Nos. 87-1614, 87-1639, 87-1668

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

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

BRIEF FOR PETITIONERS JOHN W. MARTIN, *et al.*

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August 18, 1988

QUESTION PRESENTED

May persons affected by court-approved consent decrees containing race-conscious relief challenge those decrees in a collateral lawsuit when they had notice and the opportunity to be heard before the entry of those decrees?

PARTIES TO THE PROCEEDINGS BELOW

Private Plaintiffs

Robert K. Wilks
James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
Dudley L. Greenway
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Phillip H. Whitley
Marshall G. Whitson
David H. Woodall

Plaintiff-Intervenor

United States of America

City Defendants

Richard Arrington, Jr.
City of Birmingham

Personnel Board Defendants

Personnel Board of Jefferson County
Roderick Beddow, Jr.
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors (the Martin Petitioners)

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

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The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987). *See* Pet. App. 3a-24a.[1] The initial opinion of the district court is reported as *In re Birmingham Reverse Discrimination Employment Litigation*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985). *See* Pet. App. 27a-68a. The district court's additional findings (Pet. App. 69a-76a) are not reported.[2]

JURISDICTION

The opinion of the court of appeals was filed on December 15, 1987. Pet. App. 3a. The court of appeals denied petitions for rehearing and suggestions of rehearing in banc on January 25, 1988. Pet. App. 25a. The Petition for a Writ of *Certiorari* in No. 87-1614 was timely filed on March 30, 1988, and the Petitions for a Writ of *Certiorari* in Nos. 87-1639 and 87-1668 were timely filed on March 31 and April 1, 1988, respectively. The Petitions were granted and consolidated on June 20, 1988.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) & 2101(c).

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1 The form of citations is as follows: the Appendix to the Petitions for a Writ of *Certiorari* is cited as "Pet. App."; the Joint Appendix is cited as "J.A."; exhibits to the 1985 trial are cited as "PX" (plaintiffs' exhibit) or "DX" (defendants' exhibit); the transcript and exhibits from the 1979 trial were admitted in the 1985 trial (*see* J.A. 403-08) as DX 1979 and DX 1980 respectively and are cited as "1979 trial PX" or, for the trial transcript, "[month] 1979 tr."; and the record in the court of appeals is cited as "R[volume]-[document number]-[page]".

2 The district court's opinion and findings are found in four places in the record: the trial transcript (Pet. App. 27a-36a); Defendants Richard Arrington, Jr., the City of Birmingham and Defendant-Intervenors' Proposed Findings of Fact and Conclusions of Law (Pet. App. 37a-66a); Plaintiffs' and United States' Motion to Amend Judgment (Pet. App. 69a-74a); and the district court's January 6, 1986 order (Pet. App. 75a-76a). For the Court's convenience, Petitioners combined these findings at pages 77a to 109a of the Appendix to the Petitions for a Writ of *Certiorari*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are the Fifth and Fourteenth Amendments to the United States Constitution and § 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). They are set forth at pages 1a to 2a of the Appendix to the Petitions for a Writ of *Certiorari*.

STATEMENT OF THE CASE

Petitioners John W. Martin, *et al.* ("defendant intervenors" in this case below and the "Martin Petitioners" here), the City of Birmingham (the "City"), the Personnel Board of Jefferson County (the "Personnel Board") and the United States have been embroiled for over fourteen years in litigation concerning the City's employment practices. The litigation had its genesis in January 1974 when the Martin Petitioners commenced one of three employment discrimination actions against the City, the Personnel Board and others. After seven years of litigation that included a trial that resulted in a finding of racial discrimination in entry-level positions in the Fire and Police Departments, an appeal and a petition for a writ of *certiorari*, and after a second trial concerning promotional positions, that litigation was settled in 1981 through court-approved consent decrees providing race-conscious relief.

When, pursuant to those decrees, the City proposed to promote black employees to the positions at issue here for the first time in its history, white employees commenced these separate "reverse discrimination" actions challenging the decrees' race-conscious relief on the same grounds that the district court had considered—and rejected—before entering the order approving the decrees in 1981. The reverse discrimination litigation has continued for six more years before reaching this Court, and the claims of plaintiffs in only two City departments have been tried. The issue before this Court is ultimately whether the City can complete the process of remedying past discrimination begun with the consent decrees without being subjected to unending collateral reverse discrimination litigation.

A. Birmingham's History of Discrimination.

The consent decrees at issue here arose after years of discrimination by the City of Birmingham. That egregious history is well known to the lower federal courts[3] and to this Court.[4] Indeed, the City's practices in part led to the Civil Rights Act of 1964, including Title VII. *See* B. Schlei & P. Grossman, *Employment Discrimination Law* viii-ix (2d ed. 1983).

The consent decrees at the heart of this litigation are designed to remedy the effects of the City's discrimination in public employment. As late as 1958, the City's job announcements for positions in the classified service (which are the more desirable public service jobs) expressly said that "[a]pplicants must be white". J.A. 427-28, 398-400; J.A. 591, 403-08; *see also* J.A. 387, 389, 392; Pet. App. 39a-40a, 85a. Although, as a result of litigation, the City stopped using such job announcements in 1958 (*see Johnson*, 165 F. Supp. at 79), the discrimination continued. In the Fire Department, for example:[5]

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3 *See, e.g., Ensley Branch, NAACP v. Seibels*, 616 F.2d 812, 822 (5th Cir.) (employment examinations held to be discriminatory in the litigation leading to the consent decrees here), *cert. denied*, 449 U.S. 1061 (1980); *Armstrong v. Board of Educ.*, 333 F.2d 47 (5th Cir. 1964) (segregated public schools); *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir.) (segregated zoning for housing), *cert. denied*, 341 U.S. 940 (1950); *Johnson v. Yeilding*, 165 F. Supp. 76, 79 (N.D. Ala. 1958) (City's job announcements required applicants to be "white"); *Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala. 1969) (racially restricted public cemeteries); *Woods v. Florence*, No. CV 82-PT-2272-S, slip op. (N.D. Ala. Jan. 31, 1985) (statute governing Personnel Board was passed and maintained with an intent to discriminate).

4 *See Walker v. City of Birmingham*, 388 U.S. 307, 325 n.1 (1967) (Warren, C.J., dissenting) (*citing Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964), *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963), *Gober v. City of Birmingham*, 373 U.S. 374 (1963) and *In re Shuttlesworth*, 369 U.S. 35 (1962)).

5 Although the reverse discrimination cases involve most of the City's departments, the cases in the Fire and Engineering Departments were tried first and are the subject of these proceedings. Accordingly, this brief will discuss primarily the evidence of discrimination in those two departments.

- Blacks were discouraged from applying for firefighter positions. J.A. 379-81, 391-92.
- The City did not hire a black firefighter until 1968. J.A. 438, R1-27; J.A. 365-66, 390, 392; 1979 trial PX 28 at 4, J.A. 403-08.
- The City did not hire another black firefighter until 1974, although during that six-year period it hired 170 white firefighters. 1979 trial PX 1 at 121-25, J.A. 403-08; J.A. 438, R1-27.
- Entry-level examinations discriminated against black applicants. J.A. 553-89, 408-10.
- By 1976, only nine (1.4%) of the City's 630 firefighters were black. J.A. 438, R1-27.
- By 1981, only 9.3% of the firefighters were black, and "none of the 140 lieutenants, captains and battalion chiefs [was] black". Pet. App. 243a.

In the Engineering Department:

- There were no blacks in classified positions in the Engineering Department before at least 1963. J.A. 396-98, 401-02.
- Between 1965 and 1970, fewer than 5% of the classified employees were black. J.A. 444, R1-27.
- No black employee had been promoted to transitman before the late 1960s or early 1970s. J.A. 400.
- No black employee had been promoted to chief of party before the "mid or late 70's". J.A. 400-01.
- Before 1982, no black employee had been promoted to civil engineer. J.A. 109, 397-98, 401, 444, R1-27.

In the City's classified service generally, blacks occupied fewer than 1% of the positions in 1966 and no more than 25% by 1976, while more than 70% of the less desirable unclassified jobs were filled by blacks. J.A. 437, R1-27. Yet the City's civilian labor

force was 24.5% black in 1960 and 49.9% black in 1980. J.A. 436-37, R1-27.

As for the promotional positions at issue here—fire lieutenant, fire captain and civil engineer—the number of blacks remained "the inexorable zero" until nearly a year after the entry of the consent decrees in 1981. J.A. 439-40, 442-45, R1-27; J.A. 40-41, 109, 389-91, 397-98, 401; *see International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977). Several practices prevented black employees from being promoted:

- To be eligible to take promotional examinations, employees had to receive "passing" promotional potential evaluations that were subjectively graded by supervisors (*all* of whom were white), and in the Fire Department black employees received "failing" scores four times more often than did white employees. J.A. 593, 403-08; *see also* J.A. 649-56, R10-1280 to 81.

- There were also time-in-grade requirements to be eligible to take promotional examinations, but because blacks had been excluded from entry-level positions (*see* J.A. 553-89, R10-1278 to 79, 1306; Pet. App. 242a-43a), in 1979 only *one* black firefighter, compared to 361 white firefighters, met those requirements. DX 1431 (Exhibit 7), J.A. 407-08.

- Entry-level examinations in the Fire and Police Departments were held to discriminate against black applicants (J.A. 553-89, R10-1278 to 79, 1306), promotional examinations were shown by extensive evidence to have had an adverse impact on blacks, and none of the examinations has ever been shown to be job related. *See* J.A. 290-91; J.A. 594-649, R10-1280 to 81; Pet. App. 242a-43a.

- One "seniority point" was added to the examination scores of applicants for promotion for each year of their employment in *any* position in the classified service—not necessarily in the same chain for promotion—which discriminated against black employees

because they had been excluded from the classified service. *See* J.A. 434-35, R1-27; J.A. 673-79, R10-1280 to 81; 1979 trial PX 67, 1979 trial PX 147, J.A. 403-08.

B. The Litigation Leading to the Consent Decrees.

In 1974, two actions—*John W. Martin, et al. v. City of Birmingham, et al.* and *Ensley Branch, NAACP v. George Seibels, et al.*—were commenced alleging unlawful racial discrimination in employment by the City, the Personnel Board and others. In 1975, the United States commenced *United States v. Jefferson County, et al.*, alleging that the City and the Personnel Board, among others, had engaged in a pattern and practice of discrimination against blacks and women. The cases were consolidated.[6]

A trial was held in 1976 concerning only two of the many examinations at issue--the entry-level examinations for firefighter and police officer. The district court concluded that those examinations had an adverse impact on blacks and were not job related under *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), and the court ordered the Personnel Board to certify specified ratios of black and white applicants to the City as eligible to be hired. J.A. 553-89, R10-1278 to 79, 1306.[7]

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6 City employees were very much aware of that litigation. In seeking to intervene seven years later, the president of the Birmingham Firefighters Association ("BFA") testified:

> "When the . . . litigation was commenced in 1974, I consulted with Mr. Joseph Curtin, Director of the Personnel Board, concerning the status of the Birmingham Firefighters Association and the Firefighters in general, as far as the . . . litigation is concerned. We expressed to the Personnel Board our concern that the interest of the firefighters and of the other City employees be adequately represented in resisting the claims of the Government and other persons in these cases. . . . During the intervening years in which these suits have been tried and appealed, we kept in contact with the Personnel Board and assisted them by supplying pertinent data requested by them." J.A. 772-73.

Thus, the Eleventh Circuit concluded that "BFA members . . . knew at an early stage in the proceedings that their rights could be adversely affected". J.A. 154.

7 The race-conscious relief ordered after the 1976 trial was the model for the race-conscious relief embodied in the consent decrees.

The former Fifth Circuit affirmed, and this Court denied *certiorari*. *Ensley Branch, NAACP v. Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. Jan. 10, 1977), *aff'd in pertinent part and rev'd in part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

In 1979, a second trial, lasting eight days, was held concerning promotional and certain other employment practices. At that trial, the plaintiffs (the Martin Petitioners and the United States) introduced substantial evidence of discrimination in entry-level and promotional positions. *See, e.g.*, 1979 trial PX 28 at 4; Aug. 1979 tr. at 639-40; 1979 trial DX 360; 1979 trial PX 29 at 6-7; 1979 trial PX 70 at 7; J.A. 403-08.[8]

C. The Consent Decrees.

After the 1979 trial but, before the district court announced its decision, the parties began settlement negotiations, and in 1981 the Martin Petitioners and the United States jointly entered into two proposed consent decrees—one with the City (Pet. App. 122a-201a) and the other with the Personnel Board (Pet. App. 202a-35a). The decrees together establish goals for hiring and promoting blacks and women and procedures to implement those goals.

Notice inviting "*all persons who have an interest which may be affected by the Consent Decrees*" to appear at a fairness hearing was given by publication in two local newspapers and by mail to the members of the minority and female subclasses. Pet. App. 173a, 182a (emphasis in original), 146a-47a, 222a-23a, 248a; J.A. 695, 697-98, 727-28. Several objections were filed—some arguing that the proposed race-conscious relief was unlawful (*e.g.*, J.A. 701-16), and others that the relief was not sufficient (*see* Objections Filed by and on Behalf of the Guardians Association to the Proposed Consent Decree of the Above Parties (July 14, 1981))—and the United States defended the validity of the decrees' race-conscious relief (*see* J.A. 717-26).

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8 The evidence of discrimination adduced at the 1979 trial is summarized in the United States's post-trial brief. *See* J.A. 594-693, R10-1280 to 81.

The Birmingham Firefighters Association ("BFA") and two of its members, represented by Mr. Fitzpatrick, who is counsel for the reverse discrimination plaintiffs (the Wilks Respondents here), petitioned to appear *amicus curiae* to object to the decrees. *See* J.A. 699-713. At the fairness hearing, the district court heard arguments by Mr. Fitzpatrick and others that the decrees' race-conscious relief violated Title VII and the Fourteenth Amendment. J.A. 732-40, 747-50, 770, 407-08. The court offered Mr. Fitzpatrick the opportunity to present evidence, which he declined. J.A. 732. After "review[ing] with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised", the district court found that the decrees are "not inequitable, unconstitutional, or otherwise against public policy" and entered an order approving them. *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1839 (N.D. Ala. Aug. 18, 1981), *aff'd on other grounds*, 720 F.2d 1511 (11th Cir. 1983); Pet. App. 246a.

After the fairness hearing, Mr. Fitzpatrick's clients sought to intervene, but their motion was denied as untimely. J.A. 772-76; Pet. App. 246a. The court of appeals affirmed, holding that the district court did not abuse its discretion in denying that motion. *United States v. Jefferson County*, 720 F.2d 1511, 1516-19 (11th Cir. 1983); J.A. 153-60.[9]

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9 The court of appeals found "ample justification" (J.A. 159) for the district court's denial of intervention as untimely:

1. The BFA members "knew at an early stage in the proceedings that their rights could be adversely affected", and therefore they had no excuse for waiting to intervene. J.A. 154.

2. The grant of intervention would have prejudiced the existing parties because "it would have nullified these negotiations [for a settlement] with the Board and allowed a pattern of past discriminatory practices to continue". J.A. 155.

3. The BFA members would not be prejudiced because they could "institut[e] an independent Title VII suit, asserting the specific violations of their rights". J.A. 158.

4. "[T]here are no mitigating circumstances". J.A. 159.

Mr. Fitzpatrick's clients did not file a petition for a writ of *certiorari*.

D. The Reverse Discrimination Litigation.

In April 1982, pursuant to the consent decrees, the City proposed to promote black employees to fire lieutenant for the first time in its history. J.A. 40-41. Competing white applicants (all of whom were members of the BFA (R11-23-43, R13-218-3)), represented by Mr. Fitzpatrick, commenced the first of these reverse discrimination cases and sought to enjoin those promotions. Pet. App. 110a-121a; J.A. 35-36, 38-39. The application for an injunction was denied (J.A. 37, 83-86), that decision was affirmed on appeal (J.A. 160-61), and plaintiffs did not petition for a writ of *certiorari*.

Similarly, in the Engineering Department, when the City for the first time endeavored pursuant to the decrees to promote a black employee to civil engineer (J.A. 109), competing white applicants (also represented by Mr. Fitzpatrick) commenced a second reverse discrimination action and sought to enjoin that promotion. J.A. 91-100. The district court denied that motion for a preliminary injunction. J.A. 118-20.

Four more reverse discrimination actions were commenced as the City promoted more black and female employees. *See* J.A. 130-34; Complaint, *Peter J. Zannis, et al. v. Richard Arrington, Jr., et al.*, No. CV-83-AR-2680-S; Complaint, *William L. Garner v. City of Birmingham, et al.*, No. CV-82-M-1461-S; Complaint, *Johnny Howard v. City of Birmingham Public Inspection Servs.*, No. CV-83-P-3010-S. The reverse discrimination cases were, eventually, consolidated. J.A. 207, 218-19; *see also* J.A. 138-40, 144-48, 162-64, 188-93, 208-17. Additional plaintiffs have intervened as the City has continued to promote blacks and women (*see e.g.*, J.A. 172-74, 185-87, 293-94, 307-08, 314-15, 331-32), and 41 plaintiffs presently have reverse discrimination claims pending. In the cases that were tried below, plaintiffs challenged *every* promotion of a black employee to the positions at issue. *See* R13-250.

The decrees provide that:

> "*the parties* hereto agree that they *shall* individually and jointly *defend the lawfulness* of such remedial measures *in the event of challenge* by any other party to this litigation or *by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack.*" Pet. App. 125a, 205a (emphases added).

Accordingly, John W. Martin, *et al.*, party plaintiffs in the earlier litigation, intervened as defendants in these actions—over the reverse discrimination plaintiffs' vehement objections—to defend the decrees. J.A. 43-47, 52, 101-03, 106-08, 165-71, 175-78, 185-87.

The United States, also a party to the decrees, intervened or realigned in these actions as a *plaintiff* and *challenged* many of the promotions of black employees made pursuant to the decrees. J.A. 258-64, 289-92, 319-25, 329. Although the United States maintained that it was not attacking the decrees' race-conscious relief, Mr. Reynolds, the Assistant Attorney General for Civil Rights, said that in "the Birmingham decrees . . . lower courts have approved quota systems no longer lawful under [*Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984)]". *The New York Times*, June 4, 1985 at A28. The district court observed that "the United States has advanced arguments that appear contrary to its obligations under the Decree and inconsistent with the positions it pressed so vigorously in the earlier litigation" (J.A. 290), and the court of appeals dismissed its claims on the ground that "the United States is estopped from collaterally attacking the consent decrees because it is a party to them". Pet. App. 20a. Despite its promise to "defend the [decrees] . . . in the event of challenge . . . through . . . collateral attack" (Pet. App. 125a, 205a), the United States in this very Court has indicated that it supports plaintiffs' collateral attack. *See* Brief for the United States at 9-10 (May 1988).

Defendants moved to dismiss the reverse discrimination cases as impermissible collateral attacks on the consent decrees. J.A. 121-28, 220-24. Although the United States originally

joined those motions, it withdrew its motion and then, as noted above, realigned with the reverse discrimination plaintiffs. J.A. 125-26, 205-06, 258-64, 319-25. The district court denied the motions, ruling that the decrees would provide a defense to claims of discrimination for employment decisions "mandated" by the decrees, leaving for trial, *inter alia*, the issue whether the challenged promotions were indeed required by the decrees. *See* J.A. 237-39, 250-51, 280-82.

A five-day trial was held in December 1985 concerning only the promotions of black employees in the Fire and Engineering Departments. [10] The issues at trial were (1) whether the race-conscious relief in the consent decrees was lawful and (2) whether the challenged promotions were required (or "mandated") by the decrees.

To prove the validity of the decrees, defendants introduced the complete records from the 1976 trial, the 1979 trial and the 1981 fairness hearing, and adduced additional evidence of prior discrimination. [11] On the second issue, the parties adduced evidence concerning (1) the relative qualifications of plaintiffs and the persons promoted, (2) whether the criteria that plaintiffs proffered to compare qualifications comprised a nondiscriminatory selection procedure and (3) whether the information proffered by plaintiffs to compare qualifications was available to the City when it made its promotional decisions.

At the conclusion of the trial, the district court held that the reverse discrimination plaintiffs' claims were impermissible collateral attacks on the consent decrees, that the promotions at issue were required by the decrees and that the remedial relief provided by the consent decrees—including the challenged promotions—was lawful. Pet. App. 28a-29a, 61a-65a,

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10 The cases in the Police and the Streets and Sanitation Departments were stayed pending the completion of the first trial. J.A. 329.

11 *See* DX 1422, DX 1423, DX 1424, R10-1279 to 81; J.A. 727-71, DX 1976, DX 1977, DX 1978, DX 1978A, DX 1979, DX 1980, DX 1980A, J.A. 403-408; DX 2177, R9-1273 to 74, R10-1284; DX 2210, DX 2212, DX 2213, DX 2216, R10-1292 to 96, 1300 to 04; J.A. 362-63, 365-66, 379-81, 383-84, 387-92, 396-402, 427-28, 398-400; J.A. 593-694, R10-1280 to 81; J.A. 436-45, R1-27. *See also* pp. 4-6, *supra*.

78a-79a, 106a-109a. Plaintiffs timely appealed, and defendants timely cross-appealed the district court's *sua sponte* denial of attorneys' fees. [12] The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

E. The Decision Below.

A divided panel of the Eleventh Circuit reversed the district court's dismissal of the private plaintiffs' claims. The majority (Tjoflat and Henderson, J.J.) reversed the district court's ruling that collateral attacks on consent decrees were impermissible and remanded the case for the district court to try those claims. In so doing, the court of appeals overlooked that the district court had tried plaintiffs' claims of reverse discrimination and held alternatively that the decrees' race-conscious relief was lawful. *See* Pet. App. 12a-17a. [13] The panel affirmed the dismissal of the United States's claims, holding that as a party to the decrees the United States was estopped from challenging the City's actions in these collateral proceedings. Pet. App. 20a. Judge Anderson dissented, arguing that the City should not be liable for back pay but that the private plaintiffs could seek prospective relief. Pet. App. 21a-24a.

SUMMARY OF THE ARGUMENT

Persons with notice of a proposed consent decree and the opportunity to be heard before its entry should not be allowed to attack that decree later in a collateral lawsuit. Under principles set forth by this Court in *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 505-06 (1968), and followed repeatedly by the lower federal courts, such persons should be heard as intervenors when the court hears the proponents and opponents of the decrees. Their failure to avail themselves of that opportunity to be heard as intervenors does not mean that they have the opportunity to bring a later col-

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12 The court of appeals did not consider defendants' cross-appeal for attorneys' fees. If the decision of the court of appeals is reversed, defendants' cross-appeal would be ripe for decision.

13 The court of appeals denied without comment petitions for rehearing that pointed out this alternative holding. Pet. App. 25a-26a.

lateral lawsuit. Because due process requires notice and the *opportunity* to be heard, denying them a *second* opportunity to be heard in a collateral lawsuit is completely consistent with due process.

Plaintiffs here were given both notice and the opportunity to be heard; they have never asserted otherwise. Notice of the proposed decrees was given to "all interested persons", and that notice obviously apprised the BFA—of which all of the Fire Department plaintiffs are members—and several others of the proposed decrees because they filed timely objections to them and appeared at the fairness hearing. The fairness hearing not only provided the plaintiffs with the *opportunity* to be heard, but their interests were presented by the BFA and *were in fact heard*.

There are compelling reasons for prohibiting persons in plaintiffs' position from maintaining a collateral attack. *First*, a consent decree that has been approved by a court after a full hearing should be given more respect than a voluntary affirmative action plan. No court has passed on whether a voluntary affirmative action plan satisfies Title VII and the Equal Protection Clause. In contrast, before a consent decree goes into effect, a court has determined that it is lawful.

Second, collateral attacks violate firmly settled principles of comity. They create the risk of inconsistent judgments, as starkly demonstrated by plaintiffs' express prayer for an order enjoining defendants from "[e]nforcing or complying" with the court-ordered consent decrees. They waste judicial resources by requiring the validity of the decree to be resolved in repetitive and piecemeal fashion. And they necessarily require the second court to ignore the respect that the judgment of the first court is due.

Third, allowing collateral attacks on consent decrees would discourage the settlement of Title VII litigation. Not only would parties have little incentive to settle if their settlement could be later undone, but once the settlement is consummated the parties could not return to their pre-decree positions if the court-approved decree is later declared invalid.

Nonetheless, even if the Court were to decide that collateral attacks should be allowed, plaintiffs have already had one here. The court of appeals overlooked that both plaintiffs and defendants briefed the issue of the lawfulness of the decrees' race-conscious relief, presented evidence at trial in support of their respective positions and argued that issue in closing at trial, after which the district court explicitly decided it in defendants' favor. The district court has already decided twice that the decrees are lawful—once in 1981 and again in 1985. There is nothing left for it to decide.

ARGUMENT

I. BECAUSE PLAINTIFFS WERE GIVEN NOTICE AND THE OPPORTUNITY TO BE HEARD BEFORE THE ENTRY OF THE CONSENT DECREES, THEY SHOULD NOT BE ALLOWED TO ATTACK THE DECREES IN THESE COLLATERAL LAWSUITS.

The Martin Petitioners submit that the court of appeals erroneously held that because plaintiffs were not parties to or in privity with a party to the earlier litigation, they cannot be precluded from asserting their claims in these collateral lawsuits consistently with due process. *See* Pet. App. 12a-17a. As demonstrated below, plaintiffs were given both notice and the opportunity to be heard before the consent decrees were entered, and that is all that due process requires. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). For familiar reasons of judicial efficiency, comity and fairness, such persons should be required to act promptly in the consent decree litigation rather than allowed to bring a collateral lawsuit.

The overwhelming majority of the federal courts agree that the better rule is to preclude persons who had notice and the opportunity to be heard from attacking that decree in a collateral lawsuit. *See Marino v. Ortiz*, 806 F.2d 1144, 1146-47 (2d Cir. 1986), *aff'd*, 108 S. Ct. 586 (1988) (per curiam); *Culbreath v. Dukakis*, 630 F.2d 15, 22-23 (1st Cir. 1980); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62, 64 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *Striff v. Mason*, 849

F.2d 240, 245 (6th Cir. 1988); *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984); *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981). [14] *See also Thaggard v. City of Jackson*, 687 F.2d 66, 68-69 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983). [15] The Seventh Circuit has split: one panel has squarely held that a "state agency's order that rectifies discrimination should no more be the basis for a Title VII suit than a consent decree entered into during a Title VII suit" (*Grann v. City of Madison*, 738 F.2d 786, 795 (7th Cir.), *cert. denied*, 469 U.S. 918 (1984)), but a second panel (without mentioning the first panel's decision) suggested that a consent decree concerning municipal facilities could be collaterally attacked (*see Dunn v. Carey*, 808 F.2d 555, 559-60 (7th Cir. 1986)).

A. Because Plaintiffs Were Given Notice and A Timely Opportunity To Intervene in the Consent Decree Litigation, Their Collateral Attack in These Cases Should Be Barred.

1. Persons with notice that a pending lawsuit may affect their rights must intervene timely rather than assert those rights in a later action.

This Court has held that persons with notice of a lawsuit affecting their interests may be bound by its results if they do

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14 *See also EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1237 (6th Cir. 1980); *Black and White Children of the Pontiac School Sys. v. School Dist.*, 464 F.2d 1030 (6th Cir. 1972) (per curiam) ("*Black and White School Children*"); *Burns v. Board of School Comm'rs*, 437 F.2d 1143, 1144 (7th Cir. 1971) (per curiam); *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *O'Burn v. Shapp*, 70 F.R.D. 549, 552-53 (E.D. Pa.), *aff'd mem.*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); *Freeze v. ARO, Inc.*, 503 F. Supp. 1045, 1047-48 (E.D. Tenn. 1980); *Jefferson v. Connors Steel Co.*, 25 Empl. Prac. Dec. (CCH) ¶ 31,602 at 19,486 (N.D. Ala. Jan. 19, 1981); *Austin v. County of Dekalb*, 572 F. Supp. 479, 481 (N.D. Ga. 1983).

15 Although the Fifth Circuit has suggested that the *Thaggard* line of cases should be reexamined if under the facts of a particular case a person is denied his day in court, that court remains "firmly bound" to the *Thaggard* rule where, as here, an opportunity to be heard was available. *See Corley v. Jackson Police Dep't*, 755 F.2d 1207, 1210 (5th Cir. 1985).

not intervene to defend those interests. In *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486 (1968), the Borough of Moosic brought an action in the Middle District of Pennsylvania seeking to enjoin the Penn-Central merger, one of several such actions filed in various district courts nationwide. All of the actions were stayed pending disposition of the common issues by a three-judge panel in the Southern District of New York. The Southern District approved the merger, and this Court substantially affirmed that judgment. This Court then held that, although Moosic was not a party to the New York proceedings, it was precluded from relitigating the merits of the approval of the merger in its Pennsylvania action because it "had an adequate opportunity to join in the [New York] litigation". *Id.* at 505. The Court stated:

> "All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily follows that the decision of the New York court . . . precludes further judicial review or adjudication of the issues upon which it passes." *Id.* at 505-06 (footnote omitted).

The Court also noted that Moosic's claims "were all the subject of extensive evidence and were analyzed at length" by the Interstate Commerce Commission (*id.* at 504), just as plaintiffs' challenges here were presented by the BFA and analyzed by the district court (*see* J.A. 699-713; Pet. App. 246a).

Similarly, in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 107 (1968), the Court rejected the argument that a necessary party has a "substantive right" to be joined or to have the suit dismissed in its absence. The Court suggested that in a subsequent suit, that party "should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene." *Id.* at 114.

The lower Federal courts have repeatedly and consistently followed the reasoning of *Penn-Central* and *Provident Tradesmens Bank*. In a wide variety of contexts, those courts have refused to permit a person who could have intervened in

the original lawsuit to challenge the resultant relief in a collateral lawsuit. [16]

When a nonparty has not been given notice or the opportunity to intervene and was not adequately represented, members of this Court have expressed concern about precluding that person from challenging a consent decree. *See Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of *certiorari*). In *Ashley*, the "USA consent decree between the City and the United States was agreed to the same day suit was filed, thus pre-decree intervention was impossible." Ashley's Petition for Rehearing at 6, *Ashley v. City of Jackson*, No. 82-1390 (Nov. 5, 1983). There, the court entered the decree three days after the lawsuit was commenced without notice to nonparties or a hearing. Under such circumstances, *not present here*, that nonparty

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16 *See, e.g., Bergh v. Washington*, 535 F.2d 505, 507 (9th Cir.) (Kennedy, J.) (comity and lack of standing prevent white fishermen from attacking an order in another action favoring Indian fishermen; the proper course would have been to seek intervention in the first action), *cert. denied*, 429 U.S. 921 (1976); *Safir v. Dole*, 718 F.2d 475, 482-83 (D.C. Cir. 1983) (Scalia, J.) (nonparties are collaterally estopped from challenging an issue litigated in an earlier suit where, despite the court's invitations, they "sedulously abstained" from intervening), *cert. denied*, 467 U.S. 1206 (1984); *National Wildlife Fed'n v. Gorsuch*, 744 F.2d 963, 969-70 (3d Cir. 1984) (where nonparties' attempted intervention was untimely and their interests were adequately represented, they were precluded from relitigating an environmental consent decree); *Grann v. City of Madison*, 738 F.2d at 794-96 (failure to intervene in state agency gender discrimination hearing bars male detectives' subsequent attack on the resulting relief); *Cummins Diesel Michigan, Inc. v. The Falcon*, 305 F.2d 721, 723 (7th Cir. 1962) (failure to intervene in admiralty actions binds a nonparty); *Marine Power & Equip. Co. v. United States*, 594 F. Supp. 997, 1003 (D.D.C. 1984) ("a party that fails to intervene in an action directly challenging its interests may be barred from bringing a later collateral attack" (citations omitted)); *Treasure Salvors, Inc. v. Unidentified Wreck*, 459 F. Supp. 507, 514 (S.D. Fla. 1978) ("A party who purposely fails to intervene is bound under the law of this Circuit"), *aff'd on other grounds sub nom. Florida Dep't of State v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980), *aff'd in part and rev'd in part on other grounds*, 458 U.S. 670 (1982). *Accord* F. James & G. Hazard, *Civil Procedure* § 11.31 at 599 (2d ed. 1977) ("The process of settling legal rights through adjudication is simply another form of . . . investment, whose value a bystander with knowledge should not be allowed to destroy by his silence and inaction"). *See also* Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 Colum. L. Rev. 1551 (1979).

should have a post-decree opportunity to challenge the consent decree, but even then a collateral attack is not the appropriate procedural device. Rather, at least where the district court has retained jurisdiction, the nonparty should seek to intervene. *See Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1052 (3d Cir. 1980) ("intervention is a far better course than subsequent collateral attack, if intervention is feasible and . . . an unjustified or unreasonable failure to intervene can serve to bar a later collateral attack"); *United States v. Allegheny-Ludlum Indus.*, 63 F.R.D. 1, 4-5 (N.D. Ala. 1974) (Pointer, J.) (allowing post-decree intervention to challenge specific provisions of a consent decree), *aff'd*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *EEOC v. American Tel. & Tel.*, 506 F.2d 735, 741-42 (3d Cir. 1974). [17]

2. Plaintiffs could have intervened timely to challenge the relief in the proposed consent decrees, but they did not do so.

Plaintiffs have already had their opportunity for a day in court, but they did not fully avail themselves of it. By 1981, the first litigation had been ongoing for years, and the BFA—which represents all of the Fire Department plaintiffs (R11-23-43; R13-218-3)—consulted with and assisted the Personnel Board to ensure that firefighters' interests were represented in that litigation. J.A. 772-73. At the time the decrees were proposed, all of the plaintiffs were employed by the City. *See* J.A. 366-67, 369-71, 377, 382, 384-87, 389-90, 396. They were given notice of the proposed consent decrees (J.A. 695, 697-98, 727-28; Pet. App. 146a, 171a-75a, 222a-23a, 248a), which sufficiently apprised several groups representing non-minority employees to object to the proposed decrees. *See* J.A. 699-716. They were given the opportunity to be heard at the fairness hearing; indeed, the BFA *was* heard as the repre-

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17 That is not to say that every motion to intervene should be granted automatically. The movant must demonstrate at the least that its interests were not adequately represented previously in the litigation. Fed. R. Civ. P. 24(a)(2). Moreover, persons who were given notice and could have intervened earlier—like the BFA here—should not be granted post-decree intervention to challenge the decree's validity. *See* J.A. 772-76; Pet. App. 246a.

sentative of its members, including the Fire Department plaintiffs. *See* J.A. 699-713, 730, 732-40, 770. But plaintiffs did not seek to intervene prior to the court's consideration of the decrees. [18]

If plaintiffs had sought to intervene for the purpose of challenging the relief in the proposed consent decrees in a timely fashion, that application should have been granted. *See Howard v. McLucas*, 782 F.2d 956, 959-60 (11th Cir. 1986) (abuse of discretion to deny intervention before the fairness hearing); *Kirkland v. New York Dep't of Correctional Servs.*, 711 F.2d 1117, 1125-26 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). Indeed, when the BFA and others later sought to challenge specific proposed promotions of black employees pursuant to the decrees, Judge Pointer allowed them to intervene *in the consent decree litigation* for the purpose of challenging those promotions. *See* J.A. 782-84; *see also Allegheny-Ludlum Indus.*, 63 F.R.D. at 4-5.

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18 The BFA did seek to intervene, but it waited until after the deadline for interested persons to file their briefs had passed, after the objectors had filed their briefs and the parties to the decrees had filed their responses, after the court had invited persons at the fairness hearing to present evidence (J.A. 732) and after the district court heard arguments in favor of and in opposition to the proposed decrees. *See* J.A. 727-76. That motion was properly denied as untimely. Pet. App. 246a; J.A. 154-59.

Once the validity of a proposed consent decree has been submitted for decision, a later motion to intervene to challenge the validity of the decree by nonparties who were given notice and could have intervened earlier should be denied. The policies against allowing late intervention—prejudice to the parties, judicial efficiency and finality—are the same policies that militate against collateral attacks. *See, e.g., United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986); *Pennsylvania v. Rizzo*, 530 F.2d 501, 506-07 (3d Cir. 1976); *Nevilles v. EEOC*, 511 F.2d 303, 305-06 (8th Cir. 1975) (per curiam); *Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs*, 66 F.R.D. 457, 464-66 (D. Conn.), *aff'd mem.*, 515 F.2d 504 (2d Cir.), *cert. denied*, 423 U.S. 867 (1975). That is particularly true where, as here, the person seeking to intervene has not shown any new facts or law warranting reconsideration of the challenged order.

B. There Are Compelling Reasons for Barring Collateral Attacks by Persons Who Were Given Notice and the Opportunity To Be Heard.

As demonstrated above, nonparties who may be affected by a proposed consent decree should be required to act promptly and intervene if they wish to be heard rather than allowed to maintain a collateral lawsuit. The reasons for that rule are compelling.

1. The consent decrees here were approved only after careful judicial scrutiny and therefore should not be treated as just a voluntary affirmative action plan.

To permit collateral attacks on these consent decrees is to treat them as nothing more than a voluntary affirmative action plan. The court of appeals did precisely that, concluding "[w]e perceive no reason for treating a consent decree entered pursuant to a voluntary settlement differently from a voluntary affirmative action plan". Pet. App. 19a (footnote omitted). The court of appeals treated the decrees as a private consensual agreement, notwithstanding that before the district court approved the decrees:

- race-conscious relief had already been ordered for entry-level positions in the Police and Fire Departments after the 1976 trial (J.A. 588-89), and after the 1979 trial there was "more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments" (Pet. App. 244a);
- notice of the proposed decrees was given to "*all persons who have an interest which may be affected by the Consent Decrees*" (Pet. App. 173a, 182a (emphasis in original), 146a, 171a-75a, 222a-23a, 248a; J.A. 695, 697-98, 727-28);
- the district court held a fairness hearing at which several employees appeared and filed briefs, some arguing that the race-conscious relief was inadequate,

and others (including the BFA) arguing that it was unlawful reverse discrimination (*see* J.A. 699-771); and

- it "reviewed with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised". Pet. App. 246a.

In short, the district court followed the admonition of the former Fifth Circuit and carefully scrutinized the proposed decrees. *See United States v. City of Miami*, 664 F.2d 435, 440-41 (Former 5th Cir. 1981) (en banc) (opinion of Rubin, J.). The order approving these decrees is a full adjudication of their lawfulness. *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.409[5] at 326 (2d ed. 1984). The decrees here are far more than "a contract between parties, formalized by the signature of a judge". *Ashley*, 464 U.S. at 902.

The decrees are very different from a voluntary affirmative action plan. Unlike the consent decrees here, a voluntary plan has not been scrutinized by a court before going into effect, and persons affected by it have not had the opportunity to present their views to a court of law. The fact that the order approving the decrees has been fully litigated, affording procedural guarantees to participants and to interested persons, entitles that order to far more preclusive effect than a voluntary affirmative action plan.

2. Allowing collateral attacks on consent decrees would discourage the settlement of Title VII claims.

Permitting collateral attacks by persons who chose not to be heard before the entry of the decrees would have the perverse effect of destroying the incentives to settle Title VII claims. *See Dennison*, 658 F.2d at 696; *Thaggard*, 687 F.2d at 69. This Court has recognized that "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" equal employment opportunity. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 88-89 & n.14 (1981); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986) (*"Local 93"*); 29 C.F.R. § 1608.1(b) (1986) (EEOC Af-

firmative Action Guidelines). That policy would be thwarted if collateral attacks were allowed.

Collateral lawsuits threaten the primary benefit that each party receives by settling—relief for plaintiffs and repose for defendants. In this case, the Martin Petitioners, after litigating for seven years, surrendered their discrimination claims in return for the relief set forth in the decrees. Yet they have had to fight for seven more years to defend that relief. [19] Similarly, the City has faced unending litigation rather than the repose that it had expected. Few future litigants would give up their claims or defenses if the benefits they would obtain were so ephemeral.

The incentive to settle would be diminished even further because once the parties have acted in reliance on the decree, they could not return to their pre-decree positions if the decree is later declared invalid. The original plaintiffs (like the Martin Petitioners here) would have given up their claims long before; the defendant employer (like the City and the Personnel Board) would have given up its defenses, made employment decisions in reliance on the decree and (perhaps) paid a monetary settlement. Litigants would quickly recognize that settlement would pose at least as many risks as litigating.

3. Collateral attacks on litigated consent decrees violate settled principles of comity and fail to accord due respect to federal court judgments.

Collateral attacks on consent decrees that have been carefully reviewed and approved by a federal court necessarily require reconsideration of earlier decisions, perhaps by a different judge or even by a different court. That violates the same principles of comity that led this Court to prevent a nonparty who directed earlier litigation from relitigating the resulting judgment:

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19 Indeed, plaintiffs vigorously sought to prevent the Martin Petitioners from intervening in this litigation to defend the relief. *See* J.A. 175-78.

> "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent judgments." *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

The Ninth Circuit recognized these principles when it barred a collateral attack on a litigated judgment: "[t]he proper exercise of restraint in the name of comity keeps to a minimum the conflicts between courts administering the same law, conserves judicial time and expense, and has a salutory effect upon the prompt and efficient administration of justice." *Bergh*, 535 F.2d at 507 (Kennedy, J.) (quoting *Brittingham v. Commissioner*, 451 F.2d 315, 318 (5th Cir. 1971)). Those same considerations of comity require the same rule to apply here.

a. Collateral attacks violate the respect that courts accord to prior judgments.

In this case, the collateral attacks were before Judge Pointer, the judge who approved the consent decrees. That was, however, purely fortuitous. Two of the reverse discrimination cases were assigned to another judge, who denied repeated motions to transfer them or to consolidate them with the cases before Judge Pointer. J.A. 138-40, 144-48, 162-64, 188-93, 196-201; *see also* J.A. 208-17. It was only because the first-filed reverse discrimination case happened to be randomly assigned to Judge Pointer that, when the cases were ultimately consolidated, they were all assigned to him. *See* J.A. 207, 218-19.

Many other litigants defending collateral attacks have not been so fortunate. A plaintiff challenging a consent decree obviously would prefer to avoid the court that entered the order approving that decree, just as plaintiffs here fought so vigorously to keep these cases from Judge Pointer. *See* J.A. 196-201, 208-17. Therefore, collateral attacks have often been brought in a court other than the one that entered the original judgment. *See, e.g., Gregory-Portland Indep. School Dist. v. Texas Educ. Agency*, 576 F.2d 81 (5th Cir. 1978), *cert. denied*, 440 U.S.

947 (1979); *Goins*, 657 F.2d 62; *Black and White School Children*, 464 F.2d 1030; *Feller v. Brock*, 802 F.2d 722 (4th Cir. 1986); *Common Cause v. Judicial Ethics Comm.*, 473 F. Supp. 1251, 1253-54 (D.D.C. 1979). [20] Many consent decrees cover an employer's practices nationwide, [21] and if collateral attacks were allowed, a person unhappy with one of those decrees could challenge it in any other district court in the country.

A collateral attack in another forum on the decree of a court of competent jurisdiction has long been held improper because it violates the respect that federal courts owe to each others' orders. A court of equity retains continuing jurisdiction over the enforcement of its orders (*System Fed'n v. Wright*, 364 U.S. 642, 646-48 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932)) and the power to modify its decrees based on changed circumstances of law or fact (*id.*). Courts therefore refrain from reconsidering orders by other federal courts. *See Deposit Bank v. Frankfort*, 191 U.S. 499, 510-12 (1903); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 755 F.2d 38, 42-44, 46 (3d Cir.), *cert. denied*, 474 U.S. 819 (1985). The specter of different district courts wrestling over the fate of the same school children in a

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20 For example, in *Gregory-Portland*, the United States brought a school desegregation action in the *Eastern* District of Texas against the Texas Education Agency ("TEA"). The district court enjoined the TEA from funding or accrediting school districts that discriminated on the basis of race. *See United States v. Texas*, 330 F. Supp. 235 (E.D. Tex.), *aff'd and modified*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). Gregory-Portland sued the TEA in the *Southern* District of Texas alleging that the threat to terminate Gregory-Portland's accreditation violated due process. The Southern District agreed, and enjoined the TEA from suspending Gregory-Portland's accreditation or funding. The Fifth Circuit reversed on the ground that the Southern District should not interfere with the order of another court with continuing jurisdiction. *See Gregory-Portland*, 576 F.2d at 83.

21 *See, e.g., United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826 (5th Cir. 1975) (consent decree covering nationwide practices in the steel industry), *cert. denied*, 425 U.S. 944 (1976); *EEOC v. American Tel. & Tel.*, 556 F.2d 167 (3d Cir. 1977) (consent decree covering nationwide employment practices of the Bell companies), *cert. denied*, 438 U.S. 915 (1978).

busing controversy, reviewing a school district's efforts to desegregate or issuing orders concerning an employer's promotion policies are precisely the types of dilemmas that comity is designed to avoid. *See, e.g., Black and White School Children*, 464 F.2d 1030; *Gregory-Portland*, 576 F.2d 81; *Goins*, 657 F.2d 62. The rule prohibiting collateral attacks is the mechanism for enforcing comity.

Comity precludes lawsuits challenging the orders of other courts regardless of whether the plaintiff in the collateral suit was a party or privy to the initial action. *See Treadway v. Academy of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1421-22 (9th Cir. 1986); *Goins*, 657 F.2d at 64; *Gregory-Portland*, 576 F.2d at 82-83; *Feller*, 802 F.2d at 728-29. For example, in *Feller*, the NAACP brought an action in the District of Columbia challenging the Department of Labor's ("DOL") administration of the Temporary Foreign Worker Program. Under that program, the DOL certified that employers could hire alien workers, provided that the employers paid a specified wage. The NAACP alleged that the DOL had certified employers who paid aliens less than that wage. The district court enjoined the DOL from certifying noncomplying employers, and, pursuant to that order, the DOL refused to certify two West Virginia apple growers. Those two growers sued the DOL in West Virginia and obtained an order that they be certified, with which the DOL complied. The Fourth Circuit reversed the West Virginia court's order, noting that comity "has been expanded . . . to cases in which the plaintiff in the second action was neither a party nor the successor-in-interest of a party in the first action". *Id.* at 728; *see also Exxon Corp. v. Department of Energy*, 594 F. Supp. 84, 89-91 (D. Del. 1984).

These concerns for comity are not obviated by transferring the collateral attack to the same court and judge that entered the consent decree. Because the collateral attack is a separate lawsuit, it still requires the reconsideration of an earlier order entered in another case. Allowing plaintiffs to maintain a collateral attack rather than requiring them to intervene in the original litigation means that they may effectively seek to overturn an order without first making any showing that would warrant reconsideration of that order. That is precisely what the

plaintiffs are doing here: they are challenging in these collateral lawsuits the order approving the decrees without pleading any facts or law that the district court has not already considered. Moreover, the policies of judicial efficiency and finality that underlie comity are frustrated by a collateral attack, regardless of whether the same judge presides over the second lawsuit.

b. The collateral attacks here create the risk that the City would be subject to inconsistent obligations.

This Court recognized in *Local 93* that allowing a court other than the one that entered the decree to interpret it or modify it would create a "risk of inconsistent or conflicting obligations". 106 S. Ct. at 3076 n.13; *see also Montana v. United States*, 440 U.S. at 153-54; *Thaggard*, 687 F.2d at 68; *O'Burn*, 70 F.R.D. at 552; *Dennison*, 658 F.2d at 695. That risk is very real in collateral proceedings.

A consent decree, like any other court order, can be enforced by contempt. *Local 93*, 106 S. Ct. at 3074; *see, e.g., Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1097-98 (3d Cir. 1987); *United States v. Barco Corp.*, 430 F.2d 998, 999 (8th Cir. 1970). The City could not defy the court-ordered decrees and later defend against contempt by arguing that the decrees were unlawful. *See Walker v. City of Birmingham*, 388 U.S. 307, 315-21 (1967).

In their complaints, plaintiffs expressly seek to enjoin defendants from "[e]nforcing or complying with" the court-ordered consent decrees. Pet. App. 115a; J.A. 98; *see also* J.A. 133. When the City proposed to promote black employees pursuant to the decrees for the first time to fire lieutenant and civil engineer, plaintiffs sought a temporary restraining order enjoining defendants from "enforcing" the decrees. J.A. 35-36, 38-39, 91-92. If the City were to fail to enforce and comply with the decrees, the Martin Petitioners would seek to hold the City in contempt in the consent decree case. One cannot imagine a greater risk of inconsistent obligations than allowing a plaintiff to seek in a new proceeding an order prohibiting the

defendant from "enforcing or complying with" a court order in another proceeding.

The City should not have to face that possibility. In an analogous situation, this Court rejected the argument that a broadcaster may be held liable for complying with the Communications Act's equal time provisions, concluding that such an argument "would sanction the *unconscionable* result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee." *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 531 (1959) (emphasis added); *see also National Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940) (courts cannot enter orders inconsistent with an NLRB order); 29 C.F.R. § 1608.8 (1986) ("actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII"); *Adams v. Morton*, 581 F.2d 1314, 1318 (9th Cir. 1978) (consent decree cannot form basis of a Title VII action), *cert. denied*, 440 U.S. 958 (1979). [22] Allowing the City to face liability for complying with the consent decrees here would be no less unconscionable.

c. Collateral attacks waste judicial resources by relitigating issues already decided after a full and fair opportunity for all parties to be heard.

Judicial resources are increasingly scarce (*see Schmieder v. Hall*, 545 F.2d 768, 771 (2d Cir. 1976), *cert. denied*, 430 U.S. 955 (1977)), and allowing collateral lawsuits by persons who could have intervened unnecessarily wastes those precious resources. *See Montana v. United States*, 440 U.S. at 153-54 (prohibiting relitigation of issues by persons not nominal parties "conserves judicial resources"); *Local 93*, 106 S. Ct. at 3076 n.13 (channeling litigation concerning a consent decree to the court that entered it "avoid[s] the waste of resour-

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22 Judge Anderson dissented from the decision below on the ground that the City should not be liable for back pay for complying with a court order. *See* Pet. App. 21a-24a. His analysis falters because he stated that the plaintiffs should be allowed to attack the decrees prospectively. That would still expose the City to conflicting court orders if the court in the collateral lawsuits ordered the City not to comply with the court-ordered decrees.

ces" (citation omitted)); *University of Tennessee v. Elliott*, 106 S. Ct. 3220, 3226 (1986) (giving preclusive effect to factfinding by state administrative agencies serves "the public's interest in conserving judicial resources"); *cf. Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971) (relitigation of issues "is an arguable misallocation of resources").

Here, the BFA and others objected to the decrees in the consent decree litigation on the same grounds raised by the reverse discrimination plaintiffs in this litigation. [23] The district court approved the decrees only after it "reviewed with care" those objections. Pet. App. 246a. In holding that plaintiffs' collateral attacks may go forward, the court of appeals remanded the case for the district court to decide the question that it had already decided when it approved the decrees. And because nearly every promotion of a black employee pursuant to the decrees has led to a new reverse discrimination claim, the district court will—if the decision of the court of appeals is not reversed—have to decide that same question again and again and again.

d. Allowing collateral attacks on consent decrees is inconsistent with the finality accorded to fully litigated judgments.

A judgment entered after a fully litigated proceeding cannot be collaterally attacked by persons who could have intervened in that proceeding. *Penn-Central Merger and N&W*

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23 In both 1981 and in these reverse discrimination cases, Mr. Fitzpatrick argued that the decrees' race-conscious relief violated Title VII because (1) it benefitted persons other than identified victims of discrimination (*compare* J.A. 704, 706-07, 709-11, 735-36 *with* J.A. 411, 413), (2) it was not supported by judicial findings of discrimination (*compare* J.A. 703-04, 707, 711-12, 735 *with* J.A. 411-13), (3) the percentage goals trammeled the rights of whites by reducing their opportunities for promotions (*compare* J.A. 702, 704, 711-12, 736-37 *with* Pet. App. 113a-15a, J.A. 97-98, 114, 132-33, 413) and (4) the decrees trammeled the rights of white employees who were allegedly better qualified than the black employees who were promoted (*compare* J.A. 702, 704, 738, 775 *with* Pet. App. 112a-14a, J.A. 71-72, 96-98, 112-13, 132, 414-16). *See also* J.A. 714-16, 747-50 (objections by other white employees); Pet. App. 236a-49a (opinion and order approving decrees).

Inclusion Cases, 389 U.S. at 505-06; *Bergh*, 535 F.2d 505; *Safir*, 718 F.2d at 482-83; *Feller*, 802 F.2d at 728-29; *Gregory-Portland*, 576 F.2d at 83. When a court has held a hearing and invited interested persons to present their views, there is no reason to treat the order approving a consent decree any differently than a fully litigated order. As the Third Circuit observed:

> "When a consent decree's essential features are attacked on the basis of facts which existed before entry or contentions based on legal doctrine then applicable, the challenge stands on the same basis as one employing similar grounds in an adjudicated case. In both instances, considerations of finality are dominant." *Gorsuch*, 744 F.2d at 968.

Several courts have observed that, if collateral attacks on consent decrees were allowed, "courts could never enter a judgment in a lawsuit with the assurance that the judgment was a final and conclusive determination of the underlying dispute". *O'Burn*, 70 F.R.D. at 552; *see Thaggard*, 687 F.2d at 69; *Prate*, 430 F. Supp. at 1375. [24]

These cases illustrate that an order approving a consent decree should be accorded the same finality as a litigated order. There are two court orders providing race-conscious relief—the 1977 order for entry-level positions in the Police and Fire Departments entered after a trial and the 1981 order approving the consent decrees. J.A. 588-89; Pet. App. 247a-49a. The district court entered each order after holding a hearing, carefully weighing the evidence of discrimination and evaluating the relief necessary to remedy that discrimination. *See* J.A. 553-87, 727-71; Pet. App. 236a-46a. Indeed, nonminorities had a greater voice before the entry of the consent decrees—because their interests were expressly represented by the BFA at the fairness hearing—than before the entry of the 1977 order. The lawfulness of the relief approved in both

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24 *See also Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 478 (1982) ("Stripping state court judgments of finality would . . . lessen[ ] the incentive for full participation by the parties and for searching review by state officials [and] . . . would violate basic tenets of comity and federalism" (citation omitted)).

orders was fully litigated, and both orders should be accorded the same finality.

4. Requiring persons with notice of a proposed decree to intervene in that litigation is fair to them and to the parties to the decree, and it resolves the lawfulness of the decree most efficiently.

Persons with notice that a proposed consent decree may affect their interests should assert their rights promptly. They should be required to present their position at the same time that the district court considers the other interests militating for and against the decree rather than be allowed to wait to commence a collateral lawsuit. That procedural rule would resolve the lawfulness of a proposed decree "swiftly but fairly". *Blonder-Tongue*, 402 U.S. at 327.

There is nothing remarkable in requiring persons to raise their claims in a timely fashion. For example, recipients of a "right to sue" letter must commence a lawsuit within 90 days or forever lose their day in court. 42 U.S.C. § 2000e-5(f)(1); *United Air Lines v. Evans*, 431 U.S. 553, 557-58 (1977). Similarly, statutes of limitations terminate claims after a specified period of time. *See Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944) ("even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them"). One on whom process has been served must act promptly or face default. *See* Fed. R. Civ. P. 55. And in *Penn-Central*, this Court denied the Borough of Moosic's right to prosecute a collateral lawsuit because it delayed in asserting its rights. 389 U.S. at 305-06. It is not unfair to require persons who know or should know that a proposed decree may affect them to assert their interests sooner rather than later. *See* J.A. 154. *See generally, Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) ("The State may erect reasonable procedural requirements for triggering the right to an adjudication").[25]

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25 Prohibiting collateral lawsuits is certainly more fair to the parties to the decrees because it protects them from "the expense and vexation at-

Similarly, in habeas corpus proceedings collaterally attacking state court criminal judgments, this Court has been particularly unsympathetic to prisoners who delay in presenting their constitutional claims. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72 (1977). There, this Court established the "cause and prejudice" rule because it believed that a more lenient rule "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off". *Id.* at 89.

Collateral attacks of consent decrees provide just the sort of tempting opportunity for "sandbagging" that the Court feared in *Wainwright*. For precisely this reason, courts have rejected collateral attacks in civil cases. For example, in *Gorsuch*, the district court dismissed the National Wildlife Federation's collateral attack on a consent decree entered in a related case in which the Federation had objected to the decree but had not timely intervened. The Third Circuit affirmed, stating:

> "Clearly, plaintiffs were not outsiders unaware of litigation in progress that would ultimately affect their interests. In a deliberate choice of litigation strategy, they chose to stand on the sidelines, wary but not active, deeply interested, but of their own volition not participants. Although plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this stage, assert persuasively that the interest of finality should not prevail." 744 F.2d at 971-72. [26]

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tending multiple lawsuits". *Montana v. United States*, 440 U.S. at 153; *see also University of Tennessee*, 106 S. Ct. at 3226. The defense of these collateral attacks has been expensive indeed. Although the Martin Petitioners are protecting the relief they obtained as civil rights *plaintiffs*, the district court *sua sponte* denied them attorneys' fees under the standards applicable to civil rights *defendants*. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); Pet. App. 34a, 82a. That ruling is the subject of defendants' cross-appeal. R14-301.

26 Similarly, in *Bolden v. Pennsylvania State Police*, 578 F.2d 912 (3d Cir. 1978), the Fraternal Order of Police ("FOP") had participated, but had not intervened, in an action that led to an affirmative action consent

The same is true here. Just as the Federation "was tracking the progress" of the earlier litigation in *Gorsuch* (744 F.2d at 970), the BFA here followed the *Jefferson County* litigation from the outset (*see* J.A. 772-73). Indeed, the BFA sought for its members the best of both worlds: it expressly asked the district court to consider the interests of nonminority employees even though they "have not been made a party to this action". J.A. 703.

C. The Rule Barring Collateral Attacks on Consent Decrees by Persons Who Had Notice and the Opportunity To Be Heard Is Consistent with the Requirements of Due Process.

Due process requires that before being bound by a judicial determination, a person must be afforded *notice* and *the opportunity to be heard*. As this Court held in *Mullane v. Central Hanover Bank & Trust Co.*, the "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them *an opportunity to present their objections*". 339 U.S. at 314 (emphasis added). *See also Mathews v. Eldridge*, 424 U.S. at 333 (the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" (citation omitted)). Moreover, "[i]t has been said so often by this Court and others as not to require citation of authority that due process

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decree. When the FOP sought to intervene four years later to challenge that decree, the Third Circuit denied its application:

> "[T]he FOP was seeking on behalf of its members the best of all possible worlds. Its counsel . . . could supplant, or at least supplement, the Assistant Attorney General assigned to the case in negotiating the most favorable consent decree, while it preserved the option of subsequently mounting collateral attacks on the same decree." *Id.* at 916.

The court held that the FOP was a *de facto* party to that litigation and was bound by its results. In doing so, the court noted that the FOP, like many nonparties with notice, chose not to intervene for strategic reasons. At an FOP meeting earlier in the litigation, its attorney admitted his "sandbagging" strategy: "I'm not going to let the court let me in—if he wants me in now in that capacity, I'm not going to let him bring me in. I'm going to withdraw so that you are not parties to it." *Id.* at 916.

is flexible and calls for such procedural protections as the particular situation demands". *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). Under the circumstances here, plaintiffs had their due process before the consent decrees were approved and have no due process right to bring these collateral lawsuits. [27]

There can be no doubt that plaintiffs were afforded both notice and the opportunity to be heard before the entry of the consent decrees, and they have never claimed otherwise. The BFA kept apprised of the well-publicized litigation that led to the consent decrees (J.A. 772-73), and the Eleventh Circuit concluded that "BFA members . . . knew at an early stage in the proceedings that their rights could be adversely affected". J.A. 154. When the consent decrees were proposed, notice of the fairness hearing was given by publication. Pet. App. 146a, 171a-75a, 222a-23a, 248a; J.A. 695, 697-98, 727-28. Such actual notice satisfies due process. *See National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964).

The fairness hearing provided plaintiffs the opportunity to be heard. Not only did they have the *opportunity* to be heard, but their interests were presented by the BFA and Mr. Fitzpatrick and *were* heard. *See* J.A. 699-716, 728, 730, 732-40, 747-50, 770. Even though the BFA chose to appear as an objector rather than an intervenor, its opportunity was meaningful, as demonstrated by the fact that the district court "reviewed with care" its objections. *See* Pet. App. 246a. [28] There is no due process requirement for an additional hearing

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27 *See Mathews*, 424 U.S. at 333-35, 340-43 (terminating disability benefits causes less "potential deprivation" than terminating welfare benefits and therefore requires less procedural protection); *cf. United States v. Paradise*, 107 S. Ct. 1053, 1073 (1987) (plurality opinion) (the denial of a promotion raises lesser Equal Protection concerns than a layoff); *id.* at 1076 (Powell, J., concurring).

28 Objections by nonparties have led to modifications of proposed consent decrees by parties and courts. *See, e.g., United States v. City of Miami*, 664 F.2d at 438-39, 444 (opinion of Rubin, J.); *Dawson v. Pastrick*, 600 F.2d 70, 73-74 (7th Cir. 1979); *Johnson v. North Carolina State Highway Patrol*, 91 F.R.D. 406, 407 n.1 (E.D.N.C. 1980); *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of White Plains*, 505 F. Supp. 955, 960 (S.D.N.Y. 1981).

when there is little "probable value" of that hearing, particularly where, as here, plaintiffs have come forward with nothing that the district court did not consider in 1981. *See Mathews*, 424 U.S. at 343-46; *see also* n.23, *supra*. [29]

The fact that plaintiffs, with notice of the original litigation and the proposed consent decrees, failed to intervene in that action in no way means that they were not afforded the process due them. It is the *opportunity* to be heard that is the essence of due process. As this Court held in *Kremer*, the "fact that [plaintiff] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy". 456 U.S. at 485 (citation omitted). There, the Court held that the plaintiff had not been denied due process even though his decision to pursue a remedy in state proceedings precluded him from relitigating his claim in federal court. *Id.* at 482-85. Similarly, in *Marino v. Ortiz*, 108 S. Ct. 586, 587 (1988) (per curiam), the objectors' decision not to intervene and become parties to the consent decree litigation prevented them from appealing the approval of the decree. And in *Penn-Central*, the Court expressed no concern that due process would be violated by precluding a nonparty from relitigating an issue when that nonparty "had an adequate opportunity to join in the litigation". 389 U.S. at 505. Having foregone the opportunity to be heard at the fairness hearing, plaintiffs have no due process right for a *second* opportunity to be heard in a collateral attack.

II. IN ANY EVENT, PLAINTIFFS' DISCRIMINATION CLAIMS WERE TRIED BELOW.

Although the district court held—correctly, the Martin Petitioners submit—that plaintiffs could not collaterally attack a Title VII consent decree, it nevertheless considered, in the alternative, the merits of their attack. It tried plaintiffs' reverse discrimination claims, reconsidered the lawfulness of the con-

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29 Thus, the due process concerns expressed in the dissent in *Ashley*, 464 U.S. 900, are not present here. There, nonminority employees could not have had notice or the opportunity to be heard because the consent decree was submitted on the same day that the United States's complaint was filed, three days prior to its approval without a hearing. *See* pp. 17-18, *supra*.

sent decrees and held that the promotions at issue did not violate plaintiffs' rights. Without referring to those facts, the court of appeals inexplicably found that "the [district] court did not decide the plaintiffs' Title VII and equal protection claims". Pet. App. 12a. [30] That finding had no basis and is clearly erroneous as a matter of law.

After the complaints were filed below, defendants filed motions to dismiss them as impermissible collateral attacks on the consent decrees. *See* J.A. 121-27, 220-24. In denying those motions, the district court stated that it was prepared to hold that "if preferential treatment is mandated by the decree, then it constitutes a good defense". J.A. 237. [31] However, neither party limited itself to that issue. Throughout the pretrial proceedings plaintiffs maintained that the decrees were unlawful (*see, e.g.*, Plaintiffs' First Pre-Trial Mem. at 29-54 (Dec. 5, 1985) ("Plaintiffs' Mem.")), at trial both sides introduced evidence concerning the validity of the decrees and the court did not dispose of that issue until the trial's conclusion.

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30 Just as inexplicably, the court of appeals denied without comment petitions for rehearing pointing out this alternative holding. Pet. App. 25a-26a.

31 The "mandated" test is from the Eleventh Circuit's opinion in *United States v. Jefferson County*, 720 F.2d at 1518; J.A. 158. The district court construed *Jefferson County* to mean that acts "mandated" by the decrees could not be held to be discriminatory, but that actions merely permitted by the decrees might not be absolutely protected by them. *See* J.A. 237-38, 280-82. Thus, the primary focus of the 1985 trial was whether the challenged promotions were required by the decrees. Plaintiffs argued that because the City decree excuses the City from meeting its affirmative action goals if it hires or promotes a nonminority "who is demonstrably better qualified based on the results of a job related selection procedure" (Pet. App. 60a, 104a, 124a), the promotion of such a "demonstrably better qualified" person would not be "mandated" by the decrees. *See* J.A. 231, 414. Therefore, much of the evidence at the 1985 trial concerned the relative qualifications of plaintiffs and the persons promoted.

At the conclusion of trial, the district court held that the plaintiffs had failed to prove that they were "demonstrably better qualified [than the persons promoted] based on the results of a job related selection procedure". Pet. App. 27a-29a, 77a-79a. The challenged promotions were found to be required by the decrees and thus not discriminatory.

A. Both Sides Briefed the Issue of the Validity of the Consent Decrees in Their Pre-Trial Memoranda.

In their complaints, plaintiffs directly attacked the consent decrees, seeking a declaratory judgment that the decrees were "void as illegal, unconstitutional, vague and indefinite, and violative of public policy", and they sought to enjoin the City from complying with the decrees' provisions. *See* Pet. App. 115a; J.A. 35-36, 38-39, 91-92, 98-99. Both parties in their pre-trial memoranda briefed extensively the question whether the consent decrees' race-conscious relief was impermissible reverse discrimination. *See* Plaintiffs' Mem. at 29-54; Defendants' Joint Pre-Trial Mem. at 69-84 (Dec. 12, 1985) ("Defendants' Mem."). Plaintiffs, in their memorandum, argued, *inter alia*, that the consent decrees unnecessarily trammeled their interests (*see* Plaintiffs' Mem. at 29-30, 36-38), that the relief was improper under *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (*see id.* at 36-38), and that it was unlawful under *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984) (*see id.* at 38-40, 42, 48-54).

Defendants maintained that plaintiffs' collateral attack was improper. Defendants' Mem. at 65-68. Nevertheless, they argued in their pretrial memorandum that "assuming that the validity of the Decree is at issue in this case, the Decree's affirmative action plan for the hiring and promotion of blacks is clearly a valid remedy to correct the effects of prior racial discrimination". *Id.* at 65. Defendants then argued that the race-conscious relief was justified by the significant evidence of discrimination by the City (*see id.* at 72-80), that the numerical goals of the decree were appropriate (*see id.* at 81) and that the decrees did not unnecessarily trammel the interests of white employees (*see id.* at 82). There can be no doubt that both parties prepared for trial contemplating that the validity of the decrees' race-conscious relief would be before the district court.

B. Evidence Was Introduced at Trial on the Issue Whether the Consent Decrees Were Lawful or Violated the Rights of the Plaintiffs.

Although defendants asserted that plaintiffs could not collaterally attack the decrees, they recognized that plaintiffs had

asked the district court to declare the decrees unlawful and that the district court had not yet ruled on whether the collateral attacks could go forward. Thus, at trial defendants introduced substantial evidence from which the district court could evaluate the lawfulness of the decrees.[32] Defendants tried their case in the alternative in order to avoid just the result that the court of appeals imposed—an unnecessary retrial.

To prove that the consent decrees satisfied Title VII and the Equal Protection Clause, defendants introduced—and the district court admitted—evidence that (1) there was sufficient evidence of discrimination to justify the decrees' race-conscious relief, and (2) the decrees did not unnecessarily trammel the interests of plaintiffs.[33] That evidence is relevant only to whether the decrees are valid;[34] it has nothing whatsoever to

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32 The United States sought to prevent defendants from introducing evidence to support the validity of the consent decrees. *See* J.A. 351-52. It argued that the "United States . . . is not challenging the validity of the Decree" and although "the private plaintiffs seek to challenge the Decree", there are "limitations on the extent to which a nonparty can undermine a prior judgment" that rendered defendants' evidence in support of the decrees irrelevant. Memorandum in Support of Motion in Limine of United States at 4-5 (Dec. 3, 1985) (citation omitted). *The district court denied the United States's motion, holding that the evidence supporting the lawfulness of the decrees might be "of some significance", especially to "an appellate court reviewing the matter".* J.A. 353 (emphasis added). At trial, counsel for the United States repeated its objection, stating "[w]e think that the plaintiffs are limited in their ability to challenge the validity" of the decrees (J.A. 405), which just reflected the point obvious to all—plaintiffs *were attacking* the decrees.

33 For example, defendants proved that plaintiffs' interests have not been unduly trammeled because 8 of the 15 plaintiffs had been promoted by the time of trial, and the others were free to continue to compete for a promotion. *See* Pet. App. 40a, 85a; J.A. 371, 377-79, 385; R2-265; R3-313 to 14, 358 to 59, 363, 380; R7-976 to 77, 997 to 98. As of today, it appears that all but two plaintiffs have been promoted. See the consent decree compliance reports filed with the district court.

34 *See Weber*, 443 U.S. at 197, 208; *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1449-53, 1455-56 (1987); *see also Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3051-53 (1986) (*"Sheet Metal Workers"*) (plurality opinion); *id.* at 3055-57 (Powell, J., concurring); *Paradise*, 107 S. Ct. at 1065-66, 1070-73 (plurality opinion); *id.* at 1075-76 (Powell, J., concurring).

do with whether the challenged promotions were "mandated" by the decrees.

The evidence of discrimination that defendants introduced to establish the validity of the decrees was overwhelming. Not only did defendants introduce the transcripts, exhibits and opinions from the 1976 trial, the 1979 trial and the fairness hearing, [35] but they introduced additional evidence of discrimination. [36] *See also* pp. 4-6, *supra*. Defendants also introduced evidence of "informal mechanisms [that] obstruct equal employment opportunities", "even where the employer . . . formally ceases to engage in discrimination". *Sheet Metal Workers*, 106 S. Ct. at 3036. For example:

- Mr. Duncan, the head of the Engineering Department, favored Mr. Ware (a plaintiff here) for promotion over Mr. Thomas because Mr. Ware was white. Pet. App. 31a, 56a, 81a, 100a-01a.
- Black firefighters have been instructed to sleep in particular beds in the firehouse during 24-hour shifts, even though white firefighters are free to sleep in any bed. R7-953 to 54. [37]
- The request by Mr. Davis, a black firefighter, for EMT III training was rejected by his white supervisor without explanation, despite the fact that he had been a medic in Vietnam and had studied in a physician's assistant program at Emory University. He did not receive the training until four years later. R6-819 to 22.

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35 *See* DX 1422, 1423, 1424, R10-1279 to 81, R10-1305 to 07; J.A. 593-694, R10-1280 to 81; DX 1977, DX 1978, DX 1978A, DX 1979, DX 1980, DX 1980A, J.A. 403-408; J.A. 427-71, 407-08.

36 *See* J.A. 380-81, 383-84; J.A. 436-47, R1-27; J.A. 427-28, 398-400; DX 2177, R9-1273 to 74, R10-1284; DX 2210, DX 2212, DX 2213, DX 2216, R9-1292 to 96, 1300 to 04.

37 In the Streets and Sanitation Department, the City had racially segregated bathrooms as recently as 1979. 1979 trial PX 43 at 73-81, 1979 trial PX 44 at 98-104, 1979 trial PX 48 at 77, 80-85, 1979 trial PX 50 at 37-40, J.A. 403-08.

- Although firefighters are usually made acting officer based on station seniority, Mr. Wilks, who is white and a plaintiff here, was made an acting officer over Mr. Davis, who is black and then had greater station seniority. R4-454 to 55; R6-825 to 26.

- Mr. Isaac, who is black, was assigned back-to-back watches to punish him for his statement that he believed that the consent decrees were fair. R6-888 to 90.

It was not only defendants who tried the decrees' validity. Counsel for plaintiffs argued below in summation that the evidence showed that the consent decrees' race-conscious relief was unlawful. He argued that "the use of race in a conclusory fashion is improper" (J.A. 412, 415-16), that none of the blacks who were promoted had been shown to be individual victims of discrimination (J.A. 411-13), that there was insufficient evidence of prior discrimination to justify race-conscious relief (J.A. 410-12), and that the short-term goal for promoting blacks impaired the opportunities of white employees (J.A. 413-15). He concluded that the issue whether plaintiffs' interests were trammeled because allegedly less qualified persons were promoted instead "has been framed quite well". J.A. 414. Counsel for defendants responded in summation that there was more than enough evidence of discrimination to support the decrees and that the decrees did not unnecessarily trammel the rights of whites. J.A. 422-26. *None of those arguments related to whether the City's actions had been required by the decrees; they were offered solely on the issue of the decrees' validity.* Plaintiffs' counsel had every opportunity to present his case, and no evidence that he sought to introduce to demonstrate that the decrees were invalid was excluded by the district court.

C. The District Court Explicitly Ruled on the Very Question That the Court of Appeals Remanded for Its Consideration.

In the face of plaintiffs' arguments that the decrees' race-conscious relief was unlawful reverse discrimination, and after considering the extensive evidence adduced at trial on that issue, the district court *expressly* rejected plaintiffs' claims of discrimination and held that the "City Decree is lawful". Pet. App. 61a, 106a. The district court further held that:

> "[u]nder all the relevant case law of the Eleventh Circuit and the Supreme Court, it is a proper remedial device, designed to overcome the effects of prior, illegal discrimination by the City of Birmingham." Pet. App. 62a, 106a.

The district court specifically stated that, although it had considered the lawfulness of the decrees in 1981 when it approved them, it was ruling on that question again:

> "In *United States v. Jefferson County* . . . this Court found the City and Board Decrees to be warranted by the evidence of discrimination by the City, based on the factors set forth in *United States v. Alexandria*, 614 F.2d 1358 (5th Cir. 1980), and the other applicable decisions of the several courts of appeals. Plaintiffs have demonstrated no facts demonstrating that the previous conclusion of the Court was in any way in error." Pet. App. 39a, 84a-85a.

The district court specifically held that the interests of white employees were not "trammeled by the Decree". Pet. App. 40a, 85a.

It is plain that, in focusing on the district court's alternative ruling concerning collateral attacks, the court of appeals simply overlooked that the district court allowed the collateral attack to proceed and ruled that the decrees' race-conscious relief was lawful and that plaintiffs' claims of discrimination were without merit. That question was briefed, tried, argued and decided below.

On appeal, not even plaintiffs suggested to the court of appeals that the district court had not tried their claims. To the contrary, they acknowledged that "[a]gain, in its December 1985 Conclusions of Law, the District Court upheld the legality of the Birmingham Consent Decree". Brief for Plaintiffs-Appellants-Cross-Appellees Wilks, *et al.*, at 53. Indeed, in response to direct questions from Judge Tjoflat during oral argument, counsel for plaintiffs expressly denied that the trial court had deprived plaintiffs of an opportunity to present their claims of reverse discrimination. [38] Regardless of what this

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38 Pursuant to Eleventh Circuit Rule 34-4(g), oral arguments are recorded by that court, but copies of the transcripts are not available to counsel.

Court decides on the permissibility of collateral attacks, the conclusion by the court of appeals that plaintiffs did not have their day in court in this case is flatly wrong.

The district court has already considered the lawfulness of the decrees' race-conscious relief *twice*—once in 1981 when it approved the decrees, and again in this case in 1985 when it tried and rejected plaintiffs' reverse discrimination claims. The decision by the court of appeals would require the district court to consider the lawfulness of the decrees yet a third time. That would needlessly consume judicial resources while extending for all the unsettled situation that has existed since this litigation began fourteen years ago.

CONCLUSION

For the foregoing reasons, Petitioners John W. Martin, *et al.*, respectfully request that the decision of the court of appeals be reversed and that the case be remanded with instructions to enter judgment for the defendants.

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Respectfully submitted,

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