No. 85-999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

PHILLIP PARADISE, JR., *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENTS, ALABAMA DEPARTMENT OF PUBLIC SAFETY AND COLONEL BYRON PRESCOTT IN SUPPORT OF PETITIONER

Of Counsel:
HARDIN & HOLLIS
Birmingham, Alabama
35202-1328
Telephone: (205) 328-2675

EDWARD L. HARDIN, JR.
Post Office Box 11328
Attorneys for Respondent
Alabama Department of
Public Safety

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether the Equal Protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution permits the imposition of a one-black-for-one-white promotional quota without a independent, correlative finding of discrimination.

2. Whether the use of affirmative action in the form of racial preference by the District Court as a means of enforcing the terms of valid consent decrees having a racially neutral objective is permissible under the Equal Protection Clause of the fourteenth Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE DEPARTMENT OF PUBLIC SAFETY AND BYRON PRESCOTT 1

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT OF THE FACTS 2

RATIONALE OF THE COURTS BELOW 8

INTRODUCTION AND SUMMARY OF THE ARGUMENT .. 13

ARGUMENT:

Court ordered race conscious quota relief in the present case is impermissible under the equal protection clauses of the Fourteenth and Fifth Amendments 16

I. Strict scrutiny is the only standard of review applicable to determine whether court ordered race conscious relief is constitutional 16

II. The promotion quota ordered by the court cannot pass strict scrutiny 19

III. The court ordered quota relief contravenes other compelling governmental interests. 33

CONCLUSION 36

TABLE OF AUTHORITIES

CASES: Page

Albermarle Paper Co. v. Moody, 442 U.S. 405, (1975) 26

Franks v. Bowman Transportation Company, 424 U.S. 747, (1976) 30

Fullilove v. Klutznick, 448 U.S. 448, (1980) ..... 11, *passim*

Hampton v. Mon Sun Wong, 426 U.S. 88, (1976) 21

Harris v. Birmingham Board of Education, 712 F.2d 1377 (11th Cir. 1983) 31

Hirabayaski v. U.S., 320 U.S. 81, (1943) 16

International Bro. of Teamsters v. U.S., 431 U.S. 324, (1977) 31

Kirkland v. New York St. Department of correctional Services, 711 F.2d 1117, 1130 L.2d Cir. 1983) 26

Local 28 Sheet Metal Workers' International Association v. EEOC, et al. (slip opinion) No. 84-1656, July 2, 1986 29-30

Local 93 v. City of Cleveland, ___ U.S. ___ ,106 S. Ct. 3063, 3073, n.8 (1986) 27, 34

Loving v. Virginia, 388 U.S. 1, (1967) 16, 19

McDonnell-Douglas Corporation v. Green, 411 U.S. 792, (1973) 32

Mississippi University for women v. Hogan, 458 U.S. 718, (1982) 18

NAACP v. Allen, 340 F.Supp. 703 (M.D. Ala. 1972) Aff'd, 499 F.2d. 614 (5th Cir. 1974) ..... 3, 8, *passim*

Palmore v. Sidoti, 466 U.S. 429, (1984) 19, 35

Paradise v. Prescott, 580 F.Supp. 171 (M.D. Ala. 1983) 6

Paradise v. Shoemaker, 470 F.Supp. 439 (M.D.N.D. Ala. 1979) 25

Table of Authorities Continued

Page

Pasadena City Board of education v. Spangler, 427 U.S. 424, (1976) 29

Regents of the University of California v. Bakke, 438 U.S. 265, (1978) ..... 11, *passim*

Rios v. Enterprise Association Steamfitters, 501 F.2d. 622 (1974) 27, 28

Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d. 1002 (9th Cir. 1972) 29

Setser v. Novak Investment co., 657 F.2d. 962 (8th cir. 1981) (en banc) 26

Shapiro v. Thompson, 394 U.S. 618, (1969) 29

South Florida Chapter of the Association General Contractors v. Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir.) *cert. denied* ___ U.S. ___ ,105 S.Ct. 220, (1984) ..... 11, *passim*

Swann v. Charlote-Mecklenburg Board of Education, 402 U.S. 1 (1971) 29

Thompson v. Sawyer, 678 F.2d. 257 (C.A.D.C. 1982) 28

United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980) 11, 12

United Steel Workers v. Weber, 443 U.S. 193, (1979) 9

Valentine v. Smith, 654 F.2d. 503 (8th Cir.), *cert denied*, 454 U.S. 1124, (1981) 11, 12

Washington v. Davis, 426 U.S. 229, (1976) 31

Wygant v. Jackson Board of Education, ___U.S. ___, 106 S.Ct. 1842, (1986) 100 ..... 17, *passim*

Constitution, statutes and rules:

U.S. Const.:

Amend. V 12, 13

Table of Authorities Continued

Page

Amend. XIV ..... 10, *passim*

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e. et seq.: 13, 14

703(j), 42 U.S.C. 2000e-2(j) 28

706(g), 42 U.S.C. 2000e-5(g) ..... 13, *passim*

Miscellaneous:

Legislative History of Title VII and XI of the Civil Rights Act of 1964, United States Equal Employment Opportunity Commission, U.S. Government Printing Office. (1969) p. 3189. 33

Uniform guidelines on Employee Section Procedures, 43 Fed. Reg. 38290-38309 (1978) ... 3, 4

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INTEREST OF THE DEPARTMENT OF PUBLIC SAFETY AND BYRON PRESCOTT

The Alabama Department of Public Safety is a governmental agency of the Sate of Alabama and Bryon Prescott is director of the Alabama Department of Public Safety. Both are named as party-defendants in the action below. The challenged promotional quota has been imposed on this entity and has a continuing effect on the Department.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App., pp. 1a-54a) is reported at 767 F.2d 1514. The order reported at 585 F. Supp. 72.

JURISDICTION

The judgment of the Court of Appeals (Pet. App., pp. 80a-81a) was entered on August 12, 1985. This Court granted the petition for writ of certiorari, limited to Question 3 presented by the petition, on July 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF THE FACTS

This is an employment discrimination case which involves the validity of a one for one (black for white) promotion quota imposed by the district court as a means of enforcing earlier consent decrees in this litigation.

In January 1972, a class action was brought by the National Association for the Advancement for Colored People (NAACP) against the Alabama Department of Public Safety and the Alabama Department of Personnel. Phillip Paradise, Jr., was permitted to intervene on behalf of a class of black plaintiffs and the United States intervened as a party plaintiff.

Initially, the district court determined that the Alabama Department of Public Safety along with the Alabama Department of Personnel had been involved in discrimination in hiring. The court enjoined the Department from engaging in employment practices with the effect of discriminating on the basis of race

or color, and further ordered them to hire one black state trooper for each white state trooper until the number of black troopers in the force was equal to 25% of the total troopers *NAACP v. Allen,* 340 F.Supp. 703 (M.D. Ala. 1972), aff'd, 493 F.2d 614 (5th Cir. 1974). In August of 1975, the court granted additional relief after concluding the Department restricted the number of new troopers hired and the size of the trooper force in order to frustrate the court's 1972 order (See pet. App. 7a-8a). Additional relief was granted by consent decrees in February 1979 (*Id.* at 71a-79a) and in August 1981 (*Id.* at 65a-70a).

The 1979 consent decree involved the issue of promotions. The Departments agreed to "have as an objective . . . an employment and promotion system that is racially neutral" (Pet. App., 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.*) In dealing with promotions, the Department agreed "to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion ocedure 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 further agreed to develop within one year from 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 Procedure,* 43 F. Reg. 38290-38309, and having little or no adverse affect on blacks (Pet. App., 74a-75a). When the validation of the promotion

procedure for corporal promotions was completed, the Department was to start the validation of promotional procedures for sergeants, lieutenants, captains, and majors (*Id.* at 75a). Until the validation was complete, the Department was to use the state merit system for all corporal promotions and to promote at least three black state troopers to the rank of corporal. Detailed procedures were to be followed by agreement between the parties as reflected by the consent decree approved by the district court. In February, 1980, four black troopers and six white troopers were promoted to corporal positions pursuant to the 1979 Consent Decree.

In April 1981 the Department of Public Safety and the Department of Personnel moved for approval of a written examination for the promotion of corporals. paradise and the United States objected contending the use of a test which had not been validated under the *Uniform Guidelines* would not be justified if the results had an adverse impact on black applicants. Whereupon hearings and discovery took place through August 18, 1981 when another consent decree was proposed by all the parties. This second consent decree was approved (Pet. App. 65a - 70a), in which the parties agreed the Corporal examination prepared by the Alabama Department of Personnel would be administered and scored; that the scores would be used with other factors to rank applicants on a promotion register; and that the promotion register would be reviewed "to determine whether the selection procedure has an adverse impact against black applicants either as to the initial group of promotions to be made or as to all of the expected promotions during the life of the register. (*Id.* at 68a). If the procedure for

selection did not adversely impact the blacks, selections were to be made in rank order from the promotion register; if the procedure for selection did adversely impact the blacks, the Department had to use an alternative procedure for promotions to be made" in a manner that does not result in adverse impact for the initial group of promotion or cumulatively during use of the procedure" (*Id.* at 69a). *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" (Ibid.)*

On June 2, 1982 the Alabama State Troopers Association moved to intervene and object to enforcement of the consent Decree. On August 4, 1982, the Motion to Intervene was denied.

On April 1983, Paradise filed a "Motion to Enforce" the terms of the 1979 and 1981 consent decrees. They sought an order requiring the Alabama Department of Personnel and Public Safety to promote black troopers to all upper rank positions in equal numbers with white troopers until 25% of each upper level rank is filled by a black or procedures for promotion which follow the consent decrees have been developed.

The United States opposed imposing a one-black-for-one-white promotion quota, but agreed the consent decrees should be enforced. On April 15, 1983, V.E. McClellan and three other white troopers moved to be permitted to intervene on behalf of a class composed of top-ranked white applicants for the corporal promotion. After a hearing the district court permitted intervention by order dated October 28, 1983 on

prospective issues only, but denied intervention as to previously entered orders, judgments, and consent decrees on the ground of untimeliness.

Also on October 28, 1983, the district court entered an order finding the 1981 selection procedure would have an adverse impact on blacks, prohibited its use, and ordered all the parties to submit proposals for promoting at least 15 troopers to corporal in a manner that would not have adverse racial impact. 580 F. Supp. 171 (M. Ala. 1983). The court indicated that it would consider the promotion plans submitted to it for resolution if the parties could not agree on an equitable plan. The Department submitted a plan. (pp. 125-127, Joint Appendix) When the other parties could not agree, the court took the matter under advisement.

On December 15, 1983, the district court issued an order and memorandum opinion granting Paradise's "Motion to Enforce" and the one-black-for-one-white quota relief requested. 585 F. Supp. 72 (Pet. App. 55a-64a). 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"[1] (*Id.* 56a). The Court did not enter an order requiring use of a promotional plan ". . . that does not result in adverse impact for the initial group . . .", as required by the consent decree. In other words, the Court did not devise a promotional plan for use by the Department which did not have adverse racial impact.

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[1] Eight black and eight white troopers were promoted to corporal in keeping with this order.

The Court ordered a plan which adversely impacted on white applicants.

The court also ordered that "this promotion quota should 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] developed and implemented a promotion plan for the rank which meets the prior orders and decrees of the court and all other relevant legal requirements" (*Ibid.*) The court then gave the Department 35 days to submit for the court's approval a schedule for promotional procedures for all ranks above the entry-level rank.[2] (*Ibid.*)

The Alabama Department of Public Safety then filed several motions seeking reconsideration or, in the alternative a stay pending an appeal of the Court's December 15, 1983 order imposing a temporary promitional quota. Oral argument was held on January 5, 1984 but no evidence was permitted. These motions were denied by an opinion and order dated January 13, 1984, after which Notice of Appeal was filed.

On August 12, 1985 the court of appeals affirmed the district court's order imposing the one-black-for-one-white promotion quota. 767 F2d 1514 (Pet. App., 1a-54a). They held that the quota order was not a modification of the 1979 and 1981 consent decrees. It was viewed, rather as a proper means of enforcement of these decrees and necessary to remedy the present racial imbalance in the ranks which the court considered "present effects" of the Department's prior discrimination.

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[2] The Department did submit a schedule for the rank of corporal and sergeant which were approved by the court for use on a temporary basis for a limited number of promotions.

RATIONALE OF COURTS BELOW

In fashioning a procedure the district court on December 15, 1983, recognized that twelve years prior to plaintiff's Motion to Enforce the Consent Decrees the Court condemned racially discriminatory policies and practices in the Department.[3] The Court found that the effects of the Department's prior discrimination remain after 12 years noting that "of the 6 majors, *there is still not one black.* Of the 75 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.*" (Pet. App. 60a) Based on these factual findings the district court concluded "the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons".[4] (*ibid.*) The Court agreed with the plaintiffs that for a period of time 50% of those promoted above entry-level must be black troopers "in light of the severe racial imbalances in the upper ranks." (Pet. App. 60a-61a). It reasoned that the one-black-one-white promotional quota was warranted to "address the department's delay in developing acceptable promotion procedures

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[3] The district court in 1972 found Department had discrimination against blacks in *hiring* only. *NAACP v. Allen,* 340 F.Supp. 703 (M.P. Ala. 1972).

[4] The Court obviously concluded that the findings of discrimination in the Department in its hiring practices some 12 years prior to reaching this conclusion was related in some way to the procedure through which the existing corporals, sergeants, etc., obtained their ranks. The Court related no findings of fact in reaching this conclusion, however.

for all ranks".[5] (Pet. App. 61a). The court further reasoned that since there has been unlawful discrimination the court had the responsibility to fashion race-conscious relief which is "necessary, reasonably and otherwise appropriate under the circumstances" (Pet. App. 62a) to "eliminate the discriminatory effects of past discrimination as well as bar like discrimination in the future."[6] (*Ibid.*) Immediate, affirmative, race conscious relief was "clearly necessary" because the "racial imbalances in the upper ranks . . . remains egregious and are now of long duration and because it is apparent the intolerable disparities will not dissipate within the near future." (*Ibid.*)

After the court had taken judicial notice of racial imbalances in the upper ranks of the Department and noting the past discrimination in hiring the court concluded the promotional quotas were "reasonable" and "specifically tailored to redress the continuing effects of past discrimination" noting further that the order met the test prescribed in *United Steelworkers v. Weber,* 443 U.S. 193, (1979), (Pet. App. 63a).

On appeal to the United States Court of Appeals for the Eleventh Circuit, the Department asserted that the one-black-for-one-white promotional quota

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[5] The Court at this point in the opinion appeared to loose sight that according to the 1979 and 1981 consent decrees it was being called upon to assist in approving a promotional procedure which was fair to all having little or no adverse impact upon blacks.

[6] The Court never specifically indicated what discriminatory practices of the Department it was seeking to remedy. It obviously was considering at this point the finding of unlawful discrimination in hiring practices of the Department found in 1972.

constituted a modification of the existing consent decrees without justification by any findings of post decree discrimination or other changed circumstances (Brief of D.P.S. pp. 19-25). it was also argued in brief that the promotional quota imposed by the District Court was unsupported by the evidence and amounted to unconstitutional reverse discrimination in violation of the Fourteenth Amendment of the United States Constitution (Brief of D.P.S., pp. 25-46).

On August 12, 1985, the Eleventh Circuit affirmed the district court's order imposing the fifty percent (50%) promotion quota. 767 F.2d 1514 (Pet. App. 1a-5a). The Court of appeals held the promotional quota imposed did not constitute a modification of the 1979 and 1981 consent decree but rather enforced them reasoning that the consent decrees concerned the impact of proposed promotion procedures "on blacks, and blacks alone," and did not specifically prohibit procedures adversely impacting on white. (*Id.* at 26a).

The opinion of the Eleventh Circuit expressed definite uncertainty, however, as to what standard should be applied with respect to the claim that the promotional quota ordered by the district court violates nonminority rights to equal protection as guaranteed by the Fourteenth Amendment of the United States of Constitution. The Court of Appeals clearly indicated it needs additional guidance from the Supreme Court in order to adequately address this issue. It also expressed concern over the lack of consensus in this Court on the equal protection issues stating "determining what [equal protection reverse discrimination] 'test' will eventually emerge from the court is highly speculative". (Pet. App. 35a).

The Court then reviewed the standards established in three previous decisions, *United States v. City of Alexandria,* 614 F.2d 1358 (5th cir. 1980); *South Florida Chapter of the Associated General Contractors v. Metropolitan Dade County, Florida,* 723 F.2d 846 (11th Cir.), *cert denied, ___U. S. ___, 105 S.Ct. 220, (1984), and Valentine v. Smith,* 654 F.2d 503 (8th Cir.), *cert denied,* 454 U.S. 1124, (1981) holding that under the authority of either of these decisions the district court's order does not deprive the intervenors of their right to equal protection.

The Court of Appeals quoted from the opinion in *City of Alexandria,* 614 F.2d 1358, which 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) (emphasis added). The opinion defined the "*reasonableness*" requirement by taking three factors 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), (Pet. app. 36a-37a).

In *South Florida Chapter,* 723 F.2d 846, the Eleventh Circuit, recognizing the absence of a definitive Supreme Court standard for judging the constitutionality of affirmative action interpreted the common concerns in the decisions of *Regents of the University of California v. Bakke,* 438 U.S. 265, (1978) and *Fullilove v. Klutznick,* 448 U.S. 448, (1980), concluding the employment of benign racial classifications to be

constitu nally permissible if: (1) the governmental auth has authority to pass such legislation; (2) ade e findings have been made to ensure that the legislation is remedying the present effects of past discrimination; and (3) the use of the classification extends no further than the demonstrated need of remedying the present effects of the past discrimination. (*Id.* at 851-852). The Court in *South Florida Chapter* viewed the approach 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 infringe upon the rights of third parties." (*Id.* at 852) (Pet. App. 37a-38a). Finally, *Valentine,* 654 F.2d at 510, utilized *a substantially related to a legitimate state interest* test stating further that race-conscious affirmative action 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 interest. (*Id.* at 510) (Pet. App. 38a-39a).

The Court of Appeals based on the standards just mentioned in *City of Alexandria, South Florida Chapter,* and *Valentine* held that the quota order of the

district court does not violate the Equal Protection Clause.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has limited the review of the Petition for Certiorari to the issue of 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.

Even though Title VII is not the central issue before this Court, the statute cannot be ignored because it it here in which is found the authority for the courts to award affirmative race-conscious relief. The Eleventh Circuit expressed its concern over the speculation which was going to be required to resolve the equal protection issue. To be sure, Respondent has found no decisions involving *court ordered* affirmative action in public employment in which Equal Protection was the dispositive issue, most challenges being based on the scope of authority contained in 706(g) of Title VII, 42 U.S.C. 2000e-5, leading to judicially determined limitations and policy considerations which must be exercised when any affirmative action is contemplated. To this end, this court is now called upon to articulate the specific limitations which the equal protection guarantees of the Fourteenth and Fifth Amendments place on the form and effect of court ordered relief permitted under Title VII.

Any court which seeks to remedy employment discrimination by creating racially preferenced, affirmative action in the form of quota relief finds its

remedial authority in 706(g) Title VII, Civil rights Act of 1964. Specifically this section states:

> "If the court finds that the respondent has *intentionally* engaged in or is intentionally engaging in an *unlawful employment practice* charged in the complaint, the court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such *affirmative action as may be appropriate* . . ." (emphasis added)

Emphasis is added because it is precisely these words in the statute which are most important when it becomes necessary to scrutinize affirmative action which impinges on the rights of innocent nonminorities. As will be discussed, in Equal Protection analysis, the limitations on the authority given courts pursuant to 706(g) is of considerable importance because these limitations serve the purpose of protecting the interest of those who must bear the sacrifice any time affirmative action in the form of quota relief is awarded.

Pursuant to 706(g) of title VII the district court below has invoked its authority to order affirmative race-conscious relief at a time when no remedy for intentional discrimination was warranted. It has without valid justification utilized race as the means of *enforcement* of consent decrees having racially neutral purposes. Whats worse, when called upon to assist in fashioning a promotional procedure which is "fair to all applicants" the court has seen fit to order promotion of objectively less qualified individuals over others simply because of their race. Such a casual waving aside of fundamental Fourteenth Amendment

rights of individual members of one race was seemingly justified by a need to correct an obvious imbalance in the ranks of members of the other race.

This distorted logic used by the Court of Appeals to uphold the actions of the district court can be traced to a wholly unwarranted connection of drawn by that court between the court's 14 year old finding of discrimination in hiring and present statistical underrepresentation of minorities in the higher ranks of the Department. Not a single promotion, however, awarded the individuals members of the preferred race under the courts order was at any time found to be denied those individuals by any actions attributable to the Department. Therefore, it is beyond all logic that the racial preferences ordered by the court can by justified under the guise of remedying present effects of the department's discriminatory acts. Without such justification no purpose or objective of the court can be so overriding as to overwhelm the equal protection guarantees belonging to the innocent nonminorities that necessarily must be sacrificed or at least set aside in the name of affirmative action.

Under the strictest of scrutiny and most exacting standards which all racial classification appropriately demand in equal protection analysis the quota relief awarding promotions on the basis of race alone cannot be countenanced.

ARGUMENT

COURT ORDERED RACE CONSCIOUS QUOTA RELIEF IN THE PRESENT CASE IS IMPERMISSIBLE UNDER THE EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AND FIFTH AMENDMENTS

I. STRICT SCRUTINY IS THE ONLY STANDARD OF REVIEW APPLICABLE TO DETERMINE WHETHER COURT ORDERED RACE CONSCIOUS RELIEF IS CONSTITUTIONAL.

The Equal Protection clause of the Fourteenth Amendment requires equal treatment of all persons under the law stating in pertinent part "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The equal protection guarantees of the Constitution belong to *all persons* regardless of race, color, creed, nationality or sex. "Distinctions between citizens solely because of their ancestry [are] 'odious to a free people whose institutions are founded upon the doctrine of equality'". *Fullilove v. Klutznick*, 448 U.S. 448, 497, (1980) (concurring opinion of Powell, J.); quoting *Loving v. Virginia*, 388 U.S. 1, 11, (1967), quoting *Hirabayaski v. United States*, 320 U.S. 81, 100, (1943). Such "racial and ethnic distinctions . . . are inherently suspect and thus called for the most exacting judicial examination." *Regents of University of California v. Bakke*, 438 U.S. 265, 291, (1978). For these reasons, "'it is . . . firmly settled that any racial classification emanating from [state action]', *Loving v. Virginia, supra*, 388 U.S. at 10, 'carries the heaviest possible presumption of unconstitutionality'".

The one-for-one promotional quota imposed by the district court explicitly classifies the employees of the Alabama Department of Public Safety along racial

lines inherently raising issues of reverse discrimination. Because this relief awards promotion to individuals based on racial criteria, such racial preference "must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees". *Fullilove v. Klutznick, supra,* 448 U.S. at 491. According to Justice Powell concurring in the *Fullilove* opinion, these "[r]acial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision". (*Id.* at 496).

The Court of Appeals for the Eleventh Circuit, however, employed a much lesser standard in reviewing the appellants equal protection challenge of the district court's imposition of a promotional quota.

The eleventh circuit appeared to justify the district court's action primarily on the authority of *South Florida Chapter, supra,* in which it articulated its perception of this Court's common concerns in the fragmented opinions expressed in *Bakke* and *Fullilove:* (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination. (*Id.* at 851-852). In accepting these perameters as the appropriate "test" to apply to an equal protection challenge of an affirmative action plan, the Eleventh Circuit in *South Florida Chapter* specifically

rejected the district court's conclusion that strict scrutiny was the proper standard. In applying this "test" . . . to the facts of the present case, it is obvious the courts rejected strict scrutiny standard of review. It cannot be denied, however, applying anything less than "strict scrutiny" is clearly erroneous.

This conclusion is verified by this Court's recent decision in *Wygant v. Jackson Board of Education,* U.S. ___, 106 S.Ct. 1842, 91986) which was decided on equal protection grounds. Inasmuch as the petitioners in that case challenged the constitutionality of racial preferences in a collective-bargaining agreement rather than court ordered racial preferences, the limitations and policy considerations important in *Wygant* are different from those presented here. Nevertheless, the constitutional standard applicable in *Wygant* is equally applicable to the petitioner's present equal protection challenge. According to Justice O'Connor, concurring specially:

> "the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable to individual members of the court. While the validity and importance of the objective may effect the outcome of the analysis, the analysis itself does not change." (*Id.,* at 1853); quoting *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724, n.9, (1982).

The majority in *Wygant* specifically "recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental

discrimination." (*id.* at 1846). Thus, the constitutional standard applicable to all equal protection challenges are the same.

According to *Wygant,* judicial review of any racial preference or classification must necessarily involve a "most searching examination to make sure that it does not conflict with constitutional guarantees". (Ibid). quoting *Fullilove v. Klutznick, supra,* 448 U.S. at 491, (1980) (opinion of BURGER, C.J.). This examination according to this Court involves two prongs.

> First, any racial classification 'must be justified by a compelling governmental interest'. *Palmore v. Sidoti,* 466 U.S. 429, 432, (1984); See *Loving v Virginia,* 388 U.S. 1, 11, (1971) (alienage). Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal'. *Fullilove,* 448 U.S., at 480.

Wygant, supra, at 1846. The court ordered racial preferences in the present case must unquestionably be examined under strict scrutiny. Furthermore, the judicial determination to be made in the present case is whether the promotional quota ordered by the district court below is "supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored." (*Id.* at 1847). The court below failed to make this determination applying a "reasonableness" standard. For this reason the decision must be reversed.

II. THE PROMOTION QUOTA ORDERED BY THE COURT CANNOT PASS STRICT SCRUTINY

What facts or circumstances need be demonstrated for a court to order one individual promotion over

another solely on the basis of race without such an order violating the equal protection provisions of the Constitution?

To properly scrutinize the constitutionality of court ordered affirmative action which incorporates racial preferences, analysis must necessarily begin by focusing on the objective the court seeks to achieve. This is true because *no classification based on race can be justified unless it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.* See eg. *Bakke, supra,* 438 U.S., at 290-306. Thus, any racial preference ordered by a district court pursuant to its statutory authority under 706(g), 42 U.S.C. 2000e-5, must by necessity further a purpose which is "compelling" before such racial preference can pass constitutional muster.

The concurring opinion of Justice Powell in *Fullilove* defined the appropriate criteria for determining a legitimate interest in the context of race-conscious remedial relief in the following manner:

> Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. *First,* the governmental body that attempts to impose a race-conscious remedy must have the au-

> thority to act in response to identified discrimination. c.f. *Hampton v. Mow Sun Wong,* 426 U.S. 88, 103. (1976). *Second,* the governmental body must make findings that demonstrate the existence of illegal discrimination. (*Id.* at 499). (1980).

The majority in *Bakke,* stated the criteria thusly:

> Before relying on . . . findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is *responsive to identified discrimination* (citations omitted) (*Id,* 438 U.S., at 309, (1978).

Wygant indicated it another way:

> In particular, a public employer must ensure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. *Id.* ___U.S. ___, 106 S.Ct. 1848.

While "guarantee of equal protection" was a common issue in *Fullilove, Bakke,* and *Wygant* none of these cases involved judicial review of court ordered affirmative action. *Fullilove* involved a Congressional Act requiring preferences for minorities in local public work projects.[7] Whereas, in *Bakke,* white males challenged an admissions program adopted by a state ent-

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[7] In *Fullilove,* the Court consistently stressed the scope of review was limited because they were reviewing not the remedial decree of a court but rather the legislative authority of congress noting "Although the discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudications it must remembered that 'Congress may paint with a much broader brush than may this Court.'"

ity which reserved certain positions for "disadvantaged" minority students. In *Wygant* nonminority school teachers contested the validity of a provision in a collective bargaining agreement between a teachers union and a county school board under which preferential protection against layoffs was extended to minority employees.

If Congressional acts, state university admission regulations, and union-county labor agreements which incorporate race-conscious preferences are violative of the equal protection clause if there is not identified racial discrimination, then it would certainly seem to follow that a court order imposing promotions based on race would be subject to at least the same, if not a higher, test.

Applying this criteria to the facts of the instant case under strict scrutiny there is no "compelling" justification for ordering race-conscious affirmative action without making the most exact determination possible that discrimination exists. The Equal Protection Clause of the Fourteenth Amendment demands that before a district court invokes its equitable remedial authority under 706(g) of Title VII awarding racial preference to minority public employees at the expense of innocent nonminorities that court must make the most exact finding possible of specific, identifiable discrimination.

The last sentence of 706(g) limits the authority of the courts. It states: "no order of the court shall require the . . . promotion of an individual as an employee . . . if such individual was refused . . . advancement . . . for any reason other than discrimination on account of race." Thus, without

finding specific, identifiable discrimination a district court has no authority to order a race-conscious remedy, and no "compelling" governmental purpose exists to constitutionally permit such action.

The Court of Appeals speculated on appropriate standard it felt would be most applicable to the non-minority's equal protection claim. It decided the "reasonableness" standard was most applicable. This standard, according to the Court, allow employment of racial classifications and goals to remedy the present effects of past discrimination. The applicability of these standards, however, assume "adequate findings have been made to ensure that the affirmative action is remedying the present effects of past discrimination." *South Florida Chapter, supra,* (Pet. Ap. 37a). To be sure, Justice O'Connor, concurring in *Wygant,* expressed a concensus among this Court that "remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." (*Id,* at 1853). The same opinion, however, also stated: ". . . remedying 'societal' discrimination, that is, discrimination [racial disparities] not traceable to [the actor's] own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny". (*Id,* at 1854).

The opinions of the courts below strongly indicate the quota relief ordered was to correct racial imbalance rather than to remedy actual effects of past discrimination. The district court remarked that out "of the 6 majors, there is still not one blacks. 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." (Pet. App. 60a). Thus, "[i]n light of the severe racial imbalance in the upper ranks, the [district] court agrees . . . at least 50% of all those promoted to corporal and above must be black troopers". (Pet. App. 60a-61a). The eleventh Circuit agreed that the district court's order would "accomplish the objective of remedying the 'egregious' and long-standing racial imbalances in the upper ranks of the Department. (Pet. App. 41a) and was "designed only 'to eliminate a manifest and chronic racial imbalance' caused by the Department's conduct." (*Ibid.*) The court reasoned that in light of the manifest racial imbalance, due regard given to the history of discrimination in the Department, it had not only the power but the duty to impose affirmative race-conscious promotional quotas to remedy the "intolerable disparities." The one-for-one promotional quota according to the district court was "necessary, reasonable, and appropriate under the circumstances" to correct the present racial imbalance in the ranks.

However, there was never a finding by the district court that the Department's promotional procedures or lack thereof constituted racial discrimination.

In the present case, the District Court on February 10, 1972, found within the Alabama Department of Public Safety "a pattern and practice of discrimination in *hiring.*" *NAACP v. Allen,* 340 F.Supp. 703-705 (1972); a one-for-one hiring quota was imposed in that court order. *Id.,* 340 F.Supp. at 706; in a later order defining the perameters of the hiring quota, the District Court specifically stated that the court was not imposing a promotional quota. The twenty-five percent (25%) hiring quota had been designed as "an

impetus to promote blacks." *Paradise v. Shoemaker,* 470 F.Supp. 439, 442 (M.D. N.D. Ala. 1979). There has never been a judicial finding of purposeful discrimination in promotions, or an admission of such. Neither has there ever been a judicial determination that the racial disparity among the ranks were related in any way to the findings of discrimination in *hiring* in 1972. This particular history of discrimination in hiring along with the existence of "*severe racial imbalance*", however, was obviously considered by the Court of Appeals as sufficient criteria to impose the one-to-one promotional quota in order to remedy the present effects of the Department's past discrimination. The Department of Public Safety's repeated request for an opportunity to introduce evidence to support a contrary finding was denied by the district court. The Department of Public Safety was denied the right to show the reasons why acceptable procedures for promotion to corporal had not been adopted or presented. It is always important to remember no promotions had been made, black or white, during the period in question.

The line of demarcation with respect to when racial or ethnic criteria *imposed by the Courts* unconstitutionally trammel s the rights of nonminorities remains undetermined. This court has stated however, "racial classifications are simply too percunious to permit any but the most exact connection between justification and classifications". *Regents of University of California v. Bakke,* 438 U.S. 265, 291, (1978) (opinion of POWELL, J., joined by WHITE, J.) Furthermore, it is well established that for remedial relief which "contains race-conscious relief affecting third parties, some well substantiated claim of racial discrimination

against the plaintiff class is necessary 'to ensure that new forms of invidious discrimination are not approved in the guise of [race-conscious remedies].'" *Kirkland v. New York St. Department of Correctional Services,* 711 F.2d 1117, 1130 (2d. Cir. 1983), *quoting, Setser v. Novak Investment Company,* 657 F.2d 962, 968 (8th Cir. 1981) (en banc) See e.g., *General Bldg. Contractors Ass'n v. Pennsylvania,* 458 U.S. 375, (1982).

It cannot be denied that the existence of illegal discrimination justifies the imposition of a remedy that will ameliorate the disabling effects of identified discrimination. Such relief will necessarily "make person whole for injuries suffered on account of unlawful . . . discrimination." *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975). The critical inquiry, however, is whether the relief ordered is directed at redressing such discrimination. In the present case nothing whatsoever about the Department's past discrimination in *hiring* was shown to have any disabling effect on promotions to members of the plaintiff class. There are many reasons other than discrimination for the racial imbalances in the ranks of the Department. Under the guise of remedying the "present-effects-of-past-discrimination" both courts below approved the existing racial imbalance in the ranks as criteria for ordering the 50% promotional quota. Such justification is erroneous.

This court has recently expressed its disapproval in the use of "societal discrimination" as justification for affirmative action based on race:

> Societal discrimination, without more, is too amorphous a basis for imposing a racially

> classified remedy. . . There are numerous explanations for a disparity between the percentage[s]. . ., many of them completely unrelated to discrimination of any kind. [A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive. *Wygant v. Jackson Board of Education,* 106 S.Ct. 1842, 1846 (1986).

Inasmuch as the facts of the present case involve a undisputed finding of discrimination in hiring within the Department almost fourteen years ago any discussion about the use of societal discrimination as the sole criteria for race-conscious relief would appear irrelevant. The relevance becomes evident, however, when it is understood that the promotional quota ordered by the court bears no relationship to the harm caused by prior discriminatory hiring practices. According to *Wygant,* "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." (*Ibid.*)

"Where a racial imbalance is unrelated to discrimination, 703(j) [and the equal protection clause with respect to public employees][8] recognizes that no justification exists for ordering that preference be given to anyone on account of this race". *Rios v. Enterprise Ass'n*

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[8] *See Local No. 93 v. City of Cleveland,* ___ U.S. ___, 106 S.Ct. 3063, 3073, n.8 (1986).

Steamfitters, 501 F.2d 622 (1974).[9] Furthermore, no case upholds any purported right of minorities to secure "proportional representation" in a given rank where only a limited number of positions are available and where a performance test is the determining factor as to who attains these positions.

In this case, the court in keeping with the consent decrees was called upon to facilitate the implementation of racial neutral employment procedures which utilize objective, job related criteria for purposes of awarding an individual on merit. Instead, the court erroneously invoked its equitable authority to order promotions to individuals on the basis of race under the guise of remedying the effects of discrimination. On the record, there is no showing of any sort that the criteria used for promotions in the Department of Public Safety or the procedures developed by the Department of Personnel are not probative of qualification and operate or have operated so as to discriminate against certain racial or ethnic groups making up the plaintiff's class. There was no hearing

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[9] In *Rios* the 2nd Circuit determined § 703(j) does not prohibit the use of goals to eradicate the effects of past discriminatory practices but is intended to bar preferential quota relief as a means of changing a racial imbalance attributable to causes other than unlawful discriminatory conduct. *Rios,* which held the subject quota order in *hiring* did not violate § 703(j), is distinguishable from the case at bar because the court there made an exact determination that the imbalance was directly caused by past discriminatory practice. The *hiring quota* in that case remedied a history of *de facto* discrimination in union admissions found previously. In the present case, the promotional quotas ordered by the court to remedy the racial imbalance in the ranks bear no relationship to the unlawful hiring practices of the Department 14 years ago.

designed to determine whether there was any evidence or racial discrimination in promotion.

The rationale of the court below justifying use of the one-black-for-one-white promotional quota to correct the "intolerable [racial] disparities" in the ranks appears to contemplate a "substantive constitutional right [to a] particular degree of racial balance or mixing" which this court has expressly disapproved in *Swann v. Charlotee-Mecklenburg Board of Education,* 402 U.S. 1, 24, (1971). *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 484. (1976). The promotional quota ordered by the district court which denies more qualified individuals their equal chance for promotion did not satisfy even the test of "rational relationship" to permissible state objective as articulated in *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969), let alone satisfy the test of "compelling state interest.".

Even if the objective which the district court sought to achieve by the affirmative action order meets the exacting standards required to uphold the validity of a racial classification insofar as remedying the effects of prior discrimination establishes a compelling governmental interest, this does not mean the court ordered promotion quota was *proper* under the circumstances. The court should order affirmative action only when such relief is *appropriate.* "A court must *balance the various equities* between the parties and decide upon a result which is *consistent with the purposes* of the Equal Employment Opportunities Act, and the *fundamental concepts of fairness*". (emphasis added) *Schaeffer v. San Diego Yellow Cabs, Inc.,* 462 F.2d 1002, 1006 (9th Cir. 1972). This policy consideration was recently emphasized in *Local 28 Sheet*

MetalWorkers' International Assoc. v. EEOC, et al., (slip opinion), No. 84-1656, July 2, 1986:

> Although we conclude that 706(g) does not foreclose a district court from instituting some sorts of racial preferences where necessary to remedy past discrimination, we do not mean to suggest that such relief is always proper. While the fashioning of "appropriate" remedies for a particular Title VII violation [assuming there is one] invokes the 'equitable discretion of the district courts', we emphasize that a courts judgment should be guided by sound legal principles. In particular, they should exercise its discretion with an eye towards congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force." (*Id.* at 50); quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770.

Many equitable considerations relevant in the present case indicate that the district court's one-black-for-one-white promotional quota was improper. Specifically it conflicts with compelling governmental interests of the Department and contravenes the purpose of Title VII itself, the very statute it is authorized to enforce.

As previously discussed, the last sentence of 706(g) states that no order of the court can require the promotion of an employee if it was denied for reasons other than discrimination. Thus, the Equal Protection Clause demands under the strict scrutiny standard of review the court to make the most exacting deter-

mination that discrimination persists before affirmative action is warranted. According to *Wygant,* "unless such a determination is made, an appellate court reviewing a challenge to remedial action by nonminority employees cannot determine whether the race-based action is justified as a remedy for prior discrimination." (*Id,* at 1848-1849). Such a determination requires the judicial consideration and elimination of other possible reasons for the alleged discrimination for which relief is sought.

The only evidence before the court when it ordered the promotional quota was the test results which indicated if used in rank order would violate the four-fifths rule indicating that the test had an adverse impact. "But [this court has never] embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Washington v. Davis,* 426 U.S. 229, 239, (1976). At best the statistical data established a prima-facie case creating an inference of discrimination. Once the plaintiff has met his initial burden of proof, however, the defendant is entitled to an opportunity to rebut plaintiff's prima facie case. *International Bro. of Teamsters v. United States.* 431 U.S. 324, (1977). *Harris v. Birmingham Board of Education,* 712 F.2d 377 (11th Cir. 1983). Respondents in the case *sub judice* requested an evidentiary hearing in this regard, but were denied their opportunity to introduce any evidence. The court ordered the promotional quota in total disregard of the possibility plaintiff's prima facie case could be rebutted.

The denial of a hearing requires reversal and remand, since, "[respondents] must . . . be afforded a fair opportunity to show [no Title VII violation existed]". *McDonald-Douglas Corporation v. Green,* 411 U.D. 792 at 804.

The one-for-one promotional quota unquestionably operates against innocent nonminorities and in favor of blacks. The order has the effect of depriving more qualified applicants of their right to promotion while promoting others on the basis of their race. Such actions are repugnant to the Constitution in that the best qualified are treated unequally to others less qualified and are denied equal protection of the laws.

Inasmuch as a finding of adverse racial impact may have violated a policy provision of the consent decrees in this case, respondents submit that this alone does not justify such a drastic remedy as a one-black-for-one-white promotional quota. At the most, an injunction preventing the use of this procedure may have been warranted.

The imposition of such racial preferences at this juncture without a finding of intentional discrimination not only violates the Equal Protection guarantees of nonminorities but such relief is in direct contradiction of the statutory purpose of Title VII.

Title VII was designed by congress to achieve equality of employment opportunities. While Congress did not appear to dwell at length on the matter of the applicability of Title VII to white persons, virtually every time the question was raised, the answer emphasized the Civil Rights Act prohibits all racial discrimination. One particular example can be found in Senator Williams' remarks responding to the charge

that the Act seemed to compel an employer to grant preferential treatment to minorities:

> "Those opposed to H.R. 7152 should realize that to hire [or promote] a negro solely because he is a negro is racial discrimination, just as much as a 'white only employment policy'. Both forms of discrimination are prohibited by Title VII of this Act. The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job. Some people charge that H.R. 7152 favors the negro, at the expense of the white majority. But how can the language of equality favor one race over another? Equality can have only one meaning, and that meaning is self evident to reasonable men".

Legislative History of Title VII and XI of the Civil Rights Act of 1964, United States Equal Employment Opportunity Commission, U.S. Government Printing Office. (1969) p. 3189.

III. THE COURT ORDERED QUOTA RELIEF CONTRAVENES OTHER COMPELLING GOVERNMENTAL INTERESTS

Inasmuch as the Court of Appeals applied a "reasonableness" standard to test the validity of the means chosen by the district court to *enforce* the consent decrees, the decision below must be reversed because "that standard has no support in the decisions of this Court". *Wygant,* at 1849. "Under strict scrutiny the means chosen to accomplish the State's

asserted purpose must be specifically and narrowly framed to accomplish that purpose". (Id. at 1850).

The one-black-for-one-white promotional quota ordered by the district court appears to totally disregard the purpose of the consent decrees entered into between the parties. Respondents respectfully submit at the time the court ordered the challenged racial preference the most *compelling governmental need* was a racially neutral promotion procedure. Thus, quota relief purportedly fashioned by the court to "address the delay in developing acceptable promotional procedures for all ranks" (Pet. App. 61a) was most inappropriate under the circumstances especially considering no promotions, white or black, had been awarded except pursuant to the consent decrees.

The order of the court also bears no relationship to the goal of the parties which is to devise procedures "fair to all". Actually it frustrates the purpose of the consent decrees and contravenes the preferred means of achieving the objectives of Title VII and the Constitution. See e.g., *Local Number 93, International Association of Firefighters v. City of Cleveland,* Slip opinion, No. 84-1999, July 2, 1986. Neither does the order reflect the good faith efforts made by the Department to accomplish the consent decree objectives.

The Department of Public Safety and the Department of Personnel had no opportunity to offer evidence justifying the delay. Under the Consent Decrees the defendants had agreed to devise promotional procedures which complied with the four-fifths rule, a much more stringent standard than normally required of public or private employers. The difficulty involved in designing such procedures was never permitted to be

illustrated to the district court. The Department of Public Safety was not even permitted to show that the Department of Personnel was the only state agency equipped to design promotional procedures from a staffing standpoint and under the provisions of the Alabama Employees Merit System Act. In summary, efforts to comply with the consent decrees were considered irrelevant. Now compliance has been achieved at all promotional levels to which blacks are eligible for promotion.

Wygant so aptly noted that public employers must act in accordance with a "core purpose of the Fourteenth Amendment" which is to "do away with all governmentally imposed distinctions based on race." (*Id,* 1848); *quoting Palmore v. Sidoti,* 466 U.S., at 432, 104 S.Ct., at 1881-1882. To this end, the parties in this dispute had executed voluntary consent decrees having as their objective the utilization of a promotion procedure which is "fair to all applicants". The agreement consisted of the racially neutral purpose to implement a method assuring equality in the Department's promotion procedures. The district court was called upon to facilitate this purpose. Instead, the court interjected race as the means to "enforce" the consent decrees. The promotions awarded solely on account of trace contradict the very purpose of Title VII and likewise, frustrate the purpose of the parties' consent decrees and the compelling governmental interest of the Department. It is respectfully submitted such action by the court cannot be countenanced under the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

EDWARD L. HARDIN, JR.
Attorney for Respondents
Alabama Department of
Public Safety

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