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

IN THE
Supreme Court of the United States
OCTOBER TERM 1988

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

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

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

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

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

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The interests of Birmingham's nonminority employees were considered at every turn before the consent decrees were entered. The parties to the consent decrees considered those interests when they drafted the decrees; they invited all interested persons to present their interests before the decrees went into effect; nonminority employees did present their views (through respondents' present counsel, who presented the same arguments he presented on their behalf in this action); and the district court, after considering those interests, found that the decrees satisfy Title VII and the Equal Protection Clause. *See* Pet. App. 240a-45a. The City, in reliance on the court's approval of the decrees, is now well under way in remedying the effects of its discrimination. [1] This Court should put an end to respondents' continuous attempts to relitigate in this collateral action issues that have already been litigated and lost.

The respondents' briefs are revealing in what they do not say. Neither the Wilks Respondents nor the United States disputes that the claims raised in the reverse discrimination actions are identical to the objections raised by Mr. Fitzpatrick at the fairness hearing and considered by the district court before it approved the decrees. *See* Martin Br. at 28 n.23; Pet. App. 240a-45a. [2] Nor do they claim to have been unaware of the

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1. The Wilks Respondents try to rewrite history by asserting that Birmingham is not "a recalcitrant employer of the sort found in *United States v. Paradise*". Wilks Br. at 2 n.5. However, the employment statistics introduced at trial speak for themselves, particularly the fact that *not one* black employee had been promoted to the positions at issue here before the entry of the consent decrees despite the fact that, as the Wilks Respondents acknowledge, the "majority of the citizens of Birmingham . . . are black". Wilks Br. at 2 n.5; J.A. 439-44. The effects of Birmingham's discrimination linger. Indeed, the district court found that intentional discrimination against blacks has been ongoing—the chief engineer preferred plaintiff Mr. Ware for promotion precisely because Mr. Ware is white. Pet. App. 31a, 56a, 80a-81a, 100a-01a. Moreover, the Wilks Respondents contended below that *every* promotion of a minority employee in the Fire Department pursuant to the decrees violated Title VII and that they should have been promoted instead. According to the Wilks Respondents, there should still be *no* minority Fire Department supervisors.

2. The Wilks Respondents claim that the BFA "cannot act as the surrogate for the [nonminority] employees" because it "represents a broad

prior litigation or the proposed consent decrees. That alone disposes of most of respondents' arguments.

Respondents build a straw man, citing discussions of consent decrees where there was neither notice nor a hearing. But that is not this case. [3] Where, as here, (1) there was notice to nonparties, (2) there was a hearing where nonparties were invited to appear, and (3) the court carefully considered the interests of those nonparties, then the decree cannot be attacked in collateral proceedings. Those three facts make these consent decrees far more than a mere contract signed by a judge. *Compare Ashley v. City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of *certiorari*). [4] The fact that respondents raise no new

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spectrum of employees, black and white". Wilks Br. at 45. In fact, the BFA has *never* represented the interests of minority employees in this litigation. It has consistently done the opposite, from assisting the Personnel Board in defending the prior lawsuits (J.A. 772-73) to challenging the proposed decrees at the fairness hearing. *See* J.A. 699-713, 732-40, 770.

3. The Wilks Respondents assert that "many appeals courts have also refused to bind nonparties to the provisions of consent decrees". Wilks Br. at 20 n.20. In most of those cases, however, there was neither notice nor a hearing, unlike this case. *See McAleer v. American Tel. & Tel.*, 416 F. Supp. 435, 436 (D.D.C. 1976) ("nor were [nonminority employees] invited to participate in any way"); *Reeves v. Wilkes*, 754 F.2d 965, 969 (11th Cir. 1985) ("nor were [nonminority employees] provided notice of the decree's implementation or terms"); *United States v. City of Jackson*, 519 F.2d 1147 (5th Cir. 1975) (consent decree was entered three days after being proposed); *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 834, 836 (5th Cir. 1975) (the court "signed and entered the [consent decree] documents later that same day" on which they were filed, and the decree expressly did not "prevent the institution or maintenance of private litigation"), *cert. denied*, 425 U.S. 944 (1976). In two other cases they cite, the outcome was compelled by a specific rule not applicable here. *See United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969) (§ 5(a) of the Clayton Act, 16 U.S.C. § 16(a), expressly provides that consent decrees in government antitrust actions shall have no collateral estoppel effect), *aff'd in part and appeal dismissed in part on other grounds sub nom. Grossman v. Automobile Mfrs. Ass'n*, 397 U.S. 248 (1970); *Madison Square Garden v. Shavers*, 562 F.2d 141 (2d Cir. 1977) (injunction entered against a nonparty in contravention of Fed. R. Civ. P. 65(d)).

4. Respondents do not dispute that in *Ashley*, unlike here, the consent decree was entered three days after the lawsuit was commenced, thus denying nonparties the opportunity to be heard prior to its entry. *See* Martin Br. at 17-18.

claims in these collateral attacks and do not claim to have been unaware of the proposed decrees makes petitioners' rule even more compelling.

The Wilks Respondents belittle Judge Pointer's approval of the decrees as a "cursory review of facial reasonableness". Wilks Br. at 16. That is belied by the record; it was neither a "cursory review" nor "of facial reasonableness". Rather, Judge Pointer said that he "reviewed with care" the decrees, as demonstrated by the fairness hearing and his 1981 opinion. *See* Pet. App. 236a-46a; J.A. 727-71. And far from "facial reasonableness", he reviewed the very same objections to the decrees that are made in this action. [5] That disposes of these points summarily:

- Respondents contend that the parties "would be better occupied by concentrating their efforts toward the construction of valid affirmative action plans". Wilks Br. at 48; *see also* U.S. Br. at 11. The parties to the decrees (including the United States) did construct such a valid plan; Judge Pointer found the decrees to be valid over Mr. Fitzpatrick's objections in 1981 and again in 1985.

- They contend that in *W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), the Court "refused to preclude nonminority employees from seeking redress for discriminatory practices taken pursuant to court orders". Wilks Br. at 20. [6] The practices there

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5. The Wilks Respondents also assert that Judge Pointer applied a "reasonableness" standard rather than strict scrutiny. *See* Wilks Br. at 5-6. Again, that is belied by the record. In 1981, Judge Pointer applied the same five factors applied by this Court for reviewing affirmative action plans: (1) the "duration of the remedy"; (2) the "relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force"; (3) "waiver provisions"; (4) the "effect of the [remedy] upon innocent third parties"; and (5) the "efficacy of alternative remedies". *Compare* Pet. App. 241a-45a, *with Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 486 (1986) (Powell, J., concurring) ("*Sheet Metal Workers*"); *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion).

6. They also cite *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Wilks Br. at 20. That issue was never raised in *Wygant*.

were not taken pursuant to a court order. 461 U.S. at 768. This Court was merely enforcing an arbitrator's decision, and, in contrast to Judge Pointer's review of the decrees here, noted that it was "*not entitled to review the merits of the contract dispute*". *Id.* at 764 (emphasis added). *See also* pp. 11-12, *infra*.

- They try to distinguish *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486 (1968), on the ground that the City's actions were not the result of "the considered judgment of a court". Wilks Br. at 25. In fact, they were. *See also* pp. 8-9, *infra*.

- They point to this Court's statement that the "fact that *the parties have consented* to the relief contained in a decree does not render their action immune from attack". *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986) (emphasis added) ("*Local 93*"); *see* Wilks Br. at 35. Obviously *consent* does not immunize a consent decree, since voluntary affirmative action plans may properly be challenged. *See, e.g., Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987). Rather, it is the *court's approval* after notice and a hearing that bars these collateral attacks.[7] *See also* pp. 14-15, *infra*.

Respondents' remaining points are no more persuasive:

I. CONTRARY TO RESPONDENTS' CONTENTION, THE PROPER PROCEDURE FOR NONPARTIES WITH NOTICE OF A PROPOSED CONSENT DECREE TO CHALLENGE THAT DECREE IS INTERVENTION RATHER THAN JOINDER OR A COLLATERAL ATTACK.

All of the parties agree that nonminority employees should have an opportunity to challenge race-conscious relief. The

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7. Although this Court also said in *Local 93* that a "court's approval of a consent decree between some of the parties cannot therefore dispose of the claims of nonconsenting intervenors" (478 U.S. at 529), none of the authorities cited for that proposition involved situations where the district court considered the intervenor's objections before approving the decree. Presumably it is *mere* approval to which this Court was referring. *See id.* at 529. Here, not only did the Wilks Respondents fail to intervene, but the objections they raised were carefully considered by the consent decree court. Pet. App. 238a-46a. *Mere* approval is not an issue here.

dispute is what form that opportunity must take. Respondents believe that collateral attacks should not be barred, but they do not seriously argue that collateral attacks serve any useful or beneficial purpose other than as a vehicle for such an opportunity. [8] That is for good reason—collateral attacks contravene fundamental policies of judicial efficiency, repose, finality and comity. *See* Martin Br. at 20-32. In the alternative, respondents argue that nonminority employees should have been joined under Rule 19. The better rule, however, is to require a challenge to be raised at the fairness hearing or through timely intervention.

A. The Parties to a Proposed Consent Decree Are Not Required To Join Nonminority Employees in the Litigation.

Respondents argue that the only way that the validity of the decree can be resolved in one proceeding is to join all nonminority employees. *See* Wilks Br. at 16-17, 46; U.S. Br. at 10, 15-16. This is the very first time that they have raised that argument, and it is particularly ironic that the United States agrees. Although it was a party to the prior litigation and to the consent decrees, the United States now argues in the third person:

> "The parties in the initial litigation did not attempt to join the *Wilks* respondents as parties to *their* litigation—and did not seek their approval of the consent decree—despite *their* knowing full well that the proposed settlement would adversely affect such nonparties' interests." U.S. Br. at 15-16 (emphasis added).

The United States never sought to join nonminority employees, presumably because nonminority employees are not indispensable parties under Rule 19(b) in Title VII litigation. [9]

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8. The Wilks Respondents do say that collateral attacks provide a means to "police" the implementation of a decree (Wilks Br. at 40-41), but it is to achieve that end that the district court retains jurisdiction over the decrees. *See* Pet. App. 150a, 228a.

9. The United States's joinder argument is but an example of how it ignores the past. It would like the Court to believe that it "recognizes that the consent decrees require it to defend their validity" (U.S. Br. at 8 n.6), but it has not done so. Despite its promise in the decrees to "*defend* the lawfulness of such remedial measures in the event of challenge by intervention

They are not indispensable at the outset, even when the complaint seeks race-conscious relief. [10] And the fact that such race-conscious relief is later ordered, either after a trial (as it was here after the 1976 trial (J.A. 588-89)) or in a consent decree, does not suddenly change their interests and make them indispensable. Indeed, no court has ever required the joinder of nonminority employees when a consent decree was proposed. *See* Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. Chi. L. Rev. 147, 176 n.123 (1986).

The United States argues that the Federal Rules make joinder mandatory while intervention is permissive. *See* U.S. Br. at 18-19. According to the Advisory Committee Notes to Rule 19, however, there is no such preference: "*the absentee may sometimes be able to avert prejudice to himself by* voluntarily appearing in the action *or intervening on an ancillary basis*". Fed. R. Civ. P. 19, Advisory Committee Notes to the 1966 amendments (emphasis added). The Notes make clear that the rule is permissive. "In some situations it *may be desirable* to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court *in its discretion may* itself *convey* this information by directing a letter or other informal notice to the absentee". *Id.* (emphasis added). In addition, Rule 24 was amended to ensure that "an applicant

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or collateral attack" (Pet. App. 125a, 205a (emphasis added)), the United States *supports* the Wilks Respondents' collateral attack in this Court. In fact, the United States did not introduce at trial one shred of evidence to defend the decrees' validity.

10. *See Kirkland v. New York Dep't of Correctional Servs.*, 520 F.2d 420, 424, (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); *Eaton v. Courtaulds North America, Inc.*, 16 Fed. R. Serv.2d 1115, 1116 (S.D. Ala. 1972); *Todd v. Joint Apprenticeship Comm.*, 223 F. Supp. 12, 18 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Spirt v. Teachers Ins. & Annuity Ass'n*, 416 F. Supp. 1019, 1022-23 (S.D.N.Y. 1976); *Atkinson v. Owens-Illinois, Inc.*, 9 Empl. Prac. Dec. (CCH) ¶ 10,155 (N.D. Ga. 1975). *See also Arthur v. Starrett City Assocs.*, 89 F.R.D. 542, 548 (E.D.N.Y. 1981) (refusing to dismiss in the absence of HUD because HUD could protect its interests by intervening or filing an *amicus* brief); *Smith v. Baltimore & O. R.R.*, 473 F. Supp. 572, 584 (D. Md. 1979)(nonparties' failure to intervene in highly publicized litigation "indicate[s] that they do not feel that their interests are being threatened" and therefore supports the denial of compulsory joinder).

is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i)". Fed. R. Civ. P. 24, Advisory Committee Notes to the 1966 amendments. There would have been no reason for that amendment if the drafters had expected that such a person must be joined.[11]

Finally, as noted in other briefs, joinder of nonminority employees in consent decree cases would present overwhelming practical difficulties—multiplying the number of parties, attempting to bind persons who do not want to be bound, joining an involuntary defendant class, and allocating attorneys' fees. *See* City Br. at 32-34; Nat'l League of Cities Br. at 24-26; NAACP LDF Br. at 20-23; Brief of Alabama, et *al.* at 48-55. Even commentators upon whom respondents rely acknowledge those difficulties:

> "The effects of a consent decree may ripple outward, with smaller and smaller effects on more and more people, many of whom cannot feasibly be joined. *Injunctive litigation could rarely proceed if it were necessary to join every third party who might be affected.*" Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103, 121 (emphasis added); *accord* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 101, 117-18 (Nov. 1988) (forthcoming).

The difficulty of trying to identify for joinder purposes every potentially interested person is well illustrated by *Marino v. Ortiz*, 108 S. Ct. 586, 587 (1988) (per curiam), where a consent decree was challenged by persons who were not affected by it.

B. The Wilks Respondents Should Have Intervened Timely Rather Than Brought This Collateral Attack.

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11. This Court too has rejected the argument that joinder should be preferred over intervention. In *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), the Court said that if the nonparty "is properly foreclosed by his failure to intervene in the present litigation, *then the joinder issue . . . vanishes*, for any rights of [the nonparty] have been lost by his own inaction." *Id.* at 114 (emphasis added).

1. This Court has held that a nonparty who was aware of litigation but did not intervene may be precluded from bringing a collateral attack, and respondents have not distinguished those decisions.

In *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. at 505, this Court held that a nonparty's failure to intervene in litigation of which it was aware precluded it from challenging the resulting judgment. The Court suggested, without deciding, the same result in *Provident Tradesmens Bank & Trust*, 390 U.S. at 114. *See* Martin Br. at 15-18. Respondents have devoted considerable effort to distinguishing those cases (*see* Wilks Br. at 23-26; U.S. Br. at 14-16), but have not succeeded. [12]

Respondents begin by trying to paint *Penn-Central* as *sui generis*. They correctly point out that it arose from a "unique program" involving "competing interests" to reorganize the railway system. Wilks Br. at 23; U.S. Br. at 14 n.9. But the same is true here. The consent decrees represent a comprehensive plan to remedy the effects of Birmingham's discrimination without unduly trammeling the competing interest of nonminority employees. The *Penn-Central* reorganization's "uniqueness" does not alter this Court's holding that it is appropriate and constitutional to bar nonparties who knowingly failed to intervene from collaterally attacking a judgment.

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12. The United States also argues that "nonparties can refrain from intervention in litigation that affects them", citing four decisions of this Court. *See* U.S. Br. at 18 & n.13. One of those cases—*Gratiot County State Bank v. Johnson*, 249 U.S. 246, 249-50 (1919)—was decided under the Bankruptcy Act, not the Rules of Civil Procedure. Although the Court noted that a nonparty's intervention was "permissive, not mandatory", it went on to say that "[w]hether he does so or not, *he will be bound, like the rest of the world, by the judgment*" on the issues decided by the court. *Id.* at 249 (emphasis added). Two other decisions—*Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 593 (1974), and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969)—have absolutely nothing to do with intervention. In the final decision—*Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431 (1934)—the Court noted that there "the facts and considerations affecting the [nonparty's] rights *may be different from those presented* to the state court on behalf of" the named party. *Id.* at 438-39 (emphasis added). In contrast, here the very same arguments raised in these reverse discrimination cases *were presented* to—and were considered by—the district court before it approved the decrees. *See* pp. 1-4, *supra*.

Respondents also point to the special statutes (whose relevance is not apparent) adopted to facilitate the *Penn-Central* reorganization. *See* Wilks Br. at 23; U.S. Br. at 14 n.9. In that procedural morass, one fact starkly stands out—there is no indication that the nonparty was served with notice of the first litigation. *See* 389 U.S. at 505. Rather, just as the "BFA members . . . knew at an early stage in the proceedings that their rights could be adversely affected" (J.A. 154), the Borough of Moosic was obviously aware of the New York proceedings. That awareness, without formal notice, was constitutionally sufficient to prevent it from attacking the *Penn-Central* judgment.

Nor has the United States distinguished *Provident Tradesmens Bank & Trust*, 390 U.S. 102. It argues that "the Court did state that since the arguably indispensable party was 'never before the [district] court, he cannot be bound by the judgment rendered,' *i.e.*, the judgment would not be '*res judicata* as to, or legally enforceable against, a nonparty'". U.S. Br. at 15 n.9 (*quoting Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 110 (footnote omitted)). True enough, but that passage obviously refers to *res judicata* or *claim* preclusion. This case concerns precluding the relitigation of *issues*—the validity of the decrees—under the doctrine of collateral estoppel. *See also* p. 14, *infra*. Moreover, although the United States correctly notes that the Court said that the nonparty "'may still claim that as a nonparty he is not estopped by that judgment from relitigating the issue'" (U.S. Br. at 16 n.9 (*quoting Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 114)), it does not mention that in the next sentence the Court said that the nonparty nonetheless may be estopped with respect to an issue previously determined "because . . . he had purposely bypassed an adequate opportunity to intervene". 390 U.S. at 114. This is just such a case.

2. The Wilks Respondents had an interest to intervene that was legally sufficient and apparent.

The Wilks Respondents argue that they could not have intervened before the fairness hearing because their interests were "speculative at best". Wilks Br. at 44. That is simply wrong.

In numerous Title VII actions, nonminority employees have recognized their interests and sought to intervene, often prior to settlement negotiations, and those motions, if not too late, have been routinely granted. [13] Here, the BFA and several nonminority employees certainly appreciated their interests because they filed objections to the decrees and appeared at the fairness hearing. *See* J.A. 699-716. When Mr. Gray sought to intervene, he expressed the obvious interest that he shared with the Wilks Respondents and the City's other employees—the desire for a promotion in the future. *See* J.A. 775. That interest is protectable.

3. The Wilks Respondents' argument is inconsistent with the record.

We argued in our opening brief that, having foregone the opportunity to intervene timely, the Wilks Respondents should not be permitted to bring a later collateral lawsuit. *See* Martin Br. at 18-19. Their response is to miscast the record.

First, they argue that they pursued their claims in these actions in reliance on the Eleventh Circuit's decision in *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983). Wilks Br. at 7 n.10; *see also* J.A. 158. There was such no reliance. The *last* of the reverse discrimination actions at issue here was commenced more than three months *before* the *Jefferson County* decision. *See* J.A. 134, 149.

Second, they assert that the BFA sought to "intervene *several weeks* prior to the entry of the 1981 consent decrees". Wilks Br. at 48 (emphasis added). In fact, they sought to inter-

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13. *E.g.*, *Howard v. McLucas*, 782 F.2d 956, 960 (11th Cir. 1986) (abuse of discretion to deny motion to intervene made before fairness hearing); *Vanguards v. City of Cleveland*, 753 F.2d 479, 481 (6th Cir. 1985), *aff'd on other grounds sub nom. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

Although the United States argues that the lower courts have applied "strict rules concerning timeliness of intervention" (U.S. Br. at 26 & n.24), one of the commentators it relies upon says exactly the opposite: "In general, courts have been *fairly lenient* in allowing parties time to intervene after they should have known that intervention was necessary." Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. at 124-25 (emphasis added).

vene 17 days before the decrees were entered. *See* J.A. 774-76; Pet. App. 247a-49a. More importantly, although they had known of the litigation for many years and of the proposed decrees for more than seven weeks, they moved to intervene the day *after* the fairness hearing—after the validity of the decree had been briefed, after the hearing had been held and after the issue had been submitted for decision. The district court held that they were too late and the Eleventh Circuit agreed. *See* Pet. App. 246a; J.A. 155.

C. The Policy Reasons for Precluding These Collateral Attacks Are Compelling.

1. Consent decrees do not improperly encourage employers to shift the costs of their wrongdoing to nonminority employees.

Respondents argue that consent decrees improperly encourage employers to shift the costs of their past discrimination to nonminority employees. Wilks Br. at 36-40; U.S. Br. at 25. The Wilks Respondents go so far as to request "damages to the nonminority employees harmed by the process of implementation of the settlement". Wilks Br. at 49. [14] However, there is no liability, and therefore no obligation to pay damages, for implementing race-conscious relief unless that relief "*unnecessarily* trammel[s] the interests of the white employees". *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (emphasis added). *See also Johnson*, 107 S. Ct. at 1451, 1455. [15] Moreover, although the remedy for discrimination may have some burden on nonminority employees, they benefitted from that discrimination in the past.

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14. Respondents rely upon *W. R. Grace*, but that reliance is misplaced. *See* Wilks Br. at 37-38, 49; U.S. Br. at 25, 29 n.26. There, the Court held that an employer must pay damages to nonminority employees because it had signed a contract (an arbitrator found) obligating it to do so. *See* 461 U.S. at 762-66. There is no such contract here.

15. The United States argues that the court of appeals has instructed the district court on remand to review the consent decrees with the "'heightened scrutiny' required by *Johnson*". U.S. Br. at 7 n.6; *see also* Pet. App. 20a. That standard is from whole cloth. "Heightened scrutiny" does not appear in the *Johnson* opinion.

Nor do consent decrees "encourage" employers to exceed the bounds of Title VII. Indeed, they have exactly the opposite effect. As the parties know when they draft a decree, if they wish to bind nonparties, it must be approved by a court after objectors and intervenors have had an opportunity to argue their case, just as was done here. *See* Pet. App. 236a-49a.

2. Collateral attacks on consent decrees approved after notice and a hearing violate settled principles of comity.

Collateral attacks infringe the respect that courts accord to prior judgments, create the risk of inconsistent obligations, waste judicial resources and are inconsistent with the finality accorded to fully litigated judgments. *See* Martin Br. at 22-29. That harm is even greater where, as here, the collateral attacks seek an order enjoining defendants from "[e]nforcing or complying with" the court-ordered consent decrees. Pet. App. 115a; J.A. 98, 133.[16] And respondents do not answer, or even refer to, our argument that there is no principled basis for allowing third parties to challenge these consent decrees but not fully litigated judgments. *See* Martin Br. at 28-30. *See also Bergh v. Washington*, 535 F.2d 505, 507 (9th Cir.) (Kennedy, J.), *cert. denied*, 429 U.S. 921 (1976).

Respondents rely on the fact that the cases here were all transferred to Judge Pointer, thus (they assert) reducing the risk of inconsistent judgments. *See* Wilks Br. at 42-43; U.S. Br. at 23-24.[17] Yet in the next breath, they complain that these

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16. The Wilks Respondents argue that in *W. R. Grace*, "the Court held that 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". Wilks Br. at 37. They are wrong. In truth, the Court said that, unlike the relief sought here, nothing in the conciliation agreement (the relief obtained) required the defendant to violate the court order. *See* 461 U.S. at 768. Indeed, the Court expressed "*doubt* that the District Court in this case ordered specific performance of the conciliation agreement *or granted any other type of injunctive relief*". *Id.* at 768 n.11 (emphasis added). In addition, the Court relied on the fact that the plaintiff sought only money damages and, unlike the Wilks Respondents, not an order enjoining compliance with a prior court order. *See* 461 U.S. at 766-70.

17. The Wilks Respondents claim that two of the reverse discrimination actions were transferred to Judge Pointer "pursuant to an agree-

cases were all before Judge Pointer, saying that "a district court is inclined to protect the decree it previously entered". Wilks Br. at 41 n.28. That illustrates why a plaintiff challenging a consent decree will try to avoid transfer at all costs. [18] Even if the collateral attack were transferred, it would still call upon a court to reconsider afresh a judgment entered in another action without any showing that the prior process was improper.

The United States argues that comity will not be undermined because "principles of stare decisis and comity will *inform* the second court". U.S. Br. at 24 (emphasis added). That begs the question. Either the second court is bound by the first court's determination or it is free to reconsider that judgment. If it can reconsider the judgment *de novo* in a collateral attack, comity is of little use in avoiding protracted litigation and, perhaps, a conflicting result. That is well illustrated by *Feller v. Brock*, 802 F.2d 722, 725-26 (4th Cir. 1986), where the second district court was "informed" of the first court's order but issued an inconsistent order anyway.

The United States also argues that "the concern for correctness of judicial decision making is as important as the concern for consistency". U.S. Br. at 24. [19] That argument, for which they cite no authority, assumes that the second court is more likely to decide the issue "correctly". There is no basis for that assumption; indeed, the first court is at least as likely to be "correct" since it should have considered all of the relevant facts and circumstances before approving the proposed decree. And as one commentator points out, "[i]f neither judge

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ment between the judges". Wilks Br. at 8. That is not true. Judge Acker *denied* repeated motions to transfer those cases to Judge Pointer. *See* J.A. 138-40, 144-48, 162-64, 188-93, 196-201. The cases were not consolidated until eight months later by order of Judge Pointer, and they were assigned to him pursuant to local rule because the first-filed collateral attack had been *randomly* assigned to him. J.A. 207.

18. It is ironic indeed that the Wilks Respondents now argue that "all litigation concerning consent decrees is best channeled to the court and judge which initially entered the consent decrees". Wilks Br. at 42. Not only did they oppose motions to consolidate the cases before Judge Pointer, but they sought reconsideration of the decision granting those motions. *See* J.A. 196-201, 208-17.

19. *But see Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[i]n most matters it is more important that the applicable rule of law be settled than that it be settled right").

ends the tennis match, [the employer] will be subject to conflicting obligations under the threat of contempt from two courts". Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. at 114.

3. Prohibiting collateral attacks does not alter substantive rights.

The Wilks Respondents argue that barring their collateral attacks would "reduc[e] the statute of limitations", thus "alter[ing] substantive rights of nonparties" in violation of the Rules Enabling Act, 28 U.S.C. § 2072. Wilks Br. at 33. This Court has refused, however, to treat statutes of limitations as "substantive rights" under the Rules Enabling Act. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556-59 (1974). That is because "the choice made by the drafters of the Federal Rules in favor of a discretionary procedure affects only the process of enforcing litigants' rights and not the rights themselves". *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 8 (1987). Nor would petitioners' rule require the "assertion of claims before they mature" as the Wilks Respondents contend. *See* Wilks Br. at 33. Rather, they remain free to assert discrimination claims, but to the extent that those claims concern the affirmative action plan embodied in the consent decrees, they are estopped from relitigating the validity of that plan. *See Blonder-Tongue Labs. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971) (plaintiff estopped from relitigating validity of its patent). *See also* p. 9, *supra*.

D. This Court Did Not Condone Collateral Attacks in *Local 93*.

The court of appeals below, and respondents here, erroneously rely upon this Court's decision in *Local 93*, 478 U.S. 501. *Local 93* neither holds, nor even suggests, that a collateral attack may be brought under these circumstances.[20] This Court expressly *did not decide* in *Local 93*, a consent decree proceeding, whether the union could raise its Title VII claims.

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20. Although the Court said that a consent decree "may not impose duties or obligations on a third party without that party's agreement" (478 U.S. at 529), that merely repeats the rule that an injunction cannot impose a duty or obligation on a person other than a party and persons acting in concert with that party. *See* Fed. R. Civ. P. 65(d); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. at 112. The consent decrees here impose no duty or obligation on the Wilks Respondents.

"Whether it is now too late to raise such claims . . . must be presented in the first instance to the District Court". 478 U.S. at 530. In concurring, Justice O'Connor said that she "agree[d] with the Court" that the issue must be considered "on remand". *Id.* at 531. The Court plainly meant that this issue was to be raised, if at all, in the consent decree proceeding itself, not a separate action. [21]

II. THE WILKS RESPONDENTS DO NOT HAVE A DUE PROCESS RIGHT TO ASSERT THESE COLLATERAL ATTACKS.

It is not the case that *only* parties and their privies can be bound by an earlier judgment. *But see* Wilks Br. at 19-20; U.S. Br. at 12-13. As respondents' own authority notes, "several exceptions exist". *Sea-Land Servs.*, 414 U.S. at 593. Due process requires only that a person be given both notice and the opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). The Wilks Respondents had both.

A. The Wilks Respondents Had Adequate Notice.

For the very first time in this litigation, the Wilks Respondents challenge the adequacy of their notice. *See* Wilks Br. at 26-30. Significantly, the United States does not join their argument.

1. The Wilks Respondents have no due process claim because they do not dispute that they knew, or even that they should have known, that the prior litigation and the consent decrees could affect their interests.

Although the Wilks Respondents assert that they "never *received* adequate formal or actual notice" (Wilks Br. at 26 (emphasis added)), they do not say that they *had* no actual knowledge of the decrees or the race-conscious relief. Indeed, Mr. Gray testified in 1981 that the BFA—of which all of the

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21. Despite that instruction, we are informed that the union in *Local 93* has commenced a collateral attack on the consent decree rather than raising those claims on remand in the consent decree litigation.

firefighter plaintiffs are members (R11-23-43; R13-218-3)—kept apprised of the prior litigation beginning in 1974, and that "[n]either I nor the Firefighters were aware of the negotiations which were taking place between plaintiffs and defendants in these cases *until the formal notice of the consent decrees was given*". J.A. 773 (emphasis added). The Eleventh Circuit's finding that "BFA members . . . knew at an early stage in the proceedings that their rights could be adversely affected" is well supported. *See* J.A. 154.

The City's employees could hardly not have known. Banner headlines proclaimed "U.S. suit alleges hiring bias by Jeffco, 12 municipalities" when the United States commenced the *Jefferson County* action, and the litigation was widely reported thereafter, including the fact that race-conscious relief was ordered after the 1976 trial. [22] It is thus not surprising that Mr. Fitzpatrick appeared at the fairness hearing representing the City's firefighters. *See* J.A. 699-702.

Respondents' actual notice satisfies due process. The Wilks Respondents argue that notice should have been mailed to each of them, citing *Mullane* and *Tulsa Professional Collection Servs. v. Pope*, 108 S. Ct. 1340 (1988). *See* Wilks Br. at 27-29. Neither case, however, decided that actual notice does not satisfy due process. When the Court confronted a case with actual notice, it said that the "case before us is therefore *quite different* from cases where there was no actual notice, such as *Schroeder v. City of New York*, 371 U.S. 208; *Walker v. Hutchinson City*, 352 U.S. 112; and *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306". *National Equip. Rental Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964) (emphasis added). The

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22. *Birmingham News*, May 27, 1975, at 1, col. 1. *See also*, *id.*, Jan. 4, 1974, at 1, col. 3 (commencement of *Ensley Branch* action); *id.*, Jan. 7, 1974, at 6, col. 1 (commencement of *Martin* action); *id.*, Dec. 20, 1976, at 14, col. 1 ("Discrimination case starts today"); *id.*, Dec. 21, 1976, at 43, col. 1 ("Major discrimination trial starts with focus on tests"); *id.*, Dec. 22, 1976, at 29, col. 1 ("Suits say 12 Jeffco cities discriminating"); *id.*, Dec. 23, 1976, at 4, col. 1 ("Test validity argued in bias trial of cities"); *id.*, Jan. 10, 1977, at 1, col. 4 ("*Judge orders 1-3 black ratio for police*" (emphasis added)); *Birmingham Post-Herald*, May 9, 1980, at A1, col. 7 ("Police, fireman tests bias ruling upheld"); *id.*, Dec. 16, 1980, at C1, col. 6 ("High court rules city tests biased").

Court noted that because there was actual knowledge, "no due process claim has been made". *Id.* at 315. *See also Lehner v. United States*, 685 F.2d 1187, 1191 (9th Cir. 1982) (plaintiff's "constitutional argument thus boils down to due process requiring the meaningless formality of written (rather than oral) notice. . . .We refuse to elevate form over substance"), *cert. denied*, 460 U.S. 1039 (1983). [23]

2. In any event, the notice to nonminority employees was constitutionally adequate under these circumstances.

The Wilks Respondents argue that the notice of the fairness hearing was inadequate. *See* Wilks Br. at 26-30. It is agreed that notices were not mailed to them, [24] but under the circumstances here (described in the previous section), the notice by publication was perfectly sufficient. [25]

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23. The record may not be complete on how much notice there was to the Wilks Respondents because that issue was never raised below. There is additional evidence not in the record that Mr. Gray "presented copies of the decree" to members of the BFA (Deposition of Billy Gray, Sept. 17, 1984 at 110-15) and that the BFA took steps to ensure that firefighters knew how the decrees would affect them.

However, the burden was on *respondents*, as plaintiffs asserting a violation of their due process rights, to establish that the notice was inadequate and the decrees invalid as to them. *See National R.R. Passenger Corp. v. Atchison, T. & S. F. Ry.*, 470 U.S. 451, 477 (1985); *Railroad Comm'n v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 401 (1938). *See also Johnson*, 107 S. Ct. at 1449 (burden of proof is on the plaintiff challenging an affirmative action plan). They made no effort to meet that burden.

24. The Wilks Respondents assert, as though it were racially motivated, that notices were mailed to "minority employees and to black class members". *See* Wilks Br. at 4, 29. That is misleading. Notices were mailed only to members of the certified classes, which did not include all minority employees. *See* Pet. App. 158a-61a, 230a, 248a. That notice was mailed to class members pursuant to the express requirement of Rule 23 that "individual notice [must be given] to all members who can be identified through reasonable effort". Fed. R. Civ. P. 23(c)(2). Rule 23 does not apply to the notice required for persons other than class members, such as the Wilks Respondents.

25. The district court found that the "best notice practicable under the circumstances has been given and the notice given complies with the requirements of due process". Pet. App. 248a.

The Wilks Respondents urge that notice by publication never satisfies due process, citing *Mullane* and *Tulsa*. *See* Wilks Br. at 26-27. There is no such *per se* rule. This Court has repeatedly emphasized that "due process is flexible and calls for such procedural protections as the particular situation demands" (*Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)), and the "notice required will vary with circumstances and conditions". *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956). According to a commentator upon whom respondents rely, *Tulsa* "does not hold that Oklahoma could not—if it chose—allow its courts to make a case-by-case inquiry and bar those creditors who had or should have had actual notice of the probate proceedings from any source". Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. at 129. Under the circumstances here, where the prior litigation was highly publicized and the BFA's president testified that he learned of the consent decrees from the notice (J.A. 773), notice by publication satisfies due process.

The Wilks Respondents also challenge the content of the published notice, arguing that it was "deceptively vague". Wilks Br. at 29. That is simply not true. The published notice said that the decrees contained "goals for blacks and women, each of which are designed to correct for the effects of any alleged past discrimination", and it explained how persons could obtain further information and review copies of the decrees. Pet. App. 174a. The Wilks Respondents' reliance on *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), is misplaced. *See* Wilks Br. at 28. There, the notice was inadequate because it did "not advise the customer of the availability of a procedure for protesting". 436 U.S. at 15. Here, in contrast, the published notice said:

> "[a]ny person who wishes to register an objection(s) to either of the Consent Decrees must file such objection(s) in writing with the Clerk of the court by 4:00 p.m., July 14, 1981. . . . Individual objectors may appear at that [fairness] hearing with or without the assistance of legal counsel." Pet. App. 173a (emphasis omitted).

That description is obviously adequate. Several nonminority employees—including the BFA, represented by Mr. Fitzpatrick—did precisely as the notice instructed and raised their objections. *See* J.A. 699-716, 727-71.

B. The Fairness Hearing Provided Nonminority Employees with an Adequate Opportunity To Be Heard.

The Wilks Respondents argue that the fairness hearing did not comport with due process because the objectors "could not call witnesses or offer evidence, and, most importantly, could not appeal". Wilks Br. at 30. That claim is disingenuous. At the fairness hearing, the following colloquy took place:

> "THE COURT: All right. What is the position with respect to the objections insofar as *presenting either evidence or arguments*?
>
> "MR. FITZPATRICK: *I had just planned on presenting a very short oral argument.*" J.A. 732 (emphasis added); *see also* J.A. 703.

The fact that the objectors did not introduce evidence was of their own doing. In *Local 93*, this Court held that such an opportunity to be heard satisfies due process:

> "Here, Local 93 took full advantage of its opportunity to participate in the District Court's hearings on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the District Court carefully considered these objections and explained why it was rejecting them. Accordingly, 'the District Court gave the union all the process that [it] was due'". 478 U.S. at 529 (*quoting Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 400 (1982)).

And the reason that the objectors could not appeal was also of their own doing—they had not timely sought party status. *See Marino*, 108 S. Ct. at 547.

III. IN ANY EVENT, THE WILKS RESPONDENTS WERE ALLOWED TO ATTACK THE CONSENT DECREES COLLATERALLY.

As demonstrated in our opening brief, the district court in these collateral actions heard the Wilks Respondents' arguments that the decrees violated Title VII, received evidence on that issue and held at the conclusion of trial that the "City Decree is lawful". Pet. App. 61a, 106a; Martin Br. at 34-41. The Wilks Respondents' entire response is that our "representation that the validity of the decrees was an issue for trial

is false". Wilks Br. at 9 n.12 (citation omitted). [26] They obviously thought otherwise below: they submitted two pretrial briefs on the validity of the decrees to the district court; they told the court of appeals that *"[a]gain, in its December 1985 Conclusions of Law, the District Court upheld the legality of the Birmingham Consent Decree"* (Eleventh Circuit Brief for Plaintiffs-Appellants-Cross-Appellees Wilks, *et al.*, Oct. 6, 1986 at 53 (emphasis added)); and they devoted 56 pages of their briefs to the court of appeals to the validity of the decrees, including a supplemental brief concerning only the applicability of this Court's decisions in *Johnson* and *Paradise*. They had their chance at the fairness hearing and they had their collateral attack, both.

CONCLUSION

The decision below should be reversed with directions to enter judgment for the defendants.

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Respectfully submitted,

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26. The United States is more circumspect. Although it acknowledges that the district court said in 1985 that the decrees are lawful, it refers to that decision as "passing references". U.S. Br. at 12. In fact, it was an alternative holding on an issue that was briefed and tried. Neither respondent refers to petitioners' detailed list of evidence admitted by the district court on the issue of the decrees' validity. *See* Martin Br. at 4-6, 37-39.

*Keenan R. Keller and Christopher Armeniades, law students in the Cravath, Swaine & Moore summer program, assisted in the preparation of this brief.

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