(15) (16) (8)

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.

PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,

v.

ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *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 OF RESPONDENTS ROBERT K. WILKS, *et al.*

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QUESTION PRESENTED

Whether the discrimination claims of unconsenting non-minority employees should be dismissed as impermissible collateral attacks if the employer claims to act pursuant to a consent decree which contemplates race conscious employment decisions.

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

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

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STATEMENT

Respondents Robert K. Wilks, *et al.* are fifteen individual white male employees of the City of Birmingham Fire & Rescue Service ("BFRS") and one white male employee of the City of Birmingham Engineering Department.[1] Pet. App. 82a.[2] Each would have been promoted to a position as a Fire Lieutenant, Fire Captain or Civil Engineer but for the race conscious conduct of the City of Birmingham ("City"). Pet. App. 79a, 105a. The respondents filed individual suits against the City, Mayor Richard Arrington, Jr., and the Personnel Board of Jefferson County ("Board")[3] under Title VII and the Equal Protection Clause.[4] The defense to these suits was premised upon a claim of compliance with consent decrees entered in litigation to which respondents were not parties. Pet. App. 37a-38a.

A. The Consent Decree Cases.

During 1974 and 1975, racial discrimination suits were filed in the United States District Court for the Northern District of Alabama by the United States, by the Ensley

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[1]In addition, an association of employees of the City is a plaintiff-respondent. Pet. App. 67a.

[2]The form of citations is as follows: the Appendix to the Petitions for Certiorari is cited as "Pet. App."; the Joint Appendix is cited as "J.A."; exhibits to the 1985 trial are cited as "PX" (plaintiffs' exhibits) or "DX" (defendants' exhibits); 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 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]".

[3]The Personnel Board is an independent entity created by Act No. 248 of the 1945 Alabama Legislature, as amended. PX 1; R1-27. It administers a civil service and merit system for public employees of the City, Jefferson County and other municipalities in the county. The Board administers examinations for entry level and promotional positions in the BFRS, and ranks employees for consideration by the City on the basis of test scores and seniority. J.A. 429-435, 553-554.

[4]Claims under 42 U.S.C. § 1981 and state law were also alleged. The suits were filed within the statute of limitations following the denial of promotional opportunities to the individual plaintiffs. Each plaintiff exhausted administrative remedies before the Equal Employment Opportunity Commission. PX 425-454, R1-40.

Branch of the NAACP, and by a class of blacks which included petitioner John W. Martin. Pet. App. 3a-4a. The complaints charged that the City, the Board, Jefferson County and numerous other municipalities had engaged in employment practices resulting in unlawful discrimination against blacks and women. Pet. App. 236a-237a. The district court consolidated the suits and severed the issues for separate trials pursuant to Rule 42, F.R.Civ.P. Pet. App. 4a-5a.

At issue in the first trial was whether the Board's use of entry-level Office Worker, Firefighter and Police Officer examinations unlawfully discriminated against blacks. The district court found that the Board's use of the Firefighter and Police Officer tests violated the Title VII rights of blacks; no violation of law was found in the use of the Office Worker test. J.A. 553-599. Citing the good faith voluntary efforts of the Board to administer nondiscriminatory tests and affirmatively to recruit blacks for public employment, the district court rejected the claims of the plaintiffs under the Equal Protection Clause of the Fourteenth Amendment.[5] J.A. 556-557. As a remedial device, the district court ordered the Board to comply with a short-term referral quota and thereafter achieve a goal of referral of blacks for entry-level

[5]The assertion of *amici* NAACP Legal Defense and Education Fund, *et al.* br. 7 n.9, that Birmingham is a recalcitrant employer of the sort found in *United States v. Paradise,* 480 U.S. 149 (1987) and *Local 28, Sheet Metal Workers v. EEOC,* 478 U.S. 421 (1986) is baseless. In 1977, the district court noted that the Martin plaintiffs and the United States had failed to prove intentional discrimination and rejected their constitutional and § 1981 claims. J.A. 556-557. The City consent decree made note of the good faith efforts of the City to comply with the civil rights statutes through adoption of fair hiring ordinances and the adoption of voluntary affirmative action plans. Pet. App. 123a, 124a. Petitioner Richard Arrington, Jr., the first black Mayor of Birmingham, has served as Mayor since 1979 and has long supported preferential treatment for blacks. PX 403, R1-20. A majority of the citizens of Birmingham and a majority of its city council members are black. Indeed, Birmingham's affirmative action policies have resulted in two challenges to its minority contractor set-aside ordinances. *See, Arrington v. Associated General Contractors,* 403 So.2d 893 (Ala. 1981), *cert. denied,* 445 U.S. 913 (15% set-aside struck down); *Associated General Contractors v. City of Birmingham,* CV-77-506-014-WAT (Cir. Ct. Jefferson County, Ala.) (pending challenge to City's current 35% set-aside for black contractors).

Firefighter positions based on applicant flow. J.A. 588-589. The district court's findings, in relevant part, were upheld on appeal. *Ensley Branch of the N.A.A.C.P. v. Seibels,* 616 F.2d 812 (5th Cir.), *cert. denied,* 449 U.S. 1061 (1980). Many blacks were thereafter hired, long before entry of the consent decrees. J.A. 438. Vacation of that order has not been sought.

A second trial was held in August and October, 1979. At issue were eighteen additional tests and various other screening devices and rules used by the Board. Pet. App. 237a. Fire Department promotional examinations were not attacked. J.A. 594-595. As in the first trial, the City did not participate, and the independent claims against the City were never tried. Pet. App. 16a, 237a; J.A. 762.

Prior to the court's decision in the second trial, counsel for the parties in the *Jefferson County* litigation engaged in lengthy, secret negotiations which resulted in the City and Board Consent Decrees. Pet. App. 237a; J.A. 520-522. These decrees were tendered to the district court judge and provisional approval was entered on June 8, 1981 in summary fashion. J.A. 694-696. The district court found the consent decrees to be "fair, reasonable and lawful settlements." The court approved the consent decrees "subject to further hearings" and the consideration of "any objections which may be filed and presented at a fairness hearing in accordance with the procedures explained below." J.A. 695.[6] It was further ordered that notice be given to all "interested persons." However, adequate notice was not given to the employees of the BFRS sufficient to indicate that their promotions would be adversely affected.

A public statement was published in the classified section of the *Birmingham News* on June 14 and 21, 1981. The

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[6]The district court's June 8, 1981 Order provided the following procedure for the presentation of objections:

> All objections to the Consent Decrees must be filed in writing with the Clerk of the Court by July 14, 1981. The Clerk shall forward copies of any such objections to counsel for the parties to the Consent Decrees as they are filed. A fairness hearing will be held on August 3, 1981 at 9:00 a.m. in Courtroom 2.

J.A. 695-696.

contents of the statement were materially different from a much more detailed notice mailed to minority employees and to black class members. In relevant part, the published statement provided that the "Consent Decrees contain a number of general injunctive provisions, including goals for blacks and women, each of which are designed to correct for the effects of past discrimination and to insure equal opportunities for all applicants and employees with the City and in the civil service system administered by the Personnel Board." Pet. App. 174a. While the statement addressed the appropriate relief to be granted with respect to alleged Fire Department hiring discrimination through the Board's test, Pet. App. 172a, nothing in the published statement indicated that BFRS promotional goals were to be included in the consent decrees. Significantly, the notice which was mailed to black employees included copies of the entire consent decrees, Pet. App. 144a, and a different notice explaining in detail the long-term and interim annual promotional goals and quotas in the BFRS. Pet. App. 180a-189a. The decrees made no provision for posting in the workplace.

The public statement required that written objections were to be filed by July 14, 1981. The statement did not say whether evidence would be taken at the fairness hearing and failed to outline the procedure which would be followed at the hearing. Pet. App. 171a-175a.

The litigation did not have the notoriety that petitioners suggest. While BFRS Chief Gallant knew that the litigation was pending, he did not know that Fire Department promotions might be at issue. J.A. 452. The City consent decree was negotiated secretly by the City's attorneys, who were in communication with the Mayor. After the decree was negotiated, Council approval was sought for the backpay provision whereby the City settled massive backpay claims for a total backpay liability of only $265,000. Mayor Richard Arrington, Jr. testified that he certainly did not oppose committing the City to the injunctive provisions of the decree, and in view of the meager backpay award and receipt of tools to prefer blacks in employment, deemed the entire

matter to be "the best business deal [the City] had ever struck." J.A. 520-527.

In accordance with the procedure for objections dictated by the district court, the Birmingham Firefighters Association (BFA) and its President filed written objections and appeared at the fairness hearing through the undersigned counsel of record. J.A. 699-713; 732-740. At the August 3, 1981 fairness hearing, the BFA announced that it would promptly move to intervene in order to continue to protect and assert its interests. J.A. 730. The district court responded that a motion to intervene would be denied as untimely given the passage of a lengthy period of time since the trial on the entry-level Firefighter test. J.A. 771. At the close of the hearing, the court announced that it would receive additional briefs until August 5, 1981. J.A. 770.

On August 4, 1981 the BFA and two of its members filed a motion to intervene as of right under Rule 24, F.R.Civ.P. J.A. 774-776; Pet. App. 6a. The movants were Billy Gray, a white male Fire Lieutenant, Tommy Sullivan, a white male Firefighter, and the BFA. Movants sought to intervene both individually and as representatives of the "presently-employed firefighters of the City of Birmingham." J.A. 774. Movants represented that they "desire to intervene in this action solely for the purpose of contesting the legality of the proposed consent decrees" and that they had been unaware of the ongoing secret settlement negotiations. J.A. 773. *See also,* Pet. App. 237a (court aware of ongoing negotiations). On August 5, 1981, the BFA filed, in timely fashion, a supplemental memorandum which noted that intervention was sought in order to "preserve [movants'] rights to object to the provisions of the Decrees." J.A. 781.

The district court entered an order approving the consent decrees on August 21, 1981. Pet. App. 247a-249a. The court's accompanying opinion rejected all objections to the consent decrees[7] and approved the settlement under the

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[7]The court justified the BFRS promotional goals on the 1977 findings of entry level discrimination. Pet. App. 244a. The Eleventh Circuit, in its 1985 opinion, questioned the validity of a rationale that such findings required adoption of promotional goals and quotas. Pet. App. 19a.

"reasonableness" standard.[8] In addition, the district court found the motion to intervene to be untimely since "[t]he litigation has been pending for over five years and has been vigorously contested by the existing parties through two trials and one appeal." Pet. App. 246a.

A timely appeal was filed by the BFA in which it sought to overturn the denial of its motion to intervene. *United States v. Jefferson County,* appeal no. 81-7761 (11th Cir.). In addition, the BFA sought reversal of the approval of the consent decrees.[9]

The United States Court of Appeals for the Eleventh Circuit found that the district court did not abuse its discretion by denying intervention to the BFA and its members in the consent decree case. *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983); J.A. 149-161. The appeals court found that the President of the BFA had been aware of the litigation and that no existing party then represented its interests. J.A. 154-155. In addition, the court held that intervention following the announcement of the decrees would "have plainly prejudiced the existing parties since it would have nullified these negotiations . . . " J.A. 155. Finally, the court found that the BFA and its members would suffer no prejudice by a denial of intervention since individual firefighters were free to "institut[e] an independent Title VII suit, asserting the specific violation of their rights." J.A. 158. The Eleventh Circuit expressly rejected the "impermissible collateral attack" doctrine followed by other

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[8]This Court rejected the "reasonableness" standard for approval of a public employer's affirmative action plan in *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986). In addition, the district court noted that the decree might not correspond with the findings of discrimination it would have made or the remedial relief it would have ordered had it completed the decision that was being drafted. Pet. App. 246a.

[9]*See,* Brief of Appellant, *United States v. Jefferson County,* appeal no. 81-7761 (11th Cir.). The appeals court, upholding the denial of intervention, did not reach the legality of the decree provisions. J.A. 149-161.

circuits and advanced by petitioners here,[10] and noted that its decision parallelled the analysis of *Ashley v. City of Jackson,* 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of *certiorari*). J.A. 156-159.

B. The Reverse Discrimination Litigation.

While the appeal from the denial of intervention was pending, the first of the individual respondents' complaints was filed on April 14, 1982. Pet. App. 110a (*Bennett v. Arrington,* number CV-82-P-0850-S (N.D. Ala.)). Respondents sought preliminary and permanent injunctive relief against race-conscious promotions which respondents claim violated Title VII, the Equal Protection Clause of the Fourteenth Amendment, § 1981 and Alabama state law. Pet. App. 112a-116a. The *Bennett* respondents also alleged that the City and the Board were unlawfully promoting employees on a racial basis under the "assumed protection of consent settlements . . . " Pet. App. 113a. The *Bennett* respondents' application for preliminary relief, J.A. 35-39, was denied after an oral hearing on the question whether the provisions of the consent decrees required the challenged race-based promotions. J.A. 49-86. The Martin petitioners intervened and claimed the suit was an impermissible collateral attack on the consent decrees and was, therefore, due to be dismissed. J.A. 78-79. An appeal was taken from the denial of the preliminary injunction, J.A. 48, which the Eleventh Circuit consolidated with the appeal from the denial of the BFA's motion to intervene in the consent decree case.[11] J.A. 149.

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[10]The petitioners, who were all parties to the *Jefferson County* appeal, at no time sought review by this Court, and should be estopped in their attempts to relitigate the decision that respondents are not bound by the decrees and may pursue their independent claims of discrimination against their employer. Indeed, it was in reliance on that decision against petitioners that these cases have been vigorously pursued.

[11]The Eleventh Circuit affirmed the denial of preliminary relief in *Bennett*. Appeal no. 82-7129 (consolidated with *U.S. v. Jefferson County*), J.A. 149-161. The court found that respondents failed to show irreparable injury, a necessary requirement for preliminary relief, and could be made whole through awards of backpay, remedial seniority and mandatory promotion should they prevail at a hearing on the merits. J.A. 160-161.

Following the initiation of the *Bennett* complaint, other white male City employees filed discrimination complaints in the United States District Court for the Northern District of Alabama, the same district court which had entered the consent decrees. J.A. 93 (*B.A.C.E. et al. v. Arrington*), 130 (*Wilks, et al. v. Arrington*). The various complaints were consolidated, pursuant to an agreement between the judges of the district court, J.A. 210, in a single case file captioned *In re: Birmingham Reverse Discrimination Employment Litigation,* J.A. 218. The cases were assigned to Judge Pointer, the same judge to whom the first reverse discrimination case had been assigned and the judge who had entered the consent decrees.

The petitioners promptly sought dismissal of these cases claiming that they constituted impermissible collateral attacks on the consent decrees. J.A. 220-224. On May 14, 1984, the district court refused dismissal. The court then held that the plaintiff-respondents had to prove that the provisions of the consent decrees did not require the challenged race-based promotions. The court determined that the only factual issue was whether, under the terms of the City consent decree, the black promotees were demonstrably less qualified than the respondents. Paragraph 2 of the City decree provides: "Nothing herein shall be interpreted as requiring the City to . . . promote a person who is not qualified, or to . . . promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." Pet. App. 124a. The City contended that paragraph 2 had never been "invoked," was therefore irrelevant, and was not considered in making promotions. Indeed, the City admitted, and the district court found, that the City promoted the black candidates without consideration of the relative qualifications of all the candidates. Pet. App. 105a. In addition, the district court required that the respondent plaintiffs prove that the City knew at the time of promotion that the black promotees were demonstrably less qualified. Pet. App. 28a, 29a; J.A. 237.

The district court held further that respondents could not

challenge the lawfulness of the consent decrees.[12] Consequently, the question whether the race-based promotions were permissible under Title VII and the Equal Protection Clause was eliminated and the case limited to the inquiry whether the consent decrees mandated the challenged promotions.[13]

A five-day bench trial was held in December 1985 at which respondents, in accordance with the pretrial orders of the court, demonstrated that the consent decrees did not mandate the challenged actions because of the disparities in qualifications of the competing black and white candidates. The relative qualifications of each black and white candidate were proven by using simple, objective criteria summarized by chart exhibits. J.A. 487-501. In addition, respondents offered the test scores of the competing candidates, and expert testimony of the statistical disparities in those scores. Pet. App. 87a-91a. Respondents submitted deposition testimony of the BFRS Fire Chief, the BFRS Deputy Chief, and the City's Chief Personnel Affirmative Action Officer which

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[12]The transcript reflects the following from the May 14, 1984 hearing on the motions to dismiss:

> MR. JOFFE: In essence, your honor, saying it is not open as an issue as to whether the decrees are per se unlawful or whether the decrees are unlawful in some other ways. You seem to be saying that you will hold that the decrees are unlawful. [sic — counsel obviously said "lawful"]
>
> THE COURT: That is correct. That is an issue, as I view it, the Court of Appeals did not decide but then it still is a question of lawful in the sense that the mandated aspects of the Decree may be carried out without liability. As I understand the Court of Appeals' decision, that is a permissible conclusion to be reached with their decision.

J.A. 250-251. *See also* J.A. 281. The Martin petitioners representation that validity of the decrees was an issue for trial, Brief at 11, is false.

[13]*See* J.A. 277-291 (district court's interim opinion dated Feb. 18, 1985 finding that defendants may prevail if they "establish that the challenged promotions were made because of the consent decree," J.A. 280). Thereafter, the district court strictly supervised and limited pretrial preparation in accordance with its position and instructed respondents to try their case in four days. *See* J.A. 329, 340-355. In addition, in its Feb. 18, 1985 Opinion, the district court again summarily held valid the "affirmative action aspects of the decrees regarding . . . promotion of blacks . . . " J.A. 281.

positively demonstrated that the City at no time considered the relative qualifications of the black and white candidates and issued promotions strictly on a one-for-one racial basis without regard to relative qualifications. J.A. 453-477; 502-514.[14]

The defense consisted mainly of the trial records of the 1976 and 1979 trials offered by the City "not for the truth of any matter asserted" in those records but "simply [to show] what was before the Court and the parties to the consent decree at the time it was entered." J.A. 403; DX 1977, 1978-A, 1979, 1980-A. The Court received the records on that limited basis with respect to the Wilks respondents only. J.A. 405-406. The respondents did not attempt to contest this record information since it was beyond doubt that such a record "was before the Court and the parties to the consent decree at the time it was entered."

At the conclusion of the trial, the district court entered, with minor modification, proposed findings of fact and conclusions of law submitted by the defendants. Pet. App. 27a-66a. The court held that the City was permitted, pursuant to the consent decrees, to promote demonstrably less qualified persons on the basis of race without using any job-related selection procedure. Pet. App. 105a-108a. The court reiterated its earlier holding that the consent decrees were valid remedial devices and that the respondents "cannot collaterally attack the Decree's validity." The court explained that the "only avenue of attack open to the private plaintiffs is to show that the challenged action was not taken pursuant to the Decree." Pet. App. 61a-62a. The district court entered findings that neither plaintiff-respondents, nor their privies, were parties to the consent decrees, Pet. App. 70a, 75a, 105a; that, with one possible exception, none of the black promotees were victims of past discrimination; that while the challenged fifty percent goal was implemented

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[14]Notwithstanding the proviso of paragraph 2 of the City decree, p. 8, *supra,* the district court found that the City was permitted by its consent decree to ignore relative qualifications of prospective employees and therefore could use no job-related selection procedure. Pet. App. 105a-106a, 108a.

the relevant labor pool for Fire Lieutenant candidates was between nine and thirteen percent black, Pet. App. 105a-106a; and that but for their race each respondent would have been promoted and the City had made no effort to use a job-related selection procedure in evaluating promotional candidates, Pet. App. 105a-106a.

C. The Decision Of The United States Court Of Appeals For The Eleventh Circuit In The Reverse Discrimination Litigation.

Respondents Wilks, *et al.* appealed to the United States Court of Appeals for the Eleventh Circuit. That court reversed and remanded. *In re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492 (11th Cir. 1987); Pet. App. 3a-26a.

On appeal, respondents claimed that the district court had erroneously required them to prove that the challenged promotions were not made pursuant to the consent decrees and had improperly bound them to the terms of the decrees. In addition, respondents demonstrated that the petitioners' conduct was not within the purview of lawful affirmative action and the district court's findings that the City's conduct was mandated by its consent decree was clearly erroneous.

Relying on this Court's decision in *Local No. 93 v. City of Cleveland,* 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), the Eleventh Circuit held that "even if a consent decree purports to affect the rights of third parties, those parties are not bound by the terms of the decree unless their interests were adequately represented by a party to the decree." Pet. App. 14a. Reviewing its earlier decision on the appeal from the intervention proceedings, the court noted that respondents were not parties to the decrees and their claims did not accrue until "after the decrees became effective and the challenged promotions were made." Pet. App. 15a. The Eleventh Circuit further added that there was no other factor justifying preclusion: "the individual plaintiffs [did not] have an identity of interest with a party to the consent decrees that they should be treated as parties for preclusion purposes." Pet. App. 15a. After carefully consid-

ering the time at which respondents' claims arose, its earlier decision precluding the BFA's attempt to intervene several weeks before the settlements were approved, and the voluntary nature of the affirmative action plan embodied in the consent decree, the Eleventh Circuit held that the respondents should not be bound by the consent decrees.[15]

Since the district court had incorrectly bound these respondents to the provisions of the decrees, hence limiting the scope of the trial, the Eleventh Circuit directed the district court to try plaintiffs' discrimination claims under the standards provided in *Johnson v. Transporation Agency,* 480 U.S. ___, 105 S.Ct. 1442 (1987) (Title VII), and *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986) (Constitution). Pet. App. 17a-19a. The court also stated that consideration of the defendants' conduct without giving any preclusive effect to the consent decrees is warranted under the facts of this case:

> The reasons for according a consent decree no more weight than a voluntary affirmative action plan when the consent decree is offered as justification for a race conscious employment decision are especially strong where, as here, vitally interested parties are not parties to the plan incorporated into the decree. The City Decree does contain a provision — paragraph 2 — that facially serves to protect the interests of nonminority employees. In light of the district court's interpretation of paragraph 2, however, that protection is illusory at best. The district court's interpretation of the City decree permits the City to make race conscious promotions without using *any* job-related selection procedure. Given the natural potential that such an arrangement will trammel the interests of nonminority employees, we are compelled to the conclusion that the district court should subject the consent decrees to heightened scrutiny under the second prong of the *Johnson* analysis when it tries the individual plaintiffs' claims.

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[15]Judge Anderson filed a dissenting opinion which noted that while the employer should not be held liable if it believed it was complying with the decrees, he agreed with the opinion of the court to the extent that it permitted respondents to "challenge the consent decree prospectively and test its validity against the recent Supreme Court precedent." Pet. App. 24a.

Pet. App. 19a (emphasis in original). The other issues raised by respondents on appeal were therefore not considered by the Eleventh Circuit.

This Court limited its grant of certiorari to the narrow question of whether an action by a nonparty which implicates a consent decree entered in settlement of prior discrmination litigation must be dismissed as an "impermissible collateral attack."[16]

SUMMARY OF THE ARGUMENT

Throughout years of litigation — including extensive discovery, a complex trial, and two appeals — respondents have sought a meaningful opportunity to have their discrimination claims heard and considered by a federal court. Petitioners have continually sought to insulate themselves from liability claiming that their conduct was permitted by an affirmative action plan embodied in a consent decree, the validity of which they assert cannot be questioned. This Court granted *certiorari* to resolve the narrow issue of whether respondents may challenge the provisions of consent decrees which affect them and to which they are not parties in separate and subsequent litigation.[17]

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[16]The petitioners' assertion in the question presented by each petition that respondents "had notice and an opportunity to be heard" is patently wrong and contrary to both the 1983 and 1987 decisions of the Eleventh Circuit in this litigation. Indeed, the Eleventh Circuit held that the BFA's participation at the fairness hearing was not sufficient to make it a party to the decrees and respondents did not "implicitly" consent to the decrees. This is akin to a finding that there was no waiver of an opportunity to be heard. Pet. App. 15a.

[17]The Court's grant of *certiorari* was limited to the identically worded first question in each of the three petitions. 101 L.Ed.2d 881 (June 20, 1988). This question is the identical question which the Court failed to resolve in the preceding Term in *Marino v. Ortiz,* 108 S.Ct. 586 (1988). While it was undisputed that the *Marino* petitioners intentionally eschewed an invitation to intervene, 806 F.2d 1144, 1147, as demonstrated at Part I(C), *infra,* the premise of the question presented in the instant case that respondents "had notice and the opportunity to be heard before entry of [the] decrees" of the sort necessary to adjudicate their constitutional and statutory rights is strongly contested and simply not true.

In addition, petitioners also sought review of the extent of any "extra protection" a consent decree might provide (Personnel Board pet. i), the

As nonparties, respondents are not bound by the consent decrees and are at liberty to challenge the illegal voluntary conduct of their employer. Whether such conduct was taken pursuant to a consent decree is, in our view, of little consequence since a consent decree merely embodies a voluntary affirmative action plan. *See Local No. 93 v. City of Cleveland,* 478 U.S. 501, 106 S.Ct. 3063 (1986).

Binding nonparties to the provisions of a consent decree which they or their privies had no part in making violates fundamental notions of due process. *Hansberry v. Lee,* 311 U.S. 31 (1940); *Parklane Hosiery v. Shore,* 439 U.S. 322, 327 n.7 (1979). It is without dispute that respondents were not parties or privies to parties to the Birmingham consent decrees and no decree party represented the interests of the nonminority employees. Pet. App. 15a, 105a. Indeed, the collateral attack bar advocated by petitioners has no foundation in the decisions of this Court. *See Ashley v. City of Jackson,* 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of *certiorari*).

This case comes before the Court in a unique factual context. Intervention was sought *before* entry of the consent decrees by the Birmingham Firefighters Association ("BFA") and two individual firefighters. J.A. 774-776. The City successfully opposed intervention claiming the BFA members had no standing to contest decree requirements and their application to intervene was untimely. J.A. 534-552. The Eleventh Circuit upheld the denial of intervention finding that no prejudice should accrue to the nonminority employees because they were free to institute independent suits asserting the specific violation of their rights after their

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scope of the nonparties' right to challenge the decree (Arrington pet. i), and the propriety of the Eleventh Circuit's instructions to the district court on remand (Martin pet. i). This Court denied review of these matters which will not therefore be addressed in this brief.

In view of the limited basis upon which review has been granted, respondents will not address the propriety of the provisions of the consent decrees, the sufficiency of the record of discrimination in the consent decree litigation, nor the legality of the challenged conduct as addressed at Martin br. 3-6, 38-39. *See also,* Arrington br. at 10 ("[n]o question concerning the propriety of race-conscious relief is before the Court.").

cause of action accrued. Any earlier claims would have been premature and speculative. J.A. 149-161. Respondents filed those suits, and petitioners now claim respondents are again wrong — they should have perceived their interests during the pendency of the consent decree cases and intervened. Such a shifting of positions to deny any opportunity to contest conduct related to a consent decree has been described as a judicial pincer movement on the due process rights of nonparties to litigation. Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process,* 1987 Legal Forum 155 (1987). The law is clear that persons not parties to litigation do not have an affirmative duty to intervene in litigation to which they have not been joined by the existing parties. *Chase National Bank v. City of Norwalk,* 291 U.S. 431 (1933). Moreover, a judicial rule, created pursuant to Rule 24, F.R.Civ.P., which terminates respondents' claims before they accrue impermissibly alters the statute of limitations in a manner contrary to the provisions of 28 U.S.C. § 2072.

Even if there is a duty to intervene, before individual Title VII and Constitutional rights are altered, nonparties are, at a minimum, entitled to adequate notice and a meaningful opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 317 (1950). The Constitution places the burden to give adequate actual notice on the existing party through the exercise of "reasonable diligence." *Tulsa Professional Collection Services v. Pope,* 108 S.Ct. 1340 (1988). In this case, it is undisputed that petitioners made no effort to give individual actual notice to respondents, notwithstanding the fact that all were city employees when the decrees were approved. Through the exercise of reasonable diligence, individual notice by mail of the settlement and approval proceedings could easily have been provided. Moreover, the City's black employees were each mailed a detailed notice describing the consent decrees and the specific effect the decrees would have on Fire Service promotions together with a complete copy of the decree. Pet. App. 144a-147a. The statements published in the newspaper simply announced the filing of "a decree." Indeed, under

such circumstances, it is patently unfair for a court to terminate respondents' causes of action before they have accrued.

Petitioners argue that by permitting employers to negotiate consent decrees which will immediately nullify the rights of nonparties to file discrimination claims, they will further the objective of voluntary compliance with our nation's antidiscrimination laws. But, the collateral attack bar impermissibly strips nonparties of an adequate opportunity to assert their individual claims of unlawful discrimination. Permitting independent suits such as those filed by respondents furthers the important policy against the prospective waiver by others of the right of each individual to be free from unlawful discrimination. *See Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986); *Alexander v. Gardner Denver Co.,* 415 U.S. 36 (1974). Moreover, preservation of the right of nonparties to sue will discourage employers from impermissibly shifting the burden of the past discrimination to innocent unrepresented employees through the settlement process. *W. R. Grace & Co. v. Local 759,* 461 U.S. 757 (1983). Employers will remain free to embody settlements in consent decrees and gain the benefit of judicial enforcement and supervision, but still be accountable to their employees for the consequences of actions which are not permissible remedial efforts.

A public employer's race-based conduct should be subject to the strict and searching scrutiny of adversarial litigation by the aggrieved parties, rather than the cursory review of facial "reasonableness" which the fairness hearing held in this case provided. While it is laudable to advocate settlement, voluntary compliance, and repose for litigants, such goals cannot be achieved at the expense of unrepresented parties.

Respondents suggest that two alternative approaches to the issue at hand fairly protect the rights of unconsenting nonparties while permitting employers to use consent decrees to achieve lawful objectives.

First, parties to a proposed consent decree may join potentially-affected persons as parties to the litigation under the mandatory joinder provisions of Rule 19, F.R.Civ. P.

Through this procedural device nonparties will receive adequate notice of the proposed decree through service of process, and will thereby be fully informed that a court is about to enter a judgment which may affect their rights.

As an alternative, should the district court or decree parties not see fit to join the potentially affected third parties to the litigation under Rule 19, Congress has determined through legislation creating reasonable statutes of limitation that injured parties must file suit within a definite period of time from the date upon which their injury accrues. It makes sound, logical and legal sense for injured parties to seek redress after they are in fact injured rather than to require the filing of protective motions to intervene by persons who may never suffer injury. Indeed, it makes even more sense to require a hearing on the claims of some fifteen similarly situated firefighters rather than to require the intervention of hundreds of rank-and-file firefighters who have the right to apply for promotion to the position of Fire Lieutenant. Rather than precipitate duplicative and unnecessary litigation, the channeling of the claims of actually affected persons (as opposed to potentially-affected persons) into a single proceeding is a prudent use of judicial resources, limiting the volume of litigation, while still pursuing the right of unconsenting parties to a meaningful hearing upon the merits with respect to the alleged illegal conduct.

It is clear that in the context of this case, where intervention was sought before entry of the decree and denied, respondents are entitled to challenge decree related conduct in these proceedings. Respondents request this Court to reject the collateral attack bar advocated by petitioners.

ARGUMENT

I. BINDING A NONPARTY TO A JUDGMENT IS VIOLATIVE OF FUNDAMENTAL DUE PROCESS RIGHTS.

A. A Consent Decree Cannot Bind A Nonparty.

It is a settled rule of preclusion law that a judgment is only binding on a party or its privies. *Ashley v. City of Jackson,* 464

U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of *certiorari*).[18] This rule expresses a fundamental notion of due process which ensures that the courts, as the guarantor of the legal and constitutional rights of all citizens, fairly and impartially provide all persons with a meaningful opportunity to be heard. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 327 n.7 (1979); *Hansberry v. Lee,* 311 U.S. 32 (1940). There is no dispute that respondents are neither parties nor in privity with any parties to the consent decrees. Pet. App. 12a-13a, 105a. It follows that the consent decrees cannot and do not bind respondents and that they therefore ought to be free to sue a party to the decrees within the applicable statute of limitations.

In an effort to avoid this fundamental premise, petitioners claim that this Court should adopt the "no collateral attack" bar followed by some federal circuit courts,[19] though not the

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[18]This rule dates back to the opinion of Chief Justice Marshall in *Davis v. Wood,* 1 Wheat. 6, 8-9, 4 L.Ed. 22 (1816) ("everyone should have his own day in court"). *See also Baldwin v. Hale,* 68 U.S. 223 (1864) ("parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified"); *Windsor v. McVeigh,* 93 U.S. 274 (1876); *Litchfield v. Crane,* 123 U.S. 549 (1887); *Hovey v. Elliott,* 167 U.S. 409 (1897).

[19]Since a collateral attack typically involves an attack upon a judgment by a party against whom the judgment was rendered, the term is a misnomer. *See* Kramer, *Consent Decrees and the Rights of Third Parties,* 87 Mich.L.Rev. ___ (forthcoming in Nov. 1988).

The collateral attack doctrine first received judicial recognition in *Black and White Children of the Pontiac School System v. School District,* 464 F.2d 1030 (6th Cir. 1972) (school desegregation case). Thereafter, it appeared in the context of employment discrimination suits. *Prate v. Freedman,* 430 F.Supp. 1373 (W.D.N.Y.), *aff'd,* 573 F.2d 1294 (2d Cir. 1977); *O'Burn v. Shapp,* 70 F.R.D. 549 (E.D.Pa.), *aff'd,* 546 F.2d 417 (3d Cir. 1976), *cert. denied,* 430 U.S. 968 (1977); *Dennison v. City of Los Angeles,* 658 F.2d 694 (9th Cir. 1981) (all collateral burdens on a consent decree are per se impermissible); and *Thaggard v. City of Jackson,* 687 F.2d 66 (5th Cir. 1983), *cert. denied sub. nom. Ashley v. City of Jackson,* 464 U.S. 900 (1983).

The majority of commentators have criticized the no collateral attack doctrine, finding little persuasive analysis to support it. *See* Comment, *Collateral Attacks on Employment Discrimination Consent Decrees,* 53 Chi.L.Rev. 147, 153 (1986) (rationales for *Thaggard* cases applied "haphazardly and with little explanation"); Kramer, *Consent Decrees and the Rights of Third Parties,* 87 Mich.L.Rev. (Nov. 1988) ("Courts that enforce the collateral attack bar have ignored its due process implications."); Cooper, *The*

Eleventh Circuit, which prohibits and excludes any lawsuit which implicates a consent decree entered into pursuant to a settlement of pending Title VII litigation.

This Court has already rejected the rationale that underlies the collateral attack doctrine. In *Hansberry v. Lee,* 311 U.S. 32 (1940), the Court refused on grounds of due process to preclude black plaintiffs from contesting a racially-restrictive covenant which had been held valid in earlier litigation, noting that:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States . . . prescribe. . . .

Id. at 40. Indeed, this rule has been consistently applied by this Court in a variety of contexts. *See Sam Fox Publishing Co. v. United States,* 366 U.S. 683 (1961) (Court upheld denial of intervention to contest provisions of government antitrust consent decree because nonparties would not be bound); *Blonder-Tongue Labs v. University Foundation,* 402 U.S. 313 (1971) (litigated antitrust case); *Sea-Land Services v. Gaudet,* 414 U.S. 573, 593 (1974) (admiralty wrongful death action); *McKinney v. Alabama,* 424 U.S. 669 (1976) (*in rem* obscenity proceeding); *W. R. Grace & Co. v. Local Union 759,* 461 U.S. 757 (1983) (E.E.O.C. conciliation agreement). *See also National Licorice Co. v. N.L.R.B.,* 309 U.S. 350, 366-367 (1940) (judgment in favor of the N.L.R.B. against an employer who contracted with individual nonparty employees in a manner violative of federal labor statutes did not affect the rights of such employees to enforce those contracts against employer); *Belknap v. Hale,* 463 U.S. 491, 510-512 (1983) (state action for

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Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process, 1987 Legal Forum 155 (1987); Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties,* 1987 Legal Forum 103 (1987); Mengler, *Consent Decree Paradigms: Models Without Meaning,* 29 Boston Col.L.Rev. 291, 332 (1988) (failure to consider "third parties' claim on clean slate . . . violates due process").

misrepresentation not precluded by federal labor law). *Cf., Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867 (1984) (individual claims of class members not litigated in unsuccessful class action not barred).

In the context of employment discrimination litigation, this Court recently refused to preclude nonminority employees from seeking redress for discriminatory practices taken pursuant to court orders. *W. R. Grace & Co. v. Local 759,* 461 U.S. 757 (1983) (Title VII); *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986) (U.S. Constitution). *See also Local No. 93 v. City of Cleveland,* 478 U.S. 501 (1986) (claims of nonconsenting intervenors remain even after entry of consent decree). In addition, many appeals courts have also refused to bind nonparties to the provisions of consent decrees, both in the context of appellate review of attempts to intervene in consent decree litigation and in the context of decisions to allow collateral litigation to go forward.[20]

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[20]*See United States v. Automobile Manufacturers Association, Inc.,* 307 F.Supp. 617 (C.D.Cal. 1969), *aff'd,* 397 U.S. 248 (intervention to block entry of a consent decree should be denied because proposed intervenors remained free to pursue their independent claims); *United States v. City of Jackson,* 519 F.2d 1147 (5th Cir. 1975) (Rule 24 intervention denied because courts should accord "little or no weight in the determination of the rights of persons not [a] party" to discrimination decrees); *Harmon v. San Diego County,* 477 F.Supp. 1084 (S.D.Cal. 1979) (nonminority held not bound by terms of a Title VII consent decree where he was not given notice and an opportunity to participate); *McAleer v. American Tel. & Tel. Co.,* 416 F.Supp. 435, 440 (D.D.C. 1976) (Gesell, J.) (consent decree made necessary by employer's discrimination is no defense to the claim of a faultless employee); *National Wildlife Federation v. Gorsuch,* 744 F.2d 963 (3rd Cir. 1984) (consent judgment does not bind a nonparty; nonparties have no duty to intervene); *Reeves v. Wilkes,* 754 F.2d 965, 971 (11th Cir. 1985) (intervention by whites, without notice of decrees, inappropriate; whites cannot intervene to challenge the decree because separate suit is the appropriate route; "By definition, a consent decree only binds those who consent, either expressly or impliedly"); *County of Orange v. Air California,* 799 F.2d 535 (9th Cir. 1986) (intervention to contest consent decree denied as untimely; however, denial of intervention does not preclude nonparty from taking other action; consent decree is a "negotiated settlement affecting only the signing parties"); *United States v. Allegheny-Ludlum Industries,* 517 F.2d 826, 845-46 n.21 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976); *Madison Square Garden Boxing, Inc. v. Shavers,* 562 F.2d 141, 143 (2d Cir. 1977) (consent judgment binds only consenting parties). *See also Samayoa by Samayoa v. Chicago Bd. of Education,* 807 F.2d 643 (7th

In this case, none of the traditional rules for precluding challenges by nonparties to consent decrees are applicable.[21] As previously stated, both the district court and the Eleventh Circuit held that neither respondents, nor their privies, are parties to the decrees. Pet. App. 12a-13a, 105a. While a nonparty might be bound if an existing party adequately represents its interests, *Montana v. United States,* 440 U.S. 147 (1979), the Eleventh Circuit has twice held that no party to the consent decree litigation adequately represented the interests of respondents. In the first appeal, the Eleventh Circuit stated that the "BFA members had no identity of interest with the City . . . From the beginning, the Board and City represented a wide range of occupations in the public sector and had different cost-benefit settlement interests, and incentives, from those of the BFA members." J.A. 155. The appeals court again stated in the decision below:

> [T]he record fails to indicate that the City mounted a vigorous defense to the allegations leveled against it before entering into settlement negotiations. Indeed, the district court never tried the independent claims against the City. Consequently, it is far from clear that the City in any way adequately represented the individual plaintiffs' interest in the events leading up to the entry of the decrees. Moreover, it is not clear that the plaintiffs and the City shared any identity of interest at all. The City's various interests in this dispute conceivably may have conflicted in part with the plaintiffs' single interest in preserving preexisting promotion opportunities. Indeed, the City's interests were antagonistic in that it had every reason to avoid a determination of liability and little reason to object to the promotional aspects of the settlement. The settlement did not require the City to make any additional promotions, but only to

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Cir. 1986) (Easterbrook J., joined by Posner and Coffey, J.J., dissenting from denial of rehearing *en banc*) (consent decrees resolving discrimination claims do not bind strangers and may be challenged).

[21]This case does not involve a special remedial scheme that expressly forecloses successive actions by nonparties. A legislative body may develop an appropriate procedural device which will allow courts and parties, consistent with the due process clause, to achieve finality in litigation. Bankruptcy, reorganization, and probate statutes provide such appropriate remedial schemes. This is not such a case.

> reallocate the promotions that it would have made in any event. In real terms, the relief contemplated by the decrees was to come not from the hands of the City, but from the hands of the employees who would have otherwise received the promotions. At the very least, the City was in the position of a disinterested stakeholder with respect to the contested promotions. Given the disparate interests of the City and the individual plaintiffs, it is clear that the City could not have served as an effective surrogate for the individual plaintiffs' interests when it negotiated the plan incorporated into the consent decrees. Accordingly, it would be impossible to conclude that these plaintiffs are in any way bound by those decrees.

Pet. App. 16a. Given the disparate interests of the employees and the parties to the consent decrees, the finding of the lower court that respondents cannot be bound as parties to the decrees is due to be upheld. *See also, Arizona v. California,* 460 U.S. 605, 650 (1983) (Brennan, J., joined by Blackmun and Stevens, J.J., dissenting) (nonparties not sufficiently represented by existing parties are not estopped).

B. There Is No Basis For A Theory Of Mandatory Intervention.

Petitioners seek to create a rule placing the burden of intervention on nonparties in litigation which may result in a consent decree adversely affecting their rights. Under petitioners' theory, if intervention is not sought in a "timely" manner, nonparties are precluded and effectively bound by any settlement decree entered in the litigation. This theory is flawed.

In *Chase National Bank v. City of Norwalk,* 291 U.S. 431 (1933), this Court held that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* at 441. *See also National Licorice Co. v. N.L.R.B.,* 309 U.S. 350, 366-367 (1940); Comment, *Collateral Attacks On Employment Discrimi-*

nation Consent Decrees, 53 Chi.L.Rev. 147, 157 (1986) (mandatory intervention rejected in *Chase National Bank*). Given the undisputed fact that respondents are entitled to a hearing, they therefore had no duty to intervene.

Petitioners rely upon *Penn Central Merger and N & W Inclusion Cases,* 389 U.S. 486 (1968), to support their claim that respondents had an affirmative duty to intervene in the consent decree proceedings and that respondents should be forever precluded from contesting any action allegedly taken pursuant to the settlement embodied in the consent decree. Petitioners' reliance upon *Penn Central* is misplaced for several reasons.

First, the *Penn Central* litigation arose out of a unique program of massive congressionally-mandated reorganization of an uneconomical national railway system. *Id.* at 492-494. Congress, faced with the prospect of objection to reorganization by competing interests, provided a statutory framework to resolve potential challenges to the plan of reorganization through hearings by the Interstate Commerce Commission (I.C.C.), and limited judicial review of I.C.C. orders. The relevant statutes have since been repealed. *See* Transportation Act of 1940, 5 Stat. 898; 49 U.S.C. § 5. The potential scope of litigation seeking review of I.C.C. orders was so great that Congress saw fit to provide that "orders, writs, and process of the district courts may . . . run, be served and be returnable anywhere in the United States." 28 U.S.C. § 2231. Hence, in *Penn Central*, where suit had been brought before a three judge federal district court sitting in New York, the process of the court in that case ran throughout the nation. *Penn Central*, 389 U.S. at 505 n.4. Narrow judicial review of the proceedings before the I.C.C. was further effected by a waiver of possible objections upon grounds of improper venue by the United States. *Id.* Proceedings in other district courts were stayed, but not dismissed, in order to prevent a multiplicity of litigation regarding the I.C.C.'s merger and inclusion decision.

Second, the claims of all interested parties in *Penn Central* were considered *on the merits* by the Supreme Court. Various Pennsylvania interests objected to the merger order. The

City of Scranton and Milton J. Shapp filed complaints in the New York proceeding. *Id.* at 502. The Borough of Moosic filed suit in the Middle District of Pennsylvania. Scranton and Shapp then intervened in the Moosic action, which was stayed by the district court pending resolution of the New York cases. *Id.* at 503. After Scranton and Shapp failed to prosecute their New York complaints, despite warnings from the court, their claims were dismissed. *Id.* at 502. The New York court added that the claims were substantively of "no merit." *Id.* at 504-505. This Court held that Moosic's petition for mandamus was moot because the stay of the Pennsylvania proceeding had been dissolved. *Id.* at 503. The Court upheld the dismissal of Scranton and Shapp's New York complaint both on procedural grounds and "the lack of merit of their claims." *Id.* at 505.

In discussing further proceedings in the Pennsylvania case, the *Penn Central* Court refused to preclude further proceedings, finding that "Scranton, Shapp and Moosic may of course, seek such relief, if any, in that Court as may be available and appropriate in light of our decision herein." *Id.* at 506. The Court noted that, as parties to the New York case, Scranton and Shapp were precluded from relitigating the merits of the merger order. *Id.* at 505. Moosic was also deemed bound. Although it refused to join the New York case, its claims were identical to those of Scranton and Shapp, and those same claims had been litigated to a conclusion by Scranton and Shapp before both the New York court and this Court. *Id.* at 504-506. Implicit in the Court's decision is a finding that Moosic's interests were effectively represented by Scranton and Shapp in the New York court and that there was no need to duplicate the earlier proceedings in the district court and in appellate proceedings. This Court has held, of course, that a nonparty may be collaterally estopped when an existing party acts as the effective surrogate or privy of the nonparty. *See Montana v. United States,* 440 U.S. 147 (1979), and discussion at Part IA, *supra.* Clearly, Moosic's interests were identical to, represented by, and fully litigated before this Court by Scranton and Shapp.

Third, the scope of judicial review in *Penn Central* was

necessarily very limited. The three judge New York district court was not at liberty to reopen the proceedings of the I.C.C. Rather, judicial review was confined to a determination of whether the action taken by the I.C.C. could be supported by substantial evidence. Accordingly, Moosic could never be entitled to more than a cursory review of the merits of the I.C.C. merger order. The most Moosic could have hoped for would have been a determination of whether the I.C.C. had issued the merger and inclusion orders in the *Penn Central* case upon adequate evidence. As discussed above, both the New York district court and the Supreme Court found the objections to the merger to be without merit. *Penn Central,* 389 U.S. at 504-505.

Finally, litigation seeking judicial review of an I.C.C. order of the kind found in *Penn Central* is fundamentally unlike litigation by third parties seeking to challenge voluntary action taken pursuant to a consent decree. While Moosic's claims were litigated by parties with identical interests, the agreement challenged here stems from the voluntary action of parties with interests in conflict with those of respondents rather than the considered judgment of a court.[22]

Since the *Penn Central* and *Provident* decisions in 1968, this Court has emphasized that personal jurisdiction must be found to attach in order to bind a nonparty. During the following term, in *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969), the *Hansberry* principle was reaffirmed that "[i]t is elementary that one is not bound by a judgment in personam resulting from litigation to which he is not desig-

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[22]The reliance of petitioners' and their *amici* upon *Provident Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968) is without merit. There, this Court expressly declined to decide whether a nonparty could choose to relitigate in state court issues decided in a diversity action to which he was not a party. "We do not now decide whether such an argument would be correct under the circumstances of this case." *Id.* at 114. Similarly, reliance by the City on *Arizona v. California,* 460 U.S. 605 (1983) is erroneous. *Arizona* was an original jurisdiction case wherein this Court refused to reopen past decisions relying upon the doctrines of *res judicata* and collateral estoppel. The Court held the Indian Tribes were bound by its earlier findings because the United States had fully represented their interests. *Id.* at 626-627; *see also, id.* 650-652 (Brennan, J., dissenting).

nated as a party to which he has not been made a party by service of process. . . . " *Zenith Radio,* at 110.

Given the unique circumstances in *Penn Central,* it is clear that this Court has never accepted the principle of mandatory intervention.

C. Even If There Is A Duty To Intervene, Due Process Requires Adequate Notice And A Hearing.

Respondents never received adequate formal or actual notice of the pendency of the settlement. They received no invitation to intervene, and no appellate court has yet ruled upon the merits of either the facial validity of the decrees or the conduct of the City and Board in denying promotions to the respondents.

Petitioners' assertion that respondents should never be allowed to bring their claims before any court presents a uniquely unfair situation in the factual context of this case. The BFA and two firefighters sought to intervene *prior* to approval of the consent decrees. Petitioners successfully opposed intervention by would be objectors on grounds of timeliness and standing. Petitioners now paradoxically claim that respondents intentionally bypassed an opportunity to intervene and are thereby estopped. City Br. at 36-37. *See also* Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process,* 1987 Legal Forum 155 (1987). Respondents contend, however, that they have diligently sought to assert their rights at every opportunity.

1. *Adequate Notice Was Not Given.*

Though repondents are of the opinion that the parties to the consent decrees in this case were under a mandatory duty to join those nonparties whom they sought to bind by their proposed decree, see Part IV, *infra,* respondents submit that if intervention is required, then nonparties should, at a minimum, receive formal notice. The practical effect of the doctrine of mandatory intervention proposed by petitioners is that parties to a consent decree may obtain a consent

judgment from a court and make that judgment binding against all third parties. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950) requires that in such circumstances, parties are entitled to the "best notice practicable." If a person's identity and whereabouts are known, the party seeking to bind another must mail or personally serve specific notice of the action. *Mullane,* 317-318.

In *Mullane,* this Court struck down a state statute permitting notice by publication to known beneficiaries in a proceeding for judicial settlement of trust accounts despite the fact that the trustee knew their identities and addresses. It made no difference that Mullane received actual notice of the proceeding and represented the interests of known beneficiaries. This Court held, at a minimum, individual notice by mail was required to be given to known interested parties. *Mullane,* 318-320.

Last term in *Tulsa Professional Collection Services v. Pope,* 108 S.Ct. 1340 (1988), this Court again upheld the duty to give adequate notice by mail to known interested parties. The *Tulsa* Court struck down an Oklahoma statute permitting notice by publication to known creditors in a state probate proceeding. The Oklahoma statute permitted notice by publication for 2 consecutive weeks in a local newspaper. The publication commenced after the state probate court opened the estate upon request of the executor or administrator of the estate. This Court found that when private parties trigger a state statute of limitations through commencement of judicial proceedings there is sufficient state action to implicate the Due Process Clause. In such circumstances, "due process is directly implicated and actual notice generally is required." 99 L.Ed.2d at 577. The party giving such actual notice bears the burden of "reasonably diligent efforts . . . to uncover the identities . . . " of those interested parties that are "reasonably ascertainable. . . . " *Id.* at 578. This Court held that if the interested nonparties "identity was known or 'reasonably ascertainable,' then termination of appellant's claim without actual notice violated due process." *Id.* at 579.

The notice must be sufficient to apprise nonparties of the nature of the decree-approval proceedings, the effect of failure to seek intervention, and the time limit for motions to intervene. Comment, *Collateral Attacks On Employment Discrimination Consent Decrees,* 53 Chi.L.Rev. 147, 160-161 (1986). Adequate notice must apprise the potentially affected nonparty of the procedure for resolving claims at a hearing so as to permit the objector to adequately prepare for the hearing. *Memphis Light, Water and Gas Division v. Craft,* 436 U.S. 1, 13-15 (1978).

No effort was made to give adequate formal notice in this case and it is without dispute that actual notice was not given.[23] The published statement made no mention of the goals and quotas for BFRS promotional positions, did not describe the nature of the proceedings at the fairness hearing, failed to advise the nonparties that they could seek to intervene or when they would be barred from doing so, and deceptively stated that the decree was designed to merely ensure "equal employment opportunities." Pet. App. 171a-174a. The loss that the employees who were denied promotions were to suffer is not made clear by the alleged "notice". More importantly, it is undisputed that all of the respondents were incumbent city employees during the decree-approval proceedings, and no notice was given by either hand delivery, mail or posting at the job site. The notice provisions of the decree made clear that only the black employees received actual notice. Pet. App. 141a-146a. To the extent that the consent decrees were to foreclose the claims of the City's nonminority employees, they were entitled to the same notice as that provided to the City's black employees.

In similar fashion to the notices by publication in *Mullane* and *Tulsa,* the published statement in this case was triggered by judicial action in the form of the district court's June 8,

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[23]The theory of notice was not raised in the petitioners' appellee briefs in the Eleventh Circuit. Rather, petitioners only claimed that an adequate *hearing* was given in the form of the Fairness Hearing. *See,* Brief for Richard Arrington, Jr. and the City of Birmingham, at 26 (11th Cir.); Brief for Appellees-Cross Appellants John W. Martin, *et al.,* at 2, 23 (11th Cir.). As discussed in the text, the formal published statement was inadequate and there is no evidence in the record of actual notice to the respondents.

1981 order provisionally approving the consent decrees. The City argues that respondents should have realized that their interests would potentially be affected by the proposed decrees and that therefore they should have intervened in the consent decree proceedings. By the same token, however, the Board and City, equipped with the numerous lawyers who had negotiated the decrees, through reasonable diligence should have equally realized that the City's existing nonminority employees would be affected by the decrees and ascertained their identities and addresses through the City's payroll records. Hence, respondents should have received the best possible notice in person or by mail. Indeed, the *Mullane* and *Tulsa* decisions require notice by mail to known and interested persons — regardless of whether those persons are aware of the proceedings.

In addition to petitioners' use of a defective mode of providing notice, the parties to the consent decrees crafted a deceptively vague notice. The notice mailed to each black employee included a copy of the entire consent decree together with a detailed summary of the specific goals and quotas to be entered for the various job classifications in the City employment structure including the fact that interim annual and long-term goals for the position of Fire Lieutenant were to be included in the decree. Pet. App. 186a. The published notice merely advised "interested persons" that the City had entered into a decree which included unspecified "goals" designed to "correct for the effect of any alleged past discrimination and to ensure equal employment opportunities for all . . . " Pet. App. 174a. If the parties to the decree realized that the nonminority employees were "interested persons," and they could hardly fail to do so, then they could and should have provided a notice to respondents similar in detail to that provided to the black employees.

The published statement failed adequately to inform respondents of the required steps necessary to properly protect their rights. The notice simply stated that the district court would hear objections on August 3, 1981 at the federal courthouse. Notice was not given that in order to fully protect their right of participation, respondents would have

to retain counsel, move to intervene by a certain time, and take action other than simple lodging of objections or they would be forever barred.

The parties to the decrees should have recognized their duty to provide the best notice practicable to each respondent. Such notice should have been mailed to each respondent as all were city employees at the time, and the City was aware of their identities and addresses.[24] *See Armstrong v. Marizo,* 380 U.S. 545, 550 (1965) (failure to give a known interested party individual notice of judicial "proceeding violated the most rudimentary demands of due process"; the opportunity to object "must be granted at a meaningful time and in a meaningful manner"); *Boddie v. Connecticut,* 401 U.S. 371, 377-378 (1971); *Grannis v. Ordean,* 234 U.S. 385, 395 (1913) (fundamental requisite of due process of law is the opportunity to be heard).

2. *No Adequate Hearing Was Provided.*

Petitioners cannot avoid the requirement of notice in this case by claiming that respondents received an adequate opportunity to be heard at the fairness hearing. A fairness hearing does not provide nonparty objectors with an adequate opportunity to be heard. *See,* Comment, Collateral Attacks on Employment Discrimination Consent Decrees, 53 Chi.L.Rev. 147, 181 n.139 (1986) (use of a fairness hearing to dispose of nonminority claims is the most extreme view). The fairness hearing held in this case by the district court did not provide objecting parties with the benefits normally accorded to parties in litigation. Thus, the objectors were not able to engage in discovery, could not call witnesses or offer evidence, and, most importantly, could not appeal from the proceedings of the district court. Indeed, despite over seven years of continuous litigation, no appellate court has ever

[24]As in *Tulsa,* there is no evidence in the record that the individual respondents received *actual* notice of the decree approval proceedings. The decrees made no provision for individual notice to nonminority employees. Nor is there any evidence that the individual respondents were aware of the pendency of the lawsuit. In fact, not all respondents had been hired at the time the suits were filed in 1974 and 1975. J.A. 382.

addressed the validity of Birmingham's plan, either on its face or as it applies to the respondents.

Respondents suggest that the fairness hearing process, whereby nonparties are given the opportunity to voice their concerns through objections, does not rise to the level of the full hearing necessary to terminate the substantive rights of nonparties. Rather, the fairness hearing is much like the predeprivation conference in *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532 (1985) where the charged employee is given the right to appear before the decisionmaker to coax, object and respond to the proposed deprivation, but not call witnesses or cross-examine those of the employer. Indeed, *Loudermill* provided that *after* a deprivation the employee is entitled to a full hearing. Employees who are denied a promotion on the basis of race are certainly entitled to no less. Respondents' suits are akin to the full post deprivation hearing required by *Loudermill.*

3. *Intervention Was Sought By Nonminorities And Denied.*

As stated above, the published statement did not apprise interested parties of the period of time within which intervention would be allowed or required. In any event, requiring intervention within 43 days of the publication of notice, as in this case,[25] is an unconstitutionally short period of time within which to require interested parties to intervene.

The *Martin* petitioners claim that intervention would have been timely and appropriate had it been sought before the fairness hearing.[26] While they never have demonstrated any prejudice by the one day delay, a requirement of intervention within a narrow window of some 43 days is clearly contrary to minimum standards of due process, particularly when the limitations period is triggered by an unknown

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[25]The publication was completed on June 21, 1981. J.A. 697. The fairness hearing was held 43 days later on August 3, 1981. J.A. 727.

[26]*See,* Martin Petitioners' Reply Brief In Support Of Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit, 5 n.3. This position is quite different from that advanced by the Martin petitioners in the first appeal. They argued there that the proposed intervenors were seven years too late and lacked any litigable interest to

judicial action rather than actual injury to the party entitled to receive notice. *See Tulsa Professional Collection Services v. Pope,* 108 S.Ct. 1340 (1988). A motion to intervene was made on the forty-fourth day following publication of the "notice" and seventeen days *before* final approval of the decrees. Given the lack of any announced procedure for evaluating timeliness, the attempt to intervene was clearly permissible if movants were to be deemed bound by the decrees.

The City claims intervention during the approval proceedings would still have been untimely. The City advocates imposing a burden on nonparties to intervene as soon as they learn of the *pendency* of discrimination litigation involving their employer. City Br. at 22, 36. Petitioners must concede that no notice was given to the employees of the pendency of the action and there is no evidence that the individual respondents were aware of the pendency of the *Jefferson County* litigation. The City's own Fire Chief did not even know that the litigation might involve BFRS promotions. J.A. 452. As demonstrated in Part IV, *infra,* placing a burden on respondents to intervene shortly after the cases were filed is clearly unreasonable.

D. Federal Courts Lack the Power to Alter Substantive Rights Through the Collateral Attack Bar.

The collateral attack bar alters the period of time established by Congress for the assertion of discrimination claims. In Alabama, Title VII charges of discrimination must be filed with the Equal Employment Opportunity Commission within 180 days of the act of discrimination. 42 U.S.C. § 2000e-(5)(e), (f). The statute of limitations for a claim

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permit intervention. *See,* Brief of John W. Martin, *et al., United States v. Jefferson County,* No. 81-7761 (11th Cir.); *see also* J.A. 180. The City petitioners continue to maintain that respondents should have sought intervention when *Jefferson County* was filed, some seven years earlier, and that the intervenors lacked standing to intervene. J.A. 535-536. Although we think both arguments are erroneous, the difference illustrates the guesswork attendant to the determination of the appropriate time for intervention.

under the Fourteenth Amendment is governed by 42 U.S.C. § 1988. The petitioners' position that the only time respondents could have asserted their claims is governed by the timeliness requirements of Rule 24 is thus tantamount to a judicial modification of the statute of limitations. In addition, to require the assertion of discrimination claims prior to their accrual is an alteration of the statutory provision that the limitations period commences when "the alleged unlawful employment practice occurred." 42 U.S.C. § 2000-e(5)(e). *See also Delaware State College v. Ricks,* 449 U.S. 250 (1980).

It is quite clear, however, that courts lack the authority to revise these substantive rights. Congress has required that the Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive rights . . . " 28 U.S.C. § 2072. By reducing the statute of limitations for assertion of discrimination claims through requiring "timely" Rule 24 intervention, courts alter substantive rights of nonparties. *See* Kramer, *Consent Decrees and the Rights of Third Parties,* 87 Mich.L.Rev. ___ (Nov. 1988); *see also* Comment, *Collateral Attacks On Employment Discrimination Consent Decrees,* 53 Chi.L.Rev. 147, 164 (1986) (federal courts lack the power to develop a system of mandatory intervention). Although we think there is no warrant for this alteration, the judgment whether there is must be made by Congress. It depends on facts not readily available to the courts, such as the cost to third parties from foreclosing claims due to the shortened period of intervention and the benefits to parties and the courts in terms of settlement. More importantly, it calls for a value judgment with respect to competing interests — the substantive rights of third parties versus the procedural benefits to parties.

Beyond that, a court rule that requires assertion of claims before they mature is clearly an improper alteration of respondents' substantive rights and contrary to the notion that "the limitation periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Delaware State College v. Ricks,* 449 U.S. 250, 262 n.16 (1980). It is submitted, therefore, that since the respondents filed suit within the limita-

tion period prescribed by Congress, their claims are due to be heard.

II. RESPONDENTS' SUITS ARE CONSISTENT WITH THE POLICIES OF TITLE VII AND THE CONSTITUTION.

Given the voluntary nature of a consent decree, the strong public policy of Title VII and the Constitution that individual rights cannot be waived by others, and the policy favoring the policing of all race-based conduct, there is no justification for giving the Birmingham consent decrees any more preclusive effect against third parties than one would give a voluntary affirmative action plan.

A. Consent Decrees Are Voluntary Devices Entitled To No More Preclusive Effect Than Unilaterally Adopted Affirmative Action Plans.

Petitioners' claim that the Eleventh Circuit's rule permitting nonparties to litigate the validity of conduct taken pursuant to a decree will signal the death knell for consent decrees and voluntary efforts to remedy past employment discrimination. On the contrary, nothing will prohibit an employer from voluntary efforts to remedy past discrimination in a *lawful* manner. Employers will continue to be free to adopt lawful affirmative action plans and embody those plans in a consent decree where appropriate. In addition, embodying their settlement in a consent decree is advantageous for a number of other reasons — mostly relating to enforcement of the decree as between signing parties. *See,* Part III, *infra.* Accordingly, since these benefits remain even without the collateral attack bar, petitioners are wrong to assert that consent decrees will suddenly become useless.

To treat a consent decree in the same manner as any other voluntary plan is consistent with this Court's recognition of the wider latitude afforded parties in crafting consent decrees over that allowed courts in ordering a remedy in a litigated proceeding. *Local No. 93 v. City of Cleveland,* 478 U.S. 501, 92 L.Ed.2d 405 (1986) (Court rejected union's claim

that a district court lacked the authority to enter a consent decree providing relief broader than that which the court might require under § 706(g)). *See also,* Mengler, *Consent Decree Paradigms: Models Without Meaning,* 29 Boston Col.L.Rev. 291 (1988). In the employment discrimination context, as in the antitrust field, "the voluntary nature of a consent decree is its most fundamental characteristic." *Local No. 93, supra,* 92 L.Ed.2d at 423. *See, United States v. ITT Continental Baking Co.,* 420 U.S. 223, 235-237 (1975); *United States v. Armour & Co.,* 402 U.S. 673 (1971); *Hughes v. United States,* 342 U.S. 353 (1952); *United States v. Atlantic Refining Co.,* 360 U.S. 19 (1959). "Most importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was based, that creates the obligations embodied in a consent decree." *Local No. 93,* 92 L.Ed.2d at 423-424. "[T]he parties' consent animates the legal force of a consent decree." *Id.* at 425.

Since consent decrees, while bearing the form of judgments, are essentially voluntary contractual devices, this Court should not clothe consent decree parties with whatever immunity may flow from a court-imposed judgment entered after a finding of liability. "[T]he fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates § 703 of Title VII or the Fourteenth Amendment." *Local No. 93,* 92 L.Ed.2d at 426. Just as consent decrees are not the sort of "orders" subject to the limitations of § 706(g), they are not the sort of orders of a court that might be entitled to preclusive effect.

Given these voluntary attributes of a consent decree, this Court held in *Local No. 93* that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. A Court's approval of a consent decree between some of the parties, therefore, cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." 92 L.Ed.2d at 428. While *Local No. 93* arose in the context of intervention

by a union, it makes little sense to have a different rule foreclosing unconsenting nonparties from raising their individual claims through timely lawsuits heard by the same court and judge having jurisdiction over the consent decrees. The same analysis that led the Court to conclude that a consent decree could not alter or modify the *substantive* rights of third parties, supports the conclusion that it cannot alter their *procedural* rights. Indeed, Justice O'Connor emphasized this point by stating that "nonminority employees . . . remain free to challenge the race-conscious measures contemplated by a proposed consent decree as violative of their rights under § 703 or the Fourteenth Amendment." *Id.* at 429 (O'Connor, J., concurring). *See also Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561, 589 n.4 (1984) (O'Connor, J., concurring) ("The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees. . . . ").

B. The Collateral Attack Bar Improperly Encourages Employers To Shift The Costs Of Their Alleged Illegal Conduct To Innocent Employees.

Title VII and the Constitution both embody strong policies recognizing an individual's right to not be treated differently on the basis of race. Since that right cannot be prospectively waived by others, it makes little sense to hold that a voluntary consent decree precludes third party discrimination claims before they even accrue. To be sure, the Court has treated discrimination claims by nonminority plaintiffs differently than minority claims. *See Steelworkers v. Weber,* 443 U.S. 194 (1979); *Regents v. Bakke,* 438 U.S. 265 (1978). However, within the contours of the law as thus defined, nonminority plaintiffs are entitled to the same opportunity to protect themselves as minority plaintiffs. Their right to be free from what this Court has recognized as unlawful discrimination is no less important. Yet, the collateral attack bar encourages employers to waive the rights of their nonminority employees by shifting the costs of alleged past discrimination to them through affirmative action. Hence, it makes it more difficut for third parties to prove that the affirmative action

agreed to in negotiations to which the third parties were not invited goes too far and violates their rights. This is inconsistent with recent refusals by this Court to bind nonparties to the terms of voluntary affirmative action efforts which have become the subject of court orders. *W. R. Grace & Co. v. Local 759, Rubber Workers,* 461 U.S. 757 (1983) (Title VII); *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986) (Constitution).

In *Grace, supra,* the employer negotiated a conciliation agreement with the E.E.O.C. designed to remedy past discriminatory practices. The union representing the employees was invited by the Commission to participate in the negotiations, but declined to do so. *Id.* at 759. The employer and the E.E.O.C. signed a conciliation agreement dated December 11, 1974 and thereafter laid off more senior males pursuant to the provisions of the conciliation agreement but contrary to the contractual rights of the employees. *Id.* at 760-761. The union's first suit was unsuccessful in the district court, which ordered the agreement enforced, and the layoffs took place. *Id.* at 761. Two years later the district court's decision was reversed by the Fifth Circuit Court of Appeals. *Id.* at 762. The males were reinstated to their jobs and filed grievance claims for backpay which were granted following arbitration. *Id.* at 762-764. The employer filed a second suit claiming it should not be liable for backpay because it complied in good faith with the conciliation agreement and injunction.

This Court rejected the employer's claims, noting that by voluntarily entering into the conciliation agreement with the E.E.O.C. without the consent of the union the employer was "cornered by its own actions," and was in a "dilemma . . . of [its] own making," *id.* at 767, 770. Thus, the Court held the employer could not avoid liability to its innocent employees despite the fact that its conduct was mandated by the conciliation agreement and a district court injunction ordering compliance with the conciliation agreement. This Court considered and rejected the arguments petitioners now make here that the duty to obey injunctions justified such conduct and required that the employer bear the

economic burden for its past discriminatory conduct:

> Obeying injunctions often is a costly affair. Because of the Company's alleged prior discrimination against women, some readjustments and consequent losses were bound to occur. The issue is whether the Company or the Union members should bear the burden of those losses . . . By entering into the conflicting conciliation agreement, by seeking a court order to excuse it from performing the collective-bargaining agreement, and by subsequently acting on its mistaken interpretation of its contractual obligations, the Company attempted to shift the loss to its male employees, who shared no responsibility for the sex discrimination. The Company voluntarily assumed its obligations under the collective-bargaining agreement and the arbitrator's interpretations of it. No public policy is violated by holding the Company to those obligations, which bar the Company's attempted reallocation of the burden.

Id. at 770. Similarly, the Court rejected the argument that the policy in favor of voluntary compliance justifies the employer's abrogation of the contract rights of unconsenting employees. *Id.* at 771. While no formal collective-bargaining agreement is implicated in this case, respondents have enforceable contractual rights under the state civil service statutes,[27] as well as rights under Title VII and the Fourteenth Amendment. *See, McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). Respondents' individual Equal Protection and Title VII rights are just as important as the enforcement of a private sector collective-bargaining agreement. Given the Court's holding that the union must be able to enforce its contractual rights, despite its knowing

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[27]Respondents have enforceable rights under the state merit system statute to promotions based on test scores and seniority points without regard for race, which have been unilaterally abrogated by the defendants. J.A. 434, PX 1, R1-27. The state courts have determined that these rights are akin to enforceable contract rights. *See, City of Birmingham v. Lee,* 254 Ala. 237, 48 So.2d 47 (1950); *Ex parte Bracken,* 262 Ala. 402, 82 So.2d 629 (1955); *Anderson v. Mullins,* 281 Ala. 609, 206 So.2d 856 (1967); and *City of Birmingham v. Walker,* 267 Ala. 150, 101 So.2d 250 (1958) ("laws governing the City [of Birmingham] and its employees constitute the contract of the City with [the employees]"). Respondents included state law claims in their complaints. Pet. App. 110a-116a; J.A. 93-99, 130-134.

rejection of the invitation to join the E.E.O.C. mediation process, respondents in this case should not be precluded when every effort to intervene was met with opposition from the consent decree parties.

In *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986), this Court considered the validity of a "remedial" layoff plan despite the fact that the plan was part of a union contract and the public employer had been ordered by a court to comply with the plan. *Id.* at 270-272. The *Wygant* petitioners filed suit claiming their Constitutional rights had been violated by race-based layoffs mandated by a collective-bargaining agreement which had been ordered to be enforced in earlier litigation. The plurality rejected the notion that Wygant was bound by her union's contract:

> Of course, when a State implements a race-based plan that requires such a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. . . . The Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups; and until it does, petitioners' more senior union colleagues cannot vote away petitioners' rights.

Id. at 281, n.8. *See also, id.* at 318 (Stevens, J., dissenting) (noting the "procedural inadequacy" of set aside in *Fullilove* and comparing it to *Wygant*).

The lesson of *Wygant* and *Grace* is consistent with underlying policy of Title VII and the Constitution that each person has an individual right to freedom from discriminatory practices which cannot be prospectively waived by third parties. This is all the more true in view of *Local No. 93*'s rules based on the voluntary nature of a consent decree and the limited rights of unconsenting third parties to block entry of a consent decree. While *Alexander v. Gardner-Denver Co.,* 415 U.S 36 (1974), recognized the policy of Title VII to encourage voluntary settlement of claims before the E.E.O.C., this Court also recognized that "there can be no prospective waiver of an employee's rights under Title VII. . . . Title

VII's strictures are absolute and represent a congressional concern that each employee be free from discriminatory practices." *Id.* at 51. *See also, Connecticut v. Teal,* 457 U.S. 440, 453 (1982) ("Section 703(a)(2) prohibits practices that would deprive or tend to deprive '*any individual* of employment opportunities.' "); and *E.E.O.C. v. Safeway Stores,* 714 F.2d 567 (5th Cir. 1983).

In view of these policies against waiver by others of the right to be free from discrimination and the impropriety of shifting the cost for illegal conduct to innocent third parties, there is no justification for providing a voluntary consent decree with any more preclusive effect than that given a voluntary affirmative action plan.

C. The Collateral Attack Bar Hinders The Policing Of Affirmative Action Plans.

Petitioners seek to invoke the collateral attack bar to insulate themselves from all claims contesting conduct allegedly taken pursuant to an approved consent decree. By refusing to hear the claims of nonparties challenging the lawfulness of decree-related conduct, the courts are avoiding the duty to carefully police remedial race-based conduct.

The adoption of an allegedly valid plan is only the first step in the remedial process. The plan must be implemented carefully. Facial validity does not ensure against conduct that, although within the letter of the plan, may be outside the permissible boundries of valid affirmative action. *See Fullilove v. Klutznik,* 448 U.S. 448, 480-482 (1980) (adoption of a prospective remedial plan that "functions in the manner of an injunctive decree" does not foreclose later challenges to "specific applications of the program" as unconstitutional); and *South Florida Chapter of the Associated General Contractors v. Metropolitan Dade County, Florida,* 723 F.2d 846 (11th Cir.), *cert. denied,* 469 U.S. 871 (1984) (cautioning against conclusory use of race in implementation of a facially valid plan).

The policy favoring judicial policing of plans is especially important in a case such as the present where, given the manner in which the City decree was implemented, the provisions of the decree designed to protect against tram-

melling were deemed "illusory at best" by the Eleventh Circuit. Pet. App. 19a.

Through the collateral attack bar, petitioners seek to isolate themselves from accountability after approval of a consent decree. The consent decrees at issue here are merely a defense to respondents' discrimination claims. Pet. App. 82a-83a; J.A. 130-137. The real issue is the discriminatory *conduct* of the employer. By refusing to hear respondents' claims, the petitioners are no longer accountable for their conduct.[28]

III. RESPONDENTS' SUITS WILL NOT UNDERMINE THE ACCEPTED GOALS WHICH CONSENT DECREES SEEK TO FURTHER.

The *Local No. 93* Court opined that consent decrees provide litigants with several benefits through built in judicial enforcement mechanisms which private contracts lack:

- A consent decree is often a complicated document designed to be carried out over a period of years with the benefit of continuing oversight and interpretation by the court.
- Enforcement by decree parties is easier because it will be unnecessary to prove facts that have been previously established and a court has "a more flexible repertoire of enforcement measures" than private parties.
- " '[I]t is . . . easier to channel litigation concerning the validity and implications of a consent decree into a single forum — the court that entered the decree — thus avoiding the waste of resources and the risk of inconsistent or conflicting obligations."

92 L.Ed.2d at 424, n.13, *quoting* Brief for National League of Cities, *et al.* as *Amicus Curiae*, 25. *See also,* Kramer, *supra*; Mengler, *Consent Decree Paradigms: Models Without Meaning,* 29 Boston Col.L.Rev. 291, 327-336 (1988). To permit re-

[28]It is no answer to claim that the district court or the United States is the guardian against abuse of decree-embodied affirmative action plans. As demonstrated by this case, a district court is inclined to protect the decree it previously entered and the United States, as a party to the decree, has different interests than those of nonparties.

spondents' claims to be heard on the merits will not undermine any of these goals. Moreover, the district court's consolidation of these suits is consistent with the common notion of the foregoing points that all litigation concerning consent decrees is best channeled to the court and judge which initially entered the consent decrees. In such a case, objections based on comity and abstention fall away.

In this case there were several motions to consolidate or transfer cases to District Judge Pointer. The first, filed by some respondents on August 4, 1983, sought consolidation of these claims with the consent decree cases. J.A. 129.[29] A series of motions were thereafter filed by petitioners seeking transfer of cases to Judge Pointer or consolidation with other cases. Respondents opposed transfer and consolidation without an agreement between the judges. Transcript of March 30, 1984 hearing, 4-7. After a period of several months, the cases were all consolidated before Judge Pointer in a single master file. J.A. 207, 218.

Once these cases were channeled into a single forum, any risk of inconsistent judgments and duplicative litigation dissipated. Moreover, as illustrated in this case, the fears on the part of petitioners of inconsistent judgments are unjustified given the tools available to channel related federal litigation into a single federal forum. While most litigation pertaining to a single consent decree will be filed in the same district as that in which the decree was entered, transfer is available to ensure that any case filed in another district is

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[29]No ruling was ever entered on the motion; however, Judge Pointer stated that he viewed consolidation with the consent decree case inappropriate due to the voluminous record in the old case and the filing of a separate suit was "to some degree advantageous." J.A. 118.

While repsondents and petitioners both moved to consolidate some of these cases with the consent decree case, Judge Pointer and Judge Acker both denied consolidation. J.A. 129, 144; PX 11, R1-29 (entry of Nov. 29, 1983, motion to consolidate reverse discrimination case and consent decree case denied by Judge Pointer); Transcript of March 30, 1984 hearing, 3-4. *See also* PX 11, R1-29 at Nov. 4, 1983 entry (Opposition of Martin petitioners to post-judgment application to intervene in consent decree case). Should this Court take the view that respondents' claims should be heard as a part of the consent decree litigation, it may direct the district court to consolidate the cases on remand.

transferred to the court which entered the decree. 28 U.S.C. §§ 1404(a), 1631. Similarly, consolidation under Rule 42 and cooperation among the judges will resolve any risk of inconsistency or duplication.

Petitioners also argue that the collateral attack bar is essential to further the policy of encouraging settlements. While this policy is important, their means is an improper way of advancing it. In effect, petitioners argue that it is necessary to make it harder for third parties to challenge consent decree conduct because their challenges may interfere with the enforcement process. Petitioners also suggest that settlement is advanced if third party challenges are heard sooner rather than later. But this concern may be fully vindicated by their joining potential third parties — at least those who are known to them. Their argument for placing the burden to intervene on third parties is really nothing more than an attempt to preclude third parties by obtaining an effective bar before the third parties act. In any event, making it harder for third parties to protect *their* rights is an improper means to facilitate settlement by other parties because there is no basis for preferring the rights of parties to the decree to the rights of third parties. A still better solution, from petitioners' viewpoint, would be to hold that third parties cannot even intervene, that they are stuck with whatever settlement the parties reach. This would obviously be improper. We submit that the watered-down version of this proposal embodied in the collateral attack bar is equally improper. *See* Kramer, *supra.*

IV. IF NONMINORITIES ARE TO BE BOUND BY A PROPOSED DECREE, THE DECREE PARTIES SHOULD BE REQUIRED TO MANDATORILY JOIN NONPARTIES, AND, WITHOUT JOINDER, THE ELEVENTH CIRCUIT'S RULE PERMITTING RESPONDENTS' SUITS IS A REASONABLE PROCEDURAL DEVICE DESIGNED TO ENSURE DUE PROCESS.

Respondents submit that burdening the individual respondents with the duty to intervene in the course of the

Jefferson County litigation is unreasonable. The questionable standing of the individuals to participate and their uncertainty about whether they need to bear the expenses of litigating mean that third parties will often discover that their rights have been compromised but that it is already too late to move to intervene. Petitioners claim the collateral attack bar saves judicial resources and litigation costs. On the contrary, the rule advocated by petitioners will encourage protective and often unnecessary intervention applications which will unduly expand the breadth of discrimination litigation. In fact, under petitioners' proposed rule, every employee of every employer sued for race discrimination may be placed in the position of having to hire counsel to intervene to protect his or her position in the workforce. Such a burden has never been placed on strangers to litigation. *See, Chase National Bank v. Norwalk,* 291 U.S. 431, 441 (1933) ("law does not impose . . . the burden of voluntary intervention"). *See also, Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867 (1984) (individual unlitigated claims of class members not precluded despite the fact that other class members intervened to assert individual claims).

In order to have standing, a party must have a recognizable interest which is traceable to the defendant's allegedly unlawful conduct. *Allen v. Wright,* 468 U.S. 737 (1984); *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91 (1979). The rules of Article III standing apply to intervenors as well as original parties to the litigaton. *Diamond v. Charles,* 476 U.S. 54 (1986).

The City of Birmingham has some 3,000 employees. Over 600 are BFRS employees. It is wholly unrealistic to require each individual BFRS employee to take notice in 1975 through newspaper stories of the pendency of litigation, to learn that the litigation involves rights to promotional positions rather than hiring discrimination, to foresee that their employer will settle rather than litigate and that they will be the ones to bear the burden of that settlement through implementation of the quotas. Such an individual's interest in the litigation would certainly be speculative at best. *See* Cooper, *supra.*

Similarly, in 1981, it was unreasonable to require hundreds of BFRS employees to seek to intervene in order to protect their right to a promotion which they might decide to seek in the future and which might be denied if they obtain a score high enough to be certified.[30]

The union also cannot act as the surrogate for the employees. It represents a broad spectrum of employees, black and white, officers and privates, those with seniority and those without, as well as those who intend to seek promotion and those who do not. J.A. 382-384, 548-549. *See Wygant, supra,* at 281 n.8.

Given the speculative nature in 1975 of the respondents' interest in the *Jefferson County* litigation, it is certainly unreasonable to place the burden on the individual nonminority employees of the City, not to mention persons who are not yet City employees, J.A. 382, to intervene in the litigation. *See Safir v. Dole,* 718 F.2d 475 (D.C.Cir. 1983) (Scalia, J.) (Safir's possible future reentry into the shipping business deemed too speculative to confer standing). Moreover, protective intervention adds to the high cost of litigation of the existing parties as well as subjects the intervenor to the possible assessment of attorney's fees if the defendant is ultimately deemed liable. *See, Diamond v. Charles,* 476 U.S. 54, 70 (1986); *Reeves v. Wilkes,* 754 F.2d 965 (11th Cir. 1985). Such costs and risks are simply too high to preserve the future rights of nonparties to object to a potentially illegal consent remedy.

Moreover, petitioners' claim that respondents should have intervened in *Jefferson County* contradicts the position which they took in the appeal from the intervention proceedings that Gray, Sullivan and the BFA lacked a litigable interest which would support intervention. In 1983, the City told the Eleventh Circuit that the appellants lacked standing. *See* J.A. 549 ("with respect to the promotional goals the Firefighters fail to show a sufficient direct and personal injury to its members"). Similarly, the Martin petitioners claimed the appellants lacked "standing to seek appellate review of the

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[30]Only a small portion of those passing the Fire Lieutenant's examination are ever certified. PX 23, R1-25.

consent judgments." Brief of John W. Martin, 23, *United States v. Jefferson County,* No. 81-7761 (11th Cir.).

Consent decree parties have an adequate remedy through joinder of nonparties under Rule 19, F.R.Civ.P. Such a mechanism clearly provides the nonparty with a full complement of due process safeguards by notice through a summons, a date certain after which default may be entered, the tools of discovery, the opportunity to be heard through a full evidentiary hearing, and, most important, the right to appeal any adverse decision. Just as the employer believes the nonparty should perceive its interest and intervene, so too may the employer perceive the interest of the nonparty and join the nonparty at the appropriate time. The employer has sophisticated counsel with knowledge of the proposed consent decree and the skills to perceive the potential interest of the nonparty while the nonparty has no counsel or intimate knowledge of the federal court proceedings.[31] Had Birmingham wished to bind the respondents to its settlement, it could have joined them under Rule 19 or refrained from opposing intervention. The fact that joinder will involve some cost should be of no consequence. *See,* Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties,* 1987 Legal Forum 103, 144-153. Given its opposition to intervention, the City should not now be allowed to complain. Each time a complex claim of discrimination is brought before the courts involving diverse and competing interests, there are significant costs in terms of the litigation expenses and liability exposure of the parties as well as the allocation of scarce judicial resources. If the City desires to engage in a settlement the cost of which some third party is likely to bear, it should pay the price of either joining those parties in the litigation or facing the claims of those third parties in the future. Shifting the entire cost of settlement to innocent third parties should not be permitted. As

[31]As in this case, consent decrees normally emerge "from a series of secret, informal negotiations . . . " Comment, *Consent Decrees and the Judicial Function,* 20 Catholic L.J. 312, 315 (1970). The employer's counsel, rather than unrepresented nonparties, clearly has superior knowledge of such proceedings.

Mayor Arrington has testified, the consent decree was "the best business deal [the City] had ever struck." J.A. 526. This Court should not countenance "business deals" at the expense of strangers to the litigation.

In ensuring the rights of respondents to due process, the Eleventh Circuit found that respondents' claims against their employer are due to be heard in the context of independent suits. Such a rule is a reasonable procedural device which certainly preserves the due process rights of respondents to have their claims heard. To the extent other courts devise procedural mechanisms which also ensure due process in the context of other cases, such procedures may also be deemed acceptable by this Court. *See* Kramer, *Consent Decrees and the Rights of Third Parties,* 87 Mich.L.Rev. ___ (Nov. 1988). However, since the Eleventh Circuit's approach is an acceptable means of protecting the due process rights of all parties, there is no reason for this Court to *prohibit* third party suits such as those filed by respondents. Moreover, respondents believe their suits are the preferable means of resolving these types of claims, in view of the ability of the court not only to consider the facial validity of a decree-embodied plan, but also the conduct of the parties in implementing the plan. *See, e.g., Johnson v. Transportation Agency,* 480 U.S. ___, 107 S.Ct. 1442 (1987) (goal should be flexible based on the availability of minorities in relevant labor pool at the time of the preferential promotion rather than fixed at the time the plan is adopted); *Fullilove v. Klutznik,* 448 U.S. 448, 480-481 (1980) (Court only approved facial validity of set-aside statute and did not foreclose future challenges on a case-by-case basis).

V. UNDER ANY OF THE PROPOSED RULES, RESPONDENTS SHOULD NOT BE BOUND BY BIRMINGHAM'S SETTLEMENT.

Under any of the varous rules proposed by the parties in this case, it is clear that respondents are entitled to have their claims heard, and that the consent decrees are not entitled to be given any preclusive effect. Respondents are not parties to the decrees, they were not joined under Rule 19, their

interests were not represented by others, and they did not bypass any opportunity to intervene.

The nonminority Birmingham firefighters sought to intervene several weeks prior to the entry of the 1981 consent decrees. The district court, at the insistence of the decree parties, denied intervention as untimely. The Eleventh Circuit upheld the denial of intervention holding that the claims of the individual firefighters had not accrued at the time of the approval of the decrees. The court emphasized, however, that individual firefighters who are subsequently harmed by the implementation of the decrees were free to file individual suits at a later date alleging the specific violation of their rights. J.A. 156-159. The City did not seek review by this Court of that decision. Certainly no "adequate" opportunity to intervene was bypassed on the facts of this case.

Moreover, no formal or actual notice sufficient to abrogate constitutional rights was provided to the respondents. While the respondents were all City employees during the settlement process, the City conducted its negotiations secretly and then refused to notify parties who were known by the City to be "interested" in the proceedings. To compound the matter, the City published a "notice" that deceptively misled the reader. At the same time, the City went to great lengths to mail a detailed notice to its black employees. On its face, the procedure for the provision of notice was inadequate given the differences in content and the method of service upon similarly situated employees.

A consent decree is merely a tool to effect the settlement of litigation. Consent decrees therefore have limited usefulness and effect. Parties who seek repose and finality would be better occupied by concentrating their efforts toward the construction of valid affirmative action plans and the careful implementation of those plans as opposed to the creation of devices to cut-off third party claims even before they accrue.

The race based conduct of a public employer must be carefully policed and must always be subject to a strict and searching scrutiny by the courts. To date, Birmingham has successfully avoided the scrutinous review of its decree and

its conduct in light of the standards laid down by the Constitution and Title VII. The district court's fairness hearing only determined whether the "settlement represents a fair, adequate and reasonable compromise of the issues between the parties to which it is addressed. . . . " Pet. App. 246a. Lower courts should no longer be allowed to avoid the claims of nonminorities who seek to question the validity of affirmative action plans embodied in consent decrees. Employers should no longer be permitted to saddle innocent unrepresented employees with the entire cost of the employers's past discrimination. At a minimum, the employer should be required to pay damages to the nonminority employees harmed by the process of implementation of the settlement. *See, W. R. Grace & Co. v. Local Union 759,* 461 U.S. 757 (1983). The collateral attack bar, coupled with a denial of intervention in the instant case, can no longer be tolerated in a society where due process is guaranteed to all citizens.

While the district court refused to evaluate the defendants' conduct as distinct from the question whether such conduct was mandated by the consent decrees, no appellate court has yet ruled upon the legality of the decrees or upon the conduct of the employer undertaken under the guise of the decrees. The Eleventh Circuit has wisely rejected a rule which would prohibit nonparties who are denied intervention from contesting the legality of race-based voluntary conduct in subsequent proceedings. The Eleventh Circuit's rule is consistent with the historic notion that nonparties are not bound by judgments to which they have not submitted either personally or through their privies.

While it is laudable to extoll the merits of negotiated settlements, voluntary compliance, and repose, such benefits cannot come at the expense of unconsenting parties. Respondents earnestly seek a day in court to contest the unconstitutional and illegal conduct of their employer without having to carry the millstone of their employer's settlement.

CONCLUSION

For the foregoing reasons, respondents Robert K. Wilks, *et al.* request that this Court affirm the decision of the United States Court of Appeals for the Eleventh Circuit and remand for further proceedings as mandated by the decision of the Eleventh Circuit.

Respectfully submitted,

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