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No. 84-1999

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERES, AFL-CIO, C.L.C., PETITIONER

v.

CITY OF CLEVELAND, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

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

2. Whether a consent judgment may be entered over the objection of an intervenor of right whose interests are adversely affected by the terms of the consent judgment.

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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 have a substantial effect on the Attorney General's enforcement responsibilities. The federal government, which is the nation's largest employer, also is subject to the requirements of Title VII in that capacity. 42 U.S.C. 2000e-16.

Federal agencies are parties in cases before this Court that present questions similar to this case. In one case, a government agency is the plaintiff that sought enforcement of

Title VII against offending unions, _/ and in the other an agency is a defendant sued for alleged employment discrimination. _/

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. The Vanguards alleged 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 (Pet. App. A2). The complaint also alleged that blacks and Hispanics were under-represented in the ranks of lieutenant and above (ibid.). The Vanguards 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 (Pet. App. A2-A3).

Shortly after the complaint was filed, the parties began negotiations. In 1981, petitioner (Local Number 93, International Association of Firefighters, 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

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_/ Local 28 of the Sheet Metal Workers' International Association v. EEOC, No. 84-1656, certiorari granted Oct. 7, 1985.

_/ In Turner v. Orr, 759 F.2d 817 (11th Cir. 1985), cert. pending No. , which involves a consent decree entered into by the Air Force, the government has filed a petition for a writ of certiorari (No. 85-177) and suggested that its petition be held pending disposition of the present case. To date, the Court has not acted on this petition.

any criteria other than competence, such as a racial quota system," would be discriminatory (Pet. App. A3).

In November 1982, the parties reached a tentative settlement, but this agreement was rejected by a vote of 88% of petitioner's membership. The Vanguards and the City then negotiated a new agreement. Petitioner strongly objected to the proposed settlement. The civil service rules provided for promotions to be made primarily on the basis of test scores, with extra points granted for seniority. Under the new agreement, however, a 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 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

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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).

rank and required that minority candidates be promoted "out of eligible list rank" if necessary to achieve these goals (Pet. App. 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 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 divided panel of the Sixth Circuit affirmed (Pet. App. A1-A28). The majority held 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 first noted that it had been conceded 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 also emphasized that non-minority firefighters would not be fired and were not absolutely barred from promotion (id. at A11). Finally, the court 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 Firefighters Local Union No. 1784 v. Stotts, No. 82-206 (June 12, 1984), had "no effect" on this case for two reasons: first, because here the decree did not totally abrogate the seniority system (Pet. App.

_/ 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 (Pet. App. A35-A36).

A13) and, second, because the decree was a "consent" judgment rather than a judgment entered after adjudication of the suit (id. at A13-A20). The court likened this "consent" decree to a voluntary affirmative action plan such as that in United Steelworkers v. Weber, 443 U.S. 193 (1979) (Pet. App. A16-A17); see also id. at A9-A12).

Judge Kennedy dissented "because the language and reasoning of * * * Stotts indicate that the consent decree in the present case should be governed by the principles applicable to court-ordered relief rather than those applicable to purely voluntary actions" (Pet. App. A20-A21). She first explained (id. at 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." Stotts, she wrote (Pet. App. A20), interpreted Section 706(g) of Title VII 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." _/

Because the quota relief could not have been awarded had the case gone to trial, Judge Kennedy, relying on Stotts v. System Federation No. 91 v. Wright, 364 U.S. 642 (1961), concluded that this relief could not be awarded in a consent decree. She noted that a consent decree is a court order and consequently has a legal statute far exceeding a mere contract (Pet. App. A26). She wrote (id. at A28):

> 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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ARGUMENT

THE "CONSENT" JUDGMENT IN THE PRESENT CASE IS UNLAWFUL BECAUSE IT VIOLATES THE REMEDIAL PRINCIPLE EXPRESSED IN SECTION 706(g) OF TITLE VII AND WAS ENTERED OVER THE OBJECTION OF AN INTERVENOR OF RIGHT WHOSE MEMBERS WERE ADVERSELY AFFECTED.

A. It is a general principle of equity jurisprudence that a court's remedial authority extends only as far as necessary to remedy the violation of law.

This Court has frequently recognized the ancient principle of equity jurisprudence _/ that courts are "required to tailor 'the scope of the remedy' to fit 'the nature and extent of the * * * violation.'" Hills v. Gautreaux, 425 U.S. 284, 293-294 (1976), quoting Milliken v. Bradley, 418 U.S. 717, 744 (1974) (Milliken I). Accord, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). This means, the Court has explained, that the remedial powers of a federal court can "be exercised only on the basis of a violation of the law and [can] extend no farther than required by the nature and the extent of that violation." General Building Contractors Ass'n v. Pennslyvania, supra, 50 U.S.L.W. at 4981.

The Court has applied these "fundamental limitations on the remedial powers of the federal courts" (ibid.) in cases involving claims of unlawful racial discrimination. For example, in Milliken I, in striking down a school desegregation remedy that extended beyond the jurisdiction in which discrimination had been found, the Court wrote (418 U.S. at 746 (emphasis added)):

> [A desegregation] remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.

_/ See 1 Pomeroy's Equity Jurisprudence §§ 90-91, 93 (5th Ed. S. Symons 1941); Pomeroy on Remedies and Remedial Rights §§ 1, 2; 2 Austin on Jurisprudence, at 450, 453 (Eng. ED. 1863); id. Vol. 3 at 162.

See also, e.g., Dayton Board of Education v. Brinkman, 433 U.S. 406, 420 (1977) (A desegregation remedy "must be designed to redress [the incremental segregative effect of the violation], and only if there has been a system-wide impact may there be a system-wide remedy."); Milliken v. Bradley, 433 U.S. 267, 280, 282 (1977)(Milliken II); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

B. Congress adopted this remedial principle when it enacted Title VII.

1. When Congress adopted Title VII of the Civil Rights Act of 1964, it unequivocally incorporated this fundamental remedial principle. By its terms, Title VII protects the personal right of each individual to be free from racial discrimination in employment. Noting the statute's unambiguous focus on the rights individuals, this Court has held that Title VII "precludes treatment of individuals as simply components of a racial * * * class" and, thus, "requires that [courts] focus on fairness to individuals rather than fairness to classes." Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 709 (1978). Accord, Connecticut v. Teal, 50 U.S.L.W. 4716, 4720 (U.S. June 21, 1982) ("The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole").

The section of Title VII governing judicial remedies -- Section 706(g) -- similarly focuses on the rights of individuals. While authorizing a broad range of relief to remedy discrimination, Section 706(g) also provides:

> No order of the court shall require * * * 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 employment or advancement or was

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_/ Section 703(a) makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race * * *." 42 U.S.C. 2000e-2(a)(1) (emphasis added).

> suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.

Thus, a court, upon finding that an employer has engaged in unlawful employment discrimination, may order such affirmative relief (e.g., reinstatement, back pay, hiring priority) as is necessary to make the "person or person discriminated against" whole, but may not order such affirmative equitable relief in favor of an individual whose substantive personal rights under Title VII were not violated. _/ A quota remedy, which inevitably provides employment preferences to individuals who were not "refused employment or * * * suspended or discharged" by the employer in violation of Title VII, violates the plain language of this provision.

2. The legislative history unmistakably supports this interpretation of Section 706(g).

_/ The wording of § 706(g) was based on Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), which directs the Labor Board, on finding an unfair labor practice, to order "affirmative action including reinstatement of employees with or without back pay." Decisions interpreting this provision of the NLRA have therefore been recognized as reliable guides to the intended meaning of Section 706(g). Franks v. Bowman Transportation Co., 424 U.S. 747, 769, 774-775 & n.34 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975); Teamsters v. United States, 431 U.S. 324, 366-367 (1977); Ford Motor Co. v. EEOC, 5] U.S.L.W. 4937, 4939, n.8 (U.S. June 28, 1982).

Decisions construing Section 10(c) make clear that "the thrust of 'affirmative action' redressing the wrong incurred by an unfair labor practice is to make 'the employees whole, and thus restor[e] the economic status quo that would have obtained but for the company's wrongful [act].'" Franks v. Bowman Transportation Co., supra, 424 U.S. at 769, quoting NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969). Indeed, by 1964 it was well settled that the Board's authority under Section 10(c) to order affirmative action is remedial only, and thus limited to those measures necessary to make whole "the victims of discrimination." See, e.g., Carpenters Local v. NLRB, 365 U.S. 651, 655-656 (1961); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 197-198 (1941); Republic Steel Corp. v. NLRB, 311 U.S. 7, 9-10 (1940). As one commentator has observed, the labor law understanding of "affirmative action", which was borrowed by Title VII's drafters, enabled courts to order "make whole" relief for victims of discrimination, but did not allow preferential treatment for persons not themselves victims of unlawful employment practices * * *." Comment, Preferential Relief Under Title VII, 65 Va. Rev. 729, 747 (1979) [hereinafter "Preferential Relief"].

a. In introducing in the House the bill that ultimately became the 1964 Civil Rights Act, Representative Celler, floor manager of the bill and a principal draftsman of Section 706(g) (see 110 Cong. Rec. 2567 (1964) (Rep. Celler)), expressly responded to the charge that federal courts and agencies would order quotas and other forms of preferential treatment under Title VII. Noting that a court order could be entered only on proof "that the particular employer involved had in fact, discriminated against one or more of his employees because of race," Representative Celler emphasized that "[e]ven then the court could not order that any preference be given to any particular race * * *, but would be limited to ordering an end to discrimination." Ibid. Representative Celler's understanding of Title VII was repeated by other supporters during the House debate. _/

Supporters of Title VII in the Senate took a similar view of judicial remedial authority under Section 706(g). Senator Humphrey, the Democratic floor manager of the bill, ~~was the first to speak to the remedial powers of courts~~, stating that "nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group." Id. at 5423 (emphasis added). In an interpretive memorandum often cited by this Court as an "authoritative indicator" of the meaning of Title VII (e.g., American Tobacco Co. v. Patterson, U.S. , (1982)), Senators Clark and Case, the bipartisan floor "captains" responsible for explaining Title VII, provided a detailed

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_/ See 110 Cong. Rec. 1540 (Rep. Lindsay) (Title VII "does not impose quotas or any special privileges."); id. at 1600 (Rep. Minish). Similarly, an interpretive memorandum prepared by the Republican Members of the House Judiciary Committee defined the scope of permissible judicial remedies under Title VII as follows: "[A] Federal court may enjoin an employer * * * from practicing further discrimination and may order the hiring or reinstatement of an employee * * *. But, [T]itle VII does not permit the ordering of racial quotas in businesses or unions * * *." [Id. at 6566 (emphasis added)].

description of the intended meaning of Section 706(g). (After observing that a "court could order appropriate affirmative relief," Senators Clark and Case stressed (id. at 7214):

> No court can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who as not discriminated against in violation of this title. This is stated expressly in the last sentence of Section 707(e) [enacted, without relevant change, as Section 706(g)], which makes clear what is implicit throughout the whole title; namely the employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or origin.

This point was restated, in virtually identical language, by Senator Humphrey. See id. at 6549. And to dispel all doubt on this score, Senator Humphrey went on to address the claims of opponents regarding quota remedies (110 Cong. Rec. 6549):

> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.

Other key supporters of the bill were equally clear in their understanding that Title VII's remedial provisions would not permit judicial imposition of racial preferences. _/ Indeed,

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_/ Senator Kuchel, Republican floor leader of the bill, addressed the issue squarely (110 Cong. Rec. 6563 (emphasis added)):

> If the court finds that unlawful employment practices have indeed been committed as charged, then the court may enjoin the responsible party from engaging in such practices and shall order the party to take that affirmative action, such as the reinstatement or hiring of employees, with or without back pay, which may be appropriate.
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> * * *
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> But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group.

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every Representative and every Senator to address the issue decried the use of quota remedies; and the drafters, sponsors, and supporters of Title VII uniformly and unequivocally assured their colleagues that racial quotas and other forms of class-based preferential treatment could not be imposed by courts. _/

b. This clear congressional intention was not reversed when Congress amended Title VII in 1972. The only arguably relevant change in Section 706(g) was the addition of language making clear that discriminatees are entitled, not only to the specific types of relief expressly mentioned in the Section, but also to "any other equitable relief as the court deems appropriate." _/ But the Section-by-Section analysis of the conference bill made clear that this addition to the first sentence of Section 706(g)

Its power is solely limited to ordering an end to the discrimination which is in fact occurring.

Similarly, Senator Clark inserted into the Congressional Record a memorandum prepared by the Justice Department expressly denying that a violation of Title VII could be remedied by quota relief: "There is no provision either in Title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance." Id. at 7207.

Throughout the Senate debate, the principal Senate sponsors prepared and delivered a daily Bipartisan Civil Rights Newsletter to supporters of the bill. The issue of the Newsletter published two days after the opponents' filibuster had begun declared: "Under 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." Id. at 14465 (emphasis added).

_/ "[T]he consensus among the Act's proponents emerges clearly from these debates; there is little doubt that compulsory "balancing," even when imposed upon an employer or union that had discriminated in the past, was not a measure available to the courts under Section 706(g) * * *." Preferential Relief, supra, 65 Va. L. Rev. at 738.

_/ The language added in 1972 had its origin in an amendment introduced by Senator Dominick, who opposed a provision in the Labor Committee bill to confer "cease and desist" authority on the EEOC; the committee bill proposed to make no change in either Section 703 or Section 706(g). Dominick's filibuster of the committee bill ended with adoption of his amendment, but granted it power to institute lawsuits in federal court. The purpose of the language added to the first sentence of Section 706(g) was not explained, or even discussed, by Senator Dominick or anyone else during the debate.

was not meant to expand judicial remedial authority beyond traditional limits. Prepared by Senator Williams, the Senate manager of the legislation, the Section-by-Section Analysis explained that "the scope of relief under [Section 706(g)] is intended to make the victim of unlawful discrimination whole, * * * [which] requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (Senate); id. at 7565 (House). _/

Some courts seeking justification for the imposition of quota relief have relied on the Senate's refusal in 1972 to adopt two amendments offered by Senator Ervin. See, e.g., United States v. Intern. Union of Elevator Const., 538 F.2d 1012, 1019-1020 (3d Cir. 1976). This frail arguments does not require extended refutation. First, it is always dangerous to infer congressional intent from the failure to enact legislation. See, e.g., Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241 (1970); Girouard v. United States, 328 U.S. 61, 69 (1946). Second, whatever the intent of the Senate, the House expressed continued and unmistakable opposition to quota relief. _/ And third, it is clear from the language of the

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_/ In Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976) this Court found this passage to be "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination * * *."

_/ The history of the 1972 amendments began in the House, where Representative Hawkins introduced a bill designed, among other things, to give the EEOC "cease and desist" powers and to transfer the administration of Executive Order 11246 from the Labor Department's Office of Federal Contract Compliance (OFCC) to the EEOC. Because the OFCC had imposed quotas in its enforcement of the executive order, many congressmen feared that the bill would confer on the EEOC authority to order employment quotas.

Before debate commenced, Representative Dent, the bill's floor manager, proposed an amendment that "would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-
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amendments (118 Cong. Rec. 1662, 4917) and from their sponsor's explanation (id. at 1663-1664, 4917-4918) that they had nothing to do with the remedial authority of courts but were instead concerned solely with the conduct of federal agencies, particularly the Office of Federal Contract Compliance. _/

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compliance program." 1972 Legislative History at 190. The amendment did not address the remedial power of courts under Title VII because, according to Representative Dent, "[s]uch a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under Title VII." (Ibid.) During the ensuing debate, Representative Hawkins stated: [s]ome say that this bill seeks to establish quotas * * *. [T]itle VII prohibit[s] this * * *." Id. at 204. Hawkins then acknowledged his support for the Dent Amendment, reiterating that Title VII already "prohibits the establishment of quotas." Id. at 208=209.

It is also noteworthy that the 1972 Congress refused to delete the final sentence from Section 706(g), which, as previously discussed (supra, at), makes clear that a court's affirmative equitable powers to remedy a violation extend no further than is necessary to make victims whole. The House and the Senate passed two differing versions of Section 706(g) in 1972. The House bill (H.R. 1746, 92d Cong., 2d Sess. (1972)) left the 1964 provision largely unchanged, except for the addition of a provision limiting back pay awards. See 1972 Legislative History at 331-332. The Senate-passed bill (S. 2515, 92d Cong., 2d Sess. (1972)), however, eliminated from Section 706(g) the final sentence contained in the 1964 Act. See 1972 Legislative History at 1783. The bill that ultimately became law, however, emerged from the House-Senate conference with the original final sentence of Section 706(g) restored to that provision. S. Cong. Rep. No. 92-681, 92d Cong., 2d Sess. 5-6, 18-19 (1972); H.R. Conf. Rep. No. 92-899, 92d Cong., 2d Sess. 5-6, 18-19 (1972).

_/ Senator Ervin's first amendment, which amendments that he offered during a fillibuster, would have prohibited any "department, agency, or officer of the United States" from requiring employers to practice "discrimination in reverse." 1972 Legislative History at 1017.

Senator Ervin's principal target was the Office of Federal Contract Compliance's Philadelphia Plan, which he termed "[t]he most notorious example of discrimination in reverse." Id. at 1043. The amendment was necessary, according to Ervin, because officials of the OFCC and EEOC "could not understand the plain and the unambiguous words of Congress" in Section 703(j). Id. at 1042. As he explained, the amendment would merely have extended to all federal Executive agencies, particularly the OFCC, Section 703(j)'s prohibition against requiring employers to engage in racially preferential hiring ot rectify racial imbalance in their work forces. This Court has recognized (United Steelworkers v. Weber, 443 U.S. 193, 205 n.5 (1979)), that Section 703(j) speaks only to substantive liability under Title VII, not to the scope of judicial remedial authority, which is governed solely by Section 706(g). Thus, notwithstanding the contrary statements of Senator Javits and Williams, who spoke against the amendment (see 1972 Legislative History at 1046-1048, 1070-1073), it is clear that Ervin's amendment did not seek to alter Section 706(g) and was not concerned with the remedial authority of courts. (continued)

C. This Court's prior decisions have recognized that Title VII relief may be given only to the actual victims of discrimination.

This Court's decisions have recognized this limitation on the relief that may be awarded in a Title VII case. In Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), the Court held that it was appropriate under Section 706(g) to grant retroactive seniority to individuals whom the employer had discriminatorily refused to hire at an earlier date. The Court observed (424 U.S. at 764 (emphasis added) that Title VII "'is intended to make the victims of unlawful employment discrimination whole'" and that "'the attainment of this objective * * * requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.'"

This remedial principle was applied in Teamsters v. United States, 431 U.S. 324 (1977). The Court first affirmed the lower courts' findings that the employer had engaged in a pattern or practice of excluding blacks and Hispanics from desirable positions as over-the-road (OTR) truck drivers (id. at 334-343). After holding (id. at 348-354) that the seniority system was bona fide and was not subject to attack on the ground that it perpetuated the effects of past discrimination, the Court then considered what remedy was appropriate under Section 706(g) for the company's discrimination in awarding OTR positions. The Court rejected the company's argument that retroactive seniority should be restricted to those individuals who had actually applied for OTR positions (431 U.S. at 362-371). Instead, the Court held (id. at 363-368) that individual nonapplicants should be allowed to prove that they were qualified for an OTR position but were deterred from

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Senator Ervin's second amendment makes this intent even clear. That amendment would have simply amended Section 703(j) to extend its coverage to executive orders and statutes other than Title VII. 1972 Legislative History at 1714.

applying because of the company's discrimination. The Court likewise rejected the contention that all nonapplicants should be regarded as presumptive victims (id. at 363, 367-373). "A nonapplicant," the Court stated (id. at 367), "must show that he was a potential victim of unlawful discrimination." The Court then explained "[t]he task remaining for the District Court on remand" (id. at 371-372 (emphasis added)):

> Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices. After the victims have been identified, the court must, as nearly as possible, "'recreate the conditions and relationships that would have been had there been no'" unlawful discrimination. Franks, 424 U.S. at 769. [_/]

Most recently, in Stotts, this Court clearly reiterated that Title VII relief is restricted to the actual victims of discrimination. In Stotts, the district court modified a Title VII consent decree over the objection of the employer, the City of Memphis. This modification prohibited the city from following its seniority system in determining who must be laid off insofar as application of that system would decrease the proportion of black employees. As a result, some "non-minority employees with more seniority than minority employees were laid off or demoted in rank" (Stotts, slip op. 4). The court of appeals approved the district court's modification (id. at 4-5).

This Court reversed. After first holding (id. at 10-12) that the modification went beyond merely enforcing the agreement of the parties as reflected in the consent decree, the Court concluded (id. at 11-20) that the layoff quota was a type of relief "that could not have been ordered had the case gone to

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_/ Similarly, in Ford Motor Co. v. EEOC, No. 81-300 (June 28, 1982), the Court rejected an interpretation of Title VII that "would not merely restore [the alleged discriminatees] to the 'position where they would have been were it not for the unlawful discrimination,' . . . it would catapult them into a better position than they would have enjoyed in the absence of discrimination" (slip op. 15); see discussion at infra.

trial and the plaintiffs proved that a pattern or practice of discrimination existed" (id. at 16). Expressly reaffirming its ruling 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" (Stotts, slip op. 16-17), the Court held that it was improper under Section 706(g) [redacted] for the district court to award protection against layoffs to individuals simply because of their membership in the disadvantaged class (Stotts, slip op. 15-20). The Court also canvassed and relied upon the legislative history that we have set out at somewhat greater length in the first part of this brief. The Court noted that during the legislative debates opponents of Title VII 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" (Stotts, slip op. 16-17) (footnote omitted)). The Court observed (id. at 18) that responses to those charges by supporters of the bill made "clear that a court was not authorized to give preferential treatment to non-victims" (id. at 18). The Court also cited repeated statements by the bill's supporters reflecting Congress's intent that "Title VII does not permit the ordering of racial quotas * * *" (ibid., quoting 110 Cong. Rec. 6566 (1964) (emphasis added by Court)).

2. The courts of appeals have not heeded what we believe is the clear meaning of this Court's decision in Stotts but have instead read that decision as narrowly as possible. The approach of the courts of appeals is exemplified by the Eleventh Circuit's candid pronouncement in Paradise v. Prescott, No. 84-7053 (Aug. 12, 1985): "We view [Stotts] as limited to its own facts."

While the courts of appeals have found numerous grounds for distinguishing and limiting Stotts, the two grounds upon which the court of appeals in this case relied are employed most frequently. First, the court below held that Stotts does not

apply to consent decrees. Pet. App. A13-A20; see also Deveraux, slip op. 14; Turner v. Orr, 759 F.2d at 824. We will discuss this question below (see pages _____, infra). In addition, six courts of appeals, including the Sixth Circuit in the present case, have stated that Stotts applies only when seniority rights are abridged. 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 (dicta); Van Aken v. Young, 750 F.2d 43, 45 (6th Cir. 1984) (dicta); Kromnick v. School District, 739 F.2d at 911 (dicta); Grann v. City of Madison, 738 F.2d at 795 n.5 (dicta). As Judge Kennedy noted in dissent below, seniority rights were infringed in the present case (Pet. App. A22), and in any event this basis for distinguishing Stotts is legally unsound.

The pivotal issue in Stotts was the type of relief that a court may award in a Title VII suit. Section 706(g), which broadly governs all relief in Title VII cases and is not limited to relief affecting seniority rights, speaks directly to this question. As the Court 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." Stotts, slip op. 16-17 (emphasis added).

In limiting Stotts to relief infringing seniority rights, the courts of appeals have pointed to Stotts's discussion 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, 739 F.2d at 911. But as this Court expressly held in Franks (424 U.S. at 758), Section 703(h) merely "delineates which employment practices are illegal * * * and which are not"; it does not "proscribe relief otherwise appropriate under the 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 this understanding of the meaning 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 (Stotts, slip op. 13-14), but the portion of the majority opinion devoted to the type of relief allowed under Title VII (Stotts, 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 (Stotts, slip op. 19-29) extensively discussed Section 706(g), while making no reference to Section 703(h). And in principle a reading of Stotts limited to relief infringing seniority interests is not 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 sacrificed under the promotion quota in this case no less than were seniority rights under the layoff quota at issue in Stotts; and in both cases these sacrifices were made to persons who have not themselves suffered discrimination by the defendant employer. _/

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

_/ While the relevant portion of the majority opinion in Stotts did rely significantly on Franks and Teamsters--cases involving both Sections 706(g) and 703(h)--it seems clear that the majority was referring solely to the portions of those decisions concerning the remedial question governed by Section 706(g). 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 (Stotts, slip op. 16, citing 431 U.S. at 367-371, 371-376).

706(g). The majority discussed Section 703(h) in connection with the question whether the seniority system was bona fide (Stotts, slip op. 13-14), but the portion of the majority opinion devoted to the type of relief allowed under Title VII (Stotts, slip op. 14-20) repeatedly referred to Section 706(g) and mae only one passing reference in a footnote to Section 703(h). _/ Similarly, the relevant portion of the dissenting opinion (Stotts, slip op. 19-29) extensively discussed Section 706(g), while making no reference to Section 703(h). And in principle a reading of Stotts limited to relief infringing seniority interests is not 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 sacrificed under the promotion quota in this case no less than were seniority rights under the layoff quota at issue in Stotts; and in both cases these sacrifices were made to persons who have not themselves suffered discrimination by the defendant employer. _/

D. Section 706(g) applies to consent judgments as well as to litigated decrees.

If we are correct that Section 706(g) prohibits quota relief, the only remaining question that needs to be decided in this case is a surprisingly simple one: Is a consent judgment a

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

_/ While the relevant portion of the majority opinion in Stotts did rely significantly on Franks and Teamsters--cases involving both Sections 706(g) and 703(h)--it seems clear that the majority was referring solely to the portions of those decisions concerning the remedial question governed by Section 706(g). 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 (Stotts, slip op. 16, citing 431 U.S. at 367-371, 371-376).

court order within the meaning of Section 706(g). As previously noted, the final sentence of Section 706(g) provides (emphasis added):

> No order of the court shall require the hiring, reinstatement, or promotion of an individual as an employee * * * if such individual * * * was refused employment or advancement * * * for any reason other than discrimination on account of race * * *.

Thus, if a consent decree is a court order within the meaning of this provision, such a decree, like a judgment entered in a litigated case, must comply with Section 706(g).

That a consent decree is a court order seems almost too obvious to require discussion. Indeed, the court below, in holding that the consent judgment in this case was appealable under 28 U.S.C. 1291, acknowledged: "A consent decree, although founded on an argument of the parties, is a final judgment." Such a decree is entered by a federal court and is backed by the full force of federal law. Thus, as Judge Kennedy explained in dissent below (Pet. App. A26), non-compliance with a consent decree is punishable by contempt, and the court retains jurisdiction to interpret and modify the decree. See also SEC v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984). In addition, in the "consent" decree in this case, the employer agreed to alter the collective bargaining agreement without the union's consent, an act that would generally constitute an unfair labor practice under federal labor law. W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 771 (1983). The "consent" decree at issue here also contains a provision superseding the constitution, statutes, and regulations of the State of Ohio, as well as all conflicting local laws (Pet. App. A37). Only a judgment whose force derives from federal law can have such preemptive effect.

Although four circuits have held that Stotts does not apply to consent decrees (see page ____ supra), only the court of appeals in the present case ventured to explain the basis for this distinction, and that court's explanation is plainly

United States v. Swift & Co., 286 U.S. 106, 114-115 (1932) ("the result is all one whether the decree has been entered by agreement after litigation or by consent")

U.S. v City of Miami, 664 F.2d 435, 439-440 (5th Cir. 1981)

We reject the argument that a decree entered upon consent is to be treated as a contract and not a judicial act.")

unsound. The court's primary argument, although understandably not couched in these terms, amounts to the contention that a consent decree is not really a court order but merely a contract between the parties. The court of appeals recognized (Pet. App.) that Section 706(g) limits "a court's power to award relief." Then, after accurately observing (Pet. App.) that Section 706(g) does not proscribe voluntary conduct by employers, the court incorrectly reasoned that Section 706(g) does not control a consent decree entered by a federal court. The court saw no relevant distinction between a consent decree and a mere contract, such as the collective bargaining agreement at issue in Weber, ~~and consequently~~ The court therefore wrote (Pet. App.): "To read Stotts as invalidating the present plan as impermissible under Title VII is to conclude that Stotts sub silentio overruled Weber."

This analysis is obviously invalid because it ignores the critical difference between a consent decree, which is an order entered by a court, and a mere contract. Section 706(g) by its terms governs all court orders, including consent ~~decree~~ decrees. It does not purport to govern contracts and thus did not apply to the collective bargaining agreement in Weber.

Cite Weber footnote

The court of appeals also relied on the broad proposition that generally a consent decree may "provide[ ] relief beyond that authorized in the underlying statute." But whatever the validity of this argument, it does not apply here. The question here is not whether a consent decree can go beyond what Section 706(g) authorizes but whether such a decree falls within Section 706(g)'s express prohibition. This is a simple question of statutory construction: Does "[n]o order" mean no order -- or merely no contested order?

To answer this question, larger issues regarding the permissible scope of relief in consent decrees entered pursuant to other statutes need not be confronted.

If such issues are addressed, however, we believe that, under System Federation No. 91 v. Wright, supra, a consent decree must not only obey express statutory prohibitions such as Section 706(g) but must also conform "with statutory objectives" (364 U.S. at 651).

In System Federation, employees had brought suit some years earlier under a provision of the Railway Labor Act prohibiting discrimination by employers against non-union employees, and the defendants--a railroad company and several unions--had agreed to a consent decree forbidding such discrimination. The statute subsequently was amended to permit union shops, and a union moved to modify the decree to reflect this amendment. The lower courts denied the motion, reasoning that since non-union shops remained legal, the parties' agreement could be enforced.

This Court reversed, holding that failure to modify the decree "would be to render protection in no way authorized by the needs of safeguarding statutory rights" (364 U.S. at 648). The Court explained that the parties' agreement and consideration were not enough to sustain the decree because "it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. * * * The parties have no power to require of the court continuing enforcement of rights the statute no longer gives" (id. at 651-652). The Court concluded (id. at 652-653): "The type of decree the parties bargained for is the same as the only type of decree a court can properly grant--one with all those strength and infirmities of any litigated decree * * *. [T]he court was not acting to enfoce a promise but to enforce a statue."

The Stotts decision reaffirmed this principle, stating (slip op. 13 n.9):

> "[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree.

System Federation No. 91 v. Wright, 364 U.S. 642, 651 (1961).

From the principle recognized in System Federation and reaffirmed in Stotts it follows, we believe, that a Title VII consent decree must conform to the policy of Section 706(g), which is "to provide make-whole relief only to those who have been actual victims of discrimination" (Stotts, slip op. 16-17 (emphasis added)). But in the case of Title VII, it is unnecessary to resort to the statutory policy because Section 706(g) expressly prohibits quota relief. Thus, while System Federation supports our argument here, it should be recognized that System Federation concerned a more difficult question. There, the consent decree did not violate any express statutory prohibition; no provision of the Railway Labor Act forbade a consent decree (or even a labor contract) guaranteeing an open shop. It was therefore necessary for the Court to consider whether the consent decree conflicted with statutory policy. Here the issue is much simplier: Do consent decrees fall within the terms of Section 706(g)? ~~Or, in other words, are they court orders?~~

b. The remedial restriction in Section 706(g) serves an important function in consent decrees because the vital interests of innocent nonminority employees and potential employees are at stake. It is one thing for consenting parties to enter into a consent decree affecting only their own rights. But a Title VII consent decree awarding preferences in hiring, promotions, seniority, or lay-offs to "minority" employees or propsective employees necessarily disadvantages those individuals who are not preferred. Neither the plaintiffs who sought such relief nor the employer who acceded to it can be counted on to protect the interests of the individuals who are disadvantaged by the decree. The employer may be all too willing to sacrifice the rights and interests of some employees or prospective employees in order to settle burdensome and costly litigation. Indeed, the

employer may find it advantageous to barter away the rights of some present or prospective employees in exchange for relinquishment by the plaintiffs of their monetary claims. In addition, a public employer responsible to an electorate in which "minorities" predominate may have a strong incentive to enter into a consent decree awarding preferential treatment to "minority" group members. If the relief available in a Title VII consent judgment is not subject to statutory limitations and if the courts do not police those limitations, the legitimate rights and interests of employees who do not belong to the favored groups will frequently be sacrificed.

For this reason, In a related context, this Court has emphasized that an employer may not unilaterally bargain away in a Title VII conciliation agreement the employment opportunities of its nonminority employees, particularly where, as here, those opportunities have been contractually protected in a collective bargaining agreement. In W.R. Grace & Co. v. Rubber Workers, 461 U.S. at 771, the Court stated:

> [A]lthough the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent.

See also, Stotts, slip op. 6 n.3 (O'Connor, J., concurring) ("[I]f innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process.").

In the present case, the abridgement of the rights of non-minority employees is particularly striking, for here the union representing all the employees intervened of right, thereby agreeing to be bound by the court's judgment, and strenuously objected to the entry of the consent degree. Nevertheless, the court entered the decree. The court did not adjudicate the

lawfulness of the provisions of the decree abrogating portions of the union's collective bargaining agreement and significantly disadvantaging its non-minority members. The court issued no findings of fact or conclusions of law. None of the procedures generally requird by due process were followed. All of this was dispensed with because the judgment was labeled a "consent" decree. But this lable is a misnomer because those who must bear the brunt of the decree, the union and the non-minority employees, did not consent.

It is elementary that a party cannot be bound to a "consent" decree unless that party in fact consents. For example, in United States v. Ward Baking Co., 376 U.S. 327 (1964), the Court held that a district court could not enter a "consent" judgment without the consent of the United States, which had initiated the suit. See also, e.g., Hughes v. United States, 342 U.S. 353, 357-358 (1952) (consent decree cannot be substantially modified without consent of all parties or judicial adjudication); Centron Corp. v. United States, 585 F.2d 982, 987 (Ct. Cl. 1978); 49 C.J.S., Judgments § 175 b at 311 ("Judgment by consent may be rendered only on consent of all parties interested and to be bound, or their duly authorized agents."); cf. United States v. Armour & Co., 402 U.S. 673, 682 (1971), ~~(by consent, defendant "right to litigate the issues raised, a right guaranteed to him by the Due Process Clause")~~.

The same rule applies to interveners, who are parties and are therefore bound by the judgment. See, e.g., In re Etter, 756 F.2d 882, (Fed. Cir. 1985); United States v. Oregon, 657 F.2d 1009, 1014 (9th Cir. 1981); Matter of First Colonial Corp. of America, 544 F.2d 1291, 1298 (5th Cir.), cert. denied, 431 U.S. 904 (1977); 7A C. Wright & A. Miller, Federal Practice and Procedure, § 1920 (1972); 3B Moore's Federal Practice, ¶24.16[6] at 24-671 to 24-673 (2d ed. 1981). As Professor Moore states (Moore's Federal Practice §24.16[6] at 24-181: "Once intervention has been allowed the original parties may not stipulate away the

rights of the intervenor." [_/]

In sum, the non-consent consent decree in this case is doubly flawed: it violates both Section 706(g) and, for closely related reasons, the most rudimentary principles of due process.

_/ These fundamental principles have been applied by the Fifth Circuit in a string of employment discrimination decisions. See EEOC v. Safeway Stores, Inc., 714 F.2d 567, 576-580 (5th Cir. 1983), cert. denied, No. 83-1257 (May 21, 1984); United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981); High v. Braniff Airways, Inc., 592 F.2d 1330 (5th Cir. 1979); Wheeler v. American Home Products Corp., 582 F.2d 891, 896 (5th Cir. 1977). A number of circuits have approved non-consent consent decrees. See, e.g., Kirland v. New York State Department of Correctional Services, 711 F.2d 1117, 1126 (2d Cir. 1983); Stotts v. Memphis Fire Dept. (Stotts II), 679 F.2d 579, 584 n.3 (6th Cir. 1982); Stotts v. Memphis Fire Dept. (Stotts) I), 679 F.2d 541, 554 (6th Cir. 1982), rev'd on other grounds, No. 82-206 (June 12, 1984); Dawson v. Pastrick, 600 F.2d 70, 74-76 (7th Cir. 1979); Airline Stewards v. American Airlines, Inc., 573 F.2d 960, 964 (7th Cir. 1978); see also United States v. City of Miami, 664 F.2d 435, 461-462 (5th Cir. 1981)(Johnson, J., concurring and dissenting in part, joined by six other judges). But no valid justification has been offered.

It has been stated that an objecting union or non-minority employee may not resist entry of a consent decree if the court concludes (albeit without following the procedures that would be required before entering judgment in a contested case) that the decree does not unlawfully affect the intervenor's rights. See Kirkland, 711 F.2d at 1126; United States v. City of Miami, 664 F.2d at 462 (Johnson, J., concurring and dissenting in part); Stotts II, 679 F.2d at 584 n.3. This argument justifies the failure to adjudicate the lawfulness of the relief awarded in the decree by assuming at the outset that the relief is lawful. See United States v. City of Miami, 664 F.2d at 452 (Gee, J., concurring and dissenting in part, joined by 10 other judges).

A second argument is that a rule enabling the union or non-minority or employees to veto a proposed consent decree would hamper efforts to settle Title VII cases. Kirkland v. New York State Department of Correctional Services, 711 F.2d at 1126; Dawson v. Pastrick, 600 F.2d at 75-76; Airline Stewards, 573 F.2d at 963-964. But the policy favoring voluntary settlement does not justify "ramming a settlement between two consenting parties down the throat of a third and protesting one." United States v. City of Miami, 664 F.2d at 451 (Gee, J., concurring and dissenting in part); see Stotts, slip op. 7 n.a4 (O'Connor, J., concurring).

Finally, it has been suggested that unions and employees who object to a proposed Title VII "consent" decree are not due anyting more than an opportunity to voice their objections before the decree is entered. See, e.g., Kirland, 711 F.2d at 1126; Airline Stewards, 573 F.2d at 964. This argument amounts to the contention that due process is satisfied if a party is given a right of allocution before judgment is pronounced.
~~(continued)~~