Nos. 87-1614, 87-1639 and 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.

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

BRIEF *AMICI CURIAE* OF NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., WOMEN'S LEGAL DEFENSE FUND, NATIONAL WOMEN'S LAW CENTER, AND INTERNATIONAL ASSOCIATION OF BLACK PROFESSIONAL FIREFIGHTERS IN SUPPORT OF PETITIONERS

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This brief in support of petitioners is submitted with the written consent of counsel to all parties filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The NAACP Legal Defense and Educational Fund, Inc., ("LDF") is a non-profit corporation whose prin-

cipal purpose is to secure the civil and constitutional rights of black persons through litigation and education. For more than forty years, its attorneys have represented parties in thousands of civil rights cases, including many significant employment discrimination cases. *See, e.g., Bazemore v. Friday*, 478 U.S. 385 (1986); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The issue presented here is particularly important to the LDF's litigation efforts. First, the LDF has litigated many complex class action employment cases, and, with few exceptions, has entered into consent decrees that have contained the final remedies for the plaintiff class. For example, after trial and review by the court of appeals and this Court, the LDF entered into consent decrees that resolved both the *Griggs* and *Albemarle Paper* cases. If consent decrees in fair employment cases may routinely be challenged by collateral attack as the court below permitted in this case, the LDF will be unable to rely on the use of such decrees to secure fair employment remedies.

Second, the decision below threatens severely to undercut the ability of the LDF and other civil rights groups to bring fair employment actions. The LDF litigates claims on minority employees' behalf on a *pro bono* basis, and resources available to fund that litigation are limited. Settlement of cases is therefore an essential means of maximizing the LDF's effectiveness, allowing it to provide services to more employees and other civil rights plaintiffs. If the LDF is forced to litigate every case to conclusion or to face the repeated challenges to consent decrees that the decision below promises, its effectiveness clearly will be diluted. Without the incentives to settlement that are jeopardized by the decision below, many of the important fair employment gains of the last two decades could not have been achieved.

Third, the LDF has repeatedly represented plaintiffs challenging civil rights violations in the City of Birmingham. That litigation has vindicated the right to demonstrate against racial discrimination,[1] the right to integrated transportation,[2] the right to equal educational opportunity,[3] the right to non-discriminatory zoning,[4] the right to fair employment,[5] and the right to a nondiscriminatory statute governing the personnel system.[6] Having spent four decades challenging discriminatory practices in Birmingham, it is important for the LDF to support the effective action taken by Birmingham to remedy the continuing effects of an unfortunate history of racial discrimination.

* * * *

The Women's Legal Defense Fund ("WLDF") is a non-profit, tax-exempt membership organization, founded in 1971 to provide *pro bono* legal assistance to individuals who have been discriminated against on the basis of sex. WLDF devotes a major portion of its resources to combatting sex discrimination in employment through *pro bono* litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, public education, and advocacy before the Equal Employment Opportunity Commission and

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[1] *Shuttleworth v. City of Birmingham*, 394 U.S. 147 (1969); *Walker v. Birmingham*, 388 U.S. 307 (1967).

[2] *Bowman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960).

[3] *Armstrong v. Board of Education*, 333 F.2d 47 (5th Cir. 1964).

[4] *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951).

[5] *James v. Stockham Valves & Fittings, Inc.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

[6] *Woods v. Florence*, No. CV 82-PT-2272-S (N.D. Ala. Jan. 31, 1988).

other federal and local agencies that are charged with enforcement of equal opportunity laws.

WLDF has represented numerous plaintiffs in employment discrimination actions brought pursuant to Title VII of the Civil Rights Act of 1964, and thus recognizes the importance of resolving such cases without resort to extended litigation. For example, in 1987 WLDF resolved *LaPlace v. Ridgewells Caterers*, a case in which it provided *pro bono* representation to more than 500 waitresses who alleged occupational segregation and sex-based wage discrimination. As a result of the settlement obtained in that case, men and women will be assigned to jobs and paid without regard to sex, and a class of waitresses will be provided back-pay.

Consent decrees have been relied on as an effective means of resolving complex litigation in ways that benefit employers and employees. A decision by this Court increasing the vulnerability of consent decrees would undermine the enforcement of Title VII and negate the employment gains achieved by women and people of color in this country.

* * * *

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights statutes, and through the implementation of effective remedies for long-standing discrimination against women and minorities.[7]

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[7] NWLC has participated as an *amicus curiae* in Title VII cases before the Supreme Court, including *Johnson v. Transportation Agency, Santa Clara County California*, 107 S. Ct. 1442 (1987);

Consent decrees have proven to be one of the most effective remedies for the eradication of discrimination against women and minorities. The issue presented in this case, the ability of third parties to attack consent decrees collaterally, is therefore of critical importance to the National Women's Law Center and other civil rights organizations who view consent decrees as an effective and indeed desired method of resolving complex cases involving violations of civil rights. NWLC is currently representing parties to several consent decrees resolving long-standing discrimination claims, and has seen firsthand the major advances in the elimination of discrimination resulting from these decrees.[8] Absent the entry of consent decrees in these cases it is certain that both sides would have expended a great deal more time and resources, thereby diluting their overall litigation and enforcement efforts in these areas. It is also certain that the rights and responsibilities of the parties would have been resolved much less expeditiously. A ruling by this Court, like that entered by the court below, allowing collateral attacks on consent decrees would diminish the efficacy of consent decrees as a method of promoting the resolution

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Hishon v. King & Spaulding, 467 U.S. 69 (1984); *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. 1987), *cert. granted*, 108 S. Ct. 1106 (1988).

[8] *See Haffer v. Temple University*, No. 80-1362 (E.D. Pa. June 13, 1988) (order tentatively approving proposed settlement in class action sex-discrimination challenge of intercollegiate athletic program); *Adams v. Califano*, No. 3095-70, *WEAL v. Califano*, No. 74-1720 (D.D.C. Dec. 29, 1977) (consent decree resolving Department of Labor and Department of Education's obligations for enforcement of Title IX and Executive Order 11246), *dismissed sub nom. Adams v. Bennett*, 675 F. Supp. 668 (D.D.C. 1987), *appeal docketed, WEAL v. Bennett*, No. 88-5065 (D.C. Cir. Mar. 3, 1988); *Advocates for Women v. Marshall*, No. 76-0862, *Women Working in Construction v. Marshall*, No. 76-527 (D.D.C. Dec. 5, 1978) (consent decree requiring federal construction contractors to take specific affirmative action steps for women, including goals and timetables).

of complex cases and would discourage organizations and individuals represented by NWLC from entering into consent decrees.

The ruling below significantly impedes the ability of NWLC and other public interest groups to litigate fair employment actions. Our work is done on a *pro bono* basis. The extent to which we are able to bring cases is directly related to our ability to resolve others. Settlement of these cases through consent decrees is, therefore, essential to our efforts to assist other women in securing and enforcing their rights.

* * * *

The International Association of Black Professional Firefighters was founded in Hartford, Connecticut, in October 1970. The Association promotes interracial progress throughout fire departments in the United States by advocating the promotion and hiring of black firefighters. Many of the local chapters of the Association are actively involved in the enforcement of consent decrees aimed at full desegregation of the fire service. Accordingly, the continued viability of consent decrees for resolution of fair employment disputes is of significant concern to the Association.

STATEMENT

Amici adopt the statement of facts set forth in the brief of Petitioners Martin, *et al.* *Amici* limit their factual statement to the uncontested facts that are particularly significant to their position in this brief.

The employment practices of the City of Birmingham were the subject of contentious litigation for more than eight years prior to the filing of the first of these actions in 1982. The federal government, the NAACP, and classes of minority applicants and employees alleged discrimination in virtually every branch of city employment and demanded a reversal of the city's long and infamous

history of racial discrimination.[9] Their claims—and the two resulting trials—were the subject of prominent and continuous press coverage that made the case notorious in the community.[10]

Respondents do not dispute that they had actual knowledge of the litigation from its early stages in 1974. Indeed, the Eleventh Circuit determined that respondents "knew at an early stage in the proceedings that their rights could be adversely affected" if petitioners prevailed. *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983). Members of the Birmingham Firefighters Association ("BFA") continually monitored the case and consulted with the Personnel Board regarding the litigation's impact on the interests of non-minority employees. Joint Appendix ("J.A.") 772-73. Those contacts with parties to the case were maintained throughout the course of the litigation. *Id.* at 773.

In May 1981, the parties negotiated consent decrees designed to resolve all outstanding claims of discrimination on the basis of race or sex. As an element of those decrees, the parties established a process for providing notice to all interested persons. Appendix to the Petitions

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[9] That history is recounted in the brief of petitioners Martin, *et al.* *Amici* submit that the facts of this case are no less extreme than those that this Court found to warrant extraordinary court-ordered relief in *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), and *United States v. Paradise*, 480 U.S. 149 (1987).

[10] *See, e.g.*, Birmingham News, Jan. 4, 1974, at 1; *id.* May 27, 1975, at 1; *id.* Dec. 20, 1976, at 14; *id.* Dec. 21, 1976, at 43; *id.* Jan. 10, 1977, at 1; Birmingham Post-Herald, May 9, 1980, at 1. The first trial, held in 1976, involved the legality of exams given applicants for the police and fire departments. It resulted in a judgment for plaintiffs that was affirmed by the Fifth Circuit. *Ensley Branch of the NAACP v. Seibels*, 14 Fair Empl. Prac. Cases (BNA) 670 (N.D. Ala. 1977), *aff'd*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980). The 1979 trial, involving other hiring and promotional practices, did not produce a judgment prior to entry of the consent decrees.

for Certiorari ("Pet. App.") 146a-47a; J.A. 697. That process provided nearly two months' notice of the scheduled fairness hearing and advised interested parties of their right to object to the decrees. Pet. App. 146a-47a. Notices were published in two local newspapers and also served by mail on class members. *Id.* at 146a.

Following this notice process, the district court held a fairness hearing at which it received oral and written testimony and considered the objections of a number of persons to the terms or legality of the consent decrees. J.A. 727. Several non-minority employees, as well as representatives of the BFA, appeared at the fairness hearing to present their objections. Pet. App. 238a-39a. They asserted that the court could not approve a settlement providing "for affirmative relief for blacks and females which [would] adversely discriminate against whites and males without a judicial finding of actual discrimination." J.A. 704.[11]

The district court gave all objectors a full opportunity to present their claims and to submit relevant evidence. *Id.* at 727-28, 770. It then considered and rejected those objections in a careful and thorough opinion. Pet. App. 236a.

A scant eight months later respondents filed the first of these reverse discrimination actions in reaction to the very first fire department promotion made pursuant to the consent decree. The complaint in that case, *Bennett v. Arrington*, alleged that the city and the personnel board, acting pursuant to the consent decrees, were impermissibly certifying candidates and making promotions on the basis of race. *Id.* at 113a. It alleged that

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[11] According to the objectors, such discrimination would constitute a violation of Title VII, 42 U.S.C. § 2000e-2(j). J.A. 705, 711-12. The objectors further argued that the provisions of the decrees specifying goals based on race and sex "constitute state actions which deny equal protection of law," and that for that reason the court should withhold its approval. J.A. 780.

race- or sex-conscious decisions were illegal and the consent decree was "void on its face." *Id.* at 113a-115a.[12] Respondents subsequently filed two additional complaints, both challenging actions taken by the city in compliance with the consent decree. J.A. 93, 130. Those complaints essentially constituted a restatement of objections considered at the fairness hearing, and the district court held that respondents were precluded from challenging the validity of the consent decree. Pet. App. 106a.[13]

The United States Court of Appeals for the Eleventh Circuit reversed in a sharp departure from the position uniformly adopted by other courts of appeals.[14] The court below authorized collateral attacks on the consent decrees, adopting a broad rule that is completely unjustified by the facts of this case. Indeed, the sweeping effect of the Eleventh Circuit's holding is underscored because respondents had actual notice of the pendency of the pro-

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[12] The *Bennett* plaintiffs further alleged that the race- and sex-conscious provisions of the decree conflicted with various state and local authorities, including Title VII and 42 U.S.C. § 1981, as well as the fifth and fourteenth amendments. Pet. App. 113a.

[13] While declining to permit respondents to relitigate the validity of the consent decree, Judge Pointer nevertheless expressly reaffirmed his earlier ruling that the decree "is a proper remedial device, designed to overcome the effects of prior, illegal discrimination by the City of Birmingham." Pet. App. at 106a. Having thus addressed the issue of the decree's validity, the court then ruled on the merits of respondents' reverse discrimination claims, rejecting them for failure to prove discriminatory intent. *Id.* at 107a. As petitioners Martin, *et al.*, demonstrate in their brief, that decision fully and correctly disposed of the merits of respondents' claims.

[14] *See, e.g., Striff v. Mason*, 849 F.2d 240 (6th Cir. 1988); *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986), *aff'd*, 108 S. Ct. 586 (1988); *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983); *Dennison v. Los Angeles Department of Water & Power*, 658 F.2d 694 (9th Cir. 1981); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *see also Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980).

ceeding, had opportunities to participate in it, and had their views represented at the fairness hearing by individuals pressing legal contentions virtually identical to those raised in respondents' subsequent suits.[15]

ARGUMENT

Since the enactment of Title VII in 1964, consent decrees have played a central role in the resolution of fair employment disputes. To the benefit of both litigants and the federal courts, consent decrees have provided a vehicle for terminating disputes without extended litigation, enabling the parties to develop productive working relationships under cooperatively designed guidelines.

The decision below authorizes collateral attacks on consent decrees by persons who knew of the proceedings, who had a timely opportunity to intervene, whose interests were protected by a fairness hearing, and whose position was considered by the decree court. If collateral attacks were permitted in such circumstances, consent decrees would no longer be the end to Title VII litigation, but the beginning of a protracted process in which the parties could be compelled to litigate every employment action taken under the decree. That result would nullify the multiple benefits of consent decrees and thrust onerous burdens upon the courts because parties would reject decrees as an alternative to continued litigation.

The adverse impact of the Eleventh Circuit's rule would not be limited to the *Weber*-type relief approved in

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[15] In addition to the opportunity to present their views at the fairness hearing, respondents undoubtedly could have sought timely intervention as parties. Instead, they waited until after the fairness hearing to make such a request. J.A. 774. The Eleventh Circuit affirmed Judge Pointer's rejection of this eleventh-hour request as untimely. *Jefferson County,* 720 F.2d at 1516.

this case.[16] It would extend to cases involving *Franks*-type relief providing constructive seniority[17] and to more comprehensive modification of an entire seniority system under the standards set forth in *Teamsters*,[18] both of which would necessarily affect non-party employees. Under the Eleventh Circuit's rationale, non-minority employees who judged themselves to be adversely affected by any of these established Title VII remedies could bring collateral actions challenging the decree.

The facts of this case neither justify nor compel these adverse results. Rule 24 of the Federal Rules of Civil Procedure provides a fair and adequate means for non-parties to protect their interests in ongoing litigation without compromising the interests of the parties or unduly burdening the court. When non-parties know of the ongoing litigation and of the potential adverse effect of a proposed consent decree, it is reasonable to assign them the burden of intervening or appearing at the fairness hearing and presenting all their challenges to the decree. Both fundamental principles of finality and important policies of fair employment litigation require that in these circumstances collateral attacks on the consent decree be barred.

I. THE DECISION BELOW WILL FRUSTRATE THE GOALS OF TITLE VII AND IMPAIR EFFICIENT OPERATION OF THE JUDICIAL SYSTEM

This Court has consistently emphasized that voluntary settlement of employment discrimination claims is a primary objective of Title VII. *Local 93, Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3076 (1986); *W.R.*

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[16] *See United Steelworkers v. Weber*, 443 U.S. 193 (1979).

[17] *See Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

[18] *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Grace & Co. v. Local 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America, 461 U.S. 757, 770-71 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Congress strongly encouraged employers "to self-examine and self-evaluate their employment practices" and voluntarily to cease practices that perpetuate discrimination. *International Brotherhood of Teamsters*, 431 U.S. at 364 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

Consent decrees are an important vehicle for achieving these statutory goals. Today, an employment discrimination action brought against a state or local government or a large private employer is far more likely to be resolved by consent decree than litigated to judgment.[19] Because of the high volume of Title VII litigation,[20] a negotiated resolution serves the interests of the courts and the public, as well as the parties. Consent decrees remove complex, multiple party cases from the courts' trial dockets, freeing judicial resources that would otherwise be consumed by difficult procedural and legal issues.[21]

The incentives to settlement of large-scale Title VII actions are considerable. Parties are relieved of the high costs, risks, and unavoidable delays of litigating such cases to conclusion. They can cooperate in restructuring

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[19] *See* Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L. Rev. 887, 894 (*"Title VII Consent Decrees"*).

[20] In 1987, for example, the number of private plaintiff fair employment cases pending in the federal courts exceeded 10,000 cases. 1987 *Annual Report of the Director of the Administrative Office of the United States Courts* at 116.

[21] *See, e.g., United States v. Allegheny-Ludlum Industries*, 517 F.2d 826, 851 n.28 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

their employment relationship by choosing detailed, feasible solutions that are closely tailored to their specific businesses and communities. When remedies are chosen by the parties—rather than imposed by the court on the losing party—normal working relationships can be resumed more quickly.[22]

Most important, both parties to the decree are ensured of a final disposition of their dispute, approved and enforced by the federal courts.[23] The parties obtain the court's judgment that their agreement " 'represents a reasonable factual and legal determination based on the facts of record. . . . If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.' " *Williams v. City of New Orleans*, 694 F.2d 987, 991 (5th Cir. 1982) (emphasis deleted) (quoting *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc)).[24] Indeed, recent decisions of this Court require a judicial

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[22] Consent decrees thus allow the court to enter remedies that correct past discrimination and then restore to the parties the freedom to restructure their relationship under the terms of the decree. *See Spangler v. Pasadena City Board of Education*, 611 F.2d 1239, 1242 (9th Cir. 1979) (Kennedy, J., concurring).

[23] *See, e.g., United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (district court's task before approving Title VII consent decree is to determine that the decree is not unlawful, unconstitutional, contrary to public policy, or unreasonable); *United States v. City of Philadelphia*, 499 F. Supp. 1196, 1199 (E.D. Pa. 1980) (same); *Alexander v. Bahou*, 86 F.R.D. 194, 198 (N.D.N.Y. 1980) (before approving Title VII consent decree, district court must be assured that its terms are not unlawful, unreasonable, or inequitable). *Cf. Kelly v. Kosuga*, 358 U.S. 516, 520 (1959) (court will not enforce a contract that violates the law).

[24] For example, in the decision on review in *Williams*, the district judge had declined to approve the consent decree because of its potential impact on non-parties. *Williams v. City of New Orleans*, 543 F. Supp. 662 (E.D. La.), *rev'd*, 694 F.2d 987 (5th Cir. 1982).

determination of the impact of affirmative action relief on third parties before such remedies may be approved.[25]

As the present case demonstrates, consent decree procedures have evolved to provide substantial protection for the interests of affected third parties. A fairness hearing scheduled after reasonable notice to interested persons provides a convenient and inexpensive forum for those potentially affected by a decree. Such proceedings assure that the decree may be considered, not just in the abstract, but in terms of its actual operation.

Finally, consent decrees commonly provide for retention of jurisdiction by the decree court to enforce, interpret, and monitor compliance with the decree. Judicial efficiency is served because a forum familiar with the decree and its factual background is available for resolution of future disputes. This feature also serves the interests of parties by minimizing any possibility of inconsistent interpretations.

A. The Decision Below Undermines Incentives to Settle Title VII Litigation

The decision below will inevitably frustrate incentives to settlement, resulting in a much larger volume of litigation. Moreover, because this case presents an extreme example of litigants who deliberately declined an opportunity to litigate in order to pursue an attack on the decree in another proceeding, the endorsement of their tactic by the court below necessarily endorses *all* collateral attacks on consent decrees.

Under the decision below, the decree can be subjected to seriatim attacks challenging its terms and legality. As a result, a consent decree becomes the *beginning* of litigation, rather than the end. If the rule adopted below

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[25] *See Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1445 (1987); *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

were allowed to stand, approval of a consent decree would initiate a protracted process that would involve the federal courts in perpetual scrutiny of the employment practices of local governments and private employers.

The broad rule adopted below deprives parties of much of the benefit of resolving their disputes through consent decrees, and it consequently creates a strong disincentive to their use. The employer's motivation to negotiate a settlement would be substantially reduced because implementation of the consent decree could continually force the employer back into court to defend the decree.[26] Without some assurance of finality, the employer's only alternative might be to continue the litigation.

Plaintiffs are equally unlikely to consider a consent decree an attractive alternative under the rule adopted by the court below. For many plaintiffs who negotiate consent decrees, a share of prospective opportunities for employment and promotion is a critical element of the overall bargain. Other claims, for back pay or specific relief, may have been adjusted in negotiations in light of the prospective relief. The prospect of collateral attacks on the decree, however, would make it impossible for plaintiffs to be confident of retaining the benefits of the bargain, even after the decree court's approval. If plaintiffs' hard-earned rights to employment or promotion stand to be undone when challenged by fellow employees, they will be much less willing to compromise any claims in a settlement.

B. The Decision Below Would Produce Repetitive, Duplicative Litigation

In addition to raising virtually insurmountable obstacles to settlement of Title VII cases, the decision below implicates broader issues of comity and judicial efficiency.

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[26] The employer might also be compelled to litigate its liability under Title VII—the specific judgment it sought to avoid in settling the case.

The Eleventh Circuit's rule permitting collateral attacks on consent decrees could result in the imposition of a tremendous burden of unnecessary, duplicative litigation.[27] Under the decision below, any employee who declined to participate in the consent decree litigation but claims an adverse effect due to the operation of the decree could bring a separate suit against the employer.[28] Actions by even a small number of the employees affected by the operation of existing consent decrees would not only unduly burden the parties, but would severely tax judicial resources.

Moreover, nothing in the Eleventh Circuit's decision would limit this proliferation of litigation to the original decree court. Instead, non-parties could simply sit back and observe the principal litigation and, if it appeared that the judge were inclined to approve the decree, choose to refrain from participating directly in the action.[29] By

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[27] These procedural, jurisdictional, and practical problems may explain why this Court has never required Rule 19 joinder of affected third parties. Accordingly, the lower courts have consistently proceeded on the assumption that non-minority employees are not indispensable parties to Title VII actions. *See, e.g., Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 424 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); *English v. Seaboard Coast Line Railroad*, 465 F.2d 43, 46 (5th Cir. 1972) (it is clear that Rule 19(a) does not require joinder of white employees in every case in which their interests may be adversely affected).

[28] The litigation history of the instant cases demonstrates that this scenario is not unrealistically alarmist. Following entry of the consent decrees, virtually every attempt by the City of Birmingham to effect promotions pursuant to the decrees has prompted the filing of discrimination charges with the EEOC. The fact that five separate reverse discrimination lawsuits involving 41 plaintiffs challenging promotions made under the consent decrees have been brought to date is compelling evidence that a rule permitting collateral attacks engenders costly, repetitive litigation.

[29] An inevitable consequence of this option is that the efficiency of the consent decree process itself would be undermined. With such a strong disincentive for interested parties to intervene, courts and

this strategy, non-parties could knowingly avoid having their interests affected in the principal litigation in an attempt to secure a more sympathetic forum.

The availability of a different forum or judge also compounds the possibility that the separate actions would result in judgments that conflict with a preexisting consent decree. Conflicting judgments could place employers in the untenable position of being subject to contempt of court citation for complying with either (or neither) judgment.[30] In this context conflicting judgments also implicate well-established notions of comity because they arise when one district court is asked to review another court's approval of a consent decree.[31]

Respondents' conduct here exemplifies a form of claim splitting that plainly could engender conflicting judgments and impair judicial efficiency. They allowed the union to stand as their surrogate at the fairness hearing but de-

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the parties will be handicapped in fashioning the decree in the first instance for lack of input from all those whose interests may be affected.

[30] The problem of conflicting orders is dramatically illustrated by the record in this case. *See* J.A. 208. The potential for imposition of conflicting obligations is frequently recognized as a possible result of permitting collateral attacks on consent decrees. *See, e.g., Thaggard*, 687 F.2d at 68; *Stotts v. Memphis Fire Department*, 679 F.2d 541, 559 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Dennison*, 658 F.2d at 695; *O'Burn v. Shapp*, 70 F.R.D. 549, 552 (E.D. Pa.), *aff'd mem.*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); *see also United Steelworkers v. Weber*, 443 U.S. 193, 209-10 (1979) (Blackmun, J., concurring).

[31] *See, e.g., Goins*, 657 F.2d at 64 (collateral attack on a consent decree deemed an "attempt to 'appeal from one district judge to another,'" which is barred by comity) (quoting *Ellicott Machine Corp. v. Modern Welding Co.*, 502 F.2d 178, 181 (4th Cir. 1974)); *cf. Bergh v. Washington*, 535 F.2d 505, 507 (9th Cir.), *cert. denied*, 429 U.S. 921 (1976) (comity considerations require judicial restraint where requested relief would conflict with prior judgment).

clined the opportunity formally to participate in that proceeding. When the union's objections were rejected by the decree court, respondents sought to present the very same challenge to the decrees to a different judge.[32] They vigorously opposed efforts to consolidate the reverse discrimination lawsuits in a single action before Judge Pointer. *See* J.A. 147, 196, 208. Such use of claim splitting as a vehicle for forum shopping would be inevitable if consent decrees were held subject to attack in separate proceedings.

The claim splitting endorsed by the decision below also offends basic principles of finality of judgments. While the doctrine of *res judicata* is not applicable to the present case in a technical sense,[33] it is worth noting that the doctrine

> ensures "the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals."

Nevada v. United States, 463 U.S. 110, 129 (1983) (quoting *Southern Pacific Railroad v. United States*, 168 U.S. 1, 49 (1897)). To achieve that objective, the doctrine extends both to claims actually raised and determined

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[32] Disappointed employees seeking to redress perceived violations of their rights can be expected to make every effort to avoid appearing before the judge that entered the decree; that judge has already decided that the decree is fair and lawful. Respondents made just such an effort here.

[33] In order for *res judicata* to apply, the previous litigation must have been between the same parties or their privies, or the party being estopped must have had control over the prior litigation. *See* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 4451 (1981).

and to claims that the parties could have litigated. *Brown v. Felsen*, 442 U.S. 127, 131 (1979). Respondents should not be "at liberty to prosecute [a] right by piecemeal . . . presenting a part only of the available grounds and reserving others for another suit." *Grubb v. Public Utilities Commission*, 281 U.S. 470, 479 (1930).[34]

Shorn of their verbiage, respondents' complaints seek merely to relitigate Judge Pointer's determination that the consent decrees are valid.[35] Having had the opportunity to seek timely intervention and fully to present their claims to the court at the fairness hearing—and after the very same claims were actually considered by the district court—respondents should not now be permitted to wage a full scale collateral attack on the consent decrees.

II. REQUIRING INTERVENTION IS THE ONLY PRACTICAL MEANS TO ACCOMMODATE THE INTERESTS OF THIRD PARTIES WHILE PRESERVING THE VIABILITY OF THE CONSENT DECREE PROCESS

A rule barring collateral attacks by persons who make a knowing decision to forego formal participation in the original consent decree adjudication is the only practical means of accommodating both societal interests served by Title VII consent decrees and individual opportunities to be heard. Congress provided a framework for that bal-

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[34] This Court has confirmed the importance of conformity to *res judicata* principles in resolving fair employment claims. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *see also Detroit Police Officers Association v. Young*, 824 F.2d 512 (6th Cir. 1987).

[35] The first two complaints filed by respondents, in the *Bennett* and *Birmingham Association of City Employees* cases, literally challenged the validity of the decree. Pet. App. 110a; J.A. 93. While the subsequent *Wilks* complaint avoided an express attack on the decree, that artful pleading does not alter the fact that the complaint's essential thrust is a full-scale attack on the decree. J.A. 130.

ancing of competing interests in Rule 24 of the Federal Rules of Civil Procedure, which allows the entrance of non-parties into actions in which their interests may be substantially "impaired or impeded" in their absence. *See* Fed. R. Civ. P. 24(a)(2). Rule 24 provides for orderly disposition of non-parties' claims in a single proceeding, authorizing interested persons with knowledge of the litigation and its potential effect on them to secure a hearing.

Compulsory joinder of all non-minority employees pursuant to Rule 19(a) of the Federal Rules of Civil Procedure is not a practical alternative to Rule 24 intervention because it creates insurmountable procedural difficulties. The first of these involves statutory requirements of Title VII. Non-minority employees may contend that they cannot properly be joined as defendants because they are not proper respondents under Title VII and thus could not be subject to an Equal Employment Opportunity Commission ("EEOC") charge.[36] Similarly, non-minority employees may not be subject to joinder as plaintiffs, since they will not, in most cases, have filed their own Title VII charges and will be unable to proceed within the scope of the charges upon which the litigation is based.[37]

In addition, requiring mandatory joinder would prove unfair to both existing parties and potentially interested third parties. It would place on the existing parties the onus of determining who might be interested in the judg-

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[36] Title VII limits the defendants subject to charges to employers, labor unions, agencies, and joint apprenticeships. 42 U.S.C. § 2000e-5(b). The filing of a charge with the EEOC is a jurisdictional requirement. *See* 42 U.S.C. § 2000e-5(f)(1); *Way v. Mueller Brass*, 840 F.2d 303, 307 (5th Cir. 1988); *Romain v. Kuret*, 772 F.2d 281, 283 (6th Cir. 1985); *Eggleston v. Chicago Journeymen Plumbers*, 657 F.2d 890, 905 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

[37] Non-minority employees could not become members of the existing plaintiff classes because their claims would be legally and factually distinct from those typical of the classes. *See* Fed. R. Civ. P. 23(a)(2).

ment, despite the potential parties' superior knowledge of their own interests. Without full understanding of those interests, existing parties might choose to draw broad groups of conceivably interested persons into the litigation, encumbering already complex proceedings without enhancing third parties' opportunities to be heard. In the case of large employers, the costs to both parties and the courts of litigating Title VII claims could rise exponentially.

The difficulties inherent in broadly expanding Title VII actions by joining all potentially interested parties could not be avoided by attempting to name a defendant class of non-minority employees. At the outset, it is currently unclear whether Rule 23(b)(2)—the class action provision applicable in Title VII cases—even permits a defendant class. This Court granted *certiorari* in *Henson v. East Lincoln Township*, 814 F.2d 410 (7th Cir. 1987), *cert. granted*, 108 S. Ct. 691 (1988), to resolve precisely that question.[38]

Beyond this, attempted invocation of class action mechanisms would require the district courts to deal with a tangle of procedural difficulties, including (1) determination of the scope of the defendant class; (2) identification of a representative who would be "typical" of the possibly thousands of employees involved; (3) investigation of the representative's ability to represent the class fairly and adequately; and (4) selection of a competent attorney for the defendant class.[39] Moreover, certification of

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[38] In *Henson*, the Seventh Circuit held that Rule 23(b)(2) did not authorize defendant class actions. 814 F.2d at 417. *Accord Thompson v. Board of Education*, 709 F.2d 1200, 1203-04 (6th Cir. 1983); *Paxman v. Campbell*, 612 F.2d 848, 854 (1980) (en banc), *cert. denied*, 449 U.S. 1129 (1981). *But see Marcera v. Chinlund*, 595 F.2d 1231, 1238 (2d Cir.), *vacated on other grounds sub nom. Lombard v. Marcera*, 442 U.S. 915 (1979).

[39] *See generally* Note, *Certification of Defendant Classes Under Rule 23(b)(2)*, 1984 Colum. L. Rev. 1371, 1384-89 ("*Certifica-*

the defendant class might be denied on standing grounds if plaintiffs could not demonstrate that their interests were adverse to those of all proposed class members.[40]

Substantial questions of fairness to third parties also arise, because the named representative—despite a potential lack of personal interest in the implementation of the decree—would be forced to retain appropriate counsel, assume responsibility for costs, and accept the obligation of properly representing the class.[41] In addition, these obligations to the class may make the representative unable or unwilling to settle, burdening the court with litigation that might otherwise be concluded through negotiation. Rather than providing a procedural panacea, addition of a defendant class to ongoing Title VII litigation would only compound its complexity.

Given the massive practical difficulties that would be created by requiring mandatory joinder under Rule 19, Rule 24 is clearly the superior procedural mechanism for

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tion"). The adequacy of the representative would be a critical issue that would determine the binding effect of any judgment on the unnamed class members. *See Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940); *see also* Wolfson, *Defendant Class Actions*, 38 Ohio St. L. J. 459, 477 (1977).

[40] *See* 7A C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 1770 at 403 (1986); *Certification*, 84 Colum. L. Rev. at 1375; *see also LaMar v. H.&B. Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973); *Mudd v. Busse*, 68 F.R.D. 522, 527 (N.D. Ind. 1975), *aff'd mem.*, 582 F.2d 1283 (7th Cir. 1978), *cert. denied*, 439 U.S. 1078 (1979); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 690 (E.D. Pa. 1973).

[41] *See* Wolfson, *Defendant Class Actions*, 38 Ohio St. L. J. 459, 464 (1977). Faced with the high costs of defending such litigation, the involuntary class representative might well claim a violation of his due process rights, adding a further complication to the litigation. *See* Williams, *Some Defendants Have Class: Reflections on the GAP Securities Litigation*, 89 F.R.D. 287, 293 (1981); *see also Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 235 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

resolving the claims of informed third parties.[42] While both rules provide a means of involving non-parties in litigation that may affect them, Rule 24, with its voluntary component, is better able to deal with cases in which the person has notice of the action and can decide whether his interests warrant participation in the action.

Moreover, respondents here had an additional option to participate, short of formal intervention, by appearing at the fairness hearing. That hearing, held after community-wide notice of the opportunity to appear and participate, provided respondents with an effective means of raising all their challenges to the decrees' factual foundation, terms, and design, including any alleged trammeling effect arising from the decrees. As the transcript of that hearing amply demonstrates, the district court was scrupulous in providing all interested persons the opportunity to be heard. J.A. at 727. Respondents, who declined formally to participate in that proceeding, cannot establish any procedural or equitable right to an additional opportunity to assert their claims.

CONCLUSION

The rule of law adopted by the court below undermines strong statutory policies encouraging voluntary settlement of Title VII actions and ignores fundamental policies favoring finality of decrees and judgments. This Court should reject the broad rule adopted below and require employees with knowledge of ongoing Title VII litigation against their employers to take the initiative in protecting their own interests. Neither the Federal Rules

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[42] Neither the text nor the legislative history of these rules requires a preference for mandatory Rule 19 joinder over voluntary Rule 24 intervention. *See* Fed. R. Civ. P. 24 advisory committee note (1966 Amendment); *see also New York State Association for Retarded Children v. Carey*, 438 F. Supp. 440, 445 (E.D.N.Y. 1977) (the only difference between intervention under Rule 24 and joinder under Rule 19 "is which party initiates the addition of a new party to the case").

of Civil Procedure nor the Constitution grants individuals such as respondents the right to waive formal participation in ongoing proceedings and then relitigate identical issues in their chosen forum. Accordingly, where the non-parties to a consent decree have knowledge of the proceeding and a timely opportunity to intervene but choose not to do so, they should be precluded from attacking the terms or legality of the consent decree in a subsequent collateral proceeding.

Respectfully submitted,

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