82-3435

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

file
Civil Right
General

LARRY WILLIAMS, et al.,

Plaintiffs-Appellants,

v.

THE CITY OF NEW ORLEANS, LOUISIANA,
A MUNICIPAL CORPORATION, et al.,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Applicant for Intervention.

MOTION OF THE UNITED STATES TO INTERVENE AS A PARTY APPELLEE AND FOR LEAVE TO FILE SUGGESTION OF REHEARING EN BANC IN EXCESS OF THE PAGE LIMIT

AND

SUGGESTION OF REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR-APPELLEE

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MOTION OF THE UNITED STATES TO INTERVENE AS A PARTY APPELLEE AND FOR LEAVE TO FILE SUGGESTION OF REHEARING EN BANC IN EXCESS OF THE PAGE LIMIT

The United States of America respectfully moves the Court (1) for leave to intervene as a party appellee in this case in order to seek further appellate review, and (2) for leave to file a suggestion of rehearing en banc in excess of 15 pages (28 pages).

The grounds for this motion are as follows:

STATEMENT

The judgment in this case was entered after the plaintiffs appealed from the district court's denial of approval to a proposed consent decree.

INTERVENTION

A. Intervention in the Court of Appeals

While intervention at the appellate level is unusual, it is by no means unprecedented. The United States has in 3 previous Title VII cases -- 2 of them in this Court -- sought to intervene as a party in the court of appeals in circumstances similar to those obtaining here, i.e., after a panel decision and for the purpose of, inter alia, petitioning for rehearing. Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216 (5th Cir. 1977), reh denied, hearing en banc denied, 571 F.2d 337 (1978), rev'd, 443 U.S. 193 (1979); Tedford v. Airco Reduction, Inc., 4 EPD ¶7654, 4 FEP Cases 406, vacated and withdrawn, 4 EPD ¶7776, at p. 5977, 4 FEP Cases 690 (5th Cir. 1972); Love v. Pullman Co., 430 F.2d 49, 51 (10th Cir. 1969, 1970), rev'd, 404 U.S. 522, 522, 524 n.3 (1972). 1/ This Court allowed the United States to intervene at the appellate level in Singleton v. Jackson Municipal Separate School District, 348 F.2d 729, 730 n.1, 355 F.2d 865, 867-868 (5th Cir. 1965, 1966). "The Federal Rules of Civil

1/ In Weber, this Court permitted the United States to intervene and to file a petition for rehearing and suggestion of rehearing en banc, after the United States had previously participated in the case in this Court as amicus curiae. This Court denied the petition. 571 F.2d at 337.

In Tedford, this Court withdrew its decision after the United States filed its motion to intervene and petition for rehearing.

In Love, the Tenth Circuit permitted the United States and the Equal Employment Opportunity Commission (which had previously appeared as amicus curiae) to intervene and to file a petition for rehearing even though the plaintiff had himself already filed such a petition.

Procedure, of course, apply only in the federal district courts. Still, the policies underlying intervention may be applicable in appellate courts." Auto Workers v. Scofield, 382 U.S. 205, 217 n.10 (1965). Accord, Seguros Tepeyac, S.A., Compania Mexicana de Seguros Generales v. Bostrom, 347 F.2d 168, 172 (5th Cir. 1965), reh. denied, 360 F.2d 154, 155 (1966) (intervention allowed); Hurd v. Illinois Bell Telephone Co., 234 F.2d 942, 944 (7th Cir. 1956), cert. denied 352 U.S. 918 (1956) (intervention allowed); Park & Tilford v. Schulte, 160 F.2d 984, 987, 988 (2d Cir. 1947), cert. denied 332 U.S. 261 (1947) (intervention allowed). Cf. United States v. Ahmad, 499 F.2d 851, 854 (3rd Cir. 1974) (intervention allowed); McKenna v. Pan American Petroleum Corp., 303 F.2d 778, 779 (5th Cir. 1962) (intervention denied).

B. Interest of Applicants for Intervention

1. The Attorney General may intervene as of right in an action seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution on account of race, color, religion, sex, or national origin, where he certifies that the case is of general public importance. 42 U.S.C. 2000h-2. Both plaintiffs and intervenors have asserted such claims, and the Attorney General has signed the requisite certificate. See Exhibit A attached hereto.

2. Further, the Department of Justice has important responsibilities for the enforcement of Title VII of the Civil Rights Act of 1964, as amended, which prohibits, inter alia, racial discrimination in employment. The Attorney General has

enforcement responsibility under Title VII when the employer, as here, is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5(f)(1). Moreover, Title VII authorizes the Attorney General to intervene in a civil action involving such governmental entities upon certification that the case is of general public importance and upon timely application to the court, which has discretion to grant the application. Ibid.

The principal issue in this case is whether the District Court abused its discretion in withholding approval of the consent decree because it required promotion of one black policeman for every white policeman until black officers constituted 50 percent of all ranks in the New Orleans Police Department. See slip op. 2. The resolution of this issue necessarily requires the court to decide significant, related issues such as whether the promotion quota at issue (1) exceeds the limits of judicial remedial authority under Title VII (42 U.S.C. 2000e-5(g)), (2) constitutes either an unreasonable or proscribed infringement on the interests of innocent non-black employees (slip op. 6; ibid. 1-3 (Reavley, J., dissenting)), or (3) violates the equal protection guaranties of the United States Constitution (slip op. 1 (Reavley, J., dissenting)).

The applicant for intervention believes that the panel majority decided this case incorrectly, and that its decision will have serious consequences adverse to the proper enforcement of Title VII. See slip op. 1-3 (Reavley, J., dissenting).

The Attorney General has, pursuant to 42 U.S.C. 2000e-5(f)(1), certified that this case "is of general public importance." See Exhibit A attached hereto. The resolution of the issues in this case will clearly affect the Attorney General's Title VII enforcement responsibilities. In addition, the United States believes that the majority's decision infringes upon the rights of the intervenors and countenances an expansion of the boundaries of judicial remedial power under Title VII beyond its statutory limits.

The government believes -- for reasons set forth in our suggestion of rehearing en banc -- that rehearing en banc should be granted in this case because, inter alia, a divided panel has decided a question of exceptional importance, involving significant issues not squarely addressed in its opinion, in a manner which should not stand without review by the full Court. Rule 35(a), Fed. R. App. P.

C. Grounds for Intervention

The interest of the applicant for intervention has been set forth supra. It is apparent that the majority decision may as a practical matter impair or impede our ability to protect that interest. In addition, there is serious doubt as to whether the government's interest will be represented adequately if intervention is disallowed. We believe that at the present juncture of this litigation protection of the government's interest requires suggestion of rehearing en banc. It is unclear what future steps the parties will take

in this case. No matter what steps they may take to pursue further appellate review, their legal position(s), to this date, have not been fully congruent or compatible with that of the applicant for intervention. The United States' interest in this litigation is clearly not identical to the interest of the plaintiffs or defendants. These parties have agreed to the provision of the consent decree at issue on appeal. Moreover, the legal arguments advanced by the intervenors have not addressed either the scope of the court's remedial authority under 42 U.S.C. 2000e-5(g) or all aspects of the constitutionality of the quota provision at issue.

Thus, while the United States is entitled to intervene as of right under 42 U.S.C. 2000h-2, the case for permissive intervention under Title VII is also compelling. 2/ Title VII confers upon the Attorney General a conditional right to intervene in this kind of litigation, and the Attorney General has issued the requisite certificate of public importance. Cf. 42 U.S.C. 2000e-5(f)(1); Rule 24(b)(1), Fed. R. Civ. P. Also see generally Note, Federal Intervention in Private Actions Involving the Public Interest, 65 Harv. L. Rev. 319, 328 (1951); D. Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 735 (1968). Thus, the applicant for intervention has clearly defined, judicially cognizable interests in becoming a party appellee in this case. And the legal authority for, as well

2/ We discuss the question of timeliness infra.

as the factual circumstances of the proposed intervention, render this application for intervention quite similar to those granted in Weber v. Kaiser Aluminum & Chemical Corp., Tedford v. Airco Reduction, Inc., Love v. Pullman Co., and Singleton v. Jackson Municipal Separate School District, supra.

The only remaining questions are those of timeliness and possible prejudice to the rights of the original parties. Cf. 42 U.S.C. 2000e-5(f)(1); Rules 24(a), 24(b), Fed. R. Civ. P. The United States' application for intervention is timely. The government, for reasons detailed in our suggestion of rehearing en banc, believes that the district court's rejection of the race-conscious promotion quota at issue in this case was compelled by Title VII, by fundamental principles of equity, and by the equal protection guaranties of the United States Constitution. Accordingly, not until the panel majority rendered its decision reversing the district court and ordering entry of the proposed promotion quota were the interests of the United States adversely affected. The government acted to intervene in this case as soon as it was advised of the panel's decision and had completed its study of the decision 3/ and necessary legal research. This motion was filed within the period for petitioning for rehearing, as enlarged by the Clerk of the Court. Cf. United Air Lines, Inc. v. McDonald, 432 U.S. 385, 394 (1977); Stallworth v. Monsanto Co., 558 F.2d 257, 263-266 (5th Cir. 1977).

3/ The United States received a copy of the panel's decision on December 18, 1982.

The government's interests in this appeal are not adequately protected by participation as amicus curiae. An amicus curiae may not petition for rehearing, suggest rehearing en banc, or petition for certiorari. In view of the divergences of interest among the government and the parties, and the uncertainty concerning the procedural steps which the parties might henceforth undertake and the substantive positions which they might henceforth assert, the government cannot adequately protect its interest without the degree of participation in this litigation which only the status of a party can confer.

No undue delay or prejudice to the original parties will result from the participation of the government as party appellee. The legality of the provision of the consent decree at issue has already been questioned by intervenors. In light of all the relevant circumstances, the present motion to intervene is timely "as measured by the purpose of the intervention and the possible prejudice to the parties." Natural Resources Defense Council v. Costle, 561 F.2d 904, 908 (D.C. Cir. 1977). See also Janusziewicz v. Sun Shipbuilding & Dry Dock Co., 677 F.2d 286, 293 (3rd Cir. 1982).

SUGGESTION OF REHEARING EN BANC
IN EXCESS OF THE PAGE LIMIT

The number and complexity of the issues presented in this case, the great public importance of these issues, and the government's presentation of its views for the first time

in this case, necessitate the filing of a suggestion for rehearing en banc in excess of 15 pages, the limit prescribed by Rule 16.5 of the Court's Local Rules. Accordingly, the United States respectfully requests leave to file a suggestion of rehearing en banc 28 pages in length.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter an order (1) joining the United States as intervenor-appellee herein, and (2) granting leave to file a suggestion of rehearing en banc 28 pages in length.

Respectfully submitted,

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CHARLES J. COOPER
Deputy Assistant Attorney General

Mark R. Disler

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January 6, 1983

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS

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versus

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Defendants-Appellants,

UNITED STATES OF AMERICA,

Applicants for Intervention.

On Appeal from the United States District Court
for the Eastern District of Louisiana

CERTIFICATE OF PUBLIC IMPORTANCE

The Attorney General of the United States hereby certifies to this Honorable Court that the United States has determined this case to be of general public importance in accordance with the provisions of Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Section 2000e-(f)(1) and of Section 902 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000h-2.

William French Smith
Attorney General of the
United States

January 6, 1983

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STATEMENT OF COUNSEL

I, the undersigned counsel, express belief, based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions:

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976);

Teamsters v. United States, 431 U.S. 324 (1977).

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

Whether a judicial decree requiring a municipal police department to promote one black police officer for every white officer -- without regard to whether the promoted black officer had been an actual victim of discriminatory promotional practices -- until blacks constitute 50 percent of the officers in all ranks of the department

(1) exceeds the limits of judicial remedial authority under Section 706(g) of Title VII of the 1964 Civil Rights Act;

(2) constitutes an inequitable infringement on the interests of innocent non-black employees; and/or

(3) violates the equal protection guaranties of the United States Constitution?

Wm. Bradford Reynolds
Assistant Attorney General

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STATEMENT OF ISSUE PRESENTED

Whether, in an employment discrimination case against a municipal police department, the district court abused its discretion in refusing to approve a consent decree because it contained a provision requiring the promotion of one black officer for every white officer until blacks constituted one half of the officers in all supervisory ranks?

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SUGGESTION OF REHEARING EN BANC FOR THE
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STATEMENT OF THE COURSE OF PROCEEDINGS AND
DISPOSITION OF THE CASE

On December 16, 1982, a divided panel of this Court rendered its decision in this employment discrimination case, holding that the district court had abused its discretion in refusing to approve a proposed consent decree that, inter alia, required the promotion of one black officer for every white officer until blacks constituted 50 percent of the sworn officers in all ranks of the New Orleans Police Department (NOPD). The salient features of the background of this case and the decisions of the district court (reported at 543 F. Supp. 662) and the panel can be briefly summarized.

A. Proceedings in the District Court

This action was filed in 1973 by 13 named black police officers and applicants for appointment as police officers in

the NOPD. Plaintiffs alleged that the City of New Orleans, the New Orleans Civil Service Commission (CSC), and various municipal and CSC officials had engaged in racially discriminatory employment practices in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. Section 2000e, et seq., 42 U.S.C. Sections 1981 and 1983, and the Thirteenth and Fourteenth Amendments to the United States Constitution. In 1976 the suit was certified by then District Judge Rubin as a class action (Record 534). Although the case was dismissed in 1978 for want of prosecution, it was subsequently reopened and, after extensive discovery, readied for trial. 543 F. Supp. at 667. On the day that trial was scheduled to commence, however, the parties submitted for the district court's approval a consent decree settling the case. Objections to the decree were filed by classes of female officers, Hispanic officers, and white officers, which had been permitted to intervene for the limited purpose of challenging the decree. Id.

As the district court noted, the consent decree governed "virtually every phase of an officer's employment by the NOPD." Id. at 668. The district court approved the decree's extensive provisions pertaining to recruiting, hiring, training, and testing, but refused to approve of the proposed one-to-one promotion quota. Finding (1) that the target of 50 percent black representation in all ranks was unsupported by the evidence, (2) that the promotion quota would dramatically reduce the promotion prospects of non-black officers --

particularly white and Hispanic women -- for a period of at least twelve years, and (3) that "without the proposed quota, the decree's other provisions ensure that blacks eventually will occupy all ranks in accordance with their participation in the labor market," the district court concluded that the proposed promotion quota "exceeds its remedial objectives" and would "infringe constitutional and federal statutory rights of [non-black] officers." 543 F. Supp. at 677-686. Accordingly, the district court refused to enter the proposed decree absent deletion of the promotion quota. Plaintiffs appealed.

B. The Panel's Decision

Turning first to the question of the appropriate standard of appellate review, the court rejected plaintiff's contention that a district court's rejection of a consent decree in an employment discrimination case must be subjected to de novo review by the court of appeals. Stressing the district court's prolonged familiarity with the case and its careful consideration, after a four-day evidentiary hearing, of the competing interests of the plaintiffs and intervenors, the panel held that the question for review was whether the district court abused its discretion in conditioning its approval of the proposed consent decree on deletion of the promotion quota. Slip op. 6-9.

Noting that the one-to-one promotion quota reflected "a numerical commitment to immediate increased black representation" in the NOPD supervisory ranks, the panel majority first concluded that the district court abused its

discretion "insofar as it scrutinized the promotion quota beyond the need to determine whether it was reasonably related to the permissible goal of remedying past-discriminatory practices." Slip op. at 13. The court of appeals majority also held that the district court had clearly erred in finding that the target ratio of 50 percent black representation in all ranks was unsupported by the evidence. Since the primary labor pool for the NOPD is statutorily restricted to qualified voters of the City of New Orleans (unless the City does not yield a sufficient number of eligible candidates), the district court erred as a matter of law in accepting intervenors' contention that the relevant labor market was not only the City, which is approximately 55 percent black, but also the surrounding metropolitan area, which has a much higher proportion of white residents. Slip op. at 14-20. Finally, the panel majority held that "temporary" racial quotas "are an acceptable and approved remedy to redress long-term past discriminatory practices." 1/ Id. at 21. The panel majority determined that the minimum twelve-year duration of the promotion quota "may be regarded as temporary and as not unreasonable or unlawful in its effect

1/ In support of this conclusion, the majority reasoned that "preferential treatment of victims of past discrimination may reasonably be afforded, even though some of the burden of remedying past discrimination is borne by other employees themselves innocent of the wrongdoing." (emphasis added) Slip op. at 21, citing Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). In a typical situation involving remedial use of racial quotas, as in this case, the racially preferential treatment accorded by an employment quota falls indiscriminately on nonvictims as well as victims of the employer's employment discrimination. See discussion at 6-17, infra.

on third parties." Id. at 23. The majority thus held that the district court had abused its discretion in refusing to approve the consent decree and remanded the case to the district court with directions that it enter the decree as originally proposed by plaintiffs and defendants.

Judge Reavley dissented. Noting that "approximately three-fourths of the New Orleans police officers are objecting to this proposed decree," Judge Reavley concluded that the district court properly exercised its discretion in deciding that "color-blind merit selection . . . would be better for all affected persons." Slip op. at 2-3 (Reavley, J., dissenting)

ARGUMENT AND AUTHORITIES

Although founded on the agreement of the parties, a consent decree is nonetheless a judgment, enforceable by the full panoply of judicial sanctions, including citation for contempt, if it is violated. United States v. City of Miami, 664 F.2d 435, 439-40 (5th Cir. 1981). A federal court, therefore, is bound to examine carefully a consent decree proposed by the parties "to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence." Id. at 441; see United States v. City of Alexandria, 614 F.2d 1358, 1362 (5th Cir. 1980) (terms of decree cannot be "unreasonable, illegal, unconstitutional, or against public policy"); United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975) (decree's terms cannot be "unlawful, unreasonable, or inequitable"). If the terms of a consent decree affect the interests of third parties, the court must ensure that

the impact on them is neither "unreasonable nor proscribed." United States v. City of Miami, supra, 664 F.2d at 441.

The appropriate level of appellate scrutiny is determined by a variety of factors, such as the familiarity of the trial court with the lawsuit, the stage of the proceeding at which the consent decree is approved, and the types of issues involved. United States v. City of Alexandria, supra, 614 F.2d at 1361. We submit that the panel decision in this case properly assessed these factors and correctly concluded that the district court's rejection of the proposed promotion quota should be reviewed under the traditional abuse of discretion standard.

For the reasons that follow, however, we submit that ordering implementation of the one-to-one promotion quota contained in the proposed consent decree would have (1) exceeded the limits of the district court's remedial authority under Title VII, (2) constituted an inequitable infringement on the interests of innocent non-black employees, and (3) violated the equal protection guaranties of the United States Constitution. Accordingly, the district court did not abuse its discretion in conditioning approval of the proposed consent decree upon deletion of the promotion quota. Indeed, the district court lacked discretion to do otherwise.

A. A Court's Remedial Authority Under Title VII To Order Specific Affirmative Relief Is Limited to Those Measures Necessary To "Make Whole" Actual Victims of Employment Discrimination

1. The court's statutory remedial authority in these cases is governed by Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g). That section

expressly prohibits courts from ordering specific affirmative relief for persons who were not actual victims of the defendant's unlawful employment practice. And, as to proven discriminatees, a court's remedial authority is limited to placing them in the position they would have occupied but for the defendant's unlawful discrimination. The proposed consent decree, however, requires the preferential promotion of officers on the basis of race without regard to whether the preferred black officers have been the actual victims of unlawful racial discrimination in promotions. Entry of a remedial order requiring such relief would have exceeded the limits of judicial remedial authority under Title VII. 2/ Thus, far from constituting an abuse of discretion, the district court's rejection of the proposed consent decree was required by Title VII. 3/

Section 706(g) authorizes federal courts to grant injunctive relief prohibiting employment practices violating Title VII and to "order such affirmative action as may be

2/ That this case involves a consent decree rather than a litigated decree in no way enhances the district court's remedial authority under Section 706(g). Litigants cannot, by agreement, "purchase from a court of equity a continuing injunction. * * * [A] District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." System Federation No. 91 v. Wright, 364 U.S. 642, 651 (1961); see United States v. Motor Vehicle Manufacturers Ass'n, 643 F.2d 644, 650 (9th Cir. 1981); Cf. Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977) (in assessing fairness and adequacy, consent decree's terms should be compared with relief that would likely have been received following successful trial).

3/ Because the sole issue brought on appeal to this Court concerns the promotion quota rejected by the district court, we do not address the other features of the proposed consent decree.

appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g). Such affirmative equitable relief can be granted, however, only in favor of actual victims of discrimination, as the final sentence of Section 706(g) makes clear:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.

That this congressional directive was intended to confine a court's equitable remedial authority to restoring discriminatees to the place they would have occupied but for the discrimination is amply reflected in the provision's legislative history. Section 706(g), as originally crafted in the House Judiciary Committee, prohibited a court from ordering affirmative equitable relief for anyone refused employment or advancement or suspended or discharged for "cause." Vaas, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431, 438 (1966). In an amendment introduced on the House floor by Congressman Celler, Chairman of the House Judiciary Committee and the Member responsible for introducing H.R. 7152, the word "cause" was replaced by the phrase for "any reason other than discrimination on account

of race * * *" to ensure that only actual victims of the prohibited types of discrimination would be eligible for affirmative equitable relief. See 110 Cong. Rec. 2567 (1964) (Rep. Celler); id. at 2570 (Rep. Gill) (provision intended to "limit orders under this act to the purposes of this act"). Responding to arguments that "seriously misrepresent[ed] what [Title VII] would do," Congressman Celler advised his colleagues that a court order could be entered only on proof "that the particular employer involved had in fact, discriminated against one or more of his employees because of race * * *." Id. at 1518. "Even then," assured Celler, "the court could not order that any preference be given to any particular race, * * *, but would be limited to ordering an end to discrimination." Ibid.

In the Senate, the provision was not changed. In an interpretive memorandum -- characterized by the Supreme Court as one of the "authoritative indicators" of the meaning of Title VII (American Tobacco Co. v. Patterson, 50 U.S.L.W. 4364, 4367 (U.S. April 5, 1982)) -- Senators Clark and Case, the bipartisan "captains" responsible for explaining and defending Title VII in the Senate debate, described the provision's intended effect as follows: "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section [706(g)]." 110 Cong. Rec. 7214 (1964). Explanatory statements by Senators Humphrey and

Kuchel, bipartisan floor managers on the entire Civil Rights bill, were equally clear. 4/

4/ Senator Humphrey stated with respect to permissible relief under title VII (110 Cong. Rec. 6549 (1964)):

> The relief * * * would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of back pay. * * * No court order can require [such affirmative relief] * * * for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of the section [706(g)] * * *.
>
> * * * * *
>
> [T]here is nothing in it that will give any power * * * to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.

See also id. at 11848 (Senator Humphrey). Senator Kuchel remarked as follows (id. at 6563):

> If the court finds that unlawful employment practices have indeed been committed as charged, then the court may enjoin the responsible party from engaging in such practices and shall order the party to take that affirmative action, such as the reinstatement or hiring of employees, with or without back pay, which may be appropriate.
>
> * * * * *
>
> Only a Federal court could [issue orders], and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. * * * But the important point * * * is that the court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.

basis of their accumulated company seniority. The court further held that each class member filling such a job was entitled to an award of retroactive seniority on the over-the-road driver's seniority list dating back to the class member's "qualification date" -- the date when (1) an over-the-road driver position was vacant and (2) the class member met or could have met the job's qualifications.

In the Supreme Court, the employer contended that a grant of retroactive "qualification date" seniority to non-applicants was contrary to the "make whole" purpose of Title VII and would constitute an impermissible racial preference. Noting that the district court's remedial authority under Title VII "is determined by the purposes of the Act" (431 U.S. at 364), the Supreme Court held that affirmative equitable relief can be awarded only to actual victims of the employer's discrimination -- that is (1) those who applied and were discriminatorily rejected and (2) those who were deterred from applying by the employer's discriminatory practices and would have been discriminatorily rejected. Id. at 364-371. Accordingly, the case was remanded to the district court for determinations "with respect to each specific individual" as to "which of the minority employees were actual victims of the company's discriminatory practices." Id. at 371-372.

Only these victims were entitled to preferential consideration for vacant over-the-road positions and to retroactive seniority. 9/

In the instant case, the racially preferential promotion quota contained in the proposed consent decree would have operated to prefer black officers without regard to whether they had actually been discriminatorily denied promotions in the past and thus were in a position to assert "rightful place" claims to promotion priority vis-a-vis other officers. In this respect, therefore, the proposed consent decree is legally indistinguishable from the remedial orders condemned in Franks and Teamsters. 10/ Thus, far from abusing its discretion, the district court, in rejecting the proposed promotion quota, exercised its discretion in the only manner consistent with the limits on judicial remedial authority expressed in the language and legislative history of Section 706(g) and recognized by the Supreme Court in both Teamsters and Franks.

B. The Proposed Consent Decree Contravenes Traditional Equitable Principles Regarding Appropriate Remedial Relief and the Legitimate Interests of Third Parties

Even if district courts were not expressly prohibited under Section 706(g) of Title VII from ordering race-conscious promotion priority for nonvictims of discriminatory promotion

9/ Similarly, in Ford Motor Co. v. EEOC, 50 U.S.L.W. 4937, 4941 (June 28, 1982), the Supreme Court rejected an interpretation of Title VII that "would not merely restore [the alleged discriminatees] to the 'position where they would have been were it not for the unlawful discrimination,' * * * it would catapult them into a better position than they would have enjoyed in the absence of discrimination" (slip op. 15); see discussion at infra. Surely persons who cannot even claim to be discriminatees are entitled to no more.

10/ Like the orders overturned in Franks and Teamsters, the (cont'd)

practices, the proposed promotion quota would violate fundamental principles of equitable relief. As the Supreme Court noted in Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 709 (1978), "the basic policy of [Title VII] requires that [courts] focus on fairness to individuals rather than fairness to classes." Accordingly, in crafting equitable relief under Title VII, courts must consider the legitimate interests of "innocent third parties." Ford Motor Co. v. EEOC, supra, 50 U.S.L.W. at 4942. Indeed, even in a case (unlike this one) in which the victims of unlawful employment discrimination have been identified and their rightful place determined, a court is "faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." Teamsters v. United States, supra, 431 U.S. at 372.

In Franks, the impact of an award of retroactive competitive seniority on innocent incumbent employees moved some Members of the Supreme Court to criticize the majority's ruling that identifiable victims of unlawful employment discrimination are, in essence, presumptively entitled to such an award. See Franks v. Bowman Transportation Co., supra 424 U.S. at 780-781 (Burger, C.J., concurring in part and dissenting in part); id. at 781-799 (Powell,

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10/ (cont'd)
proposed consent decree did not include a procedure affording "rightful place" relief to black officers able to sustain the burden of proving entitlement to such treatment as actual victims of promotion discrimination. Rather the consent decree provided for race-conscious promotion preferences on a wholesale basis until numerical parity is reached, which is precisely the type of relief rejected in Franks and Teamsters.

J., concurring in part and dissenting in part). When a discriminatee is awarded affirmative "rightful place" relief, such as retroactive competitive seniority or promotion priority, however, he is merely being returned to the position he would have occupied but for the discrimination -- the position now occupied by a non-minority incumbent because of the discrimination. Thus, while awarding affirmative "rightful place" relief to a discriminatee will inevitably alter the employment expectations of some incumbent employees, their expectations are, at least to some extent, born of unlawful discrimination. These equitable considerations simply do not obtain, however, when affirmative equitable relief is ordered for a nondiscriminatee, as the Supreme Court expressly recognized last Term in Ford Motor Co. v. EEOC, supra.

The Court in Ford Motor Co. held that an employer charged with hiring discrimination under Title VII can toll the continuing accrual of back pay liability under Section 706(g) by unconditionally offering the claimant the job allegedly denied. The Court rejected the argument that the employer must also offer constructive seniority retroactive to the date of the alleged discrimination, for such a rule would "encourage[ ] job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination." 50 U.S.L.W. at 4942 (emphasis added). Noting the importance of seniority in allocating benefits and burdens among employees, the Court concluded

that the "large objectives" of Title VII do not require innocent employees "to carry such a heavy burden." Ibid.

In the instant case, the promotion priority bestowed by the proposed one-to-one quota is not limited to officers who were discriminatorily denied promotions by the NOPD. The consent decree would therefore have required innocent non-black police officers to surrender their legitimate promotion expectations to black officers who have no "rightful place" claim to promotion priority. We submit that, as recognized in Ford Motor Co., the balance of competing interests in these circumstances weigh against ordering racially based promotion relief that will benefit nondiscriminatees at the expense of other innocent employees. Accordingly, the district court did not abuse its discretion in insisting that the promotion quota be deleted from the proposed consent decree.

C. Judicial Imposition of the Proposed Promotion Quota Would Have Violated the Constitution's Equal Protection Guaranties

As we have demonstrated, judicial approval of the promotion quota at issue would have exceeded the district court's statutory remedial authority and would have constituted an inequitable infringement on the rights of innocent non-black officers. Of course, if the Court agrees with either of our previous points, it need not address the constitutional questions that judicial imposition of the proposed promotion quota would raise. We submit that entry by the district court of the proposed consent

Thus, both the language 5/ and the legislative history 6/ of Section 706(g) leave no doubt that courts are authorized,

5/ A further indication in the language of Section 706(g) that Congress intended to limit affirmative equitable relief to actual victims of discrimination is contained in the sentence requiring that an award of back pay be offset by any "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against * * *." 42 U.S.C. 2000e-5(g) (emphasis added).

6/ Congressional consideration of Section 706(g) during deliberations on the 1972 amendments to Title VII fully supports the interpretation compelled by the provision's language and 1964 history. The House and Senate passed two differing versions of Section 706(g) in 1972. The House bill (H.R. 1746) left the 1964 provision largely unchanged, except for the addition of a provision limiting back pay awards. See 117 Cong. Rec. 31979-31980, 32113 (1971). The Senate-passed bill (S. 2515) eliminated from Section 706(g) the final, limiting sentence contained in the 1964 Act. See 118 Cong. Rec. 4944-4946 (1972). The bill that emerged from the House-Senate conference, however, restored to Section 706(g) the final sentence explicitly confining the scope of judicial equitable authority under Title VII to identifiable victims of unlawful discrimination. S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess. 5-6, 18-19 (1972). H.R. Conf. Rep. No. 92-899, 92d Cong., 2d Sess. 5-6, 18-19 (1972). Additionally, the Conference version of Section 706(g) included new language, borrowed from the Senate bill, making clear that discriminatees are entitled not only to the specific types of relief expressly mentioned in the section, but also to "any other equitable relief as the court deems appropriate." Id. at 5-6. The section-by-section analysis of the conference bill explained that "the scope of relief under [Section 706(g)] is intended to make the victims of unlawful discrimination whole, * * * [which] requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972) (Senate); id. at 7565 (House); See also note 8, infra. This "make victims whole" congressional understanding is precisely the interpretation accorded Section 706(g) by the Supreme Court in every case in which it has directly addressed the permissible scope of judicial remedial authority under Title VII. See Teamsters v. United States, 424 U.S. 747 (1976); Franks v. Bowman Transportation Co., 431 U.S. 324 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Some appellate courts construing Section 706(g) have mistakenly sought to attach interpretative significance to unsuccessful amendments to Title VII offered by Senator Ervin in 1972. (cont'd)

upon finding a violation of Title VII, to order affirmative equitable relief only on behalf of individual victims of the discrimination.

2. "[T]he scope of the district court's remedial powers under Title VII is determined by the purposes of the Act." Teamsters v. United States, 431 U.S. 324, 364 (1977). Section 706(g)'s prohibition on the granting of affirmative equitable relief to nondiscriminatees is wholly consistent with -- indeed, complements -- the central congressional purposes of Title VII, which, as the Supreme Court has often observed, are "to end discrimination *** [and] to compensate the victims for their injuries." Ford Motor Co. v. EEOC, 50 U.S.L.W. 4937, 4940 (U.S. June 28, 1982) (emphasis added); see, e.g., Teamsters v. United States, supra, 431 U.S. at 364. In this latter connection, "the purpose of Title VII [is] to make persons whole for injuries

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6/ (cont'd)
See EEOC v. AT&T, 556 F.2d 167, 174-77 (3rd Cir. 1977); United States v. Intern. Union of Elevator Const., 538 F.2d 1012, 1019-1020 (3d Cir. 1976). Those amendments, however, did not seek to alter Section 706(g). Indeed, it is clear from the language of the amendments (118 Cong. Rec. 1662, 4917) and from their sponsor's explanations (id. at 1663-1664, 4917-4918) that neither amendment was in any way concerned with the remedial authority of courts. To the contrary, the amendments would merely have extended to all federal executive agencies, particularly the Office of Federal Contract Compliance, Section 703(j)'s prohibition against requiring employers to engage in racially preferential hiring in order to rectify racial imbalance in their workforces. See ibid. As the Supreme Court recognized in United Steelworkers v. Weber, 443 U.S. 193, 205 n.5 (1979), Section 703(j) speaks only to substantive liability under Title VII, not to the scope of judicial remedial authority, which is governed solely by Section 706(g). And, as the Court observed in Teamsters (431 U.S. at 354 n.39), [t]he views of members of a later Congress, concerning different sections of Title VII, * * * are entitled to little if any weight."

suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); See, e.g., Myers v. Gilman Paper Corp., 544 F.2d 837, 856 (5th Cir. 1977), cert. dismissed, 434 U.S. 801 (1977) (judicial remedies under Title VII governed by "rightful place" doctrine, under which "courts are to grant affirmative relief to give discriminatees the opportunity to achieve positions that would have been theirs absent discrimination"). Section 706(g) thus requires a court "to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination and hiring." 7/ Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976) (emphasis added; footnote omitted); 8/ accord Teamsters v. United States, supra, 431 U.S. at 364.

7/ The Supreme Court has also often recognized that the ability of courts to order affirmative equitable relief such as back pay and constructive seniority also advances Title VII's other central objective -- ending discrimination -- by "providing a "'spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges'" of their discriminatory practices." Teamsters v. United States, supra, 431 U.S. at 364, quoting Albemarle Paper Co. v. Moody, supra, 422 U.S. at 417-418. See also Ford Motor Co. v. EEOC, supra, 50 U.S.L.W. at 4939-4940.

8/ In Franks the Supreme Court thoroughly canvassed Title VII's legislative history, relying particularly on the 1972 amendments to Section 706(g). The section-by-section analysis accompanying the Conference Committee Report on the 1972 amendments emphatically confirms the "make whole" purpose of Title VII: "[T]he scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, * * * restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972) (emphasis added), quoted in Franks v. Bowman Transportation Co., supra, 424 U.S. at 764, and Albemarle Paper Co. v. Moody, supra, 422 U.S. at 421. Moreover, "[t]he (cont'd)

Class-based retroactive seniority and back pay awards for identifiable victims of illegal hiring discrimination are clearly within this mandate, as held by the Supreme Court in Franks v. Bowman Transportation Co., supra, and Albemarle Paper Co. v. Moody, supra. In so ruling, however, the Court made clear that judicial authority under Section 706(g) to order affirmative equitable relief extends only to actual victims.

Franks involved a claim of unlawful discrimination by a class of black nonemployee applicants who unsuccessfully sought employment as over-the-road truck drivers. Finding that the employer had unlawfully discriminated in the hiring, transfer, and discharge of employees, the district court ordered the employer to give priority consideration to class members for over-the-road jobs, but declined to award back pay or constructive seniority retroactive to the date of

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8/ (cont'd)
Reports of both Houses of Congress indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." Franks v. Bowman Transportation Co., supra, 424 U.S. at 764 n.21. See also note 6, supra.

Additionally, Section 706(g) was originally modelled on Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), which directs the Board to order, on finding an unfair labor practice, "'affirmative action including reinstatement of employees with or without back pay.'" Albemarle Paper Co. v. Moody, supra, 422 U.S. at 419 n.11. Decisions construing this provision make clear that "the thrust of 'affirmative action' redressing the wrong incurred by an unfair labor practice is to make 'the employees whole, and thus restor[e] the economic status quo that would have obtained but for the company's wrongful [act].'" Franks v. Bowman Transportation Co., supra, 424 U.S. at 769, quoting NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969). See also Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197-198 (1941) ("only actual losses should be made good"); NLRB v. Dodson's Market, Inc., 553 F.2d 617 (9th Cir. 1977).

individual application. This Court reversed the district court's ruling on back pay, but affirmed its refusal to award retroactive seniority.

In holding that federal courts are authorized under Section 706(g) to award retroactive seniority, the Supreme Court stressed that such an award, as well as any other type of affirmative equitable relief, can only be made to restore actual victims of unlawful discrimination to their "rightful place." The defendant was entitled to an opportunity on remand "to prove that a given individual member of [the] class * * * was not in fact discriminatorily refused employment as an OTR driver in order to defeat the individual's claim to seniority relief as well as any other remedy ordered for the class generally." 424 U.S. at 773 n.32.

This understanding of the statute was reaffirmed in Teamsters v. United States, supra. There the defendant trucking company was found to have excluded blacks and Hispanics from the position of over-the-road truck driver. The seniority system in the employer's collective-bargaining agreements provided that an incumbent employee who transferred to an over-the-road position was required to forfeit the competitive seniority he had accumulated in his previous position (company seniority) and to start at the bottom of the over-the-road drivers' seniority list. After affirming the district court's finding of liability under Title VII, this Court held that all black and Hispanic incumbent employees were entitled to bid for future over-the-road jobs on the

order would violate the equal protection rights of those otherwise eligible non-black officers who would be excluded from consideration for promotion to the supervisory positions set aside for blacks. 11/

The constitutional issue presented in this case -- whether the proposed consent decree, if ordered by the district court, would violate the Constitution's equal protection guaranties 12/ -- focuses not on the "broad remedial powers of Congress" or the policy choices of a legislative or administrative body, but rather

11/ This Court has frequently countenanced employment quotas and other race-conscious remedies in employment discrimination cases without expressly addressing their constitutionality. See, e.g., Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974), cert. denied, 419 U.S. 895 (1974); id. at 1059 (Clark, J., concurring, but expressing "doubts that [a hiring quota's] constitutional validity can be reasonably articulated"). Panels of this court, however, have specifically addressed the constitutionality of consent decrees containing race-conscious employment quotas on two previous occasions. In United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980), a divided panel of this Court upheld the constitutionality of a consent decree containing race-conscious hiring and promotion quotas, but the panel's decision was subsequently vacated by the full Court. 664 F.2d 435 (5th Cir. 1981) (en banc). In United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980), a companion case to the City of Miami, the same panel upheld the constitutionality of a similar consent decree. The Court's constitutional discussion, however, took place in an unusual context: no party had challenged the constitutionality of the racial quotas in either the district court or the court of appeals. See 614 F.2d at 1363; id. at 1372 (Gee, J., concurring specially). Nonetheless, we do not think that the panel's constitutional ruling in City of Alexandria can be reconciled with the position set forth herein and therefore urge that it be overruled by the full Court.

12/ It is this issue, as opposed to the issue regarding the constitutionality of the consent decree when analyzed solely as a contract between consenting parties (i.e., without reference to its potential entry as a district court order), that is central to the question whether the district court abused its discretion in disapproving the proposed consent decree. We submit, however, that the promotion quota renders the proposed decree unconstitutional whether analyzed as a judicial order or as a mere agreement between the parties. See note 15, infra.

on the "limited remedial powers of a federal court." Fullilove v. Klutznick, 448 U.S. 448, 483 (1980). 13/ The proposed one-to-one promotion quota would explicitly classify New Orleans police officers along racial lines. When an individual is classified by government on the basis of race or ethnic origin, "the burden he is asked to bear on that basis [must be] precisely tailored to serve a compelling governmental interest." Regents of the University of California v. Bakke, 438 U.S. 265, 299 (1978) (opinion of Powell, J.); see e.g., Fullilove v. Klutznick, supra, 448 U.S. at 480 (plurality); Anderson v. Martin, 375 U.S. 399, 402-404 (1964). 14/ That the proposed consent order would disadvantage nonminority employees rather than a "discreet and insular minorit[y]" (United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)), is without constitutional significance. "[I]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group * * *." Regents of the University of California v. Bakke, supra, 438 U.S. at

13/ Equal protection analysis under the Due Process Clause of the Fifth Amendment is the same as that under the Fourteenth Amendment. E.g., Buckley v. Valeo, 424 U.S. 1, 93 (1976). It is well established that judicial action is no less subject to the constraints of the Constitution's equal protection guaranties than is legislative action. See Ex parte Virginia, 100 U.S. 339 (1879).

14/ This is true whether the individual is classified by legislative, administrative, or judicial action. See note 13, supra. But see United States v. City of Alexandria, supra, 614 F.2d at 1363 (racial quota in consent decree need only be "reasonably related" to affirmative action objectives).

299 (opinion of Powell, J.); see e.g., Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

The essence of the judicial function is to decide justiciable disputes among contending parties and, when legally cognizable interests have been invaded unlawfully, to order appropriate remedial measures. "[S]ince the legal rights of the victims must be vindicated" (Regents of the University of California v. Bakke, supra, 438 U.S. at 307 (opinion of Powell, J.)), the governmental interest in redressing unlawful conduct is substantial, indeed compelling, and generally justifies imposition of measures necessary to remedy the injury, even though such measures may incidentally impinge on the interests of innocent third parties. This principle does not change when the unlawful behavior is racial discrimination. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, * * * 'a sharing of the burden' by innocent parties is not impermissible." Fullilove v. Klutznick, supra, 448 U.S. at 484, citing Franks v. Bowman Transportation Co., supra; Albemarle Paper Co. v. Moody, supra. That the class of victims is defined by race is but a concomitant of the fact that the defendant's unlawful behavior was defined by race.

We submit that the compelling government interest of curing the effects of past racial discrimination -- the only compelling interest implicated in the context of judicial remedial action -- will justify a class-based infringement of the legitimate interests and expectations of innocent third parties only to the extent necessary to restore proven

discriminatees to the position they would have occupied in the absence of the discrimination. The rights protected under both Title VII and the equal protection guaranties of the Constitution belong to individuals, not groups. E.g., Los Angeles Depart. of Water and Power v. Manhart, supra (Title VII); Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (Constitution). In order fully to vindicate these individual rights, courts should fashion remedies designed to ensure that the identifiable victims of unlawful racial discrimination are restored to their "rightful places" in the employer's workforce. The legitimate "rightful place" claims of identifiable discriminatees warrant imposition of a remedy calling for a "sharing of the burden" by those innocent incumbent employees whose "places" are the product of, or at least enhanced by, the employer's discrimination.

Persons who have not been victimized by the employer's discriminatory practices, however, have no claim to "rightful places" in the employer's workplace. And any preferential treatment accorded to nondiscriminatees -- or to discriminatees beyond those measures necessary to make them whole -- necessarily deprives innocent incumbent employees of their "rightful places." Accordingly, as between nonvictims of the unlawful discrimination and innocent third parties, "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." Regents of the University of California v. Bakke, supra, 438 U.S. at 308-309 (opinion of Powell, J.).

Applying the foregoing analysis to the facts of this case, we submit that entry by the district court of the proposed consent decree would violate the Constitution's equal protection guaranties in two principal respects.

First, and most important, the one-to-one promotion quota contained in the proposed consent decree would embrace nonvictims as well as victims of defendants' unlawful discrimination in promotions and would thus accord racially preferential treatment to persons having no "rightful place" claim to promotion priority vis-a-vis non-black officers. See note 10, supra. Because government has no compelling interest in according such preferential treatment to nondiscriminatees at the expense of innocent third parties, judicial imposition of the one-to-one promotion quota contained in the proposed consent decree would have been unconstitutional. 15/

15/ Analyzing the consent decree as a contract between state and municipal government bodies and private parties (i.e., without reference to its potential entry as a district court order), the one-to-one promotion feature of the proposed decree still fails to pass constitutional muster. The consent decree recites that its purposes are "to provide equal employment opportunity in the New Orleans Police Department, to eliminate any prior racial discrimination that may have existed and its effects, [and] to seek to improve citizen trust and respect for and cooperation with the police and thereby improve the ability of the NOPD to provide fair and effective law enforcement." Consent decree at 9. With respect to the first two purposes, the above analysis regarding judicial remedial authority applies equally to action taken by other government authorities for the purpose of remedying past unlawful discrimination. With respect to the third purpose, it cannot be denied that state municipal law enforcement authorities have a substantial interest in improving community trust and cooperation with the police and in improving the ability of local police departments to provide fair and effective law enforcement. There is no evidence in the record of this case, however, demonstrating that the state and local defendants must accord promotion priority to black (cont'd)

Second, the proposed consent order is not premised on a judicial finding or a binding admission of past racial discrimination in promotions. To the contrary, the proposed decree expressly reiterates defendants' denial that they have discriminated against any officer on the basis of race with respect to promotions and expressly disavows any implicit contrary admission that might be conveyed by their consent to the proposed decree. Consent decree at 8. In the absence of proper findings that demonstrate the existence of illegal employment discrimination, a court may not constitutionally order implementation of class-based racially preferential relief.[16/] "Because the distinction between permissible remedial action and impermissible racial preference rests on the

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15/ (cont'd)
officers over all other officers in order to further these interests. See University of California Regents v. Bakke, supra, 438 U.S. at 311 (opinion of Powell, J.). Accordingly, the state municipal police authorites cannot, consistent with the Equal Protection Clause of the Fourteenth Amendment, require that NOPD police officers be promoted according to the one-to-one quota contained in the proposed consent decree.

The applicability of constitutional protections is a principal distinction between the instant case and United Steelworkers v. Weber, 443 U.S. 193 (1979). In Weber, the Court held that Title VII's substantive provisions did not prohibit a provision in a collective-bargaining agreement that reserved for black employees 50 percent of the openings in certain craft training programs. Since the collective-bargaining agreement was not embodied in a consent decree, the Title VII question presented here was not implicated. In addition because the Weber agreement did not involve state action, the admissions quota there, standing alone, did not raise an equal protection question. Id. at 200. Nor did the Weber case raise a question regarding judicial authority to enforce such an agreement among private parties. See Shelley v. Kraemer, 334 U.S. 1 (1948)

16/ Of course, the defendants' denial that they have discriminated

existence of a constitutional or statutory violation, legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred." 17/ Fullilove v. Klutznick, supra, 448 U.S. at 498 (Powell, J., concurring); accord Regents of the University of California v. Bakke, supra, 438 U.S. at 302 (opinion of Powell, J.). See generally Fullilove v. Klutznick, 448 U.S. 448 (1980) (plurality). This principle is but a straightforward application in the constitutional context of the "fundamental limitations on the remedial powers of the federal courts." General Building Contractors Ass'n. v. Pennsylvania, 50 U.S.L.W. 4975, 4981 (U.S. June 29, 1982). In all cases, the "controlling principle governing the permissible scope of federal judicial power" is simply that such "powers [can] be exercised only on the basis of a violation of the law and [can] extend no farther than required by the nature and the extent of that violation." Id. at 4981. Indeed, in General Building Contractors the Supreme Court expressly noted, in the context of an employment discrimination

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16/ continued

on the basis of race with respect to promotions does not free the district court from Section 706(g)'s limitations on its remedial authority. See note 2, supra.

17/ Justice Powell explained further:

> In other words, two requirments must be met. First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination . . . . Second, the governmental body must make findings that

suit brought under 42 U.S.C. 1981, that a minority hiring quota is not "the sort of remedy that may be imposed without regard to a finding of liability." Ibid. See also Myers v. Gilman Paper Corp., 544 F.2d 837, 854 (5th Cir. 1977), cert. dismissed, 434 U.S. 801 (1977) ("Before a court can grant any relief in a Title VII suit, it must find that the defendants engaged in the unlawful employment practice alleged in the complaint." (emphasis in original)).

Accordingly, the district court did not abuse its discretion in rejecting the one-to-one promotion quota contained in the proposed consent decree.

CONCLUSION

For the foregoing reasons, the judgement of the district court should be affirmed.

Respectfully submitted,

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17/ continued

> demonstrate the existence of the illegal discrimination. In Bakke, the [school authorities] failed both requirements. They were entrusted only with educational functions, and they made no findings of past discrimination. Thus, no compelling government interest was present to justify the use of a racial quota in medical school admissions. Fullilove v. Klutznick, supra, 448 U.S. at 498 (citations omitted).

CERTIFICATE OF SERVICE

I, Mark R. Disler, certify that on January 7, 1983, I served copies of the foregoing Motion of the United States to Intervene as a Party Appellee and for Leave to File Suggestion of Rehearing En Banc in Excess of the Page Limit, and Suggestion of Rehearing En Banc by mailing copies thereof, postage prepaid, to the following counsel of record:

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