

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.

(I)

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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 its capacity as an employer. 42 U.S.C. 2000e-16.

STATEMENT

We summarized the factual and procedural background of this case in the brief we filed at the petition stage. Only one additional factual matter requires mention here. In their Brief in Opposition (at 17-18), the Vanguard's argued that the record does not contain any collective bargaining agreement between the

union and the city. If the Vanguardians meant to suggest that there was no such agreement, they are wrong. There was a memorandum of understanding between the union and the city governing seniority and promotions. Under that memorandum and the civil service rules, as Judge Kennedy noted in dissent (Pet. App. A22), "promotions were based on a combination of factors that included seniority and examination scores." It seems fair to assume that the absence of the collective bargaining agreement from the record is due to the improper procedures followed by the district court, i.e., the entry of a judgment without a proper adjudication and over the objection of one of the parties (petitioner, which intervened of right).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the legality under Section 706(g) of Title VII of the Civil Rights Act of 1964 / of a so-called "consent" decree that provided preferences in promotions in the Cleveland Fire Department to individuals not shown to be the

/ The Vanguardians asserted in their Brief in Opposition (at 14-17) that the "consent" decree in this case rests ~~only~~ upon the Fourteenth Amendment as well as Title VII. The court of appeals, however, did not rely upon the Fourteenth Amendment in affirming the decree, and thus the constitutional issue need not be reached by this Court. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 163-164 (1975); Ramsey v. Mine Workers, 401 U.S. 302, 312 (1971); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Moreover, it is uncertain whether intentional discrimination, a necessary prerequisite to relief under the Constitution, was either found or admitted in this case. Washington v. Davis, 426 U.S. 229 (1976); see Stotts, supra, slip op. at 19 n. 16. The consent decree merely stipulated that there had been past "discrimination" in the fire department (see Pet. App. A.29-30). Since promotions in the relevant past were based exclusively on written examinations and other facially neutral objective criteria, it seems likely that the "discrimination" referred to was the disparate impact type. See Griggs v. Duke Power Co., 401 U.S. 424 (1978). In any event, this question should not be resolved in this Court in the first instance. The Vanguardians' argument also ignores the principle (see pages , infra) that equitable remedies must be tailored to fit the scope of the constitutional violation they are imposed to correct. Indeed, as we have argued this Term in our brief in Wygant v. Jackson Board of Education, No. 84-1340, the Fourteenth Amendment does not permit a public employer to award racial or ethnic preferences to non-victims. We are serving a copy of our brief in Wygant upon the parties in this case.

actual victims of discrimination. / This decree was entered with the consent of the employer and the minority employees who initiated the suit but over the strenuous objection of the union,

/ In their Brief in Opposition (at 19-20), the Vanguard's asserted that all of the individuals given preference under the "consent" decree were in fact actual victims of past discrimination by the Fire Department. The decree provides for racial and ethnic preferences in promotions beginning in February 1983 and continuing until December 1987. The Vanguard's argument is that every minority employee who has received or will receive such a preference is an actual victim of discrimination because he or she is likely to have been a member of the Fire Department prior to entry of the consent decree. This contention has no substance.

Although petitioner argued below that preferential relief is required to be victim-specific, the lower courts did not inquire whether the beneficiaries of the quotas were victims of past discrimination. To the contrary, the lower courts upheld the quota relief on the ground that victim-specificity was not required. Thus, if this Court holds that the lower courts' analysis of this legal question was erroneous, the Vanguard's should be required to substantiate their new victim-specific claim in the district court on remand.

Moreover, it seems apparent from the face of the decree that the beneficiaries of quotas are not victims of past promotional discrimination by the Department. Contrary to the Vanguard's assumption, the fact that a particular minority employee was on the workforce at the time the decree was entered provides no basis for assuming that that person would have received a promotion but for discrimination. As Judge Kennedy correctly noted below, "[m]any of the minority firefighters affected by the decree had never been eligible for promotion before the decree was entered, and thus could not have been the victims of discrimination in promotions" (Pet. App. A23). For example, since the Civil Service rules require a minimum of four years service in the Department's lower ranks to be eligible for promotion to lieutenant (cite) (this period was reduced to three years by the consent decree), only those minority firefighters hired by 1977 were eligible for promotion at the time of the last allegedly discriminatory act (the 1981 promotion exam). But by 1987, when the decree expires, many minority employees who joined the force after 1977 will have already completed the time needed for promotion to lieutenant and thus will benefit from the racial and ethnic preferences awarded by the decree. Indeed, minority employees who joined the Department in 1984 -- after the decree was adopted -- will be eligible under the decree's three-year rule for preferential quota promotions in 1987. Furthermore, although the 1981 exam has been alleged to be discriminatory the last examination from which promotions were made -- and thus the primary, if not exclusive, cause of whatever discrimination occurred -- was given in 1975 and thus could have adversely affected only those quota beneficiaries who were on the force in 1971.

The Vanguard's also seem to argue that every minority individual who took the test for promotion in November 1981 was an actual victim (Br. Op. 19-20). Again, this is not possible, because the district court impounded the 1981 test results before they were used (see Pet. App. A33).

which intervened of right to protect the interests of its members. This decree is unlawful.

Section 706(g)--the sole provision of Title VII governing judicial remedies--authorizes a wide range of affirmative equitable relief to make whole those individuals subjected to employment discrimination. But the final sentence of Section 706(g) states in language that could hardly be clearer that "[n]o order of the court" shall grant such relief to an individual who "was refused employment or advancement or was suspended or discharged for any reason other than discrimination." The plain meaning of this provision is that a court may not enter an order imposing a quota, because a quota awards benefits solely on the basis of race or ethnicity rather than the individual's status as a victim of discrimination.

The legislative history of Section 706(g) unmistakably shows that it was intended to preclude the imposition of quotas by Title VII courts. Both in the House and the Senate, the chief proponents and supporters of the 1964 Civil Rights Act made this point repeatedly. Section 706(g) was slightly amended in 1972, but it is quite clear that this amendment was not intended to authorize the imposition of quotas.

This Court's prior decisions construing Section 706(g)--most notably, Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Teamsters v. United States, 431 U.S. 324 (1977); and Firefighters Local Union No. 1784 v. Stotts, No. 82-206 (June 12, 1984)--have recognized that "the policy behind [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). This policy, moreover, is not limited to cases involving seniority rights. Section 706(g) by its terms applies to all court-ordered remedies. Another provision of Title VII -- Section 703(h) expresses a strong policy in favor of protection of bona fide seniority rights, but Section 703(h) is exclusively

concerned with liability and consequently provides no basis for narrowing the remedial principle contained in Section 706(g).

Similarly, Section 706(g) is not restricted to litigated decrees but applies with equal force to consent decrees. The language of Section 706(g) states without qualification that "[n]o order of the court" shall impose quota relief. There is no doubt that a consent judgment is a court order. Moreover, there are strong reasons for insisting that this remedial principle be honored in consent decrees because the rights of innocent non-minority employees may be sacrificed. In the present case, the abridgment of the rights of non-minority employees was particularly striking, because here the union representing all of the employees intervened of right, only to have the so-called "consent" decree entered over its objection. This was a flagrant violation of due process, for it is firmly established that a party cannot be bound to a consent decree unless that party in fact consents.

Recognition that Section 706(g) applies to consent decrees will not frustrate the settlement of Title VII suits. Techniques routinely applied in settling other types of class actions will permit the settlement of Title VII suits on terms that fully respect Section 706(g) but do not require a concession of discrimination by the defendant. Instead, the settling parties can reach agreement regarding the allegedly discriminatory practices upon which the settlement is to be based. They can then assess (or agree that an arbitrator or magistrate will assess) the effect of those practices on individual class members. In recent years, the government, as a Title VII plaintiff, has entered into numerous consent decrees that adhere to Section 706(g)'s remedial principle.

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.

Section 706(g) of Title VII, as we will show (see pages _____, infra, specifically limits relief to those who have been actual victims of discrimination. Yet even if Congress had not carefully spelled out this remedial limitation, principles of equity would have required the same result. This Court has 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. Pennsylvania, 458 U.S. 375, 399 (1982).

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 also, e.g., Dayton Board of Education v. Brinkman, 433 U.S. 406, 420 (1977); 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.

When Congress adopted Title VII, it unequivocally incorporated the fundamental equitable principle that remedies must correct the violation but may not exceed its scope. By its terms, Title VII protects the personal right of each individual to be free from employment discrimination. ___/ 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, Arizona Governing Committee v. Norris, 463 U.S. 1073, 1080 (1983) (opinion of Marshall, J.); id. at 1103 (opinion of Powell, J.); id. at 1108 (opinion of O'Connor, J.); Connecticut v. Teal, 457 U.S. 440, 453-454 (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").

___/ 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).

The section of Title VII governing judicial remedies -- Section 706(g) -- similarly focuses on the rights of individuals. The first sentence of Section 706(g) authorizes a broad range of affirmative relief to remedy discrimination, including "reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate."_/ But the final sentence of Section 706(g) 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 suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.

The plain meaning of these provisions is that a court, upon finding that an employer has engaged in unlawful employment discrimination, may order such affirmative relief as is necessary to make victims whole but may not award relief to individuals whose rights under Title VII were not violated. ___/

___/ The phrase "any other equitable relief as the court deems appropriate" was added in 1972. For its meaning, see page infra.

_/ The wording of Section 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). See, e.g., Ford Motor Co. v. EEOC, 458 U.S. at 226 n.8.

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., 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 Labor 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 a commentator has observed, the labor law understanding of "affirmative action," which was borrowed by Title VII's drafters, means that courts may order "make whole" (Continued)

A quota remedy, which inevitably provides employment preferences to individuals who were not "refused employment or * * * suspended or discharged" as a result of discrimination by the employer violates this provision.

2. a. The legislative history unmistakably supports this interpretation of Section 706(g). 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. Senator Humphrey, the Democratic floor manager, stated that "nothing in the bill would permit any official or court to require any employer or labor union to give preferential

relief for victims of discrimination, but does 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"].

_/ 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 (id. at 6566 (emphasis added): "[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."

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 (see, e.g., American Tobacco Co. v. Patterson, 456 U.S. 63, 73 (1982)), Senators Clark and Case, the bipartisan floor "captains" responsible for explaining Title VII, provided a detailed 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 was 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 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, 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 may be awarded not only the specific

_/ 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.

* * *

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. 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. The memorandum stated (*id.* at 7207): "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."

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).

_/ See Preferential Relief, *supra*, 65 Va. L. Rev. at 738.

types of relief expressly mentioned in the Section, but also "any other equitable relief as the court deems appropriate." / The Section-by-Section analysis of the conference bill made clear, however, that this addition to the first sentence of Section 706(g) 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 to prohibit federal agencies from imposing quotas. See, e.g., United States v. Intern. Union of Elevator Const., 538 F.2d 1012, 1019-1020 (3d Cir. 1976). This argument is doubly flawed. First, it ignores elementary constitutional principles. A law (such as the final sentence of Section 706(g)) can be amended or repealed only by the subsequent enactment of another law; it cannot be changed by Congress's failure to pass a bill. INS v. Chadha, 462 U.S. 919, 954 (1983) ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I."). Second, the Senate's

/ 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). Senator Dominick's filibuster of the committee bill ended with adoption of his amendment, which denied the EEOC independent enforcement authority 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.

rejection of Senator Ervin's amendments is not even convincing evidence of Congress's attitude in 1972 toward court-ordered quotas. Congress's failure to enact proposed legislation does not necessarily signify disapproval of its provisions. 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); Tribe, Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence, 57 Ind. L. J. 515 (1982). A bill may be voted down because of form, timing, draftsmanship, the belief that it merely duplicates existing law, the desire for further study or reflection, the identity or party of the sponsor, disagreement with some but not all of its terms, or many other reasons. Moreover, it is clear from the language of the amendments (118 Cong. Rec. 1662, 4917) and from their sponsor's explanation (id. at 1663-1664, 4917-4918) that the amendments 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. / And finally, whatever the view of the Senate in

/ Senator Ervin's first amendment, one of many that he offered during a filibuster, 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, he said, 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 to 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.

Senator Ervin's second amendment makes this intent even
(Continued)

1972, the House expressed continued and unmistakable opposition to quota relief. ___/

- 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 that Title VII relief may be awarded only to make whole the actual victims of discrimination. In Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), the Court held that it was appropriate under Section

clearer. 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.

___/ 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-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. 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).

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). After affirming 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), the Court considered what remedy was appropriate under Section 706(g). 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 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 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) 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 (id. at 16-18).

/ Similarly, in Ford Motor Co. v. EEOC, 458 U.S. at 234, 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).

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 constructed numerous arguments that seek to distinguish and limit Stotts. The two grounds upon which the court of appeals in this case relied have been employed most frequently. First, the court below held that Stotts does not apply to consent decrees. ___/ We will discuss this question below (see pages ____, infra). In addition, the court of appeals held that Stotts applies only when seniority rights are abridged. ___/ As Judge Kennedy noted in dissent below, seniority rights were infringed in the present case (Pet. App. A22). In 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) is the sole provision of Title VII defining the remedies that a court may order upon finding a violation of the statute, and 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

___/ Pet. App. A13-A20; see also Paradise v. Prescott, 767 F.2d 1514, 1529 (11th Cir. 1985); Deveraux v. Geary, 765 F.2d 268, 273 (1st Cir. 1985); cert. pending, No. 85-492; Turner v. Orr, 759 F.2d at 824.

___/ Pet. App. A13; see also 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).

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).___/

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

1. 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 simple one: Is a consent judgment a 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

___/ 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).

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, no less than 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. This Court has affirmed that "[a] judgment upon consent is 'a judicial act.'" ___/ Pope v. United States, 323 U.S. 1, 12 (1945); accord, United States v. Swift & Co., 206 U.S. 114-115 (1932) ("the result is all one whether the decree has been entered after full litigation or by consent * * *. We reject the argument that a decree entered upon consent is to be treated as a contract and not a judicial act."). A consent decree is signed and entered by the court. It is treated like any other final judgment for purposes of appeal. See Stotts, concurring slip op. of Stevens, J., at 2; Carson v. American Brands, Inc., 450 U.S. 79 (1981). Indeed, the court of appeals in the present case, in holding that the consent judgment was appealable, acknowledged (Pet. App. A9): "A consent decree, although founded on an agreement of the parties, is a final judgment." A consent decree also has the same binding effect as any other judgment and thus enjoys a status far different from a mere contract. As Judge Kennedy explained in dissent below (Pet. App. A26), non-compliance with a consent decree is punishable by contempt. See also SEC v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984). In addition, the "consent" decree in this case contains a provision superseding the constitution, statutes, and regulations of the State of Ohio, as well as all conflicting local laws (Pet.

___/ Indeed, the court below itself acknowledged (Pet. App. A20 n. 10): "To be sure, a consent decree is a judicial order."

App. A37). Only a judgment whose force derives from federal law can have such preemptive effect. _/

Although several courts 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 the distinction. That court appeared to advance three arguments, but none is sound.

The court's first argument was a play on the word "require" in Section 706(g). Section 706(g), as noted, provides (emphasis added) that "[n]o order of the court shall require" the "hiring, promotion, or reinstatement" of an employee pursuant to a quota. The court of appeals suggested (Pet. App. A15-A16) that Section 706(g) does not apply to a consent decree because an employer is not required to enter into the decree. But Section 706(g) is not concerned with protecting an employer from being "require[d]" to enter into a consent decree; the Due Process Clause does that. Rather, Section 706(g) prohibits the entry of a court order that requires the implementation of quotas. This prohibition plainly applies to consent decrees, as well as litigated decrees, because once a consent decree is entered the order requires the parties to abide by its terms.

Second, the court of appeals contended (Pet. App. A17) that if a consent decree cannot award quota relief, then "Stotts sub silentio overruled Weber." This argument confuses the question of what relief a court may order (the question governed by Section 706(g)) with the question of what an employer may do in a collective bargaining agreement or other private undertaking (the

_/ Judicial entry of a Title VII consent decree granting preferences to nonvictims is no different in principle from the entry of a consent decree contravening any other congressionally imposed limitation on statutory relief. For example, a provision of the Norris-LaGuardia Act, 29 U.S.C. 104, prohibits federal courts from issuing certain injunctive relief in labor disputes. It seems clear that the parties to a lawsuit brought under the Norris-LaGuardia Act cannot by their consent grant to a federal court remedial power to issue an injunction exceeding the restrictions statutorily imposed by Congress.

question addressed in Weber). Clearly the Weber Court viewed these as very different questions, for in holding that racial preferences in a collective bargaining agreement are not always prohibited by Title VII, the Court saw no need to grapple with Section 706(g), which by its terms applies to court orders, not to negotiated union contracts. ___/

Finally, the court of appeals relied (Pet. App. A18) upon 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. Regardless of whether a consent decree can go beyond the remedy that a statute authorizes, it certainly cannot grant relief that a statute expressly forbids. Thus, there is no need to confront larger issues regarding the permissible scope of relief in consent decrees entered pursuant to statutes that do not include explicit limitations on courts' remedial authority. If such issues are addressed, however, we believed 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.

___/ Weber dismissed Section 706(g) in a footnote as a provision concerned solely with remedies. 443 U.S. at 205 n.5.

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 enforce a promise but to enforce a statute."

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)). This is precisely what we understand this

___/ In Stotts, both the three dissenting Justices and Justice Stevens, in concurrence, interpreted the majority opinion as saying that a consent decree cannot provide relief that would be unavailable after trial. See Stotts, slip op. 20 n.9 (Blackmun, J., dissenting)("The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial."); id. at 2 n.3 (Stevens, J., concurring)("The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII.")

Court to have meant in Stotts when it stated that awarding preferences to nonvictims would be "inconsistent with" Title VII (slip op. 13 n.9) and "counter to statutory policy" (id. at 20 n.17). And in the case of Title VII, it is not only statutory policy but the express terms of Section 706(g) that prohibit 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 guaranteeing an open shop. It was therefore necessary for the Court to consider whether the consent decree conflicted with statutory policy. _/

_/ This distinction is important because it exposes the error in the court of appeals' attempt to distinguish System Federation from the instant case. The court of appeals apparently believed that a consent decree is "inconsistent with statutory objectives" within the meaning of System Federation only if it affirmatively violates the substantive rights secured by the relevant statute. Such a rule, however, is contrary to the holding and analysis in System Federation because in that case the consent order did not require conduct that violated the substantive provisions of the Railway Labor Act. As amended, the Railway Labor Act did not require the employer to discriminate against nonunion members; it simply permitted it to do so voluntarily. See 364 U.S.C. at 644-645). Thus, the order to which the employer consented simply required the employer to take action that it could have voluntarily taken without violating any statutory rights of its union employees. The lower courts in System Federation (see page ___, infra, like the court of appeals in the present case, held that the provision of the consent decree prohibiting union shop agreements was a permissible remedial order because the employer was simply consenting to do something that was not prohibited by the substantive provisions of the statute in question. This Court's reversal, however, demonstrates that a consent decree that requires an employer to take action that does not violate its employees' statutory rights may nonetheless be inconsistent with the underlying statutory scheme. In System Federation, this Court perceived such an inconsistency because the order granted rights to certain employees that were in no way provided by the statute and thus deprived other employees of opportunities that the statute intended to make available to them. The consent order at issue in this case suffers from an identical deficiency since nonvictims of discrimination have no right to preferential treatment and such preferences similarly circumscribe the opportunities that Congress intended to make available to other employees. In any event, as noted above, the defect in the order entered here is more basic because, unlike System Federation, it directly conflicts with an express statutory prohibition.

Here the issue is much simpler because consent orders awarding quota relief are expressly barred by statute.

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 prospective 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.

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).

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 decree. / 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 required by due process was followed. All of this was dispensed with because the judgment was labeled a "consent" decree. But this label 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"

/ For this reason, the court of appeals' attempt to distinguish Stotts from the instant case on the ground that Stotts involved "a disputed modification of a consent decree" (Pet. App. _____, quoting Stotts, slip op. 13 n.9). (emphasis supplied by Vanguards opinion) is clearly unavailing. Entry of the consent decree here, like modification of the consent decree in Stotts, was vigorously "disputed" by petitioner, a full party to the case and the only one whose interests were directly affected by the contested quota provision. Accordingly, even assuming that Stotts' application of the System Federation principle did not reach true consent decrees, the consent order at issue in this case is invalid under Stotts because entry was disputed by petitioner and thus "imposes on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed" (Stotts, slip op. 16).

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 interveners, who are parties and are therefore bound by the judgment. ___/ See, e.g., 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-

___/ 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. 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.

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). However, a number of courts have approved the practice of entering non-consent consent decrees such as that at issue here. 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 there is no justification for this practice.

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 must fail because it 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 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 anything 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.

E. Application of the remedial principle in Section 706(g) will not frustrate the settlement of Title VII suits but will ensure that the interests of all affected are honored.

Recognition that the remedial principle in Section 706(g) applies to consent decrees as well as litigated decrees will not frustrate the settlement of Title VII suits. As previously noted, it is a general rule that equitable remedies should be tailored to fit the underlying law violation. Thus, the problem of crafting victim-specific relief in Title VII class actions is not different in kind from the problem of determining appropriate relief in other class action settings.

Courts have developed a wide variety of practical approaches to the remedial phase of litigated class actions. In some instances, individualized relief determinations can be made mechanically once threshold issues of law common to the class are decided. In other cases, it may be necessary for a magistrate to make certain factual determinations as to individual class members within a legal framework developed by the district court. Similar techniques can be and are routinely applied in the consensual resolution of the remedial phase of class actions. In a settlement context, the parties agree on a formula for identifying class members who have been injured and for determining the degree of their injury. __/

There is no reason why these same well-established techniques cannot be successfully used in Title VII cases to frame consensual relief that satisfies Section 706(g). The defendant employer need not concede discrimination any more than a concession of liability is a needed to settle other types of

__/ If the formula is simple and mechanical, the parties will have no trouble applying it themselves. Even if the formula is complex or requires judgments about the facts relating to individual claims, the parties may still be able to settle the case without outside assistance if their counsel are able to develop a cooperative relationship. Alternatively, a wide variety of techniques are available to help parties sort through individual claims once ground rules for settlement are agreed upon. For example, individual claims may be presented to a magistrate or an arbitrator chosen by the parties.

cases. Nor is it necessary for there to be a judicial or quasi-judicial determination of whether and to what extent each class member is an actual victim of discrimination. Rather, the parties may identify those entitle to relief by assessing the nature and effect of the allegedly discriminatory practices and applying that assessment to the facts of individual cases. This process would involve establishing criteria for determining whether a member of the affected class would have received the relevant employment benefit absent the challenged practice. To satisfy Section 706(g), the bargain must simply reflect truly compensatory relief for identified victims rather than quota relief for members of a group or groups. ___/

The government's experience in seeking victim-specific relief in cases involving a pattern or practice of discrimination under Title VII demonstrates that a properly tailored settlement is not particularly difficult to formulate or obtain. In recent years, the United States, as plaintiff, has entered into at least 33 Title VII consent decrees that provide exclusively victim-specific relief. In United States v. Fairfax County, No. 78-862-A (E.D. Va.), for example, the parties agreed in a consent decree upon monetary compensation of \$2,750,000 and priority job offers to 650 claimants. The government's experience also shows that an employer's desire not to concede discrimination is no roadblock to settlement under the proper remedial principle. For example, in United States v. Nassau County, Civ. No. 77-C-1881 (E.D.N.Y.), a settlement was reached between the government and the county prior to trial and without any admission of liability. The parties nevertheless agreed upon backpay and priority job offers

___/ A requirement that settling parties abide by the principle of victim-specificity will not only protect the interests of innocent non-minority employees but will ensure that the claims of the actual victims of the discrimination are not sacrificed in favor of quota relief for a larger class of non-victims. For example, an individual class member who is entitled to back pay and an immediate promotion would not be well served by a remedy providing only future quota relief.

for 60 of the 225 claimants, rejected approximately 70 individual claims, and have since reviewed and determined the remaining claims.

It goes without saying that application of Section 706(g) to consent decrees will not interfere with the ability of courts to enjoin the use discriminatory practices. Finally, it should be noted that private parties wishing to escape the strictures of Section 706(g) can always settle a case on their own terms by filing a stipulation of dismissal under Fed. R. Civ. P. 41(a)(1). Such a disposition is not governed by Section 706(g) because the settlement is not embodied in a court order and thus "will not affect (not demonstrably, anyway) third parties or involve the judge in carrying out the underlying settlement." Donovan v. Robbins, 752 F.2d 1170, 1176 (7th Cir. 1985). Of course, Title VII litigants frequently prefer to encase quota relief in a consent decree, rather than a private settlement agreement, precisely because they want to foreclose subsequent legal challenge by non-minority employees who are adversely affected. But if non-minority employees "are to be required to make any sacrifices in the final consent decree, they must be represented and have *** full participation rights in the negotiation process." Stotts, concurring slip op. of O'Connor, J., at 6 n.3.

CONCLUSION

The judgment of the court of appeals should be reversed.

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DECEMBER 1985

Please review

No witness offered

[Summary of Evidence in Hearing on Consent Decree]

The evidence presented below is ~~patently~~ insufficient to support the adoption of racial preferences under either Title VII or the Constitution. ~~Although no party offered a statistical study to support claims of past discrimination (April 27, 1983 Tr. 137).~~

More to p 3

~~the evidence offered in support of the quota during the hearing on the consent decree was limited to ^{gross} statistics or observations regarding the numbers of blacks in the Department, ^{and a few periods} relative to ^{various} the City as a whole, and roughly hewn comparisons between the percentages of blacks and whites in the Department who were selected for promotion.~~

^{skt} Thus, stipulations were offered which compared percentages of minorities in the City with percentages in the Fire Department (J.A. 120). The stipulations also included breakdowns of the percentages of minorities and whites in the various ranks of the Fire Department. The court questioned the validity of such comparisons, suggesting that the current disparities might be explained by the rapid growth in Cleveland's black population from 1950-1980 rather than by racial discrimination (April 27, Tr. 137-138). But the court was dissuaded from further inquiry when the City's counsel insisted it need only consider the decree's "reasonableness" (id. at 138).

A lawyer associated with the firm representing plaintiffs who had no mathematics or statistical background also testified. She offered a comparison of ^{the} percentages of blacks and whites taking promotional examinations from 1968 through 1975 with the

Although she had ^{background in} no mathematics or statistics,

corresponding percentages promoted (April 27, Tr. 73). She purported to find lower "selection rates" for black candidates (id. at 75-82). On cross examination, the witness acknowledged that her figures would have been quite different had she controlled for whether an applicant for promotion passed the required test (id. at 84-87). *Inset from p. 1.*

Aside from such statistics, only anecdotal discussions of number of blacks in the Department were offered. For example,
~~No witness offered more concrete "evidence" of discrimination during any period of relevance. A retired black fireman,~~

James A. Gay, testified that he was the first black hired by Cleveland's Fire Department (January 7, Tr. 123). Yet he was hired in 1943; even if ^{there was} ~~his testimony proved~~ intentional discrimination prior to that date it is unlikely that ~~there are~~ individuals who would benefit from this quota who were denied jobs or promotions more than forty years ago. Mr. Gay and another black fireman also testified as to numbers of blacks they observed in the Department ~~in~~ ^{over the years} in the 1940's and 1950's (see also April 27, Tr. 53-57, testimony of Lloyd L. Noles). But neither they nor any other witness pointed to a single act of intentional discrimination by the Fire Department ^{Sivil} from 1943 to date.

During his direct testimony, Mr. Noles offered the misleading observation that minorities who joined the Department in 1973 and were eligible for promotion in 1976 were forced to wait until 1981 to take the examination (Tr. 56-57). On cross examination, Noles admitted that no firefighter was permitted to take the examination from 1976 until 1981 because the 1975 examination was "tied up in litigation," and there ha[d] been no tests given because of that fact" (id. at 69).

No test

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In sum, ^{there was} no evidence of discrimination was offered in the hearing on the consent decree other than the most gross statistical comparisons and some anecdotal observations of the numbers of blacks in the Department during periods well in the past. * As the court itself noted on at least one occasion (April 27, Tr. 137-138), there are serious questions as to the value of ^{the statistical} such comparisons in ^{that} this context, ~~even as statistical evidence~~. The court nevertheless entered the decree, ^{presumably because it} ~~perhaps because it was not purporting to conduct~~ a hearing on the merits (id. at 107), ^{rather than conducting a hearing} but was merely inquiring as to the reasonableness of the ^{proposal} ~~decree~~. ^{In any case, the particular} But ^{evidence} apart from specific inadequacies of the ~~statistical comparisons~~ offered below, neither Section 706(g) nor the Equal Protection Clause allows a federal court to ^{order on particular evidence} ~~order discriminatory racial quotas~~ merely to alter or maintain any particular racial balance in a job category. No other basis for the quota was offered below.

/ Occasional references were also made to Headon v. City of Cleveland, No. C73-330 (N.D. Ohio April 25, 1975), in which the district court had found discrimination in hiring in past. No party claimed that that this, which culminated in the entry of a hiring quota, established the need for a separate promotion quota on the facts of this case. Indeed, as the Union argued, the Headon quota had increased the numbers of black Department recruits so substantially that their normal progression through the ranks would eliminate any disparities that exist in the higher ranks (April 27, Tr. at 13-39)

rely solely on evidence of minority underrepresentation. Aside from [unclear]