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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 AMICUS 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.

2. Whether a consent judgment may be entered over the objection of an intervenor of right who is bound by the decree.

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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 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.

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 parties 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 and 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 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 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 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 did not expressly explain the basis for this opinion but did note that non-minority firefighters would not be fired and were not absolutely barred from promotion (id. at A11). 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 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

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

Second, 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). The court of appeals then concluded that a Title VII consent decree may grant relief that could not be awarded if the case had been adjudicated by the court (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). Relief may not be given, she stated (ibid.), "based merely on membership in the disadvantaged class."

Judge Kennedy argued (Pet. App. A21-A22) that the present case, like Stotts, involved seniority rights because here "[t]he consent decree * * * in effect gives minority firefighters superseniority over all non-minority firefighters for promotion purposes." ~~She also~~ Judge Kennedy 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).

would delete — heart of Stotts was 706(g), not 703(h).

Having found that the 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 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.

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."

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 lower court cases in the most recent of which the court candidly 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."

In this case, the lower courts approved a "consent" decree awarding benefits solely on the basis of race or ethnic background and not because the beneficiaries were the actual

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,~~ Finally, 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~~ This is a bitter complement to the companion 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).

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~~Finally, this~~ No. Thus, the 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~~ whether a court may award in a consent judgment relief which Congress expressly excluded from the remedial provisions of the statute under which suit is brought. Because of importance of consent decrees in a wide variety of cases, moreover, elucidation of this difficult question is much needed.

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This question has profound implications for the allocation of power among the legislative and judicial branches.

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 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 enforcing 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 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, _/ the Court held that it was improper to award protection against lay-offs because of mere membership in the disadvantaged class. The court ~~observed~~ held (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,~~ then is that a court in a Title VII suit may not award

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

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relief to non-victims at the expense of innocent third parties.

Seven courts of appeals have commented 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); 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), 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). As the First Circuit acknowledged may be the case

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_/ 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 petition be held pending disposition of the present case. We suggest this disposition of Turner because we believe that it presents a less appropriate 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.

_/ In EEOC v. Local 638, supra, 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.

_/ 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 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.)

Does this litany encourage S. Ct. review? Shouldn't overemphasize our lack of success.

(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 of primary importance. 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

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/ 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).

703(h). And in principle a reading not so limited 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 one case than the other -- and in both cases to persons who have themselves suffered no wrong.

To be sure, the relevant portion of the majority opinion 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~~ decrees ~~procedure in the present case~~ also calls for review. In Stotts, Justice O'Connor outlined 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

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_/ 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 seniortiy 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).

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).

The same rule applies to intervenors of right, such as petitioner. _/ Such intervenors necessarily have a substantial interest in the property or transaction at issue in the case (Fed. R. Civ. P. 24(a)(2), and they are fully 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

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_/ We do not address the rights of permissive intervenors (Fed. R. Civ. P. 24(b)). Permissive intervention is discretionary and may be denied if it "will unduly delay or prejudice the adjudication of the rights of the original parties." Accordingly, we believe that permissive intervention could properly be denied or terminated to permit the entry of a consent judgment between the original parties. Of course, the premise of such a denial is that the rights of the party seeking intervention are not definitively affected.

In the present case, however, petitioner's right to intervene under Fed. R. Civ. P. 24(a)(2) is beyond serious dispute. This case threatened both the existing collective bargaining agreement and petitioner's ability to negotiate important terms and conditions of employment in future contracts. Indeed, there is strong authority that petitioner was an indispensable party. Fed. R. Civ. P. 19(a); 7 C. Wright & A. Miller, Federal Practice and Procedure §1620 (1972).

§24.16[6] at 24-181: "Once intervention has been allowed the original parties may not stipulate away the rights of the intervenor."

These fundamental principles have been applied by the Fifth Circuit in a series of employment discrimination cases. See Wheeler v. American Home Products Corp., 582 F.2d 891, 896 (1977).

The decision below is also inconsistent with High v. Braniff Airways, Inc., 592 F.2d 1330 (5th Cir. 1979), where the court of appeals reversed a portion of a consent decree in an employment discrimination case that was entered over the union's objection. After concluding that the union had not consented (see id. at 1334), the court held that the disputed provision could not be sustained as a nonconsensual judgment because, contrary to Teamsters and Franks, there was no showing that those benefitted were "being accorded a 'rightful place' on the basis of any individual merit or any discrimination peculiar to them as individuals" (id. at 1335).

Similarly, in EEOC v. Safeway Stores, Inc., 714 F.2d 567, 576-580 (5th Cir. 1983), cert. denied, No. 83-1257 (May 21, 1984), the court held that a provision of a Title VII conciliation agreement calling for the retroactive award of seniority violated the collective bargaining agreement and could not properly be enforced unless the union consented or the merits of its claims were properly adjudicated. /

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/ The decision in the present case is also inconsistent with United States v. City of Miami, Fla., 664 F.2d 435 (5th Cir. 1981). In that case, the (en banc) Fifth Circuit held that a consent decree binding upon a defendant union in an employment discrimination suit could be entered over the union's objection "[i]nsofar as the decree does not affect the nonconsenting party

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~~The~~ elementary principle recognized in these cases is now increasingly ignored by other circuits in employment discrimination cases. See, e.g., Kirkland v. New York State Department of Correctional Services, 711 F.2d 1117, 1126 (2d Cir. 1983); Stotts v. Memphis Fire Dept., 679 F.2d 579, 584 n.3 (6th Cir. 1982) (Stotts II); Stotts v. Memphis Fire Dept., 679 F.2d 541, 554 (6th Cir. 1982) (Stotts I), rev'd on other grounds, No. 82-206 (June 12, 1984); Dawson v. Pastrick, 600 F.2d 70, 74-76 (7th Cir. 1978); Airline Stewards v. American Airlines, Inc., 573 F.2d 960, 964 (7th Cir. 1978); see also United States v. City of Miami, Fla, 664 ?F.2d at 461-462 (Johnson, J., joined by six other judges, concurring and dissenting in part). ~~The strange doctrine that a "consent" judgment may be entered over the objection of an intervening union or employee bound by the decree has become so commonplace in some circuits that the court of appeals in this case saw no need to offer any explanation for this apparent anomaly.~~ The guidance of the Court is necessary to ensure that ~~this~~ the pernicious doctrine of these cases does not compound the problems caused by undue limitations on this Court's ruling in Stotts.

~~Other decisions have attempted to justify this procedure on several grounds, but none has any validity. 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 "consent" decree did not unlawfully affect the intervenor's rights. See Kirkland, 711 F.2d at 1126; United States v. City of Miami, Fla., 664 F.2d at 462 (Johnson, J., concurring and dissenting in part); Stotts II,~~

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and its members" (id. at 442). The court concluded (id. at 442-447) that the union was affected by the decree to the extent that provisions of its contract were altered. Eleven of the 24 judges would have held that the union was not bound in any way by the judgment, since the union had not consented and the case had not been properly adjudicatedj (id. at 448-453) (Gee, J., dissenting). See page _____, infra.

In the present case, the "consent judgment altered the criteria for promotion in the collective bargaining agreement (see page ___, supra) and thus, under City of Miami, could not be entered over the union's objection. See also Newman v. Graddick, 740 F.2d 1513, 1518 (11th Cir. 1984).

679 F.2d at 584 n.3. But as 11 judges of the former Fifth Circuit wrote (United States v. City of Miami, 664 F.2d 435, 452 (5th Cir. 1981) (Gee, J., concurring and dissenting in part) (footnote omitted):

> It seems elementary that one made a party to a lawsuit is entitled to his day in court before permanent relief is granted against him over his protest. This the [union] has not had. No amount of argument that this union has not shown how its rights were affected can obscure the fact that the question was begged below and its answer assumed: here there was no trial on the merits at which it might have made such a showing and tried out its claim * * *.

A second argument is that a rule enabling an intervening union to veto a proposed consent decree would hamper efforts to settle Title VII cases. Kirkland v. New York State Dept. of Correctional Services, 711 F.2d 1117, 1126 (2d Cir. 1983). See also Dawson v. Pastrick, 600 F.2d at 75-76; Airline Stewards, 573 F.2d at 964-965. 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, leaving it bound without trial to an agreement to which it did not subscribe." United States v. City of Miami, 664 F.2d at 451 (Gee, J. concurring and dissenting in part); see Stotts (concurring slip op. of O'Connor, J., at 7 n.4).

Finally, it has been suggested that intervenors are not due anything more than an opportunity to voice their objections before the "consent" judgment is entered. See, e.g., Kirkland, 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.

In sum, it is a gross perversion of due process to hold that a so-called "consent" decree binding all parties may be entered over the objection of a party entitled to intervene of right.

b. Not only did the court of appeals in this case approve

~~the entry of a "consent" decree over the objection of the party most adversely affected, but~~ the lower court sanctioned a form of relief that, as previously shown, is not allowed in adjudicated Title VII cases. This holding raises an important question: To what extent must relief awarded in a consent decree conform to the remedial provisions of the statute under which the suit was brought?

~~This is a difficult question because~~ This Court has stated that "consent decrees and orders have attributes both of contracts and of judicial decrees." United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n.10 (1975). On one hand, consent decrees and orders have many of the characteristics of ordinary contracts (id. at 236), and the right of parties to enter into contracts, although limited in some respects by public policy, _/ is nevertheless vast. On the other hand, a consent judgment, unlike a contract, is a judicial act, _/ and therefore has legal consequences far different from a mere contract. As Judge Kennedy explained in dissent below (Pet. App. A26), noncompliance 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 the field of labor relations, a consent decree may allow an employer to engage in conduct that would otherwise be illegal. For example, absent a court order, an employer subject to the National Labor Relations Act cannot alter a collective bargaining agreement without the union's consent (W.R. Grace & Co. v. Rubber Workers,

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_/ See Restatement (2d) of Contracts §§178-199 (1981).

_/ Pope v. United States, 323 U.S. 1, 12 (1944); United States v. Swift & Co., 286 U.S. 106, 115 (1932); cf. Carson v. American Brands, Inc., 450 U.S. 79, 83-84 (1981). As the Seventh Circuit recently recognized (Donovan v. Robbins, 752 F.2d 1170, 1176 (7th Cir. 1984), parties can always settle a case on their own terms by filing a stipulation of dismissal under Fed. R. Civ. P. 41(a)(1) because this disposition, unlike a consent decree, "will not affect (not demonstrably, anyway) third parties or involve the judge in carrying out the underlying settlement").

461 U.S. 757, 771 (1983)), but that was precisely the effect of the "consent" judgment in this case. In addition, the "consent" judgment contains a provision superceding the constitution, statutes, and regulations of the State of Ohio, as well as all conflicting local laws (Pet. App. A37). Only a judgment enforcing federal law can have such preemptive effect.

Because of the hybird nature of consent judgments, there is considerable uncertainty about the scope of a district court's latitude in entering such decrees. This Court's decisions establish that the district court must have subject matter jurisdiction (Swift & Co. v. United States, 276 U.S. 311, 324 (1928); Pacific R.R. v. Ketchum, 101 U.S. 297-298)) and that any relief must be "within the general scope of the case made by the pleadings" (Pacific R.R. Co. v. Ketchum, 101 U.S. at 297). Also, the relief must be "in furtherance of" and "not inconsistent with" statutory objectives. Systems Federation v. Wright, 364 U.S. at 651. On the other hand, a consent judgment need not be supported by facts found by the court or conceded by the defendant. Swift & Co. v. United States, 276 U.S. at 327, 329.

These decisions, most of which were handed down before consent decrees assumed their present status as a major instrument of public law litigation, have not provided sufficiently clear guidance for lower courts forced to grapple with difficult questions regarding the permissible scope of consensual relief. For example, in a recent, important case, the District of Columbia Circuit articulated the following murky formulation regarding the restrictions on relief awarded in consent decrees: "the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement." Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1125 (1983), cert. denied, No. 83-1345 (July 2, 1984). _/ Similarly, in the present case, the court of appeals

~~could do no better than to state that a consent decree "must be consistent with the underlying statute" but need not "mimic court ordered remedies." Pet. App. A20 n.10.~~ See also Sansom Committee by Cook v. Lynn, 735 F.2d 1535, 1538 (3d Cir. 1984), cert. denied, No. 84-232 (Nov. 13, 1984) (consent decrees not limited to the relief that a court could provide on the merits, but the terms of the decree must be within the general scope of the pleadings). ~~These standards, we submit, are so vague and open-ended that they provide virtually no meaningful limits on what a court may order in a "consent" decree.~~ Other courts of appeals, however, have adhered to the rule established in System Federation in ~~drawn a tighter rein on trial judges~~ approving consent ~~such~~ decrees. _/ In view of this conflict ~~uncertainty~~ and the importance of consent decrees in a wide variety of cases, ~~we believe that~~ there is a substantial need for elucidation of the permissible scope of relief in a consent decree. The present case, we submit, did not resolve the question correctly and is an appropriate vehicle for review by this Court. ~~exploring this question.~~ End

~~While we readily acknowledge that there is considerable confusion regarding the limitations on relief in a consent decree,~~ we believe that the decree in this case falls squarely within the prohibition of System Federation No. 91 v. Wright, supra, and is accordingly invalid. In that case, employees'

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_/ In dissent, Judge Wilkey maintained (718 F.2d at 1131) that a "court can only enter as a consent decree such relief as would be within its jurisdictional power had the case gone to trial."

_/ See Washington v. Penwell, 700 F.2d 571 (9th Cir. 1983) (consent decree inconsistent with Eleventh Amendment unenforceable); United States v. Motor Vehicle Mfr. Ass'n, 643 F.2d 644, 650 (9th Cir. 1981); Gomes v. Moran, 605 F.2d 27 (1st Cir. 1979) (consent decree regarding prisoner transfers modified so as not to exceed due process requirements and so as to preserve state's ability to respond to emergencies); Theriault v. Smith, 523 F.2d 601 (1st Cir. 1975) (consent decree correctly modified because it granted AFDC benefits not authorized by statute as construed by this Court). Cf. Roberts v. St. Regis Paper Co., 653 F.2d 166, 172-175 (5th Cir. 1981) (court of appeals does not reach question whether consent decree must be modified in order ~~not~~ to ~~violate~~ conform to Teamsters by disturbing bona fide seniority system, because validity of seniority system not yet litigated); United States v. Georgia Power Co., 634 F.2d 929 (5th Cir. 1981) (Teamsters did not warrant modification of consent decree where seniority system not bona fide).

brought suit under a former provision of the Railway Labor Act prohibiting discrimination by employers against non-union employees. Defendants, the railroad and several unions, agreed to a consent decree forbidding such discrimination. After the statute was amended to permit union shops, a union moved to modify the decree to reflect this amendment.

This Court held that modification of the decree was required and explained (364 U.S. at 651) (emphasis added):

> The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. Frequently of course the terms arrived at by the parties are accepted without change by the adopting court. But just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives. In short, it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us.

Insert from DKF draft p. H-16

Whatever the outermost reaches of the holding in System Federation, it clearly stands for the proposition that a consent decree may not award relief that is "in conflict with" the policy of the underlying statutes. The "consent" decree in this case, which provides racial and ethnic preferences to non-victims, is squarely in conflict with the policy of Section 706(g) and therefore of Title VII. As the Court stated in Stotts (slip op. 16-17 (emphasis added)): "The policy behind Section 706(g) is to provide make-whole relief only to those who have been actual victims of illegal discrimination." Providing relief to non-victims not only goes beyond what the statute authorizes; such relief is contrary to what Section 706(g) expressly and unambiguously forbids. It is significant that the relevant sentence of Section 706(g) is prohibitory: "No order of the court

shall require * * *." This conclusion is precisely what we understand this Court to have meant in Stotts when it stated that awarding preferences to non-victims would be "inconsistent with" Title VII (slip op. 13 n.9) and "counter to statutory policy" (id. at 20 n.17).

4 c. Finally, even if full force were to be given to the "contractual" view of consent decrees under which they may not be impugned even if they contravene the underlying policy of the cause of action under which they arise, still this contractual argument is manifestly irrelevant to justify binding parties who were not parties to this putative contract. Thus the harder one insists on the full autonomy of the parties to make a binding arrangement by consent decree ~~(see part 2b (pages _____ supra),~~ the more crucial it becomes that all those bound were true and willing participants in the agreement (see part 2a (pages _____ supra). Such was not the case here, where the lower courts entered a "consent" decree over the objection of the intervenor union. Insert material from p. 13-16 as added

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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3. Insert from 19-~~20~~ DKF