Title VII cases and is not limited to relief affecting seniority rights. See note —, supra.

In limiting Stotts to relief infringing seniority rights, the courts of appeals, including the Sixth Circuit in this case, have pointed to this Court's discussion in Stotts of Section 703(h), which provides that it is not unlawful for an employer to abide by a bona fide seniority system. See Pet. App. A14; Turner v. Orr, 759 F.2d at 824; Kromnick v. School District of Philadelphia, 739 f.2d at 911. But as this Court expressly held in Franks, 424 U.S. at 758 ~~F.2d at 762~~, Section 703(h) "delineates which employment are illegal *** and which are not" and does not "proscribe relief otherwise appropriate under the ~~concerns liability under Title VII and does not govern the type of relief permitted once a violation has been found.~~ remedial provisions of Title VII, § 706(g), *** where an illegal discriminatory act or practice is found."

Both the majority and dissenting opinions in Stotts reflect the meaning and relationship of this understanding of Sections 703(h) and 706(g). The majority discussed Section 703(h) in connection with the question whether the seniority system was bona fide (slip op. 13-14), but the portion of the majority opinion devoted to the type of relief allowed under Title VII (slip op. 14-20) repeatedly referred to Section 706(g) and made only one passing reference in a footnote to Section 703(h). _/ Similarly, the relevant portion of the dissenting opinion (dissenting slip op. 19-29) extensively discussed Section 706(g), while making no reference to Section

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_/ Section 706(g), 42 U.S.C. 2000e-5(g), provides in pertinent part: (moved to pg. 8.)

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

_/ See slip op. 20 n.17. The Court referred to "statutory policy * * * here, §§703(h) and 706(g) of Title VII."

703(h). And in principle a reading of Stotts not so limited to relief infringing seniority interests is more rational. Seniority rights are, to be sure, an important aspect of a worker's bundle of expectations regarding his job; but so are the expectations regarding promotion involved here. Those expectations are no less sacrificed in this case than the other were seniority rights under the lay-off quota at issue in Stotts; and in both cases these sacrifices were made under the promotion quota to persons who have themselves suffered no discrimination not wrong by the defendant employer.

To be sure, While the relevant portion of the majority opinion in Stotts did rely significantly on Franks v. Bowman Transportation Co., supra, and Teamsters v. United States, supra -- cases involving both Sections 706(g) and 703(h) -- But it seems clear that the Stotts majority was referring solely to the portions of those decisions concerning the remedial question governed by Section 706(g).

2. The lower courts' misuse of the consent decree procedure in the present case also calls for review. In Stotts, Justice O'Connor outlined in her co-curring opinion the procedure that should be followed when Title VII plaintiffs wish to explore the possibility of a settlement that may adversely affect the rights of a union and its members. Justice O'Connor wrote (concurring slip op. at 6 (footnote omitted): "[I]n negotiating the consent decree, respondents could have sought the participation of the union [and] negotiated the identities of the specific victims with the union and employer * * *." Neither of these prerequisities -- meaningful participation by the union or the development of victim-specific relief -- was satisfied in this case.

a. It is elementary that a party cannot be bound to a

1/ In Teamsters, part II of the opinion of the Court (431 U.S. at 334-356) discussed the legality of the conduct of the employer and the union, as well as the validity of the seniority system. It was in this portion of the opinion that Section 703(h) was discussed. Part III of the opinion (431 U.S. at 356-377), which discussed the remedial question, made no reference to Section 703(h), but instead made repeated references (431 U.S. at 359, 362, 364, 366, 372) to the sections of Franks concerning Section 706(g) (see 424 U.S. at 762-779). The Stotts majority cited only part III of Teamsters (slip op. 16, citing 431 U.S. at 367-371, 371-376).

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(Pet. App. ___): "The fact that this case involves a consent decree and not an injunction makes the legal basis of the Stotts decision inapplicable." Recognizing that Section 706(g) of Title VII provides that no court order may accord preferential relief to a nonvictim of unlawful discrimination, the majority noted: "By its very terms, this section provides a limit only on a court's power to award relief. It does not forbid an employer from engaging in certain actions but rather limits what an employer may be forced to do" (Pet. App. ___).

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Action taken pursuant to a consent decree, therefore, cannot be equated with voluntary action. Accordingly, Judge Kennedy concluded (id. at A 28):

> When a voluntary affirmative action program is challenged under Title VII, a court need answer only one question: whether that program itself violates Title VII. This is the question addressed in United Steelworkers v. Weber, 443 U.S. 193 (1979) and left unanswered in Stotts. When a court-ordered remedy for a prior Title VII violation is challenged under Title VII, however, two questions must be addressed: (1) whether the remedy itself violates Title VII; and (2) whether the remedy is within the scope of relief permissible under §706(g) to correct a Title VII violation. * * * Under the Supreme Court's decision in Stotts, a court may not enter relief of the type embodied in the consent decree in this case. Since the power to enter a consent decree purporting to enforce a statute is drawn from that statute, it is incongruous to approve a consent decree that goes far beyond the scope of relief permissible under the statute.

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The instant case thus represents the two most commonly recurring grounds used thus far by the lower courts to justify the post-Stotts imposition of employment quotas based on race: (1) that this Court's decision in Stotts only disapproved of quota relief that abrogates bona fide seniority systems protected under Section 703(h) of Title VII and (2) that in any event courts are free to order quota relief so long as it is ~~adopted~~ imposed pursuant to a consent decree, rather than a litigated decree, even if those most grievously burdened by the measures have never given their consent.

INSERT D

The Court expressly reaffirmed its rulings in Franks and Teamsters that the policy underlying Section 706(g) "is to provide make-whole relief only to those who have been actual victims of illegal discrimination" (Slip op. 16-17). In discussing at length the legislative history of Section 706(g), the Court noted that during the legislative debates preceding passage of the 1964 Civil Right Act, opponents of Title VII had charged that "if the bill were enacted, employers could be ordered to hire and promote persons in order to achieve a racially-balanced work force even though those persons had not been victims of illegal discrimination" (footnote omitted) (ibid.). Responses to those charges by supporters of the bill, however, made "clear that a court was not authorized to give preferential treatment to non-victims" (id. at 18). The Court emphasized repeated statements in the legislative history by the bill's supporters reflecting Congress' clear intent that "Title VII does not permit the ordering of racial quotas * * *" (ibid., quoting 110 Cong. Rec. 6566 (emphasis added by Court)). _/

_/ This congressional understanding regarding the remedial powers of courts in Title VII cases was perhaps most succinctly expressed in a bipartisan newsletter prepared by the principal Senate sponsors of the bill and distributed to supporters during an attempted fillibuster: "[u]nder Title VII, not even a Court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title" (Slip op. 18, quoting 110 Cong. Rec. 14465 (footnote omitted). In addition to the legislative history references cited by the Court in Stotts, see similar statements at 110 Cong. Rec. 1518, 5094, 5423, 6563, 7207 (1964).

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__/ Several courts of appeals have correctly held that the victim-specific limits on affirmative equitable relief recognized in Stotts do not apply to provisions of an affirmative action plan adopted and implemented by an employer on a voluntary basis -- that is, without the support of a court order, by consent or otherwise. See, e.g,. Van Aken v. Young, 750 F.2d 43, 45 (6th Cir. 1984); Wygant v. Jackson Board of Education, 746 F.2d 1152, 1157-1158 (6th Cir. 1985) (dicta), cert. granted, No. 84-1390 (April 15, 1984); Kromnick v. School District of Philadelphia, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, No. 84-606 (Jan. 7, 1985); Grann v. City of Madison, 738 F.2d 786, 795 n.5 (7th Cir. 1984), cert. denied. No. 84-304 (Oct. 15, 1984). The validity under Title VII of such voluntary preferential measures, as these courts have recognized, is governed by this Court's decision in United Steelworkers of America v. Weber, 443 U.S. 193 (1979).