85-999

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL.

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

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QUESTIONS PRESENTED

1. Whether the district court's provision of supplemental relief to private plaintiffs in the form of a one-black-for-one-white promotion quota for state troopers constitutes a modification of the promotion requirements of two existing consent decrees and is justified by any post-decree discrimination or other changed circumstances.

2. Whether the one-black-for-one-white promotion quota imposed by the district court is permissible under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, inasmuch as it accords preferential treatment to black applicants for promotion who have not been identified as actual victims of racial discrimination.

3. Whether the one-black-for-one-white promotion quota is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution.*

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* The questions presented in this petition all relate to the first of two consolidated appeals decided together by the court of appeals; the parties are therefore listed above according to their status in that appeal, No. 84-7053. The other appeal was not a cross-appeal, as the court of appeals' caption suggests, but rather an appeal from a later district court order not involved in this petition; in that appeal, No. 84-7564, the defendants-intervenors were appellants and the other parties were all appellees.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the court of appeals were as follows: the United States of America, plaintiff-appellant; Phillip Paradise, Jr., and the class he represents, plaintiffs-appellees; the Alabama Department of Public Safety and its director, Byron Prescott, defendants-appellees; and V. E. McClellan, William M. Bailey, D. B. Mansell, Dan Davenport, and the class they represent, defendants-intervenors-appellees.

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

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-54a) is reported at 767 F.2d 1514. The order and memorandum opinion of the district court (App., *infra*, 55a-64a) are reported at 585 F. Supp. 72.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 80a-81a) was entered on August 12, 1985. On No-

vember 5, 1985, Justice Powell extended the time to petition for certiorari to and including December 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This employment discrimination case involves a challenge to a one-black-for-one-white promotion quota imposed by a district court, ostensibly pursuant to earlier consent decrees in this litigation.

1. The NAACP brought this class action suit against the Alabama state trooper force in January 1972. The United States was made a party plaintiff, and Phillip Paradise, Jr., was permitted to intervene on behalf of a class of black plaintiffs (Paradise) shortly thereafter.

In the initial phase of the suit, the district court determined that the Alabama Department of Public Safety and other state defendants (the Department) had engaged in a pattern and practice of discrimination in hiring; enjoined them from engaging in employment practices for the purpose or with the effect of discriminating on the basis of race or color; and ordered them to hire one black trooper for each white trooper hired until blacks comprised 25 percent of the state trooper force. *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), aff'd, 493 F.2d 614 (5th Cir. 1974).[1] Three years later, in August 1975, the court granted supplemental relief after concluding that the Department had artificially re-

[1] The former Fifth Circuit explicitly limited its approval of the quota relief granted to the hiring context, "pretermit-[ting] any intimation of a position as to promotion practices" (493 F.2d at 622 n.12).

stricted the size of the trooper force and the number of new troopers hired in order to frustrate the court's 1972 order (see App., *infra*, 7a-8a). Further supplemental relief was granted in two consent decrees, one entered in February 1979 (*id.* at 71a-79a) and the other in August 1981 (*id.* at 65a-70a).

2. The 1979 consent decree resolved several issues then before the court, including the matter of promotions. The Department agreed to "have as an objective * * * an employment and promotion system that is racially neutral" (App., *infra*, 72a), and "not to engage in any act or practice which has a purpose or effect of unlawfully discriminating against blacks * * * [or] which discriminates on the basis of race in hiring [or] promoting" (*ibid.*). With respect to promotions, the Department specifically agreed "to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact upon blacks seeking promotion to corporal" (*id.* at 74a). The Department also agreed, pursuant to that objective, to develop within one year from entry of the decree, and to submit for the other parties' review and the court's approval, a procedure for corporal promotions conforming with the 1978 Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290-38309, and having little or no adverse impact on blacks (App., *infra*, 74a-75a). Upon completion of validation of the promotion procedure for corporal promotions, the Department was to begin validation of promotion procedures for the positions of sergeant, lieutenant, captain, and major, in turn (*id.* at 75a). In the interim, the Department was to use the state merit system for all corporal promotions and to pro-

mote at least three black troopers to the rank of corporal (*ibid.*). More detailed interim procedures were set forth in an agreement between the parties and, pursuant to the consent decree and that agreement, four black troopers and six white troopers were promoted to corporal positions in February 1980.

Over two years after entry of the first consent decree, the Department moved for approval of a written examination for promoting corporals. Because the examination had not been validated in accordance with the standards set forth in the Uniform Guidelines, Paradise and the United States took the position that its use would not be justified if the results had an adverse impact on black applicants. However, in a second consent decree entered in August 1981 (App., *infra*, 65a-70a), the parties agreed that the examination would be administered and scored; that the scores would be used in conjunction with other factors to rank applicants on a promotion register; and that the promotion register would then be reviewed "to determine whether the selection procedure has an adverse impact against black applicants" (*id.* at 68a), either as to the initial group of promotions to be made or as to all promotions anticipated during the life of the register. If the selection procedure had little or no adverse impact on blacks, selections were to be made in rank order from the promotion register; if the selection procedure did have an adverse impact on blacks, the Department was to propose an alternative procedure for promotions to be made "in a manner that does not result in adverse impact for the initial group of promotions or cumulatively during use of the procedure" (*id.* at 69a). If the parties could not agree on an appropriate promotion procedure, the matter was to be submitted to the court for resolution (*ibid.*).

The Department's 1981 examination was administered and scored, and a promotion register was prepared. In June 1982, the Department advised the United States that there was a current need for 8-10 promotions to corporal, and that it was anticipated that a total of 16-20 corporal promotions would be made from the 1981 promotion register. We responded by advising the Department that, in our view, rank-ordered use of the unvalidated 1981 promotion procedure would result in a substantial adverse impact on black applicants for promotion, and, accordingly, the Department should submit an alternative proposal for making promotions in conformity with the 1979 and 1981 consent decrees. No such proposal was submitted to us, and no promotions were made, during the next nine months.

3. In April 1983, Paradise filed a "motion to enforce" the terms of the 1979 and 1981 consent decrees, seeking a court order requiring the Department to promote qualified black troopers to all upper rank positions in equal numbers with white troopers until either approximately 25% of each rank above entry level is black or promotion procedures complying with the consent decrees have been developed and implemented.

The United States agreed that the consent decrees should be enforced, but opposed imposition of a one-black-for-one-white promotion quota. V. E. McClellan and three other white troopers were permitted to intervene on behalf of a class composed of the top-ranked white applicants for promotion to corporal on the 1981 promotion register (McClellan). McClellan and the Department also opposed imposition of a promotion quota.

In an order entered October 28, 1983, the district court found that use of the Department's 1981 selec-

tion procedure would have an adverse impact on blacks, prohibited its use, and ordered the Department to submit a proposal for making at least 15 corporal promotions in a manner that would not have an adverse racial impact. 580 F. Supp. 171 (M.D. Ala. 1983). The court indicated that, if the parties could not agree on a promotion plan, the issue of corporal promotions would be deemed submitted for resolution by the court pursuant to the 1981 consent decree. When the other parties objected to the proposal submitted by the Department pursuant to the court's October 1983 order, the court took the matter under advisement.

4. On December 15, 1983, the district court issued an order and memorandum opinion granting Paradise's "motion to enforce" and the relief requested. 585 F. Supp. 72 (App., *infra*, 55a-64a). The court found that as of the date of decision there were still only four blacks among the Department's upper ranks (*id.* at 60a), and that the Department was still "without acceptable procedures for advancement of black troopers" into these ranks (*ibid.*). Based on these findings, the court entered an order enjoining the Department "from failing to promote from this day forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted to the rank" (*id.* at 56a).[2] The court further ordered this promotion quota to "remain in effect as to each trooper rank above the entry-level rank until either approximately 25% of the rank is black or the [Department has] developed and implemented a promotion plan for the rank which meets the prior orders and decrees of the court and all other relevant legal

[2] On February 6, 1984, eight black and eight white troopers were promoted to corporal pursuant to this order.

requirements" (*ibid.*). Finally, the court gave the Department 35 days to submit for the court's approval a schedule for the development of promotion procedures for all ranks above the entry-level rank (*ibid.*).[3]

5. The United States, the Department, and McClellan appealed to the United States Court of Appeals for the Eleventh Circuit. On August 12, 1985, the court of appeals affirmed the district court's order imposing the one-black-for-one-white promotion quota. 767 F.2d 1514 (App., *infra*, 1a-54a). The court of appeals held that the quota order did not constitute a modification of the 1979 and 1981 consent decrees, as those decrees are concerned with the impact of proposed promotion procedures "on blacks, and blacks alone," do not prohibit procedures adversely impacting on whites, and expressly authorize plaintiffs to apply for an order enforcing their terms or providing any other appropriate relief (*id.* at 26a).

The court of appeals also held that the quota order did not exceed the district court's remedial authority

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[3] The Department submitted such a schedule, and as of this date has developed promotion procedures for corporals and sergeants. Both procedures have been approved for use on a temporary basis for a limited number of promotions, and the one-black-for-one-white quota has been temporarily suspended for purposes of those promotions. The district court's order approving the procedure for corporals was appealed by McClellan, and was affirmed by the court of appeals along with the quota order (App., *infra*, 45a-54a). Pursuant to the temporary promotion procedures approved by the district court, the Department has promoted twelve troopers, of whom three (25%) are black, to corporal and four troopers, of whom one (25%) is black, to sergeant. This case is not moot, however, since no promotion procedures have been approved for permanent use, and the one-black-for-one-white quota remains in effect with respect to all other promotions.

under Title VII (*id.* at 28a-35a), rejecting our reading of this Court's decision in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), as prohibiting the award of any affirmative equitable relief that benefits persons not found to have been actual victims of discrimination. While conceding that "a superficial reading of *Stotts* supports [the government's] position" (App., *infra*, 31a), the court viewed that case as "limited to its own facts, and factually and legally distinguishable from the one at bar" (*ibid.*). Specifically, it distinguished the instant case from *Stotts* on the grounds that here (1) the challenged order does not require overriding a bona fide seniority system; (2) there were judicial findings of past intentional discrimination against blacks, and the consent decrees being enforced were intended to overcome that discrimination; (3) the case was brought primarily under the Fourteenth Amendment rather than under Title VII; and (4) the case involves the enforcement of a voluntarily negotiated consent decree rather than the modification of such a decree over the objection of one of the parties.

Finally, the court of appeals held that the quota order does not violate the Equal Protection Clause (App., *infra*, 35a-42a), because of "the long history of discrimination in the Department" (*id.* at 39a), and because of "the fact that the relief now at issue was designed to remedy the present effects of past discrimination" (*id.* at 40a) and "is substantially related to the objective of eradicating [those effects] and extends no further than necessary to accomplish [that] objective" (*id.* at 41a). The court of appeals agreed with the district court that the promotion quota "is a temporary measure designed only 'to

eliminate a manifest and chronic racial imbalance' caused by the Department's conduct" (*ibid.*), and noted that "the district court's order does not require the discharge or demotion of a white trooper or the replacement of a white trooper with a black trooper," or the promotion of any unqualified black trooper (*ibid.*); the court of appeals also reasoned that "white troopers are not barred by [the district court's order] from advancement through the ranks" (*ibid.*).

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial and recurring importance regarding the limitations upon the remedial authority of the federal courts in litigation involving public employers brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Fourteenth Amendment to the United States Constitution. At issue here is the validity under these provisions of a racial preference accorded to individuals who have not been identified as actual victims of racial discrimination at the expense of innocent third parties. Because this Court has agreed to hear several cases raising these issues this term, we suggest that the petition for certiorari be held pending disposition of those cases.[4]

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[4] In our view, the quota order we challenge here constitutes a *modification* of the earlier consent decrees in this case (see Question Presented #1). The court of appeals, however, concluded that this quota order simply enforces the consent decrees rather than modifying them (see page 7, *supra*). That determination involves an incorrect interpretation of the consent decrees, which prohibit only procedures with an adverse impact and require the development of valid promotion procedures in accord with the Uniform Guidelines on Employee

1. This Court recently discussed the limitations that Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), imposes upon a court's remedial authority in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984). This petition seeks review of one of a series of recent lower court decisions upholding quota relief and giving the Court's decision in *Stotts* what we regard as an overly narrow and improper interpretation. The Court has recently agreed to hear two of those cases, *Local No. 93, International Association of Firefighters* v. *City of Cleveland*, cert. granted, No. 84-1999 (Oct. 7, 1985), and *Local 28, Sheet Metal Workers' International Association* v. *EEOC*, cert. granted, No. 84-1656 (Oct. 7, 1985). Also pending before the Court is a case challenging the validity of a similar racial preference scheme un-

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Selection Procedures. Although it was contemplated by the earlier consent decrees that specific numbers of blacks would be promoted, the one-for-one quota was greatly different, in kind and degree. Accordingly, the one-for-one quota is clearly a modification of the prior decrees because it requires more of the Department than simply avoiding such adverse impact. Thus, the issue here, as in *Stotts*, is whether a "disputed modification of a consent decree" (slip op. 13 n.9) may require racial quotas.

In any event, the modification issue is inextricably interwoven with the Title VII issue presented here because the court of appeals purported to distinguish *Stotts* on the basis that the quota order enforced, rather than modified, the earlier consent decrees. Finally, if there was no modification of the order, this case would present the issues before this Court in *Local 93, International Association of Firefighters* v. *City of Cleveland*, cert. granted, No. 84-1999 (Oct. 7, 1985), and the court of appeals' decision is erroneous for the reasons we state in our amicus brief filed there.

der the Equal Protection Clause, *Wygant* v. *Jackson Board of Education*, cert. granted, No. 84-1340 (Apr. 15, 1985). The views of the United States as to the validity of such racial preferences under Title VII and under the Equal Protection Clause have been expressed in a brief as amicus curiae supporting the petitioner in *Local 93* (at 6-20); in a brief on behalf of the EEOC in *Local 28* (at 21-34); in a brief as amicus curiae supporting petitioners on the merits in *Wygant* (at 6-30); and in our petition for certiorari in *Orr* v. *Turner*, No. 85-177 (filed July 31, 1985) (involving statutory and constitutional challenges to a racially preferential consent judgment) (at 12-25).

The instant case presents questions similar to those raised in *Local 93*, *Local 28*, and *Wygant*. In *Local 93*, petitioners challenge a racial preference incorporated in a Title VII consent judgment; in *Local 28*, another Title VII case, the racial preference was awarded by the court; and in *Wygant*, the racial preference under review is incorporated in a collective bargaining agreement and is challenged under the Fourteenth Amendment. In this case, we seek review of a racial preference imposed on nonconsenting parties as part of a court order purporting to enforce earlier decrees entered by consent.

The decisions in *Local 93*, *Local 28*, and *Wygant* are likely to provide substantial clarification of the principles bearing on the resolution of the second and third questions presented in this petition, so that a remand after this Court has decided these cases is likely to be merited. Alternatively, this case itself may provide the Court with an opportunity for further clarification of those principles in the wake of its decisions in the three cases it has already agreed

to hear. Accordingly, we suggest that the Court hold this petition pending disposition of *Local 93*, *Local 28*, and *Wygant*.

2. We do not repeat the discussion of the Title VII and constitutional questions contained in our briefs in *Local 93*, *Local 28*, *Wygant*, and *Orr*,[5] and add only the following observations pertaining to this case.

a. As noted earlier,[6] the court of appeals held the district court's order to be within its authority under Title VII and attempted to distinguish this case from *Stotts* on four grounds. Regarding the first "distinction," our briefs in *Local 93* (at 10-11) and *Local 28* (at 24) respond to the court of appeals' argument that *Stotts* does not apply unless seniority rights are abridged. Second, as we discuss in our brief in *Local 93* (at 12-20) and our petition in *Orr* (at 19-21), *Stotts* cannot be distinguished on the basis that the race-conscious relief is embodied in a consent decree.[7] Third, the fact that the district court here, unlike the court in *Stotts*, predicated its order on findings of

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[5] We have served copies of these filings on counsel for each of the other parties to the proceedings below.

[6] See pages 7-8, *supra*.

[7] As discussed earlier (see note 4, *supra*), the one-to-one promotion quota entered here was, in our view, "a *disputed modification* of [the earlier] consent decree[s]" (*Stotts*, slip op. 13 n.9 (emphasis added)) and thus is factually indistinguishable from *Stotts*. In any event, even if the quota order is deemed to enforce the earlier consent decrees rather than modify them, the order is nonconsensual because the decrees that were negotiated by the parties did not include promotion quotas and all parties except Paradise objected to "enforcing" the decrees in this manner.

past intentional discrimination is plainly beside the point, as we discuss in our brief in *Local* 28 (at 26). Section 706(g) broadly governs *all* relief entered in Title VII cases. Nothing in Title VII, in *Stotts*, or in any other decision of this Court even remotely suggests that the remedial power of a Title VII court differs depending upon whether the discrimination is intentional. Finally, the court of appeals' conclusion that the relief here was entered pursuant to the Fourteenth Amendment, as well as Title VII, and that this affords a basis for avoiding *Stotts*' victim-specific remedial principle is both factually and legally unsound. It seems apparent that the 1979 and 1981 promotion consent decrees that were modified (or enforced) here, unlike the initial 1972 quota order governing hiring, were premised exclusively on Title VII.[8] In any event, the court of appeals' distinction ignores the principle that equitable remedies must be tailored to fit the scope of the constitutional violation they are imposed to correct by "restor[ing] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974).

b. The court of appeals here also found the district court's quota order to be consistent with the Equal Protection Clause of the Fourteenth Amendment. Our views on why such orders violate the Equal Protection Clause are stated in our amicus brief in *Wygant* (at 6-30). Although the quota order chal-

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[8] See App., *infra*, 74a-75a (discussing only adverse impact and the development of a valid "promotion procedure which is in conformity with the 1978 *Uniform Guidelines of Selection Procedure* [*sic*], 43 Fed. Reg. 38290 * * *"); and App., *infra*, 68a-69a (same).

lenged here represents the action of a federal court rather than the voluntary action of a state or local agency, as in *Wygant*, it nevertheless violates the Constitution's equal protection guarantees. As we argued in our brief on the merits (at 31) in *Local 28* in relation to a quota imposed in part as a civil remedy for contempt by a defendant found guilty of intentional discrimination, a federal court is no less subject to these constitutional constraints and protections of the rights of innocent third parties.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Local 93*, *Local 28*, and *Wygant*.

Respectfully submitted.

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DECEMBER 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 84-7053, 84-7564

PHILLIP PARADISE, JR., ET AL., PLAINTIFFS-APPELLEES

UNITED STATES OF AMERICA,
PLAINTIFF-AMICUS CURIAE-APPELLEE,
CROSS-APPELLANT

v.

BYRON PRESCOTT, as Director of the
Alabama Department of Public Safety,
DEFENDANT-APPELLANT, CROSS-APPELLEE

V.E. MCCLELLAN, ET AL., DEFENDANTS-INTERVENORS,
APPELLANTS-CROSS-APPELLEES

Aug. 12, 1985

Before FAY and ANDERSON, Circuit Judges, and GIBSON *, Senior Circuit Judge.

PER CURIAM.

In 1972, then Chief District Judge Frank M. Johnson, Jr., found that the Alabama Department of Pub-

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* Honorable Floyd R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

lic Safety (the Department) "engaged in a blatant and continuous pattern and practice of" discriminating against blacks in hiring. *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974). Thirteen years later, the unfortunate effects of that unconstitutional discrimination still persist. These consolidated appeals involve the district court's latest attempts to integrate the Alabama state trooper force.

In case number 84-7053 (Paradise I) all parties, save the plaintiffs, appeal the December 15, 1983 order of Judge Thompson [1] enjoining the Department to promote one black trooper for each white trooper promoted to a higher rank until either 25% of the rank is comprised of black troopers or the defendants have in place a promotion plan for the rank conforming to the law and to all prior court orders and consent decrees. As a result of that order, the Department developed and implemented a plan for promotions to the rank of corporal. The court thereafter suspended operation of the December 15 order to such corporal promotions and instead allowed the Department to use its long-awaited promotional plan for that rank. Only the intervenors, in case number 84-7564 (Paradise II), appeal this order. Having carefully reviewed the record and the numerous briefs submitted by the parties and amicus curiae, we affirm the district court in both cases.

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[1] For the most part, then Chief Judge Johnson presided over this litigation until he assumed his position on the former Fifth Circuit in 1979. The case was then transferred to the docket of District Judge Varner. The case was reassigned to Judge Thompson in October, 1980, shortly after his appointment to the district court.

I. PROCEDURAL HISTORY

(a) *NAACP v. Allen:* "blatant and continuous . . . discrimination in hiring".

In January, 1972, the NAACP brought a class action suit against the Department and the Alabama Personnel Department, alleging violations of the fourteenth amendment and 42 U.S.C. §§ 1981 and 1983. The NAACP contended that the Department "systemically exclud[ed] Negroes from its employees," R.E. at 39, and that because the Department had "not abandoned its racially discriminatory hiring practices . . . the constitutional rights of the Plaintiff, its members, and the class" were abridged. *Id.* at 41. Thereafter, the United States was made a party plaintiff, and the motion by Phillip Paradise, Jr., to intervene as a party plaintiff, individually and on behalf of the similarly situated class, was granted.

After a hearing was held, the district court concluded:

> Plaintiffs have shown without contradiction that the defendants have engaged in a *blatant and continuous pattern and practice of discrimination in hiring* in the Alabama Department of Public Safety, both as to [state highway patrol] troopers and supporting personnel. *In the thirty-seven-year history of the patrol there has never been a black trooper* and the only Negroes ever employed by the department have been nonmerit system laborers. *This unexplained and unexplainable discriminatory conduct by state officials is unquestionably a violation of the Fourteenth Amendment.* (citations omitted).
>
> Under such circumstances . . . the courts have the authority and the duty not only to order an

> end to discriminatory practices, but also to correct and eliminate the present effects of past discrimination. (citations omitted). *The racial discrimination in this instance has so permeated the* [*Department's*] *employment policies that both mandatory and prohibitory injunctive relief are necessary* to end these discriminatory practices and to make some substantial progress toward eliminating their effects.

NAACP v. Allen, 340 F. Supp. at 705 (emphasis added).

The district court entered a comprehensive injunctive order (1972 Order). The court enjoined the defendants from engaging in any employment practices —including promotion—for the purpose or with the effect of discriminating against any employee or applicant for employment on the basis of race. *Id.* at 706. The court, *inter alia*, also ordered the defendants to hire one black trooper for each white trooper hired until the state trooper force was comprised of approximately 25% blacks.[2] *Id.*

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[2] In a supplemental opinion the court also awarded plaintiffs attorney's fees because of the defendants' bad faith defense of the lawsuit. The court reasoned: "[D]efendants unquestionably knew and understood that their discriminatory practices violated the Fourteenth Amendment . . ., *see United States v. Frazer*, 317 F.Supp. 1079 (M.D.Ala. 1970), [thus] their defense of this lawsuit amounts to unreasonable and obdurate conduct which necessitated the expense of litigation." *NAACP v. Allen*, 340 F.Supp. at 708.

In *Frazer*, then Chief Judge Johnson held that the Alabama Personnel Department, which administered the state merit system and supplied employees to all state agencies, including the Department, unconstitutionally discriminated against blacks. This finding was predicated on, among other things; (1) the defendants' systematic refusal to appoint qualified

On appeal to the former Fifth Circuit, the defendants did not challenge the finding of "blatant and continuous" discrimination in hiring; rather, they contended that the quota hiring relief ordered by the district court unconstitutionally discriminated against eligible white applicants and improperly forced the Department to pass over whites who had fared better in the testing process in favor of less qualified blacks. *NAACP v. Allen*, 493 F.2d 614, 617 (5th Cir. 1974).[3] The Fifth Circuit disagreed.

The court first addressed the constitutional issues raised by affirmative hiring relief. The court held that white applicants who had higher eligibility rankings than blacks were not denied equal protection or due process rights because unvalidated selection procedures which disproportionately exclude blacks "have not been shown to be predictive of successful job performance." *Id.* at 620. Absent validated selection procedures, the court reasoned, "it is illogical to argue that quota hiring produces unconstitutional 'reverse' discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons." *Id.* The court further held that temporary affirmative hiring relief which resorted to racial cri-

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black applicants; (2) the defendants' practice of appointing and preferring low-ranking white applicants; (3) the defendants' discriminatory recruiting and advertising practices; and (4) the defendants' practice of segregating state employees by race in the use of facilities. *Frazer*, 317 F.Supp. 1089-90.

[3] The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit handed down prior to October 1, 1981. We also are bound by decisions of Unit B of the former Fifth Circuit rendered after that date. *Stein v. Reynolds Secs., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

teria, if it were the only rational, nonarbitrary means of eradicating the present effects of past discrimination, denied no one their constitutional rights and was justified by the governmental and social interest in effectively ending unconstitutional discrimination. *Id.* at 619.

Having rejected the defendants' constitutional arguments, the court next proceeded to determine whether the district court abused its discretion in ordering quota hiring. *Id.* at 620. The court recognized that the district court was faced with "(1) clear evidence of a long history of intentional racial discrimination, (2) a paucity, if not a total absence of any positive efforts by the [Department] to recruit minority personnel, and (3) utilization of unvalidated employment criteria and selection procedures and other discriminatory practices." *Id.* Because the fourteenth amendment violation was "so clearly demonstrated," the district court was obliged "to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 617 (quoting *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965)). The court accordingly upheld the district court's conclusion that quota hiring relief "was essential to make meaningful progress towards eliminating the unconstitutional practices and to overcome the patrol's thirty-seven year reputation as an all-white organization." 493 F.2d at 620-21.[4]

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[4] The court relied heavily on *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974), a factually similar case involving the Mississippi Highway Patrol (MHP). In *Morrow*, a panel of the Fifth Circuit affirmed the district court's finding that

(b) *1975 Order:* The defendants purposefully frustrate or delay full relief to the plaintiff class.

The plaintiffs, in 1974, moved the district court for further relief. The hearing which was held on that motion focused on two issues: (1) whether the defendants had artificially restricted the size of the trooper force to frustrate the 1972 hiring order; and (2) the disproportionate failure of blacks hired under that order to achieve permanent trooper status. Record, Vol. 1, at 41.

The district court found that at the time it entered the 1972 Order, and at all material times thereafter, the responsible state officials recognized that there was a "critical shortage of troopers" in Alabama. *Id.* at 42. The court further found that since the 1972 Order, the Department hired fewer troopers than was necessary to offset even normal attrition. *Id.* Additionally, examination of the Department's pre- and post-1972 Order fund allocation and expenditure pat-

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the MHP unconstitutionally discriminated against blacks in hiring and employment. *Morrow v. Crisler,* 479 F.2d 960, 962 (5th Cir. 1973). The panel also upheld the district court's refusal to order affirmative hiring relief, finding that the court did not abuse its discretion. *Id.* at 963-65. In light of a supplemented appellate record, however, the en banc Court held that the district court's injunction did not order sufficient injunctive relief to eradicate the effects of the defendants' discriminatory employment practices. The Court therefore remanded the case to the district court to fashion a decree which would have the "certain" result of integrating the MHP. *Morrow v. Crisler,* 491 F.2d at 1055. The Court further held that the district court would have to order some affirmative hiring relief, such as "*temporary* one-to-one or one-to-two hiring, the creation of hiring pools, or a freeze on white hiring," *id.* at 1056, until the residual effects of past discrimination were eliminated.

terns revealed that the Department had either not spent or had diverted to other uses funds which could have been used for salaries and ancillary expenses for new troopers. *Id.* at 42-43. The court concluded:

> These findings, when combined with the considerable testimony regarding the defendants' reluctance to implement the court's remedial order by placing black troopers on the state's highways, necessitate the conclusion that the defendants have, for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired.

Id. at 43.

The district court further found that the comparatively high black attrition rate (of the 40 blacks hired since the 1972 Order only 27 were still on the force, while all 29 whites hired in that period remained) was not coincidental. Indeed, the court found that the high attrition rate among blacks resulted from: (1) failure to select the best qualified blacks from the eligibility rosters; (2) official and social discrimination against blacks at the trooper training academy; (3) preferential treatment of white new hires in training and testing; and (3) harsher discipline for blacks than whites for similar misconduct while on the force. *Id.* at 44. Based on these findings, the court enjoined the defendants from artificially restricting the size of the troopers force for the ~~purpose~~ or with the effect of delaying or frustrating achievement of the goal of having blacks comprise 25% of the trooper force (1975 Order). *Id.*

(c) *The 1979 Partial Consent Decree:* The defendants obligate themselves to develop a promotion procedure within one year that will have little or no adverse impact on blacks.

In September of 1977, plaintiffs moved the district court for supplemental relief. After extensive discovery, a Partial Consent Decree (1979 Decree) resolving most of the disagreements between the parties was agreed to by all concerned and approved by the court on February 16, 1979. Record, Vol. 1, at 50-57.

In the 1979 Decree, the parties explicitly recognized the continuing effect of the district court's 1972 and 1975 Orders. *Id.* at 50. The defendants also agreed not to engage in any act or practice which had the purpose or effect of unlawfully discriminating against blacks. *Id.* at 50-51. With respect to promotions, the defendants agreed to develop a promotion procedure which would be fair to all applicants and have "little or no adverse impact on blacks seeking promotion to corporal." *Id.* at 53.[5] The defendants obligated themselves to accomplish this within one year from the signing of the 1979 Decree.[6] *Id.* Once the procedure

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[5] The defendants also agreed that the promotion procedure would conform with the 1978 *Uniform Guidelines of Employee Selection Procedure,* 28 C.F.R. § 50.14. These guidelines were adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission, to satisfy "[t]he Federal government's need for a uniform set of principles on the question of the use of tests and other [employee] selection procedures." *Id.* § 1A.

[6] During the period in which a new promotion procedure for the rank of corporal was being validated, the defendants agreed to use the existing state merit system for all promo-

for promotion to corporal had been validated, the defendants were to begin validation of promotion procedures for the positions of sergeant, lieutenant, captain, and major, in turn. *Id.* The defendants further agreed to allow plaintiffs to apply to the court for an order enforcing the terms of the 1979 Decree, or to "apply for any other relief which may be appropriate." *Id.* at 51.

(d) *Paradise v. Shoemaker:* The 1972 Order means what it says and will not be modified.

Five days after the district court approved the 1979 Decree, the defendants filed a motion to more fully define the quota relief set forth in the 1972 Order, or, in the alternative, for supplemental relief. Interpreting the motion as one seeking "clarification" of the 1972 Order, the district court gave short shrift to the defendants' argument that "state trooper" referred only to arresting officers holding entry-level positions. See *Paradise v. Shoemaker,* 470 F. Supp. 439, 440 & n. 1 (M.D. Ala. 1979). "On this point, there is no ambiguity. The Court's [1972] order required that one-to-one hiring be carried out until approximately twenty-five percent of the *state trooper force* is black." *Id.* at 440 (emphasis in original).

The district court likewise had little difficulty disposing of the defendants' alternative claim that they were entitled to supplemental relief in the form of modification of the 1972 Order.[7] The defendants ar-

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tions to that rank provided that at least three black troopers were promoted. Record, Vol. 1, at 53. Exactly how this was to be done was detailed in a document styled "Agreement of Counsel for the Parties." *Id.* at 58-59.

[7] The defendants asked the court to strike the 25% quota and to order that 1-for-1 hiring continue only until (1) a valid

gued that the affirmative hiring relief ordered by the court exceeded what was necessary to eliminate the effects of past discrimination in that the Department's promotion policy required advancement through the ranks and prohibited lateral hiring. Because, according to the defendants, the 25% objective could not be achieved unless 37.5% of entry-level positions were filed by blacks, a greater number of "more qualified white applicants" were excluded than was constitutionally permissible. *Id.* at 441.

The district court, relying on the Fifth Circuit's affirmance of the 1972 Order in *NAACP v. Allen*, 493 F.2d 614, held that modification was precluded by the law of the case doctrine. *Paradise v. Shoemaker*, 470 F. Supp. at 441. Even if the doctrine were not apposite, however, the district court discerned no constitutional reason for disturbing its prior order. *Id.* at 441-42. The court concluded:

> To modify this order would be to do less than the law requires, which is to eradicate the continuing effects of past unlawful practices. In 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions. The Court found that in thirty-seven years there had never been a black trooper at any rank. One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, *there is still not one black.* The quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore

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examination was used to produce a new hiring list, or (2) 25%, or (3) 15% of the entry-level positions were filled by blacks. *Id.* at 62.

> that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest. As the Fifth Circuit has recognized, the order in this case does not seek to grant proportional representation in public employment to the black citizens of Alabama. *NAACP v. Allen*, 493 F.2d at 621. The order in this case is but the necessary remedy for an intolerable wrong. Accordingly, the motion for supplemental relief will be denied.

Id. at 442 (emphasis in original).

(e) *The 1981 Consent Decree.*

More than two years after the 1979 decree was entered, the defendants, on April 13, 1981, moved the district court for approval of a new examination to be used for promotions to the corporal rank. Record, Vol. 1, at 66. After reviewing the proposed promotion procedure,[8] the plaintiffs and the United States filed a joint response objecting to approval of the proposed examination and promotional procedure. *Id.* at 83-97. They essentially maintained that the examination had not been validated in accordance with the *Uniform Guidelines*, *see supra* note 5, and that its use would not be justified if the results showed an adverse impact on blacks. A hearing was never held on the defendants' motion, however, because the parties executed another consent decree (1981 Decree), which was endorsed by the district court on August 18, 1981. Record, Vol. 1, at 101.

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[8] The proposed promotion procedure was comprised of four components weighted as follows: written test—60%; length of service—10%; supervisory evaluation—20%; service ratings—10%. *Id.* at 102; R.E. at 100.

In the 1981 Decree, the defendants acknowledged their obligation under the 1979 Decree to utilize a promotion procedure having little or no adverse impact on blacks. To avoid unnecessary liitgation, and to expeditiously establish a selection procedure for corporals, the parties agreed that defendants' proposed promotion procedure would be administered and scored. Thereafter, the promotion register would be "reviewed to determine whether the promotion procedure has an adverse impact against black applicants." *Id.* at 103. This determination was to be made by reference to the "four fifths" rule [9] set forth in Section 4D of the *Uniform Guidelines*. *Id.* at 103-04; *see* 28 C.F.R. § 50.14. If the procedure had little or no adverse impact on blacks, selections were to be made in rank order from the promotion register. Record, Vol. 1, at 104. If the parties were unable to agree whether the procedure had an adverse impact, the matter was to be submitted to the district court for resolution. *Id.* at 104. No promotions to the corporal rank were to be made pending resolution of the adverse impact issue. *Id.* If the parties agreed, or the court found, that the procedure did have an adverse impact on blacks, promotions were to be made "in a manner that does not result in adverse impact for the initial group of promotions or cumulatively during use of the procedure." *Id.* The defendants were to submit an alternative proposed promotion procedure, and if the parties failed to agree on the method for making promotions, then the matter was to be

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[9] Under Section 4D of the *Uniform Guidelines*, "[a] selection rate for any race . . . which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 28 C.F.R. § 50.14.

submitted to the court for resolution. *Id.* No promotions to corporal were to be made unless the parties agreed on, or the court ruled upon, the method to be used for making promotions with little or no adverse impact. *Id.* at 104. In the event that the promotion procedure was deemed to have an adverse impact on blacks, the defendants agreed to examine the results to identify the sources of that impact and to revise the promotion procedure so as to avoid the problem in the future. *Id.* at 105. The defendants also agreed to give the plaintiffs data showing the impact of each component of the promotion procedure, as well as an item-by-item analysis of the impact of the written examination. *Id.* The parties were then to attempt to agree upon modifications in the promotion procedures for future administrations. *Id.* Again, if the parties were unable to resolve their differences, the matter was to be submitted to the district court for resolution. *Id.*

In accordance with the 1981 Decree, the defendants administered their written examination on October 24, 1981. The resulting promotion register indicates that of the 262 applicants for promotion to corporal, 60 (22.9%) were black. Of the 60 blacks who took the test, only 5 (8.3%) were ranked among the top half of the candidates, and of these, the highest ranked was # 80. *Id.* at 117-28. On June 21, 1982, the defendants, responding to an inquiry from the United States, stated that there was an immediate need for 8-10 promotions to corporal, and that 16-20 promotions would ultimately be made from the promotion list before the construction of a new list. *Id.* Vol. 2, at 222. The United States, by letter, objected to rank-order use of the promotion procedure, contending that, in its view, such use would result in substantial adverse impact on black applicants for

promotion to corporal. *Id.* at 220-21. The United States suggested that the defendants abide by the terms of the 1981 Decree and formulate a "proposal for making promotions in a manner that does not result in discriminatory impact on black troopers." *Id.* at 220.

(f) *The Instant Proceedings.*

Plaintiffs, on April 7, 1983, moved the district court for an order enforcing the terms of the 1979 and 1981 Decrees. Plaintiffs sought an order requiring the defendants to promote blacks to the corporal rank "at the same rate at which they have been hired, 1 for 1, until such time as the defendants implement a valid promotional procedure." Record, Vol. 1, at 112. According to plaintiffs, such an order was justified by the terms of the decrees, would "encourage defendants to develop a valid promotional procedure as soon as possible," and would "help alleviate the gross underrepresentation of blacks in the supervisory ranks of the Department." *Id.* Plaintiffs principally relied on the results of the October, 1981, corporal examination and the fact that since the 1979 Decree had been entered, no valid promotional mechanism had been developed. Indeed, the only blacks promoted since 1972 were the four promoted pursuant to the 1979 Decree. Thus, even though blacks had been employed in the Department of 11 years, only four had advanced beyond the lowest rank.

The United States opposed imposition of a 1-for-1 promotional quota, contending that such relief was inconsistent with the 1981 Decree, went beyond the district court's remedial authority under Title VII, and was unconstitutional. Record, Vol. 2, at 195-202. The United States agreed, however, that the decrees

should be enforced by ordering some promotions, unless the defendants could show cause why such promotions should not be made.[10]

The defendants agreed with the United States that the relief sought by the plaintiffs in their motion to enforce was unconstitutional. The defendants also argued, however, that they should be given an opportunity to demonstrate that the proposed promotion procedure was valid and did not adversely impact on blacks, within the meaning of the consent decrees and the *Uniform Guidelines*.

Shortly after the motion to enforce was filed, four white applicants for promotion to corporal moved to intervene on behalf of a class composed of those white applicants who took the corporal's promotion examination and ranked # 1 through # 79. Record, Vol. 1, at 130-35. The intervenors, *inter alia*, contended that the 1979 and 1981 Decrees, as well as the relief sought by the plaintiffs in their motion to enforce, were unconstitutional, unreasonable, illegal, and against public policy. *Id.* at 131-134.

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[10] In support of enforcement, the United States noted that: (1) the defendants had yet to submit a proposal for making promotions in conformity with the 1979 and 1981 Decrees; (2) no corporal promotions had been made, despite the defendants' representation the year before that there was a "current need" for such promotions; and (3) the defendants failed to offer any reasons why promotions should not be made, nor had they offered an explanation as to why they halted progress toward remedying the effects of past discrimination. Record, Vol. 2, at 199-201. The United States maintained that the failure to promote corporals thwarted the purposes of the orders entered in the case, and that the failure to present a promotion plan in accordance with the 1979 and 1981 Decrees "suggests that a pattern of discrimination against blacks in the Department . . . may be continuing." *Id.* at 200.

The district court, on May 27, 1983, held a hearing on both the motion to enforce and the motion to intervene. In an order filed October 28, 1983, the district court allowed the intervenors to participate in the case on a prospective basis only; the court held that as to prior orders, judgments, and decrees, intervention was untimely. Record, Vol. 2, at 309-10. By separate order, also filed on October 28, the district court determined that, when judged against the 1979 and 1981 Decrees, the defendants' selection procedure adversely impacted on blacks. *Paradise v. Prescott*, 580 F. Supp. 171 (M.D. Ala. 1983). The court noted that even if 79 corporals were promoted in rank order, rather than just the 15 the defendants stated were needed as soon as possible, none would be black. *Id.* at 173. "Short of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact." Id.[11]

Having held that the promotion procedure adversely impacted on blacks, the district court, pur-

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[11] The court rejected the defendants' argument that section 4D of the *Uniform Guidelines* entitled them to an opportunity to present evidence in support of their position that the selection procedure did not have an adverse impact. That section provides in part that "[g]reater differences in selection rate may not constitute adverse impact . . . where special recruiting or other programs cause the pool of minority . . . candidates to be atypical of the pool of applicants from that group." 28 C.F.R. § 50.14. The defendants contended that the 1-for-1 hiring quota was such a "special program" resulting in an atypical pool, since black troopers scored lower on a hiring test than did white troopers. *Paradise v. Prescott*, 580 F.Supp. at 173. Accepting as true the defendants' representation that blacks did not score lower on this test than whites, the court reasoned that such proof was "an unacceptable basis to rest a claim of atypicality." *Id.* at 174.

suant to the 1981 Decree, enjoined the defendants from using that procedure for promotion purposes. *Id.* at 174-175. The court also ordered the defendants to submit a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that would not have an adverse racial impact. *Id.* at 175. The court indicated that if the parties to the 1981 Decree were unable to agree on a promotion plan, "the issue of corporal promotions shall be deemed submitted for resolution by the court." *Id.*

On November 10, 1983, the Department submitted to the district court its proposed promotion procedure. Record, Vol. 2, at 356. The Department proposed to promote 15 troopers to the position of corporal, of whom 4 would be blacks. It urged that this procedure, to be used on a one-time basis only, reflected the percentage of blacks to white who took the corporal examination, and met the requirements of the four-fifths rule of the *Uniform Guidelines*. The Department also requested an order permitting the Department of Personnel a specified period of time within which to develop and submit for *prior* court approval a non-discriminatory corporal promotion procedure for use in subsequent promotions.

The plaintiffs vigorously opposed the Department's proposal. *Id.* at 382-89. They contended that the proposal "totally disregards the injury plaintiffs have suffered due to the defendants' four-and-a-half year delay [a reference to the 1979 Decree] and fails to provide any mechanism that will insure the present scenario will not reoccur." *Id.* at 382. Plaintiffs reasoned that because of the defendants' conduct, blacks were clustered at the lowest level of employment with no proper procedure for promotion to corporal in place, while the Department continued to promote whites from all-white rosters to the positions of ser-

geant, lieutenant, captain, and major. *Id.* at 382-83. Approval of the Department's procedure, the plaintiffs argued, would place the judicial imprimatur on the defendants' obdurate conduct. Plaintiffs reiterated their request for a 1-for-1 promotion requirement until a valid promotion procedure is in place. Such relief would give the defendants "an incentive to carry out their almost five-year-old obligation," *id.* at 385, and would "make up for the additional injury they have thrust upon plaintiffs for their noncompliance [with the 1979 and 1981 Decrees]." *Id.* at 384.

The United States did not oppose the Department's proposal to promote 11 whites and 4 blacks to corporal; it did, however, oppose the entry of an order which would sanction court approval of a promotion plan prior to its actual implementation. Such an order, according to the United States, would circumvent the 1981 Decree's requirement that a selection procedure be actually administered to determine if it adversely impacted on blacks. *Id.* at 423-26.

The intervenors opposed approval of any promotion plan which imposed a promotion quota. They submitted that corporal promotions should be by rank-order use of the promotion register resulting from the 1981 corporal promotional examination. *Id.* at 448.

On December 15, 1983, the district court granted the plaintiffs' motion to enforce the 1979 and 1981 Decrees. *Paradise v. Prescott*, 585 F.Supp. 72 (M.D. Ala.1983). Faced with the Department's immediate need to promote 15 new corporals, and the fact that the parties were unable to agree on a promotion procedure, the court "in accordance with" the 1979 and 1981 Decrees, *id.* at 73, undertook to "fashion a [promotion] procedure." *Id.* at 74.

The court aptly summarized the situation as follows:

> On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 lieutenants, *there is still not one black.* Of the 65 sergeants, *there is still not one black.* And of the 66 corporals, *only four are black.* Thus the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers.

Id. (emphasis in original). The court agreed with plaintiffs that, temporarily at least, 50% of all promotions to corporal and to higher ranks must be filled by qualified black troopers. *Id.* at 75. The court also shared the plaintiffs' concern over the Department's delay in developing acceptable promotion procedures for all ranks. *Id.* The court therefore ordered the Department to promote one black trooper for each

white trooper promoted to a higher rank, if there is a black trooper objectively qualified to be promoted to the rank, until either (1) approximately 25% of the rank is comprised of black troopers, or (2) the defendants have developed and implemented a promotion plan for the rank conforming with the prior orders and decrees in the case and all other legal requirements. Record, Vol. 2 at 482-83; *see Paradise v. Prescott*, 585 F.Supp. at 75. The court also ordered the defendants to submit for the court's approval a schedule for the development of promotion procedures for all ranks above the entry-level position. Record, Vol. 2 at 483.

The order was premised on the court's belief that the effects of past discrimination "will not wither away of their own accord." *Paradise v. Prescott*, 585 F.Supp. at 75. Quota relief was appropriate, the court reasoned, because such relief was necessary and reasonable. The relief was necessary because the history of this case made it clear that the "intolerable" and "egregious" racial disparities in the upper ranks of the Department would not be eradicated absent "immediate, affirmative, race-conscious action." *Id.* The quota relief was reasonable because: (1) it was a temporary measure; (2) it did not require the discharge, demotion, or replacement of any white troopers; (3) it did not require the promotion of any unqualified black trooper; (4) it did not unnecessarily trammel the interests of white troopers; and (5) it was specifically tailored to redress the present effects of past discrimination. *Id.* at 75-76. The court noted that the Department had "the prerogative to end the promotional quotas at any time, simply by developing acceptable promotion procedures." *Id.* at 76.

The district court, after a hearing, denied all motions to reconsider the December 15, 1983 order, to

alter or amend the judgment, and to stay enforcement of the order pending appeal. Record, Vol. 3, at 578-81. The intervenors also moved this court for a stay pending appeal. That motion was denied on February 10, 1984. The Department, the United States, and the intervenors all filed timely notices of appeal. (*Paradise I*). It appears that on February 6, 1984, eight black troopers and eight white troopers were promoted to the rank of corporal.

II. *PARADISE I*

The principal issues on appeal are as follows: (1) whether the December 15, 1983, order of the district court constitutes an improper modification of the 1979 and 1981 Decrees; (2) whether the district court's order exceeds the district court's remedial authority under Title VII, as interpreted in *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984); and (3) whether the district court's order unconstitutionally discriminates against, or unnecessarily trammels the interests of, white troopers.[12] We address these issues seriatim.

(a) Enforcement of the 1979 and 1981 Decrees

"A consent decree, although founded on the agreement of the parties, is a judgment." *United States v. City of Miami*, 664 F.2d 435, 439 (5th Cir.1981) (en

[12] The intervenors and the Department raise a number of other arguments, most of which proceed from the erroneous assumption that the district court modified the 1979 and 1981 Decrees. We have considered all of these arguments and find them to be without merit. We pretermit any discussion of them except as they directly relate to the principal issues set forth in the text of the opinion. *See infra* notes 14 and 16.

banc). It therefore has the force of res judicata, and may be enforced by judicial sanctions, including a citation for contempt. *Id.* at 439-40. While a consent decree is a judgment, the decree also has many attributes of a contract between the parties. *United States v. I.T.T. Continental Baking Co.*, 420 U.S. 223, 236, 95 S.Ct. 926, 929, 43 L.Ed.2d 148 (1975). It therefore "must be construed in the light of traditional tenets of contract construction." *Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 171 (5th Cir. Unit B 1981). In this regard, the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971); *Stotts*, 104 S.Ct. at 2586; *Turner v. Orr*, 759 F.2d 817, 821 (11th Cir.1985); *Roberts*, 653 F.2d at 171. Appellate review of a district court's construction of a consent decree is akin to review of a district court's contract interpretation; in this aspect of the case, we thus are not bound by either the clearly erroneous rule or the abuse of discretions standard. *See Turner*, 759 F.2d at 821 (construction of consent decree is question of law subject to *de novo* review); *Eaton v. Courtaulds of North America, Inc.*, 578 F.2d 87, 90 & n. 2 (5th Cir.1978) (interpretation of consent decree may be considered afresh by appellate court; Fed.R.Civ.P. 52(a) not applicable and since issue is not whether trial court erred in approving consent decree, exercise of discretion is not in question). With these principles in mind, we have little difficulty rejecting the appellants' arguments that the district court improperly modified, rather than enforced, the 1979 and 1981 Decrees.

We initially note the district court's fidelity to the detailed procedural mechanism established in the

1979 and 1981 Decrees. The 1979 Decree, wherein the Department first obligated itself to develop within one year a promotion procedure having little or no adverse impact on blacks, allowed the plaintiffs to move the district court for an order enforcing the terms of the decree or for an order granting any other appropriate relief. *See supra* p. 1519. With the results of the 1981 corporal promotion examination in hand, the plaintiffs availed themselves of this provision. Because the parties were unable to agree on whether the examination adversely impacted on blacks, the district court was required, under the 1981 Decree, to resolve that issue. *See supra* p. 1521. In its order of October 28, 1983, the court recognized the requirements of the decrees, applied the four-fifths rule to the results of the examination, and found that the proposed promotion procedure adversely impacted on blacks. *Paradise v. Prescott*, 580 F.Supp. at 172-74. Again in keeping with the 1981 Decree, the court ordered the Department to submit a proposal for interim promotions. *Id.* at 175. The court stated that, under the 1981 Decree, the issue of promotions would be deemed submitted for resolution by the court if the parties failed to agree on a method for making promotions. *Id.*

The parties again failed to agree. With the various proposals of the parties before it, the court issued its ruling upon the method to be used for making promotions. *See Paradise v. Prescott*, 585 F.Supp. 72. The court specifically stated that "as required by the 1981 consent decree, [the parties] have requested that the court fashion a promotion procedure." *Id.* at 74.

Despite the district court's adherence to the procedural provisions agreed to by the parties to the de-

crees, the appellants claim that the December 15, 1983, other constitutes a modification of those decrees. In support of their position, they correctly note that the 1979 Decree provides that the Department agreed: (1) to have "as an objective . . . an employment and promotion system that is racially neutral," Record Vol. 1, at 50; (2) "not to engage in any act or practice which discriminates on the basis of race in . . . promoting;" *id.* at 52; and (3) to have as an objective the use of a "promotion procedure which is fair to all applicants." *Id.* at 53. We also agree with appellants that the 1981 Decree required the court to rule upon a promotion procedure "with little or no adverse impact." *Id.* at 104. The appellants reason that these provisions of the decrees prohibited the district court from ordering relief which was not racially neutral and resulted in adverse impact on *whites.*

Were we free to ignore the other provisions of the 1979 and 1981 Decrees, we might agree that the district court went beyond interpreting and enforcing the decrees. Our inquiry, however, is not confined to isolated provisions of the decrees. *See Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1011 (7th Cir.1984) (en banc) ("The relevant 'four corners' are those of the decree, not of one provision of the decree."). Indeed, we must "presume that all parts of the decree have meaning and must be construed together." *Roberts*, 653 F.2d at 171. As we have seen, the 1979 Decree required the Department to implement a promotion procedure having little or no adverse impact on *blacks* seeking promotion. *See supra* p. 1519. The Department in that decree agreed to develop such a procedure within one year, and then to develop valid promotion procedures for

the upper ranks. *See id.* These upper rank promotion procedures also were to have little or no adverse impact on *blacks*. *Id.* In the 1981 Decree, the Department reiterated its commitment to develop a promotion procedure having little or no adverse impact on *blacks*. *See supra* p. 1520. That decree also provided that "[i]f the selection procedure has little or no adverse impact against *black applicants*, selections *shall* be made in rank order." Record, Vol. 1, at 104 (emphasis added). All further references to "little or no adverse impact" obviously are references to adverse impact against *blacks* seeking promotion. Wholly absent from either decree is a prohibition on promotion procedures adversely impacting on whites. Indeed, two of the appellants expressly concede that the gravamen of the 1981 Decree concerns the effect of proposed promotion procedures on blacks, and blacks alone. *See* Brief for the United States at 21 ("[T]he primary concern of the 1981 Consent Decree is with promotion procedures as they affect *blacks*. . . .") (emphasis in original); Brief of Intervenors at 20 ("Simply stated, the 1981 consent decree strived to create a situation where promotions will be made to corporal in a way that would have little or no adverse impact on blacks.").

Significantly, the parties to the 1981 Decree agreed "that it would be in the best interest of all [concerned] to avoid unnecessary litigation and to put a selection procedure for State Trooper Corporals in place as soon as possible." Record, Vol. 1, at 102. Moreover, the parties to the 1979 Decree agreed that plaintiffs could move to enforce the decree or "for any other relief which may be appropriate." *Id.* at 51. Fairly read, the 1979 and 1981 Decrees simply did not place the substantive limitation on the dis-

trict court's enforcement authority that the appellants urge here. In our view, the district court, faced as it was with the Department's representation that promotions needed to be made immediately, did not modify the 1979 and 1981 Decrees or exceed the relief authorized by those decrees when it granted the plaintiffs' motion to enforce.[13]

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[13] The Department and the United States cite *United States v. Swift & Co.*, 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932), as the Supreme Court benchmark governing modification of consent decrees. In that case, the Court recognized the inherent authority of a court to modify a consent injunction if that injunction "has been turned through changing circumstances into an instrument of wrong." *Id.* at 115, 52 S.Ct. at 462. More specifically, the Court held that an injunction should not be modified at the instance of a defendant absent "a clear showing of grievous wrong evoked by new and unforeseen conditions." *Id.* at 119, 52 S.Ct. at 464. A defendant accordingly bears a heavy burden to justify modification of a valid consent judgment.

It appears, however, that a plaintiff seeking modification of a consent judgment generally bears a lighter burden. In *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 88 S.Ct. 1496, 20 L.Ed.2d 562 (1968), the Court drew a sharp distinction between a case where the defendant, as in *Swift & Co.*, seeks to escape the impact of a decree, and a case where a plaintiff seeks modification of a decree to achieve the purposes of the provisions of the decree. *Id.* at 249, 88 S.Ct. at 1499. In the latter situation, a court may have the duty to modify the decree to avoid frustration of the decree's purposes. *See id.* at 251-52, 88 S.Ct. at 1501 ("If the decree has not, after 10 years, achieved its 'principal objects' . . . the time has come to prescribe other, and if necessary more definitive, means to achieve the result. A decade is enough.)" In short, were we to construe the plaintiffs' motion to enforce as a motion to modify, we probably would not be constrained by the rigorous *Swift & Co.* standard. *See Newman v. Graddick*, 740 F.2d 1513, 1520 (11th Cir. 1984) (consent decree may be

(b) *Firefighters Local Union No. 1784 v. Stotts*

The appellants argue that even if the district court's December 15, 1983, order merely enforced the terms of the 1979 and 1981 Decrees, reversal is appropriate because the district court exceeded its remedial authority under Title VII. Appellants insist that after *Stotts*, —— U.S. ——, 104 S.Ct. 2576, 81 L.Ed.2d 483, a district court may not award affirmative equitable relief that benefits persons not found to have been actual victims of discrimination. Since in this case there never has been a finding of discrimination in promotions, and, perforce, no specific victims of promotion discrimination have been identified, the appellants contend that the district court erred in granting plaintiffs' motion to enforce the consent decrees. Having carefully reviewed the *Stotts* decision and cases interpreting it, we conclude that appellants read *Stotts* too broadly.

The *Stotts* case arose out of a class action filed in 1977 by black employees of the Memphis, Tennessee fire department. Plaintiffs charged that the fire department engaged in a pattern or practice of making

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modified if "significant time has passed and objectives have not been met").

Even if the district court's December 15, 1983 order is properly viewed as a modification of the 1979 and 1981 Decrees, a good case could be made for affirmance. When that order was issued, nearly five years had passed since the 1979 Decree had been entered. Yet the 1979 Decree had not achieved its objectives of having in place promotion procedures for all ranks in the trooper force. Indeed, the Department had failed to implement a promotion procedure having little or no adverse impact on blacks for the rank of corporal. In light of our holding that the district court did not modify the consent decree, however, we need not decide whether modification was warranted in the absence of an evidentiary hearing.

hiring and promotion decisions on the basis of race, in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. §§ 1981 and 1983. *Stotts*, 104 S.Ct. at 2581. Prior to trial, the case was settled by a consent decree wherein the fire department agreed to promote certain individual firefighters, and also agreed to eventually increase minority representation in all job classifications to reflect the proportion of blacks in the relevant labor force. Toward this end, interim hiring and promotional percentage goals were established. The defendant did not, however, admit that any allegation in plaintiffs' complaint was true, nor did the consent decree mention what would happen in the event of layoffs. *Id.*

A little more than a year after the consent decree was entered, the City announced the fiscal problems necessitated a reduction in non-essential personnel. Layoffs were to be made according to the "last hired, first fired" rule of the city-wide seniority system. Plaintiffs sought relief in the district court to protect the advances by blacks made since the entry of the consent decree. Because the court found that the City's seniority system was not bona fide, and that the proposed layoffs would have a racially discriminatory effect on blacks, it enjoined the City from applying the "last hired, first fired" rule to the extent that it would decrease the percentage of blacks then employed in certain job classifications. *Id.* at 2582.

On appeal, the Sixth Circuit affirmed even though it disagreed with the district court's finding that the seniority system was not bona fide. 679 F.2d 541, 551 n. 6 (6th Cir.1982). The court of appeals reasoned that the district court's injunction enforced the terms of a valid consent decree, *id.* at 561, and, in any event, was a valid modification of the decree. *Id.* at 562-64.

The Supreme Court reversed. The Court stated that the issue at the heart of the case was "whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." *Stotts*, 104 S.Ct. at 2585 (footnotes omitted).

The Court first rejected the Sixth Circuit's holding that the injunction merely enforced the terms of the consent decree. *Id.* at 2585-86. The Court also found erroneous the Sixth Circuit's confusion that the injunction was a proper modification of the consent decree even though the modification conflicted with the City's bona fide seniority system. The Court noted that Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), immunizes a bona fide seniority system from a Title VII challenge absent proof of an intention to discriminate. *Stotts*, 104 S.Ct. at 2587. The Court also relied on *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976), and *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Those cases, the Court stated, made it clear that: (1) individual members of a class may be awarded competitive seniority if they can prove that they have been actual victims of a discriminatory practice; and (2) even where an individual proves that the discriminatory practice had an impact on him, he is not automatically entitled to the displacement of a nonminority employee to make room for him. *Stotts*, 104 S.Ct. at 2588. The Court reasoned that since there was no finding that blacks protected from layoff had never been discriminated against, and since no blacks had been awarded competitive seniority, the

Sixth Circuit "imposed 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." *Id.*

The Court also held that the injunction was not permissible as a valid Title VII remedial order. The Court stated that the *Teamsters* holding that competitive seniority can be awarded only to actual victims of illegal discrimination is consistent with the policy behind § 706(g), 42 U.S.C. § 2000e-5(g). The policy of that remedies provision "is to provide make-whole relief only to those who have been actual victims of illegal discrimination." *Stotts*, 104 S.Ct. at 2589.

We concede that a superficial reading of *Stotts* supports appellants' position. We view that case, however, as limited to its own facts, and factually and legally distinguishable from the one at bar.

First, as the Supreme Court itself was careful to note, the central issue in that case concerned the district court's authority to override a bona fide seniority system to require layoffs of more senior whites, in the absence of a showing of intentional discrimination. Here, the order under review involves promotions, not layoffs pursuant to a bona fide seniority system. Section 703(h) of Title VII simply is not a controlling factor in this case. *See Turner*, 759 F.2d at 824 ("there is no contention that a bona fide seniority system will be affected by the [remedy authorized by the consent judgment];" *Stotts* is therefore distinguishable); *EEOC v. Local 638 Sheet Metal Workers' International Ass'n*, 753 F.2d 1172, 1186 (2d Cir.1985) (remedies at issue were not "in direct conflict with a bona fide seniority plan that was

protected by § 703(h) of Title VII;" *Stotts* is therefore distinguishable), *petition for cert. filed*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 53 U.S.L.W. 3842 (U.S. April 16, 1985); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 486 (6th Cir. 1985) (consent decree did not have "the direct effect of abrogating a valid seniority system to the detriment of non-minority workers;" *Stotts* is therefore distinguishable); *Kromnick v. School District*, 739 F.2d 894, 911 (3d Cir.1984) ("no override of a bona fide seniority plan, and no requirement of race-conscious layoffs;" *Stotts* is therefore distinguishable), *cert. denied*, —— U.S. ——, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985); *see also Deveraux v. Geary*, 596 F.Supp. 1481, 1485 (D.Mass.1984) (*Stotts* "opinion [is] limited to a discussion of layoffs made in violation of a bona fide seniority system.").

Second, the defendant in *Stotts* never admitted that it had engaged in intentional discrimination. Here, there are judicial findings that the Department was so successful in its intentional exclusion of blacks from its ranks, that in the 37 years preceding the institution of this action the Department did not have a single black on its state trooper payroll. *See EEOC*, 753 F.2d at 1186 (*Stotts* distinguishable because there was a finding of intentional discrimination against nonwhites); *NAACP v. Detroit Police Officers Ass'n (DPOA)*, 591 F.Supp. 1194, 1202 (E.D.Mich. 1984) (same). Moreover, the 1979 and 1981 Decrees enforced by the district court were entered to overcome the manifest and chronic effects of the outright and total exclusion of blacks.

Third, *Stotts* was primarily a Title VII action. Here, the case was brought under the Fourteenth Amend-

ment. *See Detroit Police Officers Ass'n (DPOA)*, 591 F.Supp. at 1202 ("*Stotts* and the Title VII cases relied upon by the Supreme Court there rest on interpretations of Congressional intent in enacting Title VII, and contain no interpretation of the Fourteenth Amendment.").

Fourth, assuming this case is properly viewed as a Title VII case, *Stotts* did not involve the enforcement of a voluntary negotiated consent decree. Rather, that case "dealt with the power of a court to *modify* a consent judgment over the objection of one of the parties." *Turner*, 759 F.2d at 824 (emphasis added); *see Stotts*, 104 S.Ct. at 2587 n. 9 ("[A] district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute."). We have held here, however, that the district court's order was fully authorized by the 1979 and 1981 Decrees. *See Turner*, 759 F.2d at 824.

Regardless of the scope of section 706(g) of Title VII, relied upon by the Court in *Stotts*, that section "does not limit the remedies to which parties may voluntarily agree under a consent judgment." *Id.*; *see Vanguards*, 753 F.2d at 487-88. Several decisions since *Stotts* make this unmistakably clear. This court stated in *Turner* that neither Section 706(g) nor the *Stotts* case, prevents a court from approving a consent decree that provides relief which is consistent with, but goes beyond, that authorized in the underlying statute. *Turner*, 759 F.2d at 824-26. Surely the district court's order enforcing the terms of the 1979 and 1981 Decrees is consistent with the purposes of Title VII. *See id.* at 826. Similarly, in *Vanguards* the Sixth Circuit had little difficulty upholding a voluntary affirmative action plan approved by

the district court over the objection of a local union even though the seniority rights of non-minority employees were abridged. The court noted that *Stotts* did not hold that "consent decrees must strictly conform to the scope of relief available to a court in a wholly coercive action." *Vanguards*, 753 F.2d at 488. To hold that Title VII forbids voluntary affirmative action by an employer to the detriment of seniority rights of white employees would be to hold that *Stotts* overruled *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). *Vanguards*, 753 F.2d at 487-88. This the Sixth Circuit was not prepared to do. The *Vanguards* decision is consistent with another post-*Stotts* Sixth Circuit case. In *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir.1984), *cert. granted*, —— U.S. ——, 105 S.Ct. 2015, 85 L.Ed.2d 298 (1985), the court upheld a race-conscious layoff formula contained in a collective bargaining agreement between the board of education and the teachers union. Relying on *Weber*, the court characterized the formula as a valid "voluntary, race-conscious affirmative action plan," *id.* at 1158, which was "easier to defend in [court] than [a plan] mandated ab initio by federal trial courts." *Id.* at 1159; *accord*, *Kromnick*, 739 F.2d 894; *see also Britton v. South Bend Community School Corp.*, 593 F.Supp. 1223, 1230 (N.D. Ind.1984) (collectively bargained "no minority layoff clause" survives *Stotts* challenge).

Based on the foregoing, we conclude that the district court's order enforcing the 1979 and 1981 Decrees is not rendered invalid by the *Stotts* decision. The district court's order will not be reversed simply because black troopers promoted under it have not

been identified as specific victims of unlawful discrimination.[14]

(c) The Fourteenth Amendment

The intervenors claim that the district court's order enforcing the 1979 and 1981 Decrees violate their constitutional right to equal protection. We disagree.

The Supreme Court squarely confronted the constitutionality of race-conscious affirmative action plans in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed. 750 (1978). Unfortunately, "[n]o clear consensus emerged from the Court's decision." *South Florida Chapter of the Associated General Contractors v. Metropolitan Dade County, Florida*, 723 F.2d 846, 850 (11th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984). Nor did *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), produce a majority opinion on the equal protection issue. Hence, "determining what [equal protection reverse discrimination] 'test' will eventually emerge from the Court is highly speculative." *South Florida Chapter*, 723 F.2d at 851; *see also Bratton v. City of Detroit*, 704 F.2d 878, 885 (6th Cir.) ("The Supreme Court has not provided the kind of guidance in the constitutional context that [it has] under Title VII"), *modified*, 712 F.2d 222 (6th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984); *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir.) ("There is no [Supreme Court] consensus on what findings of

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[14] Given our holding, the district court's failure to hold an evidentiary hearing to determine whether or not the black troopers to be promoted under the plaintiffs' motion to enforce had in fact been discriminated against does not constitute reversible error.

past discrimination justify remedial action"), *cert. denied*, 454 U.S. 1124, 102 S.Ct. 972, 71 L.Ed.2d 111 (1981); *United States v. City of Miami*, 614 F.2d 1322, 1337 (5th Cir.1980) ("We frankly admit that we are not entirely sure what to make of the various *Bakke* opinions. In over [150] pages of United States Reports, the Justices have told us mainly that they have agreed to disagree"), *aff'd in part and vacated in part and remanded*, 664 F.2d 435 (5th Cir. 1981) (en banc). In spite of the absence of a definitive Supreme Court standard on this issue, however, we recently stated with confidence:

> "At this point in the history of the fight against discrimination, it cannot be seriously argued that there is any insurmountable barrier to the use of goals or quotas to eradicate the effects of past discrimination." *United States v. City of Miami, Fla.*, 614 F.2d 1322 (5th Cir. 1980), *modified* 664 F.2d 435 (5th Cir. 1981)." "Without race and sex consciousness, the effects of past racial and sexual discrimination cannot be eradictated. Many cases have held racial and sexual goals to be appropriate." *United States v. City of Alexandria*, 614 F.2d 1358, 1365 (5th Cir.1980).

Palmer v. District Board of Trustees, 748 F.2d 595, 600 (11th Cir.1984) (footnotes omitted).

In *City of Alexandria*, 614 F.2d 1358, this court's predecessor held that the district court erred in not approving a consent decree which established long-term and interim employment goals for blacks and women. The court concluded that "goals and targets are acceptable under the Constitution . . . so long as they are reasonably related to the legitimate state

goal of achieving equality of employment opportunity." *Id.* at 1363 (footnote omitted). In fleshing out the "reasonableness" requirement, the court enumerated three factors which should be taken into account: (1) whether the remedial relief is temporary "and will terminate when the manifest [racial] imbalances have been eliminated;" (2) whether the relief establishes "an absolute bar to the advancement of white[s];" and (3) whether the relief will benefit only "qualified" persons. *Id.* at 1366.

More recently, in a different context, this court enunciated a somewhat different standard. In *South Florida Chapter*, 723 F.2d 846, we had occasion to examine the constitutionality of a county ordinance granting preferential treatment to blacks in the contract bidding process. We held that in the circumstances of that case, a minority "set aside" provision and a minority "goals" provision were constitutional. For our purposes, the analysis employed in that case is more important than the result reached.

We recognized the absence of a definitive Supreme Court standard for judging the constitutionality of affirmative action. See *id.* at 850-52. After examining the various opinions found in *Bakke* and *Fullilove*, we concluded that the appropriate standard of review should account for the concerns common to the various views expressed in those two fragmented decisions. Using this approach, we concluded that legislation employing benign racial clasifications generally will be upheld if: (1) the governmental authority has authority to pass such legislation; (2) adequate findings have been made to ensure that the legislation is remedying the present effects of past discrimination; and (3) the use of the classifications extends no further than the demonstrated need of

remedying the present effects of the past discrimination. *Id.* at 851-52. Although not a formal "test," the approach used in *South Florida Chapter* was viewed as an attempt "to balance the legitimate objective of redressing past discrimination with the concerns that the chosen means be 'narrowly tailored' to the legislative goals so as to not unfairly impinge upon the rights of third parties." *Id.* at 852.

After *South Florida Chapter* was handed down, we decided *Palmer*, 748 F.2d 595. Although in *Palmer* the constitutional issue was not the subject of appeal, we suggested that an approach of the "type" outlined in *Valentine*, 654 F.2d 503, might have been appropriate if the constitutional issue had been presented. *Palmer*, 748 F.2d at 600 n. 14. In *Valentine*, the Eighth Circuit held that after a competent body has made findings of past discrimination, the constitutional inquiry is "whether the affirmative action plan is 'substantially related' to the objective of remedying prior discrimination." *Valentine*, 654 F.2d at 510; *see Palmer*, 748 F.2d at 600 n. 14. More specifically, the Eighth Circuit stated:

> A race-conscious affirmative action program is substantially related to remedying past discrimination if (1) its implementation results or is designed to result in the hiring of a sufficient number of minority applicants so that the racial balance of the employer's work force approximates roughly, but does not unreasonably exceed, the balance that would have been achieved absent the past discrimination; (2) the plan endures only so long as is reasonably necessary to achieve its legitimate goals; (3) the plan does not result in hiring unqualified applicants; and (4) the plan does not completely bar whites from

> all vacancies or otherwise unnecessarily or invidiously trammel their interests.

Valentine, 654 F.2d at 510.[15]

A review of the foregoing authorities convinces us that the differences between the various approaches are more of phraseology than of substance. In any event, we need not choose among them since, under either the *City of Alexandria*, *South Florida Chapter*, or *Valentine* approaches, the district court's order enforcing the 1979 and 1981 Decrees does not deprive the intervenors of their right to equal protection.

First, the long history of discrimination in the Department cannot be denied. In 1972, when the district court ordered quota hiring, the court noted that

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[15] The Sixth Circuit has adopted a similar approach, concluding that the only clear consensus to be garnered from *Bakke* and *Fullilove* is that an affirmative action must (1) serve some governmental interest, and (2) must somehow be directed toward the achievement of that objective. *Bratton*, 704 F.2d at 885. The Sixth Circuit's approach is essentially two-tiered. First, because the government has a significant interest in ameliorating the effects of prior discrimination, remedial action may be taken towards that end. *Id.* at 886. Second, remedial actions pass constitutional muster if the measures employed are reasonable. *Id.* at 887. "Reasonableness" is determined by examining the facts of the case to see "whether any discrete group or individual is stigmatized by the program and whether racial classifications have been reasonably used in light of the program's objectives." *Id.*; *see Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 694 (6th Cir. 1979), *cert. denied*, 452 U.S. 983, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981); *see also Wygant*, 746 F.2d at 1157 (quoting *Wygant v. Jackson Bd. of Educ.*, 546 F.Supp. 1195, 1201 (E.D.Mich 1982)) ("The reasonableness test asks whether the affirmative action plan is 'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation.").

"[i]n the thirty-seven year history of the patrol there has never been a black trooper." *NAACP v. Allen*, 340 F.Supp. at 705. In 1975, the district court found that "the defendants have, for the purposes of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired." Record, Vol. 1, at 43. In 1979, when the defendants sought clarification or modification of the 1972 Order, the district court found that the effects of defendants' discrimination pervaded all levels of the Department. *Paradise v. Shoemaker*, 470 F.Supp. at 442. The court noted that the quota relief it ordered in 1972 was designed to provide an impetus to promote blacks into positions above the rank of entry-level trooper. Yet, "out of the 232 state troopers at the rank of corporal or above, *there is still not one black.*" *Id.* (emphasis in original). To agree with defendants that the quota relief applied only to entry-level positions would be to "ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest." *Id; see supra* p. 1520. Faced with this poor track record, as well as additional allegations of discrimination, the Department agreed to the 1979 and 1981 Decrees which were enforced by the district court in its December 15, 1983, order. As we have held, those decrees which were adopted as orders of the court, fully authorized the promotion quota now at issue. *See supra* Part II.(a). Just as clear is the fact that the relief now at issue was designed to remedy the present effects of past discrimination. *See Paradise v. Prescott*, 585 F.Supp. at 75.

The district court's requirement that the promotion quota remain in effect until either 25% of the

rank is black or until a proper promotion procedure for that rank has been developed or implemented also was appropriate. The same ratio for hiring was ordered in the 1972 Order, and that ratio was affirmed on appeal. *NAACP v. Allen*, 493 F.2d 614. Additionally, the district court's 1975 Order made it clear that the 25% requirement was applicable for *all* ranks of the trooper force. *Paradise v. Shoemaker*, 470 F.Supp. 439; *see supra* p. 1519.

The district court's order enforcing the consent decrees also is substantially related to the objective of eradicating the present effects of past discrimination, and extends no further than necessary to accomplish the objective of remedying the "egregious" and long-standing racial imbalances in the upper ranks of the Department. *Paradise v. Prescott*, 585 F.Supp. at 75. As the district court observed, its order is a temporary measure designed only " to eliminate a manifest and chronic racial imbalance" caused by the Department's conduct. *Id.* at 76. The promotion quota will cease to exist when the percentage figure has been met, or the Department succeeds in doing what it promised to do years ago. Additionally, the district court's order does not require the discharge or demotion of a white trooper or the replacement of a white trooper with a black trooper. *Id.* Moreover, only qualified black troops may be promoted pursuant to the order, and white troopers are not barred by it from advancement through the ranks. *Id.* Finally, the promotion quota ordered by the district court extends no further than necessary to ameliorate the present effects of the Department's past discrimination, effects which, as the history of this case amply demonstrates, "will not wither away of their own accord." *Id.* at 75.

We conclude that the district court's order enforcing the consent decrees is eminently reasonable given the history of this case. While the concern of intervenors' is understandable, we are not prepared to upset the considered judgment of the district court that "without promotional quotas the continuing effects of this [long-term, open and pervasive racial] discrimination cannot be eliminated." *Id.* at 76. Intervenors have not been denied their constitutional rights to equal protection by the district court's order enforcing the 1979 and 1981 Decrees.[16]

(d) Title VII

The intervenors also assert that the district court erred in not allowing them to present evidence on the

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[16] Similar to their contention regarding Title VII and the *Stotts* case, intervenors and the Department argue that the district court's order enforcing the decrees is unconstitutional since there is no evidence in the record that the Department has intentionally discriminated against black troopers seeking promotions. We disagree for essentially two reasons. First, these appellants assume that the district court's order amounts to a disputed modification of the 1979 and 1981 Decrees. We have held, however, that the district court merely enforced the terms of those decrees. *See supra* Part II(a). Second, it is no answer in this case to say that plaintiffs have not proven that the Department has discriminated against blacks above the entry-level seeking promotions; there were no blacks holding such positions until 1979, and even then the only black troopers promoted obtained their promotions pursuant to the 1979 Decree, not the voluntary action of the Department. On the other hand, it cannot be gainsaid that white troopers promoted since 1972 were the specific beneficiaries of an official policy which systematically excluded all blacks. We conclude that, in these circumstances, a finding of departmental discrimination against blacks in promotions was not a necessary predicate for granting the plaintiffs' motion to enforce.

"harsh impact" that the imposition of a promotion quota would have on them. Brief of Intervenors at 30. They argue that, notwithstanding the district court's finding to the contrary, the order enforcing the consent decrees "unnecessarily trammel[s] their interests." *Id.* The Department, whose standing to raise this issue is questionable, joins the intervenors on this issue.

The Supreme Court, in *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), upheld against a Title VII challenge a voluntary affirmative action plan established by the USWA and Kaiser Aluminum & Chemical Corp. The collectively-bargaining plan set percentage hiring goals for blacks, and established training programs which reserved a specified percentage of openings for blacks. *Id.* at 198-99, 99 S.Ct. at 2724-25. The court held that "Title VII's prohibition in §§ 703 (a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans." *Id.* at 208, 99 S.Ct. at 2729. The Court declined, however, to pronounce a bright line test for judging the permissibility of voluntary affirmative action plans. The Court simply held that the Kaiser-USWA plan was permissible under Title VII. The Court did, however, identify several factors it found important: (1) the purposes of the plan —to eliminate old patterns of racial segregation and hierarchy and to open to black jobs traditionally reserved for white only—mirrored those of Title VII; (2) the plan did not unnecessarily trammel the interests of white employees by requiring their discharge and replacement with black employees; (3) the plan did not foreclose the advancement of white

employees; and (4) the plan was a temporary measure. *Id.* at 208, 99 S.Ct. at 2729.

The district court concluded that the relief it ordered pursuant to the 1979 and 1981 Decrees was permissible under *Weber*. *See Paradise v. Prescott*, 585 F.Supp. at 75-76. The intervenors complain, however, that the district court had before it an inadequate factual basis to make that conclusion. Intervenors' position is untenable.

We initially note that intervenors failed to present this issue to the district court when the best opportunity to do so was presented. During the hearing on plaintiffs' motion to enforce and the intervenors' motion to intervene, held on May 27, 1983, the district court made it clear that one purpose of the proceeding was to "determine whether or not [the introduction of] evidence would be appropriate." Tr. at 34. Counsel for the intervenors, however, devoted the bulk of his argument to his clients' contention that the motion to enforce could not be granted absent evidence that blacks to be promoted were actual victims of unlawful discrimination. We have seen, however, that such evidence was not necessary to justify enforcement of the 1979 and 1981 Decrees. *See supra* Part II.(b). Counsel for intervenors did not at that time request an evidentiary hearing to determine whether the relief sought in plaintiffs' motion would unnecessarily trammel their interests.[17]

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[17] We admit that intervenors were in a somewhat ambiguous position at this hearing in that the court was hearing argument on the need for evidence vis a vis plaintiffs' motion to enforce as well as on the motion to intervene. The fact remains, however, that intervenors were painfully aware of the motion to enforce and the relief sought therein for quite some time. We agree with the district court's response to

In any event, we conclude that the district court had before it an adequate factual basis to resolve the *Weber* issue. It is clear beyond cavil that the district court's order enforcing the 1979 and 1981 Decrees is consistent with the purposes of Title VII does not unnecessarily trammel the interests of intervenors by requiring their discharge and replacement with black troopers, does not absolutely bar their promotion to corporal, and is a temporary measure intended to eliminate a manifest racial imbalance. *See Weber*, 443 U.S. at 208-09, 99 S.Ct. at 2729-30. Under these circumstances, the district court was not required to hold an additional evidentiary hearing.

III. *PARADISE II*

Shortly after the district court entered the order appealed from in *Paradise I*, the Department, pursuant to that order, filed its schedule for developing promotion procedures for all ranks above the entry level position. Record, Vol. 3 at 569-70. That schedule was approved by the district court. *Id.* at 627. Thereafter, on June 19, 1984, the Department filed a statement of completion of selection procedure for promotion to the rank of corporal and a motion to approve the procedure. Record, Vol. 1, at 9 and 12, No. 84-7564. The court directed the other parties to submit written responses to the Department's motion, and set the matter for a hearing, which was held on July 3, 1984.

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intervenors' suggestion that they were unable to respond to plaintiffs' motion until the court had ruled on the motion to intervene: "Haven't you had the file before you? Haven't you had an opportunity to go through it? This is not an evidentiary hearing, you know the motion was filed, and you've read it. I'll hear you on it." Tr. at 25.

Briefly put, the proposed selection procedure was comprised of the following: (1) administration of a written examination to all candidates for promotion; (2) preliminary ranking of all candidates based on examination scores and service ratings; (3) certification of the top-ranked candidates for structured oral interviews; and (4) evaluation of each certified candidate, based on his or her interview, as "best qualified," "highly qualified," "qualified," or "not qualified." All candidates within each of these categories were to be equally eligible for promotion. The Department, which had administered the proposed selection procedure prior to the filing of its motion, wished to begin making promotions from among the 13 "best qualified" candidates.

The written examination was given to 256 candidates, of whom 179 (69.9%) were white and 77 (30.1%) were black. Before the examination was given, the Department had decided to use the written examination and service rating as a screening device to determine who would be certified for oral interviews. If 15% of the top 25% of those participating in the initial portion of the promotion procedure were black, the Department planned to certify the top 25% as eligible for oral interview. A preliminary ranking of test scores and service ratings, however, revealed that of the top-ranked 64 (25% of 256) candidates only three were black (4.7% of 64). To insure that 15% of the top 25% were black, and to avoid passing over any white candidates to achieve this objective, the Department decided to certify the top 116 candidates. Of these, 105 (90.5%) were white and 11 (9.5%) were black. The difference in scores between the white candidate ranked # 64 and the black candidate ranked # 116 was 1.2 points out of a total of

100 possible points (96.25 and 95.05, respectively). Intervenor Bailey ranked # 14 with a score of 98.37, intervenor McClellan ranked # 33 with a score of 97.27, intervenor Davenport ranked # 53 with a score of 96.69, and intervenor Mansell ranked # 56 with a score of 96.62.

The oral interview panel consisted of three persons. The panel asked the candidates six structured questions. Each member of the panel then independently rated the responses of each applicant. As a result of the interviewing process, 13 candidates—10 white and 3 black—were rated "best qualified;" 51 candidates—46 whites and 5 black—were rated "highly qualified;" 46 candidates—43 white and 3 black—were rated "qualified;" and 4 candidates, all white, were rated "not qualified." Two white candidates did not appear for their interviews. Of the three black candidates among the top-ranked 64 candidates in the preliminary ranking, one was rated "best qualified" and the other two were rated "highly qualified." Of the 61 white candidates among the 64, eight were rated "best qualified;" 29 (including intervenors Bailey and McClellan) were rated "highly qualified;" 22 (including intervenor Mansell) were rated "qualified;" and 2 (including intervenor Davenport) were not rated in any of these three categories. The 3 black candidates among the "best qualified" candidates were originally ranked # 34, # 68, and # 76. The ten white candidates in this category originally ranged from # 2 to # 102. As is apparent, there is no readily discernible correlation between a candidate's preliminary ranking before the oral interviews and his or her final rating.

As we have seen, the Department indicated that it intends to promote only those in the "best qualified"

list. When the "best qualified" list is exhausted, the Department will administer a new examination and candidates will be interviewed.

The plaintiffs and the United States suggested that the Department be permitted to employ the proposed selection procedure, but that any approval of further use of the procedure be withheld pending discovery and a hearing on the validity of the procedure. The intervenors, however, objected to any use of the Department's proposed selection procedure pending discovery and a final determination of the content validity of the procedure.

The district court, on July 27, 1984, ruled on the Department's motion. The court allowed the Department to select corporals in a nondiscriminatory manner from the candidates rated "best qualified" and suspended the 1-for-1 corporal promotion quota as to any such promotions. Record, Vol. 1, at 116, No. 84-7564. The court ordered the defendants to give notice to all parties of any proposed corporal promotions at least 5 days prior to the effective date of promotion. If a party objects to a proposed promotion, the promotion will be stayed until further order of the court. *Id.* The court gave the parties leave to conduct discovery on the issue of whether the selection procedure is valid as job-related under the *Uniform Guidelines* and in compliance with the 1979 and 1981 Decrees. *Id.* at 117. The court indicated that it would conduct further proceedings to determine whether future administrations of the Department's proposed selection procedure may be used without judicial intervention, and enjoined corporal promotions other than from the 13 "best qualified" candidates. *Id.*

Only the intervenors appealed the July 27, 1984 order. Thereafter, the Department notified the other

parties of their intention to make nine corporal promotions from the "best qualified" list. The intervenors objected, and moved the district court to stay operation of the July 27 order and any promotions made under it. *Id.* at 168-71. The district court denied the motion for stay, and the promotions subsequently were made.

(a) Issues

Although intervenors raise a number of issues on appeal, we agree with the United States that the only issue properly before this court is whether the district court's July 27, 1984 order exceeds the district court's remedial authority or otherwise violates the law.[18] For the reasons which follow, we affirm.

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[18] The intervenors devote most of their argument to an attack on the 1979 and 1981 Decrees. They argue that these decrees, which serve as "charters" for all promotional procedures to be developed by the Department, Brief of Intervenors at 13, No. 84-7564, are unlawful in that they sanction prospective race-conscious relief to individuals who have not been shown to be victims of discrimination. Intervenors also argue that these decrees have been rendered invalid by *Stotts*, and violate their constitutional rights and rights under the state merit system. Intervenors finally contend that, in light of *Stotts*, the decrees must be modified. Although most of these arguments probably have been answered by our resolution of *Paradise I*, we agree with the appellees in this case that the validity of the 1979 and 1981 Decrees is not properly before this court.

Intervenors correctly note that since they were not parties to the 1979 and 1981 Decrees, it cannot be said that they consented to the terms of those decrees. *See Stotts*, 104 S.Ct. at 2586; *Reeves v. Wilkes*, 754 F.2d 965, 971 (11th Cir. 1985). The intervenors nonetheless have not appealed the district court's ruling that they "may participate in these proceedings on a prospective basis only and *may not challenge previously*

(b) Discussion

The intervenors argue that the district court's approval of the Department's promotion procedure "extends beyond the remedial authority allowed . . . by § 706(g) of Title VII, . . . is inconsistent with . . . *Stotts*[,] and . . . violates the rights of the intervenors guaranteed by the United States Constitution and both federal and state law." Brief of Intervenors at 18. In their view, the promotion procedure is unlawful because it was designed to guarantee preferential treatment to persons not proven to be victims of discrimination. The intervenors suggest

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entered orders, judgments, and decrees since intervention is untimely as to these." Record, Vol. 2, at 309. The soundness of that ruling accordingly is not before us, though we would be hard-pressed to reverse it in light of recent circuit precedent. *See Reeves*, 754 F.2d 965. It is one thing to say that the July 27, 1984 order violates their rights or exceeds the court's authority; it is quite another to say the same about the 1979 and 1981 Decrees.

Intervenors also argue that the 1979 and 1981 Decrees should be modified. Quite apart from the fact that the intervenors are in this action on a prospective basis only, curiously absent from the record is any indication that a motion seeking modification has been submitted to the district court. In their proposed opinion and order submitted to the district court after the July 3, 1984 hearing on the Department's motion, the intervenors proposed that they "should be allowed the right to file appropriate pleadings seeking a modification of those consent decrees." First Supp. Record, Vol. 1, at 3. The intervenors, however, also expressly stated that consideration should be given to modifying the decrees only at a future hearing, and then only "if appropriate pleadings are filed." *Id.* In the order appealed from, the district court neither acknowledged the intervenors alleged right to modify the decrees, nor did it deny them that right. Since *no party* has asked the district court to modify the decrees, that issue is not properly before us.

that because the Department was operating under the 1979 and 1981 Decrees, "some number of promotions were . . . guaranteed or assigned for blacks." *Id.* at 9.

The intervenors identify two points in the promotion procedure wherein impermissible quotas allegedly were imposed: when the Department decided to certify the top 116 candidates for oral interviews and the evaluation of certified candidates as "best qualified." The intervenors suggest that 116 candidates, as opposed to the top 64 (25%), were certified for oral interviews to satisfy the adverse impact requirement of the consent decrees. They also suggest that 13, and only 13, candidates were rated "best qualified" in order to satisfy the immediate promotional needs of the Department while guaranteeing "that a requisite number of blacks, in this case three, would be promoted." *Id.* at 17.

Defendants ignore the fact that by certifying 116 candidates for oral interviews, no white candidates were passed over in favor of blacks scoring lower on the examination. Thus, the benefit of an oral interview and the possibility of promotion was conferred equally on similarly situated candidates of *both* races. Moreover, contrary to intervenors' suggestion, the decision to expand the class of candidates to be certified was not arbitrary. As we have seen, a large pool of candidates scored better than 95 out of 100 possible points, and numerical distinctions between the candidates ranked = 64 through = 116 were insignificant. *See supra* p. 1535. All candidates certified for oral interview thus demonstrated substantial qualification for promotion by scoring better than 95 on this phase of the promotion procedure.

The Department also cannot be faulted for employing an oral interview component in its promotion pro-

cedure when the scores of the top-ranked candidates were so closely grouped. The Department's determination that "merit" could best be measured by a combination of factors rather than by rank order use of scores on the written examination is also supported by the function performed by the oral interviews. As counsel for the Department stated in the district court: "These [oral interview] questions were designed to determine: one, how that candidate thought under stress, how he could think on his feet, communication skills, his career objectives, knowledges and goals of the duties of the Department . . ., and his overall ability to perform as a supervisor in the Department. . . ." Tr. at 16-17, No. 84-7564. Furthermore, the decision to require candidates for promotion to undergo oral interviews was particularly appropriate where the written examination had not been validated.

The intervenors' assumption that 13 "best qualified" candidates were selected to guarantee that a certain number of blacks would be promoted also is unwarranted. The intervenors introduced no evidence whatsoever in support of this charge. Indeed, the record indicates otherwise. Counsel for the Department represented to the district court that the interviewers were not "coached" or instructed on how the interviewees were to be graded. "They were not told anything. They were told to select the best candidates that appeared before them. There was no . . . they were not given any quotas or goals or any racial composition at all." *Id.* at 29-30. Additionally, since there were no limits on how many candidates could be rated "best qualified," and since the Department intends to promote only from the "best qualified" list, we fail to see how the intervenors' chances for

promotion have been materially affected by the certification of 116 candidates, rather than 64, for oral interview.

We conclude that, regardless of the wisdom of our various holdings in *Paradise I*, intervenors simply have failed to show that the Department's promotion procedure imposes promotion quotas or otherwise accords preferences or benefits to black candidates for promotion at the expense of more qualified white candidates. Rather, the record shows that the Department's promotion procedure is fair to all applicants, white and black, and that only merit factors were considered in the selection of the 13 "best qualified" candidates from the 116 certified for oral interviews. The district court therefore did not exceed its remedial authority under Title VII when it approved the Department's promotion procedure. Moreover, since the promotion procedure approved by the district court does not involve "reverse discrimination" against white candidates for promotion, the intervenors' other contention also must fail.[19]

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[19] When the district court overruled the motions to reconsider, alter or amend, and stay enforcement of the order enforcing the 1979 and 1981 Decrees, it predicted that use of the promotion quota might be a "one-time occurrence" in light of the defendants' pledge to promptly develop promotional procedures conforming with the consent decrees. R.E. at 178. The reasonableness of the order enforcing the decrees and the accuracy of the district court's prediction are attested to by recent events.

After the district court entered the July 27, 1984 order, the defendants moved the court for approval of a proposed selection procedure for promotions to sergeant. The court thereafter entered an order similar to the July 27 order, suspending the 1-for-1 promotion quota for that rank, allowing sergeant promotions from among the "best qualified" candidates for promotion to that rank, and prohibiting other ser-

The district court's orders in *Paradise I* and *Paradise II* are AFFIRMED.

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geant promotions until further order of the court. Additionally, the defendants have been allowed to promote only white troopers to the lieutenant and captain ranks since there apparently are no black troopers qualified for promotion to those ranks.

The recent progress made by the Department also reinforces our conclusion that the quota relief granted by the district court was necessary to commence the process of eliminating the present effects of the Department's past discrimination. It seems that the 1-for-1 promotion mandate, which has been used only once, has given the Department the incentive to comply *now* with its obligations under the law and the 1979 and 1981 Decrees. It thus appears that the principal effect of the order enforcing the decrees might be the development of acceptable promotion procedures for all ranks and the nullification of the promotion quota.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

Civil Action No. 3561-N

PHILLIP PARADISE, JR., individually and on behalf of the class similarly situated, PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF AND AMICUS CURIAE

v.

BYRON PRESCOTT, as Director of the Alabama Department of Public Safety, ETC., ET AL., DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS

[Filed Dec. 15, 1983]

ORDER

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court:

(1) That the plaintiffs' April 7, 1983, motion to enforce the terms of the February 16, 1979, partial consent decree and August 18, 1981, consent decree, be and it is hereby granted to the extent hereafter set forth;

(2) That the defendants and their agents and employees be and each is hereby enjoined and restrained from failing to promote from this day forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted to the rank;

(3) That this promotion requirement shall remain in effect as to each trooper rank above the entry-level rank until either approximately 25% of the rank is black or the defendants have developed and implemented a promotion plan for the rank which meets the prior orders and decrees of the court and all other legal requirements;

(4) That within 35 days from the date of this order the defendants shall submit to the court for the court's approval a schedule for the development of promotion procedures for all ranks above the entry-level position;

(5) That the plaintiffs be and they are hereby allowed 21 days from this date to file a request for interim attorney fees, which request shall be supported by affidavits and shall address each of the criteria set forth in *Hensley v. Eckerhart*, —— U.S. ——, 103 S.Ct. 1933 (1983), and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); and

(6) That all other relief requested by the plaintiffs in their motion and not specifically granted be and it is hereby denied.

DONE, this the 15th day of December, 1983.

s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 3561-N

PHILLIP PARADISE, JR., individually and on behalf of the class similarly situated, PLAINTIFFS

UNITED STATES OF AMERICA,
PLAINTIFF AND AMICUS CURIAE

v.

BYRON PRESCOTT, as Director of the Alabama Department of Public Safety, ETC., ET AL.,
DEFENDANTS

V. E. MCCLELLAN, ET AL., DEFENDANT-INTERVENORS

[Filed Dec. 15, 1983]

MEMORANDUM OPINION

The present phase of the proceedings in this lawsuit began on April 7, 1983, when the plaintiffs filed a motion to enforce the terms of two previously entered consent decrees. In accordance with these decrees and as a result of recent developments, this court must determine what procedure the Alabama

Department of Public Safety must use in promoting troopers. The court understands that the department is in need of at least 15 new corporals immediately.

I.

In 1972, then Chief District Judge Frank M. Johnson, Jr., remarked in this case that "[i]n the thirty-seven-year history of the patrol there has never been a black trooper and the only Negroes ever employed by the department have been nonmerit system laborers." *NAACP v. Allen*, 340 F. Supp. 703, 705 (M.D. Ala. 1972). The court found that the department had "engaged in a blatant and continuous pattern and practice of discrimination in hiring . . . both as to troopers and supporting personnel;" and the court ordered that the department hire one black trooper for each white trooper hired "until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes." *Id.* at 705, 706. The order was affirmed on appeal. 493 F.2d 614 (5th Cir. 1974).

In a later proceeding in this case, Judge Johnson was asked to clarify "whether the twenty-five percent hiring quota applies to the entire state trooper force or just to entry-level troopers." *Paradise v. Shoemaker*, 470 F. Supp. 439, 440 (M.D. Ala. 1979). The court responded that "there is no ambiguity" and that the twenty-five percent quota applies "to the entire force of sworn officers, not just to those in the entry-level rank." *Id.* at 440-41. The court observed that the defendants were guilty of discrimination not just in hiring, but in all ranks of the patrol. The court then emphasized that,

> One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state

> troopers at the rank of corporal or above, *there is still not one black.* The quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest.

Id. at 442 (emphasis in original).

On February 16, 1979, the parties entered into a consent decree which required that the department develop and implement a valid promotion procedure for the rank of corporal. The decree gave the department a year to meet this objective, after which the department was to do the same, in turn, for the ranks of sergeant, lieutenant, captain and major. This time schedule was not met, and on August 18, 1981, the parties entered into another consent decree which allowed the department to administer a newly developed promotion procedure for the rank of corporal, but prohibited any promotions under the procedure until it had been first determined that the procedure had "little or no adverse impact against black applicants." According to the decree, adverse impact was to be determined and measured by the "four-fifths rule" set forth in Section 4 D of the Uniform Guidelines of Employee Selection Procedures, 28 C.F.R. § 50.14 (1983).

On April 7, 1983, the plaintiffs filed a motion seeking enforcement of the 1979 and 1981 consent decrees and, in particular, a determination whether the department's promotion procedure for corporal had an adverse racial impact. The department needed at least 15 new corporals, and the parties were unable to agree whether the procedure developed in 1981

could be used for the promotions. On October 28, 1983, the court found that the procedure did have an adverse racial impact on black applicants and, in accordance with the 1981 consent decree, prohibited use of the procedure.

The parties have been unable to agree upon another selection procedure for the 15 needed corporals; and, as required by the 1981 consent decree, they have requested that the court fashion a procedure.

II.

On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 *lieutenants, there is still not one black.* Of the 65 sergeants, *there is still not one black.* And of the 66 corporals, *only four are black.* Thus, the Department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers.

In light of the severe racial imbalances in the upper ranks, the court agrees with the plaintiffs that for a

period of time at least 50% of all those promoted to corporal and above must be black troopers, as long as there are qualified black troopers available.[1] The court also agrees with the plaintiffs that if there is to be within the near future an orderly path for black troopers to enter the upper ranks, any relief fashioned by the court must address the department's delay in developing acceptable promotion procedures for all ranks. The court will therefore enter an order requiring that, for each white trooper promoted to a higher rank, the department shall promote one black trooper to the same rank, if there is a black trooper objectively qualified for the promotion. This requirement shall remain in effect as to each rank above entry level until either 25% of the rank is black or the department has developed and implemented for the rank a promotion procedure which meets the requirements of the prior orders and decrees of this court and all other relevant legal requirements.[2] The court will also require that the department submit to

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[1] In light of the department's failure after almost twelve years to eradicate the continuing effects of its own discrimination and to develop acceptable promotion procedures and in light of the severity of the existing racial imbalances, a credible argument could be made that all 15 of the new corporals should be black, followed perhaps by a one-to-one ratio. However, the plaintiffs are not seeking this relief.

[2] According to the *1980 Census of Population* published by the U.S. Department of Commerce, the State of Alabama is approximately 26% black. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n. 20, 97 S.Ct. 1843, 1857 n. 20 (1977), the Supreme Court stated that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

the court for the court's approval a schedule for the development of promotion procedures for all ranks above the entry-level position. The schedule should be based upon realistic expectations.

III.

The relief fashioned by the court today is warranted by law. Where there has been unlawful discrimination, a district court has not only the power but the responsibility to fashion a remedy that will as much as possible eliminate the discriminatory effects of past discrimination as well as bar like discrimination in the future. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372 (1972). As the evidence in the present case dramatically demonstrates, these effects will not wither away of their own accord. Furthermore, in fashioning relief, a court should include race-conscious requirements if they are necessary, reasonable, and otherwise appropriate under the circumstances.[3] *United States v. City of Miami*, 664 F.2d 435 (5th Cir. Dec. 3, 1981) (en banc) (former Fifth Circuit); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980).

The promotional quotas imposed by the court today are clearly necessary. The racial imbalances in the upper ranks of the Alabama Department of Public Safety remain egregious and are now of long duration; and, furthermore, it is apparent from the history of this lawsuit that without immediate, affirmative, race-conscious action these intolerable disparities will not dissipate within the near future.

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[3] In an earlier order this court demonstrated dramatically the efficacy of quotas, over other remedies, in instances where blacks have historically been completely excluded or almost completely excluded from employment. *NAACP v. Dothard*, 373 F. Supp. 504 (M.D.Ala. 1974) (Johnson, C.J.).

The promotional quotas are also reasonable. They are specifically tailored to redress the continuing effects of past discrimination, but they do "not unnecessarily trammel the interest of white employees." [4] *United Steelworkers v. Weber*, 443 U.S. 193, 208-09, 99 S.Ct. 2721, 2730 (1979). They do not require the discharge or demotion of a white trooper or his replacement with a black trooper; nor do they create an absolute bar to the advancement of white troopers. Moreover, the quotas are but a temporary measure, designed not to maintain a racial balance, but simply to eliminate a manifest and chronic racial imbalance. Finally, only qualified black troopers will be considered for promotion under the quotas. *See, e.g., United Steelworkers v. Weber, supra; United States v. City of Miami, supra; United States v. City of Alexandria, supra.*

The quotas imposed by the court are also not without legal precedent. In *United States v. City of Alexandria, supra*, the former Fifth Circuit approved a consent decree imposing on a municipality promotional quotas ranging from 25 to 50%. Under the decree, the quotas are to remain in effect until the municipality achieves the same percentages of blacks and women as are in the overall work force in the

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[4] The court has allowed four white troopers to intervene as defendant-intervenors. Their intervention is on a prospective basis only; they are not allowed to challenge prior orders, judgments, and decrees of the court. *United States v. California Co-operative Canneries*, 279 U.S. 553, 556, 49 S.Ct. 423, 424 (1929); *Smith v. Missouri Pac. R. Co.*, 615 F.2d 683 (5th Cir. 1980). *See Thaggard v. City of Jackson*, 687 F.2d 66, 68 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, —— U.S. ——, 104 S.Ct. 255 (1983). *See also* 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 24.16[5]; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1920.

affected localities. *See also, e.g., E.E.O.C. v. American Telephone and Telegraph Company*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 439 U.S. 915, 98 S.Ct. 3145 (1978).

Two factors in the present case make the claim for promotional quotas even stronger than it was in *City of Alexandria*. In contrast to the earlier case, here the court has made a specific finding of long-term, open and pervasive racial discrimination. Moreover, this court has before it a record demonstrating that without promotional quotas the continuing effects of this discrimination cannot be eliminated. Nevertheless, the quotas imposed by this court are substantially less constraining than those imposed in *City of Alexandria*. Under the order this court will enter today, the Alabama Department of Public Safety has the prerogative to end the promotional quotas at any time, simply by developing acceptable promotion procedures. It is thus possible for the use of quotas to be a one-time occurrence.

IV.

Finally, as this lawsuit moves into its twelfth year, it is clear that the court and the parties should now contemplate bringing this litigation to an end. The court therefore hopes that, in addition to achieving the above objectives, the remedy imposed today will hasten the day when the Alabama Department of Public Safety is no longer under the supervision of this court.

An appropriate order will be entered in accordance with this memorandum opinion.

DONE, this the 15th day of December, 1983.

s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 3561-N

PHILLIP PARADISE, JR., individually and on behalf of the class similarly situated, PLAINTIFFS

UNITED STATES OF AMERICA,
PLAINTIFF AND AMICUS CURIAE

v.

JERRY SHOEMAKER, as Director of the Alabama Department of Public Safety, ETC., ET AL.,
DEFENDANTS

[Filed Aug. 18, 1981]

CONSENT DECREE

On February 16, 1979, this Court entered a Partial Consent Decree in resolution of certain issues raised in Plaintiffs' Motion for Supplemental Relief. Part IV of the Partial Consent Decree provides in part as follows:

> The defendants agree to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion pro-

> cedure when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal . . . In accordance with that objective defendants agree to utilize a promotion procedure which is in conformity with the 1978 *Uniform Guidelines* [*on Employee*] *Selection Procedures*, 43 Fed. Reg. 38290, and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal.

Defendants have submitted to plaintiffs Paradise, et al., and the United States [hereinafter referred to collectively as plaintiffs] and to the Court a proposed selection procedure for State Trooper Corporal positions and a validity study for the written examination component of that selection procedure. Defendants have presented no validity evidence in support of the components of the proposed selection procedure other than the written examination. Plaintiffs and defendants disagree whether the proposed selection procedure is in conformity with the *Uniform Guidelines on Employee Selection Procedures*, 43 Fed. Reg. 38290, 28 C.F.R. Sec. 50.14 (1978 [hereinafter, *Uniform Guidelines*]. Because the selection procedure has not yet been administered, the adverse impact of the selection procedure, if any, is not known.

Defendants recognize their obligation under the Partial Consent Decree to utilize a selection procedure which has little or no adverse impact on blacks seeking promotion to corporal. The parties agree that it would be in the best interest of all parties to avoid unnecessary litigation and to put a selection procedure for State Trooper Corporals in place as soon as possible. Accordingly, the parties have entered into

this Consent Decree governing the use of the proposed selection procedure for promotion of State Troopers to State Trooper Corporal positions.

NOW, THEREFORE, IT IS HEREBY ORDERED that the proposed selection procedure for State Trooper Corporal, submitted to this Court May 21, 1981, shall be administered and used as follows:

1. The proposed selection procedure shall be administered and scored as set out in defendants' letter to plaintiffs and this Court dated May 21, 1981 and in the proposed selection procedure and validation report accompanying that letter. Each of the four components of the procedure shall comprise the percentage of the total score for the selection procedure that is set out in defendants' May 21, 1981 letter.

2. Any State Trooper with permanent status for at least 24 months as of October 15, 1981 shall be permitted to take the written examination for State Trooper Corporal. It is recognized that the selection procedure provides for a score for length of service such that thirty months' service at the time the selection procedure is administered shall equal seventy points and sixty months' service (or more) shall equal one hundred points. Accordingly, one point more than seventy shall be awarded to each applicant for each month of service more than thirty months, up to a maximum of one hundred points.

3. Defendants shall compile a list of candidates for promotion for State Trooper Corporal positions based upon the composite numerical scores of applicants on the selection procedure. In determining eligibility, defendants may apply the standards for length of service set out in the proposed selection procedure. Under this Decree, defendants shall not be

required to promote any State Trooper who does not have at least 30 months' service as a State Trooper at the time of the promotion, provided that the length of service requirement is applied consistently. Defendants shall provide a copy of this list, identifying each applicant by race, to plaintiffs.

4. The list of candidates for promotion shall be reviewed to determine whether the selection procedure has an adverse impact against black applicants. Adverse impact shall be determined by reference to the *Uniform Guidelines*, by comparing the numbers (by race) of applicants with the numbers (by race) of persons passing the procedure and by comparing the numbers (by race) of applicants with the number (by race) of persons ranking high enough on the selection procedure to be promoted if promotions were made in rank order from the list of eligible candidates. For purposes of this Decree, "applicants" shall include all persons who take the written examination for State Trooper Corporal. Adverse impact shall be determined for each of the following groups of "persons ranking high enough on the selection procedure to be promoted if promotions were made in rank order:" (a) the first eight corporal promotions, which are expected to be awarded as soon as selections based upon the proposed selection procedure are approved by the Court; (b) all corporal promotions expected within one year of the administration of the selection procedure, based upon the good faith estimate of the Department of Public Safety; and (c) all corporal promotions expected during the life of the list of eligible candidates, based upon the good faith estimate of the Department of Public Safety as to the length of time the list will be used and the Department's anticipated staffing needs during that time. Adverse

impact shall be determined by reference to Section 4D of the *Uniform Guidelines, supra,* and the answer to question 12 of the *Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures,* 44 Fed. Reg. 11996, March 2, 1979.

5. If the selection procedure has little or no adverse impact against black applicants, selections shall be made in rank order from the list described in paragraph 2 of this Decree. Whether or not the selection procedure has "little or no adverse impact" will be measured by the "four-fifths rule" set forth in Section 4 D of the *Uniform Guidelines, supra.* If the parties cannot agree whether the selection procedure has an adverse impact, the matter shall be submitted to the Court for resolution. No promotions to State Trooper Corporal positions shall be made pending resolution of the question of adverse impact.

6. If the parties agree, or the Court finds, that the selection procedure has an adverse impact, promotions shall be made in a manner that does not result in adverse impact for the initial group of promotions or cumulatively during use of the procedure. Defendants shall submit to plaintiffs their proposal for making promotions in conformity with the Partial Consent Decree and with this Decree. If the parties do not agree on the method for making promotions, the matter shall be submitted to the Court for resolution. No promotions to State Trooper Corporal positions shall be made until the parties have agreed in writing or the Court has ruled upon the method to be used for making promotions with little or no adverse impact.

7. If the selection procedure has an adverse impact against blacks seeking promotion to corporal, de-

fendants shall examine the results of each component of the selection procedure to identify the source(s) of the adverse impact and shall revise the procedure so as to avoid adverse impact in the future. Defendants shall provide plaintiffs with data showing the impact of each component of the selection procedure and an item-by-item analysis of the impact of the written test. The parties shall attempt to agree upon modifications in the selection procedure for future administrations. If the parties are unable to agree upon the procedure to be used after the first administration of the selection procedure and the method of using that procedure, the matter shall be submitted to the Court for resolution.

ORDERED this 18th day of August, 1981.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO:

APPENDIX E

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 3561-N

PHILLIP PARADISE, JR., individually and on behalf of the class similarly situated, PLAINTIFFS

UNITED STATES OF AMERICA,
PLAINTIFF AND AMICUS CURIAE
CLIFTON BROWN, PLAINTIFF-INTERVENOR

—*v*—

M. L. HILYER, as Director of the Alabama Department of Public Safety, ETC,; ET AL.,
DEFENDANTS

PROPOSED PARTIAL CONSENT DECREE

Come the parties, plaintiff Phillip Paradise, Jr., individually and on behalf of the class similarly situated, plaintiff and *amicus curiae* the United States of America (hereinafter referred to collectively as "plaintiffs") and defendants, M. L. Hilyer, as Director of the Alabama Department of Public Safety, his agents, assigns, etc., and Stanley Frazer, as Director of the Alabama Department of Personnel, his agents, assigns, etc., and enter into a consent agreement as to Plaintiffs' Motion for Supplemental Relief as follows:

I. STATEMENT OF PURPOSE

Defendants recognize the continuing effect of the orders issued by this Court on February 10, 1972 and August 5, 1975. Defendants will have as an objective within the Department of Public Safety an employment and promotion system that is racially neutral. In this respect, defendants and their officers, agents and employees, successors and all persons acting in concert with them or any of them, in the performance of their official functions, agree not to engage in any act or practice which has a purpose or effect of unlawfully discriminating against blacks. In addition, defendants agree not to engage in any act or practice which discriminates on the basis of race in hiring, promoting, upgrading, training, assignment, discharge or otherwise discriminate against any employee of, or any applicant, or potential applicant for employment with respect to compensation, terms and conditions or privileges of employment because of such individual's race. Defendants agree that any time after entry of this partial consent decree the plaintiffs may apply to this Court for an order which would enforce the terms of the partial consent decree or apply for any other relief which may be appropriate.

II. NEW DISCIPLINARY REVIEW PROCEDURES

Defendants will distribute the attached Notice of Disciplinary Review Procedures to all Department employees of the trooper rank. In this way, all troopers will be apprised of the availability of procedures for them to obtain a review of certain disciplinaries contained within their files, including oral and

written counseling, oral reprimands, written reprimands, suspensions, transfers and pay raise denials, which said troopers contend were the result of racial discrimination. These procedures are fully described in the attached Notice of Disciplinary Review Procedures and are fully incorporated herein and agreed to by the parties.

This notice will be distributed to all employees of the trooper rank no later than thirty (30) days from the date of this decree. Plaintiffs and defendants will submit names of the persons they have selected for the Disciplinary Review Board within thirty (30) days of the date of this decree, and they request the Court to select the third Board member at its earliest convenience. Board members who are not members of the Department of Public Safety will be compensated at a reasonable rate by the Department for Board service.

III. RACE RELATIONS PROGRAM

In order to further their objective of a racially neutral employment and promotion system, defendants will establish a comprehensive Equal Employment Opportunity (EEO) Program. This program will be designed to provide a vehicle for airing grievances concerning allegations of racially disparate treatment and to further and promote race relations within the Department. Defendants agree to appoint an employee of the Department of Public Safety as the Department-wide EEO officer. This officer will have responsibility for supervising the Equal Employment Opportunity Program within the Department and monitoring Departmental compliance with this and other court decrees. This officer will also conduct a class or series of classes concern-

ing race relations for each state trooper academy class and for each supervisory in-service training program held by the Department. This officer will also be responsible for instituting an EEO grievance procedure, which will provide all troopers with access to specially trained EEO officers when such troopers have complaints of a racial nature. This grievance procedure will be implemented as an addition to present grievance procedures. The Department-wide EEO officers will make recommendations to the Director concerning resolutions of these racial grievances.

Defendants also agree to appoint an EEO officer for each state trooper district in the State and to provide him with special training in the field of race relations. These district EEO officers will process racial grievances and forward them to the Department-wide EEO officer for resolution, and will promote and further race relations within each individual district.

Defendants will, within 60 days, publish a comprehensive description of the EEO program and distribute it to all state trooper personnel, along with a letter from the Director encouraging all personnel to utilize the program.

IV. PROMOTIONS

A. The defendants agree to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact upon blacks seeking promotion to corporal (hereinafter referred to as the "objective" or "above-stated objective.") In accordance with that objective defendants agree to utilize a pro-

motion procedure which is in conformity with the 1978 *Uniform Guidelines of Selection Procedures*, 43 Fed. Reg. 38290, and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal.

B. In accordance with the above-stated objective defendants agree to develop for the position of corporal a promotion procedure which (1) would be developed by defendants no later than one year from the signing of this Consent Decree, (2) would be submitted upon completion of the formulation of the promotion procedure to counsel for plaintiffs who would have at least 60 days to review the promotion procedure and would be able to request from defendants any information relevant to the proposed promotion procedure, and (3) would be submitted upon completion of plaintiffs' review to this court for approval on the basis of the above-stated objective.

In the interim, defendants agree to utilize the state merit system for all promotions to corporal, during which time defendants will promote at least three black troopers to the rank of corporal.

Upon completion of validation of a new procedure for promotion to corporal, defendants, in accordance with the above-stated objective, agree to begin validation of a promotional procedure for the position of sergeant and, in turn, for the positions of lieutenant, captain and major.

V. TERMINATIONS

Defendants agree to review all terminations of state troopers made from August 5, 1975 through March 1, 1979. If the Department finds that any termination resulted in whole or in part from racial

discrimination, each such person shall be offered re-employment at the level at which he was terminated, unless such termination occurred prior to graduation from the trooper Academy, in which case such person shall be required to complete the entire Academy training course.

A report of this review will be presented to counsel for plaintiffs as soon as practicable, but not later than April 15, 1979. All reinstatements will be made by April 15, 1979, with the exception of any individual terminated during his Academy training, who shall be reinstated at the next Academy training session. Plaintiffs except from this portion of the decree with respect to class member Charles Gregory Potts. Plaintiffs contend that Mr. Potts should be reinstated irrespective of the review conducted by defendants.

VI. ATTORNEY FEES AND COSTS

The defendants hereby agree to pay all court costs and related expenses incurred by plaintiffs, as well as reasonable attorneys fees to counsel for the plaintiffs.

TO: All Department Employees Holding the Rank of State Trooper

FROM: M. L. Hilyer, Director

NOTICE OF DISCIPLINARY REVIEW PROCEDURES

Judge Frank M. Johnson, Jr. has approved of a new procedure whereby the Department of Public Safety will review certain disciplinary actions taken by the Department against its employees holding the rank of state trooper, which disciplines were given between August 5, 1975 and March 1, 1979.

All troopers are hereby given permission to review their 201 files. Any trooper who, after reviewing his file, feels that any discipline given him during this period, including oral and written counselings, oral and written reprimands, suspensions, transfers and pay denials, was given him as a result of racial discrimination, shall give notice thereof to the Department in writing. This written notice *shall* specify the dates and nature of the disciplinary which the trooper contends was racially motivated, as well as the name(s) of the Department personnel whose conduct the trooper contends was racially motivated.

Each claim so presented will then be assigned a date, at which time each trooper will be given an opportunity to present his contentions to an impartial review board. This board will consist of three persons, as follows: one private citizen chosen by Judge Frank M. Johnson, Jr.; one person chosen by the attorneys representing the plaintiff class; and one person chosen by the Department of Public Safety. Troopers presenting such claims may, on their own,

obtain an attorney, who will be given an opportunity to participate in the hearing. The Department may respond to such claims through an attorney of its choice.

Attorneys for both sides will be afforded an opportunity to present opening statements, to examine and cross-examine witnesses, to introduce documentary evidence and to give closing arguments. Although the hearing will be conducted in a trial-like manner, formal rules of evidence will not be followed.

If after hearing both sides, a majority of the Board finds the claim to be established by a preponderance of the evidence, any and all records relating to such disciplinaries shall be removed from all three of said trooper's personnel files and given to the trooper. No copies shall be retained by the Department. If the Board finds that a trooper has not established his claim, no action will be taken. Neither side has a right to appeal from the determination of the Board.

All written requests for review in accordance with this notice must be submitted within sixty (60) days of the date of this notice. The Department gives its assurance that no adverse action will be taken against troopers who utilize these procedures.

M. L. HILYER

Date

ORDER

Upon consideration of the foregoing proposed partial consent decree executed and presented by all parties in this case, and with the specific understanding by this Court that the orders made and entered herein on February 10, 1972, and August 5, 1975, continue in full force and effect, it is the ORDER, JUDGMENT and DECREE of this Court that said partial consent decree be and is hereby approved and the parties are hereby ORDERED to implement same in accordance therewith and in accordance with the orders of this Court of February 10, 1972, and August 5, 1975.

Done, this the 16th day of February, 1979.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 84-7053 and 84-7564

D.C. Docket No. 72-3561

PHILLIP PARADISE, JR., ET AL., PLAINTIFFS-APPELLEES

UNITED STATES OF AMERICA, PLAINTIFF AMICUS CURIAE-APPELLEE, CROSS-APPELLANT

versus

BYRON PRESCOTT, AS DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, ET AL., DEFENDANT-APPELLANT, CROSS-APPELLEE

V. E. MCCLELLAN, ET AL., DEFENDANTS-INTERVENORS, APPELLANTS, CROSS-APPELLEES

Appeals from the United States District Court for the Middle District of Alabama

---

Before FAY and ANDERSON, Circuit Judges, and GIBSON*, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and were argued by counsel;

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* Honorable Floyd R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the orders of the District Court appealed from, in these causes be and the same are hereby, AFFIRMED;

It is further ordered that defendant-appellant/cross-appellee and defendants-intervenors, appellants/cross-appellees pay to plaintiffs-appellees and plaintiff, amicus curiae appellee/cross-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 12, 1985

For the Court: SPENCER D. MERCER, Clerk

Issued as Mandate: Sept. 4, 1985

By: /s/ Jarren A. Godfrey
Deputy Clerk

APPENDIX G

LAW OFFICES OF
EDWARD L. HARDIN, JR., P.C.
A Professional Corporation
Attorneys at Law
1825 Morris Avenue
Birmingham, AL 35203
(203) 320-2679

May 21, 1981

Hon. John Carroll
Southern Poverty Law Center
1001 S. Hull Street
Montgomery, Alabama 36101

Re: *Paradise* v. *Shoemaker*
U.S. District Court of Alabama
Case No. 3561-N

Dear John:

As per the Court's order of May 16, I am enclosing to you one copy of each of the following:

1. Proposed Examination of State Trooper Corporal;
2. Alabama Merit System Report of Validation Study State Trooper Corporal;
3. Alabama Department of Public Safety Service Rating Form;
4. Procedure for Evaluating Length of Service State Trooper Corporal;
5. Supervisory Promotional Evaluation State Trooper Corporal Form;

6. Definitions of Evaluation Factors State Trooper Corporal;
7. Promotional Examination Rating Form (Defines terms used in form described in #5 above);
8. Information and Guides Supervisory Evaluation State Trooper Corporal.

Our proposed promotional procedure accords the following weights to the above factors:

1.	Written test	60%
2.	Length of Service	10%
3.	Supervisory Evaluation	20%
4.	Service Ratings	10%

The Service Ratings score to be used in the above procedure would be the average of the candidate's three most recent service ratings.

It is my understanding that we have agreed that our production of this material relieves the Defendant of the obligation to answer the Interrogatories and Request for Production filed by the Southern Poverty Law Center on April 16, and that, should you have any questions after your examination of the material we are producing today, you will pursue the answers to those questions thru depositions or additional interrogatories. Please inform me immediately if I have misunderstood our agreement on this matter.

Regarding any questions you might have, if you will convey them to me informally first via telephone or letter, it may be that I can get them answered for you without the necessity of formal discovery proceedings, thereby expediting this whole matter.

If I can be of further assistance, please feel free to call me.

Yours truly,

/s/ Buddy
LEON (BUDDY) KELLY, JR.

LKjr/jws
Encl.

cc: Honorable Myron Thompson
U.S. District Judge

Mr. Tommy Flowers
State of Alabama Personnel Department

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20042