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

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

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.

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

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

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE~~ AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Association of Fire Fighters, AFL-CIO, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of the respondents in these cases.

INTEREST OF THE IAFF AS AMICUS CURIAE AND ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

The International Association of Fire Fighters, AFL-CIO, (IAFF) is an unincorporated association comprised of municipal, state, and federal fire fighters throughout the United States and Canada. The current membership includes approximately 153,000 state and municipal fire fighters employed by states, cities, and towns across the United States.

The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF here represents the interests of its many members across the country who are employed in cities and towns whose employment rights are now, or may be, affected by the terms of consent decrees entered in settlement of employment discrimination lawsuits to which they are not parties. Most of the jurisdictions employing IAFF members operate pursuant to civil service laws which prescribe procedures for promotions. The legal principles espoused by the Court of Appeals below are perfectly consistent with the precedent of this Court, particularly as set forth in *Local Number 93, Firefighters v. City of Cleveland*, 478 U.S. ——, 92 L.Ed.2d 405 (1986) and *Wygant v. Jackson Board of Education*, 476 U.S. ——, 90 L.Ed.2d 260 (1986). Those principles protect the rights of public employees to challenge decisions of their employers, taken pursuant to settlements of employment discrimination lawsuits brought by others, which constitute unlawful discrimination under Title VII

of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Fourteenth Amendment to the U.S. Constitution. The filing of petitions seeking this Court's review of the decision of the Court of Appeals prompts the filing of this brief to point out that the issue of the rights of employees affected, by but not party to, consent decrees has already been settled by this Court. No further review is necessary.

CONCLUSION

For this reason, this motion for leave to file an *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* in this case is set forth in that motion.

ARGUMENT

THE PETITIONS FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The Court below twice has held that an employee need not intervene in pending employment discrimination litigation in order to preserve his right to challenge actions, taken pursuant to a settlement of such litigation, which adversely affect him and which he believes are the product of unlawful discrimination. In the first instance, *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983), petitioners did not seek review by this Court. Respondents relied upon that earlier ruling and pursued such an independent challenge with the approval of the Court of Appeals. Now, petitioners seek certiorari.

The lower court's application of the traditional concepts of fundamental due process and fair play in these circumstances was entirely appropriate. This Court held in *Local Number 93, Firefighters v. City of Cleveland*, 478 U.S. ——, 92 L.Ed.2d 405 (1986) that a consent decree is indistinguishable from a voluntary affirmative action program in assessing the rights of non-minorities affected by the terms of the settlement. "[A]bsent some contrary indication, there is no reason to think that voluntary, race-conscious affirmative action such as was held permissible in Weber is rendered impermissible by Title VII simply because it is incorporated in a consent decree." 92 L.Ed.2d at 421. *Local 93* tested the effect of Section 706(g) of Title VII on the extent of relief which could be contained in consent decrees. The Court held that the limits on the parties' ability to fashion such court-approved settlements "must be found outside § 706(g)." 92 L.Ed.2d at 423. It noted that this hold-

ing does "not suggest that voluntary action by employers or unions is outside the ambit of Title VII regardless of its effect on non-minorities. . . . The rights of non-minorities with respect to action by their employers are delineated in § 703 of Title VII, 42 U.S.C. § 2000e-2 and, in cases involving governmental employees, by the Fourteenth Amendment." 92 L.Ed.2d at 423, n. 11.

This latter principle was enunciated in *Wygant v. Jackson Board of Education*, 476 U.S. ——, 90 L.Ed.2d 260 (1986) as well. Treating the contention that the impact on non-minorities of the racial preference in layoffs was permissible under the Fourteenth Amendment because a majority of the affected non-minority employees did not object to it, Justice Powell explained:

> [W]hen a state implements a race-based plan that requires such a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. . . . [T]he petitioners before us today are not "the white teachers as a group." They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race. That claim cannot be waived by petitioners' more senior colleagues.

90 L.Ed.2d at 273, n. 8.

The Eleventh Circuit's opinion below is wholly consistent with this Court's decision in *Local Number 93, Firefighters*. There, a union which had intervened and presented objections to a proposed consent decree, attempted to block the settlement. This Court held that the union could not, simply by reason of its intervention, "preclude other parties from settling their own disputes and thereby withdrawing from litigation." 92 L.Ed.2d at 427-428. Conversely, the Court held that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may

not impose duties or obligations on a third party, without that party's agreement." 92 L.Ed.2d at 428. The gist of this holding is that a nonconsenting intervenor may continue to press claims that conduct covered by a consent decree is unlawful. Justice O'Connor specifically so noted in her concurring opinion—"As the Court explains, nonminority [public] employees therefore remain free to challenge the race-conscious measures contemplated by proposed consent decree as violative of their rights under § 703 [of Title VII of the Civil Rights Act of 1964] or the Fourteenth Amendment." 92 L.Ed.2d at 429.

Surely if nonconsenting intervenors retain such rights, even where they have specifically intervened to object to entry of a consent decree, then nonconsenting nonparties should enjoy at least the same modicum of procedural protection. It is the lower court's recognition of the respondents' right to such due process which the petitioner's complain about. The sole result of this Court's denial of a writ of certiorari will be that the respondents will enjoy their day in court on the merits of their claims of unlawful discrimination. Because their claims did not accrue until after the decree was entered, they possessed no claim ripe for presentation and disposition earlier.

The decision of the Eleventh Circuit is so plainly correct and consonant with the principles laid down by this Court in the *Local 93* case, there simply is no reason for this Court to grant the petition and further delay respondents' day in district court.

The petitioners artfully attempt to portray this case as identical to *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986) which this Court earlier this term affirmed by virtue of an equal division of the Justices. 484 U.S. ——, 98 L.Ed.2d 629 (1988). The portrayal is flawed, however. This case is not the same factual vehicle to resolve the issues which *Marino* presented. *Marino* posed the question whether non-minority employees who could have intervened in litigation brought by minority em-

ployees, but made no attempt to do so, should have been permitted to maintain a separate action claiming that the effect of a consent decree in that litigation was to deny them equal protection of the laws in violation of the Fourteenth Amendment. The U.S. Court of Appeals for the Second Circuit held that the non-minority employees' "proper course . . . would have been to intervene in the lawsuit from which the consent decree issued." 806 F.2d at 1146. That Court of Appeals consequently dismissed the employees' lawsuit as an improper collateral attack on the consent decree. "Attempting intervention . . . was obviously available when they commenced this action, since the final consent decree in that litigation had not yet issued." 806 F.2d at 1147.

In the instant case, the non-minority plaintiffs (respondents) cannot properly be criticized for not attempting intervention before the consent decree was entered. In fact, other non-minority employees did attempt to intervene and were rebuffed in an order affirmed by the U.S. Court of Appeals for the Eleventh Circuit:

> In their motion to intervene, the BFA members could not have alleged that they had suffered any reverse discrimination as a result of the Board's or the City's implementation of the affirmative action plan prescribed by the consent decrees, because the court had not yet approved those decrees. BFA members could present such a claim now, however, since the decrees have been approved and entered. For example, they could do so by instituting an independent Title VII suit, asserting the specific violations of their rights. The consent decrees would only become an issue if the defendant attempted to justify its conduct by saying that it was mandated by consent decree.[18]

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[18] It should be clear from this discussion that it is not necessary for the BFA members to make a frontal attack on the validity of the decrees between the parties in order to assert a discrimination claim against their employers.

United States v. Jefferson County, 720 F.2d 1151, 1518 (11th Cir. 1983). Thus, due to the earlier order, the respondents had no incentive to intervene. The Eleventh Circuit reiterated in its opinion which is the subject of the petitions for certiorari, "we took pains to point out in *Jefferson County* that the denial of the motion to intervene was not prejudicial to the movants partly because they were not precluded from instituting an independent Title VII suit." Pet. App. p. 15a, n.21.

Clearly, these respondents, unlike the non-minority employees in *Marino*, had a reasonable basis for not acting earlier. Petitioners here took no issue with the earlier order; no petition for a writ of certiorari was filed from the 1983 decision. Thus respondents here justifiably waited for their cause of action to accrue before seeking federal court relief. This fact alone distinguishes this case from *Marino* and renders a grant of certiorari inappropriate.

The entitlement of a non-minority individual to a "day in court" is explicit in *Local 93* and *Wygant*. Moreover, it was held out to the respondents by the Eleventh Circuit in a previous opinion in this same litigation as a rationale for denying intervention to similarly-situated individuals. In short, there is no good reason for this Court to inject itself into the process at this time.

CONCLUSION

For the foregoing reasons, the Amicus requests that the petitions for a writ of certiorari be denied.

Respectfully submitted,

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