OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1999

TITLE LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C., Petitioner V. CITY OF CLEVELAND, ET AL.

PLACE Washington, D. C.

DATE February 25, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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LOCAL NUMBER 93, INTERNATIONAL :
ASSOCIATION OF FIREFIGHTERS, :
AFL-CIO, C.L.C., :
Petitioner, :
V. : No. 84-1999
CITY OF CLEVELAND, ET AL. :

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Washington, D.C.

Tuesday, February 25, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:48 o'clock p.m.

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APPEARANCES:

WILLIAM L. SUMMERS, ESQ., Cleveland, Ohio; on behalf of the petitioner.

WILLIAM BRADFORD REYNOLDS, ESQ., Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae in support of the petitioner.

EDWARD R. STEGE, JR., ESQ., Cleveland, Ohio; on behalf of respondent Vanguards of Cleveland.

JOHN D. MADDOX, ESQ., Director, City of Cleveland, Cleveland, Ohio; on behalf of respondent City of Cleveland, et al.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Local Number 93, International Association of Firefighters, against City of Cleveland.

Mr. Summers, I think you may proceed whenever you are ready.

ORAL ARGUMENT BY WILLIAM L. SUMMERS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SUMMERS: Mr. Chief Justice, and may it please the Court, petitioner here questions whether or not the District Court below is empowered by the Congress of these United States to award quota relief and promotions to a class of persons none of whom had ever been shown to be specific victims of any past promotional discriminatory practices of the City of Cleveland.

Reviewing the decisions of this Court together with the clear and absolute legislative intent of Congress, it seems to us, as we have steadfastly maintained, this court ordered remedy below was not lawful. This is purely a question of statutory construction.

There was in fact a consent decree in this matter. That consent decree was negotiated from the very beginning between the city of Cleveland and the

Vanguards. The matter was filed in District Court in the fall of 1980, and intervention was not sought as a matter of right by the intervenors, the local which I represent here today, until the spring of 1981, and it was in fact granted together with the filing of our responsive pleading.

Negotiations continued between the city of Cleveland and the Vanguards to the exclusion of Local 93 until roughly November of 1981. In November of 1981, a proposed consent decree in draft form was presented to me as counsel for the intervenors, and a quick meeting thereafter was held in the chambers of the United States District Court. Initially it was said to have "approved the fairness of the proposed consent decree."

At that time, the United States District Court said, wait a minute. I have allowed this union in. I want this union to participate, and I want them to have full participation. We did in fact have full participation in the negotiation process to our knowledge from that point on.

In the fall of 1982, due to the illness of our trial judge, the magistrate took over the negotiating process and, yes, long and arduous, as both briefs have stated, discussions, negotiating sessions were had towards the possibility of a consent decree. I might

add to you, however, that from the very beginning the position of this local union was the imposition of quota remedy relief against any of its members was in fact an unlawful exercise of Title 7.

While it was not articulated as such, they said that they felt that the quota relief in any form in preference, racial preference of any individual over another was not lawful, and that that -- certainly the lawfulness of that would be derived from 706(g).

This court order became a consent decree in the absence of the signature of this local. The membership of that local, almost 90 percent of it, rejected this consent decree because of the very quota relief which was contained therein.

It was entered over their objections, and I add to you that in seeking the imprimatur of the District Court by way of an attempt to utilize the District Court, its attendant jurisdictional powers, its contempt powers, and everything else, the City of Cleveland, certainly with a keen interest in not having any back pay awards, chose to settle the alleged discriminatory wrongs in the past on the backs of the innocent non-minority firefighters.

We felt that was wrong. We feel that is wrong as we stand before you today.

QUESTION: And who consented?

MR. SUMMERS: The consent, Mr. Chief Justice, was entered by the City of Cleveland and the minority firefighters, being the Vanguards. Signature was withheld on behalf of my client. That was done by mandate, the mandate of the membership, if you will.

QUESTION: Would an individual member of the union have had the veto power under your theory?

MR. SUMMERS: Sir, not really veto power. First of all, I believe under case law, the Vukovich case out of our circuit, that once this became a matter within the District Court, once this became a court order under Title 7, that collateral attack was precluded by anyone, and therefore a -- in comparing it, if you will, to Weber in the private sector, that challenge by Brian Weber was not precluded because that affirmative action plan entered into between that union and that employer did not preclude collateral attack, and Brian Weber in fact did make his collateral attack, but here, where you have it as a court order, certainly collateral attack was prevented.

QUESTION: Would you answer my question. Could an individual member of the union have done what you wanted the union to be able to do?

MR. SUMMERS: Yes, he would have been able to

-- had he not sought intervention, I am assuming your question has within it, Mr. Justice.

QUESTION: Even if he had intervened.

MR. SUMMERS: If he had intervened, no, he would not. He would have been precluded from challenging, since intervention was granted on behalf of his collective bargaining representative.

QUESTION: Would you explain how the union is bound by the consent decree since it didn't consent?

MR. SUMMERS: It is bound by the consent decree -- first of all, any state or collateral attack -- for example, there was a collective bargaining agreement in this that is recited, and I have lodged that just recently with this Court.

The collective bargaining agreement said that the city was bound to follow all of the specific rules and regulations of the Civil Service Commission which therefore became attendant upon the charter of the City of Cleveland and the constitution of the State of Ohio.

Once this became a United States District Court order, that was precluded.

QUESTION: What if the union had consented to the decree? Would it then have been valid in all respects in your view?

MR. SUMMERS: Then I believe that you still

must look at the fact -- well, that would be a more close situation to the Weber matter, Your Honor, and in that situation you have full, really full representation, and you have really full consent, ergo the minority firefighters negotiated and consented, the City of Cleveland negotiated and consented, and Local 93 would have negotiated and consented. Absent that consent, you don't have a real consent decree, but you certainly do have an order of court.

QUESTION: Would it have been valid had the union consented to it? Could you just answer that question?

MR. SUMMERS: Yes.

QUESTION: Even as against those members who voted against confirming the consent decree?

MR. SUMMERS: In all honesty, Mr. Justice White, I would certainly think that if a union president were to affix his signature there in the face of a 90 percent rejection --

QUESTION: No, no. Say a majority of the union voted for him.

MR. SUMMERS: Yes.

QUESTION: But dissenters, would dissenters be bound?

MR. SUMMERS: They would be bound, but yet the

remedy is still above the scope of --

QUESTION: All right. Well, go ahead.

QUESTION: Are you saying they would be bound so that none of them could bring an individual action if they claimed there was a violation of either Title 7 or of the Constitution?

MR. SUMMERS: Well, they would certainly be more precluded, if you will, than in the situation that we have at hand.

QUESTION: Yes. That is probably a pretty good answer.

QUESTION: Interesting.

MR. SUMMERS: I do the best I can, Judge.

QUESTION: May I ask a little question?

MR. SUMMERS: Yes.

QUESTION: I must confess, I don't understand it. It seems to me either the statute is an obstacle or it isn't, and I don't know why the union's agreement makes any difference to the minority or the absence of the union agreement makes any difference if the statute is not violated. I don't understand your argument.

MR. SUMMERS: In all due honesty, Justice Stevens, if the remedy is improper, the remedy is improper wherever it is handed.

QUESTION: And that would be true if you

agreed to it, and if it is proper the fact you didn't agree to it doesn't make it improper. Isn't that correct?

MR. SUMMERS: That's correct.

QUESTION: So you want to change your answer to my earlier question?

(General laughter.)

MR. SUMMERS: I guess I am going to have to.

The court order here, there has been great light made of whether or not this court order is the same court order as if there had been a full adjudication of the underlying discrimination. I think that is a question that this Court not address at this time. I think the question -- and for purposes of these facts of this case, the petitioners in assumption fashion will assume that there would have been an underlying general finding of discrimination.

First, you have to have that, whether it is by agreement or whether or not it is by a fully litigated matter. If you have a fully litigated matter, you certainly have the opportunity at a later date under Teamsters and Franks versus Bowman to come back and individually identify victims.

If you just have a mere caving in, if you will, as the city did here, to bargain away the rights

of the innocent non-minorities' promotions, instead of paying back pay, then you certainly do not have the parameters and the specific acts of violation which an innocent minority could come in and say, look, I was harmed, and here is how I was harmed, and the District Court would have before that that adjudication, that finding hearing wherein there were specific examples shown, and the court would certainly have that background before it to make that determination.

The claims of the -- as I say, this is not a Weber type agreement, because Weber in fact did have all the parties represented and all the parties agreeing.

As I said in the last line of the introductory paragraph to my presentation, we stand before you today. We think we understand what this Court's majority ruled in Stotts. We think we understand the language that was written in Franks versus Bowman. We believe truly that we understand the language in Teamsters.

This legislation -- and the question was made of the comments of Senators Chase and Clark. For the record, in 1964, and, of course, Senators Clark and Case were captains of Title 7 in the Senate, they stated in an interpretive memo, "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 706(g).

The chief sponsor, who appeared in the House as well to discuss it, Senator Humphrey, "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or 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. That bugaboo has been brought up a dozen times, but it is nonexistent."

He introduced an explanation of the House bill in the Senate which he said had been read and approved by the bipartisan floor manager of the bill in both Houses of Congress, and in pertinent part the explanation provided, "The relief available is a court order enjoining the offender from engaging further in discriminatory practices, and directing the offender to take appropriate affirmative action, for example, reinstating or hiring employees with or without back pay.

"The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not

provide that any quota systems may be established to maintain racial balance in employment."

QUESTION: Are you still quoting Senator Humphrey?

MR. SUMMERS: Yes, I am.

QUESTION: I can't help but ask the question, if he were here today, on which side of this case do you think he would stand?

MR. SUMMERS: Mr. Justice Blackmun, that is a very difficult question, but I think that the principles that Senator Humphrey stood for were strong enough that if he felt the necessity for quota relief in 1985, he would do everything within his power on the floor of Congress to see that those words were in fact added to this title, and in explaining on so many occasions before that very same Congress that Congress was not giving that power to the courts of this United States nor to the Equal Opportunity Commission, I think he made it very clear what the intent of that bill was at that time, and in knowing his job the way he knew it, if it were necessary to change it, he would see that the possibility would have every opportunity to come about, and would certainly not expect this Court to do so.

Going on to paraphrase, the relief available, and this is Senator Humphrey again, is a court order

enjoining the offender from engaging further in discriminatory practices, and that is by necessity what must happen in the employment of quota relief. Discrimination must go on, and directing the offender to take appropriate affirmative action, for example, reinstating or hiring employees with or without back pay.

The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. I reemphasize this. I repeat this because he said it.

Great light has been made, and I say to you, by various amici that in 1972, for example, the failure of the Ervin amendment signaled the defeat of the proposition. Could it possibly in defeating an amendment to a bill, Congress not speaking, could it possibly defeat the intention of Congress so specifically stated in 500 and some pages of Congressional record for the enactment of Title 7 that Congress through its normal means, through the means of negotiation, enacted this bill, and this bill was to provide make whole relief.

In 1972 they chose to include state and federal governments, and they added, yes, a sentence at the end. That sentence at the end did in fact mean

appropriate relief to make whole victims of past discrimination where they truly have been identified.

I have reserved five minutes at the end, and I would concede to Mr. Reynolds for the Justice Department.

CHIEF JUSTICE BURGER: Mr. Reynolds.

ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,
ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF THE PETITIONER

MR. REYNOLDS: Mr. Chief Justice, and may it please the Court, as Mr. Summers stated, the question that is raised by this case is purely one of statutory construction, whether a judicial order entered with the consent of the employer is subject to the remedial limitations imposed by Section 706(g) of Title 7.

Section 706(g) prescribes all remedial orders, all remedial court orders that grant preferential treatment to nonvictims of discrimination. This victim-specific limitation on a court's Title 7 remedial power is in no way relaxed where the employer consents to the entry of the decree. Neither the language nor the legislative history of Section 706(g) lends itself to a selective reading of the phrase, "no order of the court," and it is simply not the case that the explicit statutory constraint on a court's authority to order

into place one discriminatory selection process to counteract another, that that constraint can be bargained away at the expense of innocent third parties by an employer who considers it to be in its interest to consent to a decree that provides for discrimination in reverse.

QUESTION: Of course, you still have to convince us as to what the last sentence of 706(g) means. You said it, but --

MR. REYNOLDS: Mr. Justice White, I -- I am sorry.

QUESTION: Do you think it is subject to some other construction?

MR. REYNOLDS: There had been proposed in some of the briefs some different ways to parse the words that might suggest that it doesn't mean that there is a limitation on --

QUESTION: Well, Mr. Reynolds, apart from the briefs, Congressman Seller was the sponsor of that last sentence, wasn't he?

MR. REYNOLDS: The no order of the --

QUESTION: The last sentence of 706(g).

MR. REYNOLDS: 706(g). He was one of the sponsors.

QUESTION: Yes, and he suggests that that bars

any relief except for some victim of discrimination.

MR. REYNOLDS: That's correct.

QUESTION: But that wasn't his view of it, was it?

MR. REYNOLDS: I believe that was his view, and that was the view of --

QUESTION: That is the last sentence, bars an order of hiring or otherwise for anyone suspended or discharged for any reason other than discrimination on account of race. Doesn't that mean it bars -- or rather addresses the situation where an employer refuses to hire for some reason other than race? Isn't that what it says?

MR. REYNOLDS: I think the legislative history of that sentence and the discussion in the Senate --

QUESTION: I am addressing my -- I am asking, isn't that what Representative Seller said?

MR. REYNOLDS: I think Representative Seller made a number of comments about this sentence and what it means in the legislative debates, and I think that the overwhelming import of what his understanding was is that this sentence barred the awarding of relief to those who were not victims of discrimination. There was a delicate balance that was struck by Congress in 706(g). It was a balance that was designed to ensure

that those who were victims of discrimination were made whole, but also to ensure that you would not discriminate against those who were not victims.

The fundamental purpose of the statute has -- this Court has recognized time and again.

QUESTION: You mean discriminated in favor of those who were not --

MR. REYNOLDS: It was, you would not discriminate in favor.

QUESTION: Of those who were not --

MR. REYNOLDS: Who were not victims. That is correct. The purpose of the statute was -- the primary purpose was, one, to eradicate discrimination, and the seconiary purpose, as this Court has recognized over again, was to make whole victims of discrimination. Preferential selection arrangements such as the one here go contrary to both those purposes. They do not eradicate discrimination, but they instead promote discrimination and further discrimination. They are themselves discriminatory. They are not aimed to make whole relief. Indeed, they are wholly indifferent to make whole relief for victims.

QUESTION: Do you suggest that giving relief, a court's giving relief to nonvictims itself violates Title 7? Or is it just an excessive remedy?

MR. REYNOLDS: I don't think that the Court can give relief to nonvictims of the discrimination.

QUESTION: What if it does? What if it does? Is it just an invalid remedy, or does that violate Title 7?

MR. REYNOLDS: If a court orders it? If a court requires that you give relief to somebody who is not a victim of the discrimination?

QUESTION: Yes.

MR. REYNOLDS: I think if that is the specific requirement of the order, that it is invalid under 706(g) and the --

QUESTION: It is just an invalid remedy.

MR. REYNOLDS: That is right. It goes beyond the authority of the court. It will indeed be the case that the court can fashion relief that is neutral as to race, that will have the benefit of advantaging some of those who have not been victims of discrimination.

For example, an affirmative action recruitment program that reaches out to those people who were not reached before and allows them to come in and compete will give them an advantage they didn't have when they were excluded from the recruitment. That certainly would be a permissible remedy, but I don't think that the courts can order relief under Title 7 that gives an

advantage to somebody who has not been victimized by the discriminatory conduct, and do so within the authorization that Congress gave by the statutory provision.

QUESTION: Mr. Reynolds, would you describe exactly the effect of the consent decree on the promotion of people who already were in the union? What effect did it have on the promotion of union members who were white?

MR. REYNOLDS: The effect of the decree and its operation would, I think, deny to some union members who were eligible for promotion the ability to be promoted solely by reason of their race. It would exclude them from promotions because of race.

QUESTION: Did it apply to promotion of blacks who did not possess the requisite qualifications for promotion by whites?

MR. REYNOLDS: I think that this decree does require that you promote blacks without regard to their qualifications.

QUESTION: There were specified numbers of promotions that were to be made to each office, weren't there?

MR. REYNOLDS: Specified numbers, well, percentages.

QUESTION: Those goals or quotas had to be met even if there were better qualified whites at the time?

MR. REYNOLDS: That is the way that the decree was written and it was to operate, and indeed the way it did operate.

QUESTION: Does the record show that?

MR. REYNOLDS: The record of this case in terms of how it has operated, I think that this case comes to court before the time -- the record was developed in this case before the time the promotions actually took place. So that as to what happened with regard to the promotions under this decree, that is not part of the record that is before this Court.

QUESTION: Mr. Reynolds, can I ask you another question about the text of the last sentence of 706(g)? It refers to no relief for a particular individual, and then it defines the kind of individual for which the relief shall not be given as "if such individual" -- the "such" refers back -- "was refused admission," and so forth, "for any reason other than discrimination on account of race."

Is it your contention that the black officers who were promoted here had been refused advancement for some other reason within the meaning of that section? A

MR. REYNOLDS: I don't know, Mr. Justice

Stevens, but it certainly would be within -- it certainly would be very possible that there were black officers who had not been promoted by reason of qualifications, that is, for coms reason other than race, who would by virtue of this decree, would indeed have the promotion award to them in order to fill the percentages.

QUESTION: If that were true, if they had been denied promotion because of lack of qualification, you would say the language reads directly on them. My question really is, does this language read on other "nonvictims" unless they meet that test?

MR. REYNOLDS: Well, I think this language -- as I say, I think one can parse this language in several different ways which requires us to turn to the legislative history. I think it is clear from the legislative history what the intention was of this language, and that it was in 706(g) to ensure that you would not have courts giving preferential treatment for purposes of achieving or maintaining racial balance.

QUESTION: But you do not really contend that it is a plain language case, but rather it is an ambiguity case, and we must then look at the legislative history.

MR. REYNOLDS: I certainly think that we do

need to look at the legislative history. My own reading of the language itself leaves me with less doubts, but I can understand that it can be parsed the way you are suggesting, and I think the legislative history removes all doubts on that score.

I believe my time is up.

CHIEF JUSTICE BURGER: Very well.

Mr. Stege.

ORAL ARGUMENT OF EDWARD R. STEGE, JR., ESQ.,
ON BEHALF OF RESPONDENT VANGUARDS OF CLEVELAND

MR. STEGE: Mr. Chief Justice, and may it please the Court --

CHIEF JUSTICE BURGER: You may raise the lecturn if you would like and find it more convenient.

MR. STEGE: Thank you for reminding me. I took a look at Mr. Reynolds' size before I approached the lecturn, and I thought that I would not have to do this, but apparently he forgot to raise it.

The plaintiff and the defendants have different perspectives in this case, and therefore we have agreed to divide our argument, and the Court actually granted that motion.

I would like to speak to two points. When Congress -- Vanguards here assert two points and I will address both. When Congress enacted Title 7, it gave

the federal courts broad authority to remedy discrimination, including the authority to use race-conscious remedies in appropriate circumstances, and second, this Court should treat a consent decree, which includes race-conscious affirmative action as voluntary action in accordance with Weber not as court-imposed relief, and it does not make a difference that the petitioner did not consent.

Now, before turning to the merits of my argument, I would like to address a couple of factual points that came up during the preceding 30 minutes.

First, there is simply no dispute on the record that for years the City of Cleveland has discriminated against minorities and that a remedy was appropriate. There is no argument also that this remedy is unreasonable. In response to Justice Powell's question earlier, there is clearly nothing in this decree that requires the promotion of unqualified individuals.

As a matter of fact, passing a promotional examination is a prerequisite to minority and non-minority promotion alike. In addition, I would point out that there is nothing on the record to show that this particular remedy, this particular affirmative action plan actually denies any non-minorities any

promotions.

One thing is clear from the record. That is, the city created substantially more promotions, and this is conceded by the petitioner. The city created substantially more promotions to accommodate the interests of both minorities and non-minorities alike, and there is no indication that any particular non-minority was denied a promotion in favor of a minority.

QUESTION: But ordinarily if the city created more promotions, as you refer to them, they would have gone to people next in line, would they not have?

MR. STEGE: That's correct. To that extent, Justice Rehnquist, the remedy does affect who gets the promotions. My point is simply that without this consent decree, the non-minorities would not have received the promotions anyway. They would not even have had a chance for the promotions. What this consent decree did was not only create some promotions for minorities, but it also created many more non-minority promotions.

QUESTION: You mentioned examinations. Would the grades made by the applicants be taken into account in determining who would be promoted? Would the grades made on the examinations?

MR. STEGE: They would to the extent to which the grades control your ranking on an eligible list. That is correct.

QUESTION: Yes, but assuming that ten people passed, and some were much higher in grade scores than others, and only five positions were to be filled, would they be filled in accordance with the grade scores or not?

MR. STEGE: They would be filled in accordance with the grade scores except insofar as the court -- the affirmative action plan embodied in the consent decree requires otherwise. So in theory --

QUESTION: How far is that?

MR. STEGE: Well, it depends on the given list. There is no question but in a given situation a non-minority with a low score could be promoted --

QUESTION: Would have to be. Would have to be promoted.

MR. STEGE: That is correct. No question about that. This is not -- to speak to qualifications, no one achieves a place on the eligible list without passing the examination.

QUESTION: So they all have -- you can all say that they are minimally qualified but they are ranked.

MR. STEGE: More than minimally qualified,

Justice White. Only 20 percent, for example, on the '84 -- 20 percent of the applicants passed the 1984 promotional examination. I think that is enhanced qualifications, if anything. Not only that, but under 706(g), the City of Cleveland, the rights, the prerogative of the City of Cleveland under 706(g) to object to the promotion of any single individual in the last sentence of 706(g) was retained.

QUESTION: Did seniority have anything to do with who was entitled to a promotion?

MR. STEGE: No seniority system is involved in this case.

QUESTION: All right.

MR. STEGE: Much has been said about 706(g) previously this afternoon. I would like to add a couple of things. First of all, 706(g) simply -- the last sentence of that paragraph simply has no application here. That sentence was not designed to deal with situations such as we have here, which is systemic discrimination over the years both at a hiring level, at an assignment level, and also at a promotion level such that the violation was keyed to classes rather than individuals.

The court found that an entire class had been discriminated against, and I don't think 706(g) was

intended to reach this situation. However --

QUESTION: Counsel, if there had been no voluntary agreement, and if there had been no consent decree, but the case had gone to trial, do you think the court could have ordered precisely the same remedial scheme as was developed here for the consent decree?

MR. STEGE: Absolutely, Justice O'Connor. The limitations would be equitable limitations.

QUESTION: And you don't see anything in the Stotts opinion that would be contrary to that?

MR. STEGE: No, and there is no argument that there are equitable -- the equitable limitations of the court have been exceeded, and there is nothing in the Stotts opinion that speaks to the contrary. The Stotts opinion in our view is a competitive seniority opinion. Competitive seniority is not involved in this case.

QUESTION: Stotts does talk about the policy, the remedial policy of 706(g), doesn't it?

MR. STEGE: That's correct, Justice White.

QUESTION: And it says at least that its result is consistent with that policy, which is as follows.

MR. STEGE: That is correct, and there is nothing that we quarrel with in that discussion because what 706(g), what the last sentence here does is

preserves management's prerogative in the individual case to say that Person X is not in fact qualified. It reserves that prerogative.

QUESTION: Did the District Court make any finding as to past discrimination on the part of the City of Cleveland in making the decree?

MR. STEGE: Yes, it did. It found past discrimination. The city admitted past discrimination. The city admitted not only past discrimination but a long history of discrimination, and the court found it, and Local 93 didn't challenge it. The only -- they put on one exhibit, which spoke to the remedy question, the fairness of the remedy. It put on one witness who testified to the fairness -- the alleged unfairness of the remedy.

They went up to the Court of Appeals on purely an abuse of discretion ground. They argued that the Court exceeded its equitable powers and abused its discretion in approving this particular consent decree, but they do not advance that challenge here. There is no serious debate that this is a reasonable approach to a very, very serious problem.

And I would point out in response -- and I am coming back to 706(g) for a moment. The last sentence of 706(g), Justice Brennan, is supported by what

Congressman Seller intended. Congressman Seller did sponsor the last sentence of 706(g). It is clear that that sentence was originally a for cause sentence, and that for cause language arose from a 1947 amendment to the NLRA, and if one looks to the legislative history of that particular provision, it is clear that it was designed to preserve management's prerogative to object to the lack of qualifications of any single individual.

We believe that this is a plain language case, that there is nothing in the plain language or in the legislative history for that matter of 706(g) that prevents this particular relief, but I would point out that in addition to that, it is simply -- what we have here is not a court order. It is our contention that if it is a court order, it is purely law. But it is --

QUESTION: Well, it has effects different from a voluntary settlement, doesn't it?

MR. STEGE: Certainly it does. It is a hybrid. I mean, I think we have to concede it is a hybrid. Justice Rehnquist, I noted in his dissent from denial of cert in the Ashley versus City of Jackson case, described a Title 7 consent decree as little more than a contract between the parties formalized by the signature of a judge.

But we concede that it has aspects of a court

order. The court signed a decree.

QUESTION: This wasn't an agreement of the parties at all. One party did not agree.

MR. STEGE: Well, that is totally irrelevant under these circumstances, Justice Marshall.

QUESTION: They found a particular motion in the court and said, one, we don't agree with this, and two, we don't agree with anything that is involved in affirmative action.

MR. STEGE: Absolutely --

QUESTION: On the next page the court issues a consent decree.

MR. STEGE: Your Honor --

QUESTION: Who consented?

MR. STEGE: Your Honor, they --

QUESTION: Who consented?

MR. STEGE: The consent was between the plaintiff and the defendants. Local 93 --

QUESTION: I thought the defendant said he didn't.

MR. STEGE: The original defendant -- the original defendants, the city defendants consented and the plaintiffs consented. Local 93 did not consent. Now, Local 93 -- what happened was, initially -- an initial consent decree was --

QUESTION: Was Local 93 a party?

MR. STEGE: They intervened as a party. If I may explain, initially there was -- initially after the action was brought negotiations ensued between the plaintiff and the defendant. During those negotiations, Local 93 intervened. What emerged from that was the first proposed consent decree. The District Court held -- that was not the same as the consent decree that was ultimately approved.

QUESTION: That was the 45.

MR. STEGE: No, it was a more strenuous consent decree but it was not a 45 percent consent decree. What happened was, evidentiary hearings were held on that first proposed consent decree for four days. Local 93 participated. At the conclusion of those -- at the conclusion of those hearings, the court suggested strongly to all three parties that they sit down and they attempt to work out a three-way settlement, and that is what we did. We negotiated a three-way settlement.

That is when the city created all these additional promotional positions. We thought we had Local 93's agreement. They submitted to their membership, and the membership said no. At that point the District Court clearly did approve that same

three-way negotiated consent decree over the objections of Local 93, and we contend that that issue, their lack of consent is in essence a red herring.

I mean, let's look at the alternatives for a moment. Does an intervenor whose legal rights are not affected, merely whose interests -- there were interests clearly, but does an intervenor whose legal rights are not affected have the right to block a settlement between two principle parties?

QUESTION: Is this case in any different posture than if the City of Cleveland had voluntarily decided, I think we will go ahead and do this because of our past employment practices?

MR. STEGE: The Weber decision, we submit, is controlling.

QUESTION: But the Weber decision did not apply to a public body. That was a private firm.

MR. STEGE: That is not a question that is argued by petitioner.

QUESTION: You say the Weber decision is controlling. And I am saying to you, one thing that strikes me is different is the fact that the Weber decision involved Kaiser Aetna, which is a private firm. This case involves the City of Cleveland, which is bound by the Fourteenth Amendment.

MR. STEGE: My response is, there is no serious -- this plan meets the Fourteenth Amendment requirements, Number One. Number Two --

QUESTION: Do you think the City of Cleveland could just as a matter of course decide that we are going to hire 60 percent blacks and 40 percent whites because of, say, the political situation in the City of Cleveland?

MR. STEGE: No, this Court has spoken to that question, or very closely to that question in Fullilove and also in Bache. There are procedures under the Fourteenth Amendment that must be followed. The City of Cleveland clearly here -- the District Court made findings of a long history of discrimination. There is no question but what there were findings.

QUESTION: So you are justifying this on the basis of a remedy for past discrimination. That is your argument.

MR. STEGE: That's correct. That is absolutely correct. And I would point out -- my response on the question of public versus private, Number One, there is no argument here from the other side, from the Justice Department or from Mr. Summers that it makes a difference, and secondly --

QUESTION: As a matter of fact, I think they

stipulated to that effect.

MR. STEGE: They in fact stipulate that question away. But the amici, I would draw Your Honor's attention -- particularly the City of Atlanta brief addresses that question head on in the history of the extension of Title 7 to the state and local governments in 1972. It seems clear that there was no intent by Congress to draw distinctions in terms of the ability of an employer, whether he be public or private, to engage in voluntary compliance.

What we have here is voluntary compliance at root.

QUESTION: Yes, but Congress can't have the final say on what an employer can do as to voluntary compliance when you are talking about a public body.

MR. STEGE: It can under Section 703. There is no 703 claim here. It cannot, obviously, under the Fourteenth Amendment. It has no final say. But there is no serious debate about a Fourteenth Amendment issue here. It is nowhere to be seen in petitioner's briefs, for example.

This is a voluntary compliance case. What the city did here -- no one held a gun to their head, and admittedly the consent decree has some aspects of a court order. There is no question about it. But there

are very strong reasons why this Court should apply the Weber standards to -- should treat this as purely voluntary action.

The pivotal fact in Weber, namely that the employer voluntarily agreed to the plan, is present here. Secondly, it does not affect whether the Weber standards are applied. Whether this is treated as a court order, a consent decree, or is a voluntary affirmative action, it really does not impact on Local 93's right.

They have the same right to challenge the lawfulness of the plan in either instance. In the purely voluntary plan situation, for example, they bring an independent action, and once they bring that action and they litigate those issues, they can't file a second action and relitigate them.

Similarly here -- I realize that my time is up, Mr. Chief Justice, and I would simply add, if I may, and I have the understanding of my colleague that I may complete my thought, it simply does not make a difference to third parties whether they file a separate independent action or whether they frame their objections as they did here within the context of an intervention, in a fairness hearing, in framing their lawfulness objections, and they are precluded from

relitigating and filing a second action to relitigate those same issues.

There are advantages to a consent decree, and consistent with the strong views of Congress in Title 7 to favor and encourage voluntary compliance with the Act, we urge this Court to treat this particular affirmative action plan as a measure of voluntary compliance.

QUESTION: But the validity of a consent decree depends upon the jurisdiction of the court to enter it, does it not?

MR. STEGE: Mr. Chief Justice, that is absolutely correct, and there is no question about the court's jurisdiction here. There is a question raised about the applicability of the last sentence of 706(g) to a consent decree, and I would merely point out that if one construes the last sentence of 706(g) to preclude a consent decree in this context, if you adopt -- if you take literally the argument that is being advanced by the other side in this case, and you look at the last sentence of 706(g), you will conclude that even if Local 93 had consented to this particular decree, it would have been barred, and I suggest --

QUESTION: Well, suppose 706(g) said that no court order may include A, B, C, which is precisely what

this consent decree included. You would say under your argument the consent decree is nevertheless valid.

MR. STEGE: My interpretation is --

QUESTION: Isn't that right? Even if 706(g) expressly prevented what is in this decree, you would say the consent decree must stand.

MR. STEGE: Well, I would say that, but it is clearly not necessary to reach that question, because 706(g) is not --

QUESTION: Well, it is if we agree with the government on what the construction of 706(g) is.

MR. STEGE: Well, there are two issues on the construction of 706(g), Number One, whether it authorizes this as a matter of court-imposed remedies, Number One, and Number Two, whether there is anything in 706(g) that bars the parties from voluntarily agreeing, and on that latter question, I would urge the Court to take into consideration the fact that if Local 93 were to have even consented to this consent decree, that under their interpretation the last sentence of 706(g) would bar it.

I apologize to the Court and to Mr. Maddox for taking part of his time. Thank you.

CHIEF JUSTICE BURGER: Mr. Maddox.

ORAL ARGUMENT OF JOHN D. MADDOX, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. MADDOX: Mr. Chief Justice, and may it please the Court, petitioner and the Department of Justice would resolve this case as a simple one of numbers. The number they want you to impose is zero, no race-conscious relief. That is their preference today. I am here to tell you what the City of Cleveland and state and local governments' perspective is on the numbers that are important, I think, to understanding this case.

In 1972, when Congress extended the reach to state and local governments and empowered the Justice Department, the Justice Department in the next eleven years settled 88 percent of those cases by a consent decree like the one we have today. That is not quite right. Not like the one we have today, and the reason is, if you look at the materials filed with the Court, the favorite number of the Justice Department in all those years was 50 percent. That is the ratio they liked. That is the race-conscious relief they liked. As a matter of fact, as recently as 1983, in the San Diego County case, the Justice Department approved 60 percent race conscious relief.

QUESTION: How does that bear on the issues that we have here now, Mr. Maddox?

MR. MADDOX: I think, Your Honor, that in looking at the governmental authority which Congress has delegated to enforce the statute and their construction of the statute, that helps the Court in formulating what Congress' intent was. Another example. In this case every governmental amicus has filed on behalf of the side of the City of Cleveland. Not one has filed on behalf of the side of petitioner.

The City of Cleveland during that time was just like many of the other cities confronted with meeting its obligations under federal law. For 14 years, as is indicated in this record, we had the Sealco case filed in 1972, we had the Heddon case, which was firefighters, in 1973, adjudications by Federal District Judges of violations of the Thirteenth and Fourteenth Amendments in 1981 and 1983, Title 7 not involved in those cases.

In 1977, Judge Manos also made such a finding, so when this case was filed in 1980, the City of Cleveland had eight years at that point of litigating these types of cases, and eight years of having judges rule against the City of Cleveland.

You don't have to beat us on the head. We finally learned what we had to do and what we had to try to do to comply with the law, and it was the intent of

the city to comply with the law fully in entering this consent agreement.

We were faced again with claims under the Thirteenth, Fourteenth Amendments, 1981, 1983, and Title 7. We had already been adjudicated under all of those other provisions not included in Title 7 of discrimination, and the exact type of relief afforded in this case was imposed on the city.

The question here is, can cities and local governments and defendants be able to settle these types of cases? I submit that it is essential that we be able to settle them, and I don't think we can with the construction of 706(g) which is being urged by the Department of Justice.

I think the 706(g) construction of the legislative intent regarding 706(g) was best expressed by the Justice Department in 1979 in their brief in this case, in Weber. In that case, they said, Section 706(g) provides substantial support for the proposition that Congress intended numerical race-conscious relief is available under Title 7 to remedy employment discrimination. That is the Justice Department's brief in Weber at Page 35.

This is a case to remedy the effects of discrimination. That is not make whole relief under

which there is any sort of limitiation under 706(g). The plain reading of 706(g), I think, supports that. The focus has been on the last sentence. I do not believe that proper statutory construction allows one to ignore the first sentence.

In the first sentence it says, if the court finds that respondent, focusing on the employer. The first sentence doesn't talk about individuals. It is talking about a different problem. It is talking about race-conscious prospective relief.

If the court finds that respondent has intentionally engaged or is intentionally engaging in unlawful employment practices, and I paraphrase and skip down, affirmative action -- that term is used in dealing with respondents -- as may be appropriate, which may include but is not limited to, and it lists certain types of affirmative action, or any other equitable relief as the court may deem appropriate.

It is clear to me, I believe, as it was to the Justice Department in 1979 that Congress did not mean to strip Federal District Courts of their equitable authority to deal with these types of complex problems. How complex are they? This type of remedy, as is evident from the record in this case, has been used regularly and has been approved by every single Court of

Appeals. Not one has said that race-conscious prospective relief is inappropriate either under Title 7 or under 1981 in the Thirteenth and Fourteenth Amendments.

Now, the policy that is being urged that there can be no prospective race-conscious relief in my opinion reduces Title 7 to little more than an employment torts claims act. They talk about make whole, victim-specific. None of that language appears in 706(g). If you take that approach, it will severely hamper, I think, Congressional intent that the federal agencies charged with the responsibility of alleviating such discrimination of the state and local governments who they encourage to resolve these matters of courts' abilities to deal with these problems, all would be severely handicapped in terms of eliminating systemic historical discrimination in institutions.

This cannot be the policy I do not think that this Court should find underlying and not expressed. Congress wanted to eliminate the effects of historical discrimination. What would be the result of saying there could be no race conscious prospective relief? One, I think, it would frustrate Congress's intent as set forth in this --

QUESTION: Do you think that is the submission

of the other side, there may be no race-conscious --

MR. MADDOX: Yes, it is, Your Honor. I believe that is their suggestion. There may be no race-conscious prospective relief to eliminate historical discrimination. Certainly that is the Justice Department. It is not clear from Mr. Summers --

QUESTION: I hadn't understood they went that far. They certainly are saying relief should be given only to victims.

MR. MADDOX: That is correct, Your Honor, but that is contrary and not consistent with race-conscious prospective relief, which does not focus on the victims, but focuses on the respondent, as is said in the first sentence of 706(g), focuses on the institution and what steps must be taken to alleviate discrimination in that institution. Now, I think --

QUESTION: Do you agree that the black officers who get the benefit of this decree are non-victims?

MR. MADDOX: Some may be. Some may not be. It was not necessary to determine that in this case because the plaintiff class voluntarily gave up any claim to make whole relief, although they put it in their complaint. They wanted the prospective race-conscious and the city after two years of

negotiations agreed with that tradeoff, Your Honor.

QUESTION: So we could assume and it may be true that all of them are non-victims, or that all of them are victims.

MR. MADDOX: You could assume either way, Your Honor, and that particular point is not relevant to race-conscious prospective relief.

QUESTION: But for you to win you should win on either assumption.

MR. MADDOX: That is correct, Your Honor. Now, the ramifications of reaching the Justice Department's result in my opinion will be an increase in the judicial workload, one, because there necessarily will be more cases filed, and we won't be able to settle these cases.

QUESTION: But back to your previous point, who takes care of the 30 percent of the union and those in the union who have never themselves participated in any discrimination?

MR. MADDOX: Your Honor, I believe that the negotiations resulted in a very fair allocation of any sort of burden. As a matter of fact, if you compare the first consent decree with the second consent decree, we added more than the number of non-minority promotions to make up for the number of promotions that existed under

the prior consent decree.

Not one non-minority did not get promoted in the initial waves of promotions because of that consent decree. The city took the burden. We made more promotions than we wanted to make. We made more promotions, in fact, than we needed to make in order to work with the trial judge to accommodate and minimize the burden in this case.

I think other potential ramifications here will be an increased disruption, and that is the most important thing to us here today, the disruption of state and local governments' ability to run a fire department, as happened in this case. The judge impounded the examinations for two years. In other cases, we have had preliminary injunctions for two years.

You cannot run and operate a safety force by having such judicial disruption, however well justified or intended. This consent order alleviated that for the period of four to five years, so that we could attempt to make the promotions that both minority and non-minority wanted here.

I do not think this Court wishes to adopt a procedure or policy which will inhibit defendants from settling these types of cases. It is clear to me that

Congressional intent was and should be to settle these cases, to work those problems out at the local level. Judge Lambrose, who handled this case in the trial court, was very experienced in handling these cases. As is evident in Williams versus Vukovich, he denied a consent order, and the Court of Appeals affirmed that denial. So, he is not a judge that is not very considerate of the equities to everyone, and he certainly was very sensitive to them in this case.

In summary, I think this Court should adhere to the language in Milliken that the court in fashioning a remedy should be sensitive to the needs of state and local governments. The trial court did that here. We believe this Court should do that also. The court below should be affirmed.

CHIEF JUSTICE BURGER: Thank you.

Mr. Summers.

ORAL ARGUMENT OF WILLIAM L. SUMMERS, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. SUMMERS: Mr. Chief Justice, Mr. Maddox on behalf of the City of Cleveland seems to look towards the position of the Justice Department and allow singularly our claim to be one of -- not that important, but it certainly seems to me that from the beginning and in the complaint which is in this joint appendix which

prayed for dolkar back pay relief, this City of Cleveland, he, the law director of the City of Cleveland, saw a way around it.

I will give the jobs away of the innocent non-minorities, and I won't have to pay any back pay awards. He didn't answer that for you. When he says to you that we made more --

QUESTION: Well, he did in part.

MR. SUMMERS: Pardon me, sir.

QUESTION: He did in part, and I would like to hear your answer. He said they created more jobs, which obviously would have increased the budgetary responsibility of the city, which made more jobs available to your client. So is that true or not?

MR. SUMMERS: Who knows what is true?

(General laughter.)

MR. SUMMERS: First of all, Mr. Justice, if it please you, they have the sole and exclusive right to decide how many lieutenants, how many captains, and how many battalion chiefs. In the order it says that manning and staffing shall never be considered in this affirmative action plan, so they can make as many jobs as they want. But in the footnote to our reply brief, I would ask that you look at it, Page 17. In 1976, there were 26 percent of the fire force were in the officer,

promoted officer ranks. In 1986, there is 26 percent promoted rank membership on that fire service.

Now, the old saying about figures can lie and liars can figure, there is the same percentage of individuals in the promoted ranks in the fire service in the City of Cleveland this year than there was ten years ago, so where's all these new jobs?

Those jobs that they are talking about, and I have added one page to my reply brief, was because there is some illusion here that maybe some litigation, and maybe even it was affirmative action litigation, kept promotions from happening. Not true. And testimony produced by the plaintiff in this matter shows that that wasn't true. There was a bad, mechanically bad test given.

That was contested in state courts and held up the promotions because the city didn't give promotions between 1972 and 1975, and then again between '75 and '81, even though the law says that every two years upon the expiration of a list they should do so.

Now, when they assert to this Court that, well, we made more jobs and therefore what was the wrong, the wrong is, in every single individual, minority or non-minority, if his job is taken away from him by the operation of 706(g) interpreting a court

order to say, you won it, you won it fair and square, but you are not going to get it, that is not what 706(g) meant to say.

And, Mr. Justice Brennan, you questioned the meaning and the intent of Representative Seller. In the government's brief on Page 9, he is quoted there that he expressly responded to the charge that federal courts and agencies would order quotas and other forms of preferential treatment under Title 7. Noting that a court order could be entered only on proof, he was quoted as saying that the particular employer involved had in fact discriminated against one or more of his employees because of race.

Representative Seller emphasized even then the court could not order that any preference be given to any particular race, but we would be limited to ordering an end to discrimination. The citation to the Congressional Record is there.

Folks, I started off by saying this is a question of statutory construction. Does that statute provide for make whole relief in the forms of quotas? We honestly believe it does not. It is Congress's job. Congress should not put that job before this Court. In construing that statute, we believe it is clear, we believe the Stotts opinion is clear, and we ask your

indulgence to rule in that manner.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:47 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1999 - LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner V. CITY OF CLEVELAND, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)