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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

JOHN W. MARTIN, ET AL., Petitioners V. ROBERT
K. WILKS, ET AL.;
PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,
AL., Petitioners V. ROBERT K. WILKS, ET AL.;
and
RICHARD ARRINGTON, JR., ET AL., Petitioners V.
ROBERT K. WILKS, ET AL.

CAPTION:

CASE NO:

87-1514; 87-1639; 87-1568

PLACE:

WASHINGTON, D.C.

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January 18, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN W. MARTIN, ET AL. :
 Petitioners :
 v. :
 No. 87-1614
ROBERT K. WILKS, ET AL.; :

-----x
PERSONNEL BOARD OF JEFFERSON :
COUNTY, ALABAMA, ET AL. :
 Petitioners :
 v. :
 No. 87-1639
ROBERT K. WILKS, ET AL.; :

-----x
RICHARD ARRINGTON, JR., ET AL. :
 Petitioners :
 v. :
 No. 87-1668
ROBERT K. WILKS, ET AL. :

-----x
Washington, D.C.
January 18, 1989

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:05 a.m.

APPEARANCES:
JAMES P. ALEXANDER, ESQ., Birmingham, Alabama; on behalf

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of the Petitioners Personnel Board of Jefferson
County, Alabama, et al., and Richard Arrington, Jr.,
et al.

ROBERT D. JOFFE, ESQ., New York, New York; on behalf of
the Petitioners John W. Martin, et al.

RAYMOND P. FITZPATRICK, JK., ESQ., Birmingham, Alabama;
on behalf of the private Respondents.

THOMAS W. MERRILL, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the federal Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-1614, Martin against Wilks and companion cases. Mr. Alexander, you may proceed.

ORAL ARGUMENT OF JAMES P. ALEXANDER

ON BEHALF OF THE PETITIONERS

PERSONNEL BOARD OF JEFFERSON COUNTY, ET AL.,

AND ARRINGTON, ET AL.

MR. ALEXANDER: Mr. Chief Justice, may it please the Court:

Petitioners divide their argument this morning. I will address the facts and circumstances why respondents, in fairness and equity, are precluded from relitigating the validity of consent decrees providing race conscious relief entered after seven years of contested litigation.

Respondents are precluded for two reasons. First, they knowingly sat on the by -- sidelines of this litigation for seven years without either intervening or otherwise claiming an interest in the case.

— Thereafter, they were afforded an opportunity at a fairness hearing to contest the issue of race conscious relief, and they had a full and fair opportunity to do so on that occasion.

1 We argue for the following rule in the nature
2 of collateral estoppel where the lawfulness of remedial
3 race relief has been determined, where non-minority
4 employees have had a meaningful opportunity to
5 participate in that determination, then they cannot
6 thereafter repeatedly relitigate that issue in separate
7 cases.

8 We believe that the rule we propose adequately
9 accommodates the interest of non-parties; conserves
10 judicial resources; and certainly, in Title VII
11 litigation, provides an opportunity for the prompt
12 settlement that Congress has mandated where possible.

13 No better illustration of the difficulties of
14 a contrary rule exists than this very case. In
15 accepting the invitation of the United States to settle
16 this case in 1981, the city of Birmingham, Alabama,
17 agreed to comprehensive consent decrees to conclude
18 seven years of litigation.

19 In terminating --

20 QUESTION: Had -- had the people who sought to
21 intervene there, were they named in that action?

22 MR. ALEXANDER: I'm sorry, Your Honor. The
23 people who sought to intervene --

24 QUESTION: The people who sought intervention,
25 had they been named as defendants in the action?

1 MR. ALEXANDER: They had not, Your Honor.

2 QUESTION: Do you know why they weren't
3 named?

4 MR. ALEXANDER: Certainly at the time the
5 litigation was filed by the United States, the United
6 States didn't name -- they certainly did not have the
7 view that they were necessary or indispensable parties
8 for purposes of providing relief under Rule 19.

9 Thereafter, we were aware, of course, that the
10 same individuals who subsequently did try to intervene
11 unsuccessfully at a later point were interested in the
12 litigation from the outset, participated certainly by
13 consulting with our co-defendant, the personnel board,
14 through a period of two trials, one in 1976, one in
15 1979, without ever intervening.

16 QUESTION: well, you know, some of our cases,
17 like Justice Brandeis' opinion, I think, in Chase
18 National Bank against the City of Norwalk, there isn't
19 any duty to intervene in a case.

20 MR. ALEXANDER: Well --

21 QUESTION: Are you trying -- are you
22 suggesting a special rule for this type of case? You're
23 suggesting that case is wrongly decided?

24 MR. ALEXANDER: I'm suggesting that case was
25 decided under the old rule and may not be fully

1 applicable now. Certainly --

2 QUESTION: well, what -- what has changed that
3 would make that case inapplicable?

4 MR. ALEXANDER: Well, it seems to me, Your
5 Honor, that -- that in the Penn-Central case, this Court
6 with respect to the Borough of Moosic clearly determined
7 that they had an obligation to intervene in the pending
8 litigation in New York.

9 And when they failed to do so, they were
10 precluded, and we think properly so, from relitigating
11 issues that were fairly subject to litigation in the
12 earlier case.

13 QUESTION: well, that was quite a different
14 case from this, though.

15 MR. ALEXANDER: Well, Your Honor, I think
16 they're perhaps closer than you may think.

17 This has been a complicated case. Certainly
18 we don't say we're the Penn-Central merger. But there
19 are a lot of competing interests, and over 2,500 white
20 employees in the City of Birmingham.

21 Under Rule 19 as we read it, certainly we
22 don't fall under clause (1), and I think the reason we
23 don't fall under clause (1) is we're not performing a
24 contract. Complete relief could have been afforded
25 without the participation of the white employees.

1 Clause (2), as I read it --

2 QUESTION: Well, is -- is that a fact, could
3 complete relief have been afforded without --

4 MR. ALEXANDER: Yes, sir. And, and, and, Your
5 Honor, in the words of the Court's opinion in Local 93,
6 the consent decree to which the city agreed at the
7 invitation of the United States imposed no obligation or
8 duty on the white respondents.

9 QUESTION: Well, but it -- it certainly was
10 going to have an effect on their careers in city
11 government, wasn't it?

12 MR. ALEXANDER: Certainly to the extent that
13 promotions in the city of Birmingham were no longer the
14 exclusive preserve of whites, their interests were
15 implicated.

16 I think that under the provisions of Rule 24
17 they would have been in a position to try to have that
18 interest protected.

19 QUESTION: It's more than just that promotions
20 are no longer the exclusive preserve of whites, it's --
21 It's that a certain number of blacks have to be favored
22 under the consent decree, and that a white is not
23 entitled to a promotion simply by reason of his color,
24 under the consent decree.

25 And, and you don't think that's the kind of

1 thing that requires that the individual had a chance to
2 -- in the case that he's appeared in have a chance to
3 refute that?

4 MR. ALEXANDER: I think, Your Honor, if he
5 elects to contest his interest, he has an avenue under
6 Rule 24 to do so.

7 I think there are many white employees who
8 recognize the somewhat egregious history in my city,
9 take the position that some remedial relief is
10 appropriate to deal with us.

11 In the city of Birmingham, Alabama --

12 QUESTION: well, that's fine, but you could
13 have joined them. I mean, the usual rule is, if you
14 want to take away something from somebody you join them
15 in a lawsuit.

16 You're saying that you can take it away from
17 them unless they take the initiative and join the
18 lawsuit. That's two contradictory --

19 MR. ALEXANDER: Respectfully, Your Honor, if
20 they are the beneficiaries of past discrimination, as I
21 believe them fairly to be, I don't know of any of the
22 cases of this Court that say they must be joined as a
23 party in the action.

24 QUESTION: That's how you would distinguish
25 this from our other cases, that these people are

1 beneficiaries of past discrimination?

2 MR. ALEXANDER: Certainly they are. I don't
3 know that that's the only distinction and I'm not --

4 QUESTION: That -- that's been adjudicated --
5 has that been adjudicated as to each of these individual
6 --

7 MR. ALEXANDER: Not as to each of these
8 individuals, but Justice Scalia --

9 QUESTION: But we're talking about individual
10 rights that are being affected here.

11 MR. ALEXANDER: We are, but we're talking
12 about it in an incredibly unusual situation.

13 This case experienced an adversarial trial in
14 1976. The trial court concluded that the entry-level
15 test discriminated against black candidates for both
16 police and fire. Race conscious relief was afforded on
17 that occasion. Thereafter, that relief was affirmed by
18 the Court of Appeals and cert to that court was denied.

19 A second trial was had in 1979. At that
20 trial, promotional practices were in issue, practices
21 varying across the city of Birmingham's various
22 departments. There simply was an egregious history of
23 discrimination.

24 QUESTION: So you answer Justice Scalia's
25 question by saying, oh, they're beneficiaries of past

1 discrimination, and thereby solve the problem by
2 claiming that they are somehow the beneficiaries of a
3 particular kind of benefit, but that seems to me
4 precisely the kind of thing that ought to be tried.

5 If your answer to the question, well, why
6 shouldn't they get their day in court, is, oh well,
7 because they are in a special class, it seems to me
8 that's precisely what they want to try.

9 MR. ALEXANDER: Justice Kennedy, they could
10 have had their day in court. They were interested from
11 the outset, there were no blacks in supervisory
12 positions --

13 QUESTION: Do you say that because of their
14 attorney, or were these -- each of these persons
15 represented by this attorney in 1974?

16 MR. ALEXANDER: No, Your Honor, I cannot say
17 that. I do say that each of the respondents in the
18 Wilks case were members of the BFA.

19 The BFA began monitoring this litigation in
20 1974 on an active basis. Surely any --

21 QUESTION: Were most members of the fire
22 department members of the union?

23 MR. ALEXANDER: Most white members of the fire
24 department were members of the BFA.

25 QUESTION: In your --

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MR. ALEXANDER: The BFA --

QUESTION: In your view, was it appropriate for the trial court to deny the motion to intervene at the fairness hearing?

MR. ALEXANDER: Your Honor, that -- the motion to intervene was made after the conclusion of the fairness hearing, in the first instance.

QUESTION: well, the day after?

MR. ALEXANDER: In the second instance --

QUESTION: was it the day after?

MR. ALEXANDER: The day after. And -- and it was, in fact, denied at the time the court approved the relief in question.

QUESTION: And in your view that's a proper order?

MR. ALEXANDER: In my view, Your Honor, that is a proper order. I would call your attention --

QUESTION: So that the duty to intervene arises at some time before the fairness hearing begins?

MR. ALEXANDER: Two responses. One, in the Eleventh Circuit, the McLucas case, takes the position that it could be an abuse of discretion not to permit intervention prior to that time.

Item two, the trial court determined that intervention was untimely. That particular decision was

1 appealed to the Eleventh Circuit, which agreed with the
2 decision of the trial court, and cert was not sought.

3 QUESTION: Well, I'm trying to fix the point
4 at which a firefighter, say, who comes into the fire
5 department, for six months or so, and hears about a
6 lawsuit, suddenly has to go join it. When -- when does
7 he have to join it?

8 MR. ALEXANDER: I think he must go as soon as
9 he believes that his interest is implicated. I think
10 that that -- the facts in that calculus will necessarily
11 vary from case to case.

12 QUESTION: Well, under your view, I, I suppose
13 many of us would be -- have our interests affected by
14 lawsuits and we'd have to read the newspapers every day
15 to see what lawsuits have been filed?

16 MR. ALEXANDER: Certainly if your union, Your
17 Honor, is following a case, actively working with one
18 party, making a report to its membership, and if you're
19 in Birmingham, Alabama, where many of our institutions
20 have been restructured over the past 20 years, it is not
21 a leap of faith to understand that when you are in a
22 fire department with no black firemen, as was the case
23 prior to 1968, that a federal court may well, whether by
24 consent or by litigated judgment, impose goals to remedy
25 the effects of past discrimination, as we believe was

1 done properly here.

2 QUESTION: We're talking about a rule that has
3 to apply to a lot of cases, however, and you're urging
4 upon us, in the interest of judicial efficiency, that we
5 have to get into, on a case by case basis, this, it
6 seems to me, very difficult issue of whether a person
7 has had sufficient notice that his or her rights are
8 about to be affected, whereas the opposite rule, which
9 has been our traditional rule, is quite simply, if you
10 want to cut off somebody's rights, join them in the
11 lawsuit. You don't have to go into a lot of inquiry
12 about how much notice somebody had, when did he have the
13 notice, and so forth. You want to affect them? Join
14 them.

15 QUESTION: Mr. Alexander, were these people
16 charged with any violations of law, or was any relief
17 sought against any of them?

18 MR. ALEXANDER: When you say these people,
19 Your Honor --

20 QUESTION: The people that Justice Scalia just
21 referred to.

22 MR. ALEXANDER: The --

23 QUESTION: Were any of the white firemen
24 charged with violating the law?

25 MR. ALEXANDER: No, sir.

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QUESTION: Or was relief requested against them?

MR. ALEXANDER: Relief has not been requested against the white firemen in any case.

QUESTION: I see.

MR. ALEXANDER: If I may respond, Justice Scalia, to your question or comment, it seems to me that the alternative of the rule we propose is simply a sanctioning of the sandbagging that occurred in this very case.

It is not in the interests of white employees, I suppose ever, to share their promotional benefits and rights with blacks. They can sit on the sidelines knowing that they can bring a collateral attack, knowing that they can in effect interfere with the process, and leave the city in a position where it cannot undertake to remedy what is clearly a very serious legal problem in terms of its own operations.

QUESTION: Well, the city could have brought in these people.

MR. ALEXANDER: Yes, sir. I did not send out the invitations to the dance. I was invited by the United States. They sued me in the first instance; they proposed that I settle. They never suggested anything else. Thank you.

1 QUESTION: Thank you, Mr. Alexander. Mr.
2 Joffe?

3 ORAL ARGUMENT OF ROBERT D. JOFFE
4 ON BEHALF OF THE PETITIONERS MARTIN, ET AL.

5 MR. JOFFE: Mr. Chief Justice, may it please
6 the Court:

7 I would like to make three points today.
8 First, due process does not require allowing respondents
9 a separate proceeding to attack the decree.

10 Second, the Wilks Respondents should have
11 Intervened. Joinder is not required for finality. And
12 third, they did in fact have their collateral attack
13 below.

14 This Court has held in a series of cases from
15 Weber to Johnson that, in appropriate situations,
16 affirmative action is lawful. The issue today is when
17 those determinations are final.

18 We argued for a rule that allows for closure
19 once there has been judicial determination and a
20 meaningful opportunity to participate. Under
21 Respondent's rule, that would not happen.

22 For example, in the two years prior to July of
23 1987, there were 654 consent decrees entered in
24 employment civil rights cases. That doesn't count
25 litigated decrees.

1 Everyone, or virtually every one of those
2 decrees would be subject to attack by white employees
3 who were not joined in those cases, let alone the
4 hundreds of cases that occurred before then.

5 QUESTION: Do you have any statistics on how
6 many employment actions were filed?

7 MR. JCFFE: I don't, Your Honor.

8 QUESTION: In that same period?

9 MR. JCFFE: The 654 is the number that
10 resulted in consent decrees. In addition, there were
11 others --

12 QUESTION: Because merely because an action is
13 filed doesn't mean that a consent decree is going to
14 follow.

15 MR. JCFFE: No, Your Honor. But those 600 --

16 QUESTION: In fact, I would speculate -- and
17 it's sheer speculation -- that it's probably a factor of
18 something like 50 to one.

19 MR. JCFFE: Well, if the rule that Respondents
20 urged was adopted in those other 49 cases for each of
21 the one, massive numbers of whites would have to joined
22 as parties, and all the problems of joinder, which I
23 hope to get into, would be added to those other
24 thousands and thousands of cases.

25 QUESTION: But isn't it a corollary to that

1 that if your rule is adopted, interested employees would
2 have to join each of the 49 suits on the grounds that
3 they might lead to a consent decree? That's just the
4 flip side of the coin, isn't it?

5 MR. JOFFE: I think the problems of
6 intervention are far less than the problems of joinder.
7 Let me turn to that.

8 QUESTION: Excuse me. That -- that joinder
9 would only be necessary in those massive numbers of
10 cases that you say where the relief ultimately desired
11 is the extraordinary relief of race conscious relief.
12 Right?

13 MR. JOFFE: I think in most --

14 QUESTION: In all of the other cases, if
15 there's not going to be any race conscious relief,
16 there'd be no need of joinder.

17 MR. JOFFE: I think in most of those
18 employment civil rights cases, there is race conscious
19 relief, Your Honor.

20 I think, the point is that, when you have
21 intervention, only one person need intervene. And
22 unless the others sitting on the sidelines think that
23 person isn't doing an adequate job they don't have to
24 come into the litigation.

25 The problems of joinder are enormous. First

1 there's the question who to sue. If you're going to sue
2 all the white employees in the city of Birmingham, who
3 do you name as their representative?

4 Some of the whites don't want to be in the
5 litigation because they have no objection to the
6 result. Of the -- of the whites who wish to object to
7 the result, they're going to throw up every procedural
8 hurdle you can imagine.

9 They're going to say the representative is
10 inadequate; they're going to drag their feet. Unless
11 this Court holds that non-opt out defendant classes can
12 be allowed in this case, people will opt out, and you
13 won't have the result.

14 What essentially has been going on in this
15 case for 14 years, the record and procedural history
16 indicate, is guerilla -- something between guerilla
17 warfare and massive resistance to affirmative action in
18 Birmingham.

19 This is not a case where people were unaware
20 of what was going on. In response to Chief Justice
21 Rehnquist's question about the Chase case, in Chase
22 there was no evidence that the mortgagee knew that the
23 case against the mortgager was proceeding.

24 In this situation, it's far different. This
25 was a well-publicized suit --

1 QUESTION: But certainly notice -- notice, in
2 the sense of knowledge, has never been thought to be an
3 adequate substitute for service, if you're trying to get
4 jurisdiction over somebody.

5 MR. JOFFE: Well, I think, Your Honor, there
6 may be three points to make in response to that.

7 First, I think this record demonstrates
8 notice, and in the Szukhent case --

9 QUESTION: but my point was that knowledge and
10 notice have never been thought as a substitute for, for
11 service.

12 MR. JOFFE: Well, knowledge -- knowledge forms
13 the prerequisite in estoppel cases, or waiver cases.
14 Essentially this is an application of the equitable
15 doctrine of waiver.

16 QUESTION: well, can you cite some case from
17 this Court which has applied the equitable doctrine of
18 waiver to someone against whom relief was granted, it
19 was not made a party to the action?

20 MR. JOFFE: Your Honor, the --

21 QUESTION: Can you?

22 MR. JOFFE: I can't. But in this case relief
23 was not granted against the whites. They were adversely
24 affected, but there are many cases where one can be
25 adversely affected. The Penn Central case is one

1 example, the Provident Tradesmens case shows that is not
2 unique.

3 There are other cases where people are
4 affected by a decision. And if they fail to intervene,
5 they can't later say that they didn't have the
6 opportunity. It is the opportunity to be heard which
7 due process requires, not actually the hearing.

8 QUESTION: But this -- the problem here, to my
9 mind, is not due process but simply the rules. Do the
10 rules say that you must alert yourself to actions that
11 are going on and intervene? Or do the rules require
12 that parties to be affected by a judgment should be
13 joined?

14 MR. JOFFE: We're not urging that people must
15 alert themselves. We're saying, on the facts of cases
16 like this, the people were alerted. And that's the
17 difference.

18 QUESTION: What is it that they were alerted
19 to? I mean, if I know that A is suing B, and that the
20 subject of the suit is, A is saying that B should take
21 some money out of my pocket and give it to A, then I
22 might have notice that -- that I should join that suit.

23 But if all I know is that A is suing B and
24 some subject of the suit may somehow remotely affect me,
25 that's something different. Now, what did these people

1 know? All they knew is that there was litigation going
2 on, a possible settlement in question, that might affect
3 their rights.

4 Did they know for sure that their rights were
5 going to be affected by a race conscious remedy at the
6 time when you say they should have intervened?

7 MR. JOFFE: The Eleventh Circuit said, in the
8 Joint appendix at page 772 to 773, that the BFA knew of
9 the litigation and its potential adverse effect from the
10 time it was commenced in 1974.

11 QUESTION: Potential adverse effect. I'm
12 talking about an individual white fireman who knows the
13 suit is going on, does he have clear notice at that
14 point that what you're talking about here is preventing
15 you from being promoted?

16 MR. JOFFE: In 1977, Your Honor, in this -- in
17 that proceeding, the court entered race conscious
18 relief. He issued an order against the city which
19 resulted in white firemen for the first time having a
20 real number of blacks in the fire department. There was
21 then a second trial at which evidence of promotional
22 discrimination was entered.

23 It defies imagination to believe that the
24 white firemen, who were fighting this affirmative action
25 tooth and nail, which the BFA was doing, didn't know

1 that they were potentially adversely affected.

2 And the proof of the pudding is they came in
3 and they objected to the consent decree. They made
4 every objection to that consent decree at the fairness
5 hearing that they make now.

6 They filed their briefs in timely fashion
7 under the notice of the application. They just did not
8 intervene in timely fashion. We're urging for a rule
9 that gets people to make their objections at one time,
10 and not save them for later.

11 In the words of this Court, in *Wainwright v.*
12 *Sykes*, paraphrasing this Court in *Wainwright v. Sykes*,
13 the fairness hearing should be the main event, not a
14 tryout on the road.

15 And that is what we are urging. Otherwise,
16 all the existing decrees will be opened up, and in
17 future cases all the procedural tangles of massive
18 joinder against defendant class will take place.

19 I would like to turn to the fact that in this
20 case they did have their collateral attack, in this very
21 case below. The judge said, he was going to try the
22 issue of prior discrimination, prior to the hearing.
23 They argued in their pre-trial brief that the decrees
24 were illegal.

25 QUESTION: (Inaudible) parties at this time?

1 MR. JOFFE: Yes, in this case, in this Title
2 VII case which they brought, they were parties.

3 They argued that the decrees were illegal,
4 they put in all the evidence that they wanted on
5 trammeling. The judge didn't deny any of their
6 evidence. They argued in summation that the decrees
7 were illegal.

8 QUESTION: But did they get the normal sort of
9 trial on that issue that you would if it hadn't, in the
10 judge's view, been tried before?

11 MR. JOFFE: The Judge let them put in whatever
12 they wanted. There was no ruling of excluding any
13 evidence on the issue of trammeling --

14 QUESTION: But what was the basis for the
15 judge's decision in the case?

16 MR. JOFFE: He had made several decisions.
17 One is that the city was not compelled to -- I'm sorry,
18 that the city was compelled under the decree to hire and
19 promote blacks, but second, he found the decree lawful
20 under Weber.

21 He made five findings that I refer the Court
22 to. At 85(a) in the appendix to the petition at page
23 12, he said they have demonstrated no facts
24 demonstrating that the previous conclusions of the court
25 were in error.

1 Paragraph 13, he says, there was serious
2 underrepresentation of blacks. Paragraph 14, he says,
3 the whites' rights were not trammled. Paragraph 151 of
4 page 106, he said, under all the relevant case law of
5 the Eleventh Circuit and the Supreme Court, the decree
6 is a proper remedial device.

7 In their appeal to the Eleventh Circuit, they
8 argued the decrees were illegal. Never until this Court
9 did they raise for the first time that they didn't have
10 their collateral attack.

11 QUESTION: Well, I thought the district court
12 held that the Plaintiff's claims were impermissible
13 collateral attacks --

14 MR. JOFFE: He did, Your Honor.

15 QUESTION: On the consent decrees. I mean,
16 that was my understanding of the ruling.

17 MR. JOFFE: He -- he issued several rulings.
18 And I believe they were alternative rulings.

19 QUESTION: Well, to the extent that he, the
20 Judge, determined they were impermissible attacks. I
21 guess that's the issue we have here, isn't it?

22 MR. JOFFE: That's the issue in which the
23 Court granted cert, but I would think, Your Honor, now
24 that --

25 QUESTION: Well, I mean, it's entirely

1 possible, if not likely, that the Respondents would lose
2 on the merits, if their claims were ever heard.

3 MR. JOFFE: Your Honor --

4 QUESTION: But I guess that's not our concern
5 here.

6 MR. JOFFE: Your Honor, I believe they were
7 heard on the merits. The findings I refer to and that
8 are referred to in our brief demonstrate they were
9 heard. They did lose on the merits. The Eleventh
10 Circuit, for whatever reasons, overlooked that, and that
11 the court cannot find against us, unless it finds that
12 collateral attacks are allowed, and that there was no
13 trial on the merits.

14 Or put another way, if you find that there was
15 a trial on the merits, you need never reach the other
16 issue.

17 I'd like to reserve what remains of my time
18 for rebuttal.

19 QUESTION: Very well, Mr. Joffe. Mr.
20 Fitzpatrick, we'll hear now from you.

21 ORAL ARGUMENT OF RAYMOND P. FITZPATRICK, JR.

22 ON BEHALF OF THE PRIVATE RESPONDENTS

23 MR. FITZPATRICK: Thank you, Mr. Chief
24 Justice, and may it please the Court:

25 The issue before the Court today is whether a

1 district court should hear the Title VII and equal
2 protection claims of Plaintiffs who were denied
3 promotions on the basis of their race when their
4 employer simply alleges that the challenged actions were
5 taken pursuant to a court-approved consent decree.

6 We believe it is improper to allow an employer
7 to bargain away the Title VII and constitutional rights
8 of non-parties and bind them to their settlement. This
9 is especially true in the context of this case, where
10 intervention was sought before entry of the consent
11 decree and denied.

12 Through their joint invocation of the
13 timeliness provisions of Rule 24, as well as the
14 so-called no-collateral attack doctrine, the petitioners
15 have effectively insulated their decrees and their
16 conduct from the scrutiny of adversarial litigation
17 brought by the people who have in fact been denied
18 promotions, and thereby denied the Respondents a day in
19 court.

20 I want to address, if I may, Justice
21 O'Connor's question right up front, with respect to
22 whether or not we had that collateral attack.

23 When the district court heard the motions to
24 dismiss on May 14, 1984, it set out the issues, and that
25 is cited in our brief and is in the joint appendix.

1 But it, at that time, at the motion to dismiss
2 stage, adopted the no-collateral attack position and
3 held that the only way that we could prevail would be to
4 prove that the city was not in fact following the
5 consent decree, pursuant to the provisions of paragraph
6 two of the decree, which we believe provides a caveat to
7 the terms of the decree.

8 Again, in its February 1985 Interim order on
9 motions for partial summary judgment, the court again
10 repeated that its earlier discussions with counsel on
11 what it believed the trial issues were, and the fact
12 that we could not collaterally attack -- the word
13 "collateral" isn't even appropriate, because we were not
14 parties. We could not attack actions taken pursuant to
15 the decree.

16 The court carefully limited all of the
17 pre-trial preparation, culled our witness list, and
18 directed the preparation for trial, and the Eleventh
19 Circuit recognized all of this and noted it in its
20 decision. And in its final order, which was drafted by
21 the Petitioners, the court made passing references to
22 its prior positions that the decree is lawful.

23 At any rate, we believe that the Respondents
24 should not be bound by the decrees which were entered in
25 this case, because they were not parties nor privies to

1 parties to the decree parties, both --

2 QUESTION: Mr. Fitzpatrick, can I ask a kind
3 of basic question here?

4 MR. FITZPATRICK: Yes, Justice.

5 QUESTION: Supposing instead of a settlement
6 this case had been tried, and there were findings of
7 fact of discrimination, and then the court made it clear
8 that after appropriate hearings and plenty of time to
9 study it, the court was going to enter a remedial decree
10 that would affect whites as well as blacks. And then
11 you had a chance to come in and you did exactly what
12 happened here right on the eve of it, you either did or
13 did not intervene.

14 Would that make any difference whether it was
15 a litigated decree or a consent decree?

16 MR. FITZPATRICK: The question of whether or
17 not there was a litigated decree or not, in my view, if
18 non-parties had filed separate litigation subsequent to
19 entry of that decree, after having been denied
20 promotion, I would think the District Court might take
21 into account the prior findings and -- but still allow
22 the Respondents to prove --

23 QUESTION: Well, that might go to whether he'd
24 grant relief or not. But say he granted just relief
25 that's way off the wall, he just said no whites can ever

1 be hired here for the next six years, or something like
2 that, wouldn't you have the same standing -- pardon me?

3 MR. FITZPATRICK: Excuse me, Justice.

4 QUESTION: I'm just -- I'm just -- really I'm
5 trying to get, with what I'm trying to think through is
6 whether the fact that it's a consent decree has any
7 bearing one way or another on your right to say, I want
8 to attack that decree because I wasn't a party to it,
9 and I'm not bound by it.

10 MR. FITZPATRICK: In the view of the Eleventh
11 Circuit, which I believe is the correct view, that would
12 make no difference whether it was a litigated decree or
13 not. And I think that's consistent with the Chase
14 National Bank v. City of Norwalk rule.

15 QUESTION: So, really, the question isn't
16 whether your clients are bound by the decree, the
17 question is whether the decree is a defense to the
18 litigation.

19 MR. FITZPATRICK: Yes --

20 QUESTION: And in that connection --

21 MR. FITZPATRICK: That is the defense which
22 the Petitioners have -- have alleged, and they believe
23 it is a complete defense.

24 QUESTION: And of course, it may or may not
25 be, but you at least, you have standing to say it's an

1 invalid decree; It might have been entered fraudulently
2 or all sorts of reasons. But you're just claiming -- at
3 this point all you want is standing to challenge it, is
4 that right?

5 MR. FITZPATRICK: We want the opportunity to
6 go to court and prove that under Title VII in the equal
7 protection clause, the conduct of the city of Birmingham
8 is outside the parameters of valid affirmative action as
9 recognized by this Court in Johnson and Wygant.

10 That is what the Eleventh Circuit remanded the
11 case to the District Court for.

12 QUESTION: well, you're not just asking for
13 standing, you're asking us to rule on what the standards
14 should be on deciding whether the decree is valid, is a
15 defense of the litigation --

16 MR. FITZPATRICK: No, that is not an issue
17 upon which certiorari was granted, although that was
18 raised by the Petitioners. Cert was denied on that
19 issue.

20 The -- the Eleventh Circuit in this case first
21 held that the decree should not be binding upon the
22 Respondents who were non-parties to the decree.

23 QUESTION: Right. And you say that's the same
24 whether it's a consent decree or litigated decree?

25 MR. FITZPATRICK: That's correct, Your Honor.

1 QUESTION: Right. And, of course, then the
2 merits would also be the same whether it's a consent
3 decree or litigated decree?

4 MR. FITZPATRICK: When you say -- you mean in
5 our challenge --

6 QUESTION: Yes.

7 MR. FITZPATRICK: In our subsequent challenge,
8 yes, we believe we should be able to attack the city's
9 conduct, even though it's taken pursuant to a consent
10 decree or, in the case of a litigated decree, if -- if
11 we have been denied promotions pursuant to a -- to a
12 court order, which is beyond the remedial authority of
13 that court -- and of course there are some differences
14 between what is permissible in the realm of voluntary
15 action and remedial action under 706(g).

16 The -- but if those actions were taken outside
17 the court's remedial authority in a litigated case, then
18 I believe the non-parties ought to be able to say, no,
19 this is wrong.

20 QUESTION: I understand.

21 QUESTION: You're not asserting necessarily,
22 and it's not before us here, whether the city might not
23 have some sort of defense to certain kinds of relief, if
24 it was acting in reliance upon the judicial decree.

25 I suppose you would categorically say that the

1 city cannot keep doing the bad thing, but -- but whether
2 it's liable to damages for the past doing of it might be
3 a different question, no?

4 MR. FITZPATRICK: We believe -- when the first
5 of challenge promotions was made in this case, we sought
6 preliminary relief. The district court denied that
7 relief and we appealed to the Eleventh Circuit. That
8 appeal was consolidated with the appeal from the
9 intervention proceedings.

10 The Eleventh Circuit said that there should be
11 no irreparable injury because make whole relief was
12 available to any non-minority employees who were
13 improperly denied promotions.

14 We believe that the appropriate remedy in this
15 case would be make whole relief in the form of
16 preferential promotions or seniority or back pay.
17 Whether the city was following a decree is -- might be
18 liable as to whether or not the city could be liable
19 for, say, punitive damages under Section 1983. That --
20 it might be relevant in that situation.

21 But simply because they were following a
22 consent decree does not in our view provide some limits
23 on the availability of make whole relief. As the Court
24 recognized in the W.R. Grace case, the city has
25 voluntarily placed itself in a dilemma of its own

1 making.

2 And In Grace the employees were entitled to
3 recover their back pay, even though the employer in
4 Grace was acting pursuant to a conciliation agreement
5 which had been ordered enforced by a district court. So
6 --

7 QUESTION: Surely for that purpose, to go back
8 to Justice Stevens' line of questioning, there would be
9 a difference between a consent decree and simply a court
10 determination, because there the city wouldn't be the
11 architect of its own violation, if it was -- if it was
12 simply hit with a judgment that required it to do
13 certain things.

14 MR. FITZPATRICK: Yes, I -- I see your point
15 there, Justice. If the city was not the architect of
16 its --

17 QUESTION: Well, of course, you assume the
18 party settling a case is an architect of the
19 settlement. Sometimes he has to negotiate with his
20 adversaries.

21 MR. FITZPATRICK: Well, the city, in the words
22 of the mayor in his deposition, made the best business
23 deal it had ever made when it settled this case for
24 \$265,000.

25 QUESTION: Are you claiming it was a collusive

1 settlement?

2 MR. FITZPATRICK: No, sir. I'm not claiming
3 it's a collusive settlement. I'm saying that the city
4 was eager to make the settlement.

5 QUESTION: well, there are a lot of people who
6 have been eager to settle lawsuits once they get the
7 evidence before the judge.

8 MR. FITZPATRICK: Yes, sir. But I --

9 QUESTION: When they know -- when they think
10 they're going to lose, especially.

11 MR. FITZPATRICK: Yes, we've all settled
12 cases.

13 QUESTION: Mr. Fitzpatrick, this -- this
14 litigation involved promotion practices of the city, I
15 take it. What we're dealing --

16 MR. FITZPATRICK: The original --

17 QUESTION: Yes, the original action involved
18 hiring.

19 MR. FITZPATRICK: Let, let -- yes.

20 QUESTION: Now, who has to be joined in your
21 view in a hiring suit?

22 MR. FITZPATRICK: In a hiring case. That is a
23 good question. In a hiring case, the -- of course, if a
24 hiring quota or goal is ordered, of course the -- it --
25 one cannot be certain who the remedy will affect down

1 the line. It will affect the public at large or the --

2 QUESTION: So who has to be joined, in your
3 view, in a hiring action?

4 MR. FITZPATRICK: Who has to be joined -- I
5 would think it would be appropriate to join a defendant
6 class of applicants, of current applicants perhaps, to
7 the city.

8 The personnel board which administers the
9 examinations continuously gives examinations and
10 maintains a register of eligibles, and it would be easy
11 for the existing parties --

12 QUESTION: Just people on the eligibility
13 list.

14 MR. FITZPATRICK: I would think that they
15 would be adequate representatives for the interests of
16 those who might apply to the city of Birmingham, and
17 therefore might be subject to the relief which --

18 QUESTION: In a class action?

19 MR. FITZPATRICK: Through a defendant class.
20 Justice O'Connor's question, as I understood it, asked
21 me for a vehicle upon which potential applicants to the
22 city might be bound by a decree and, in my view, a
23 possible vehicle for achieving that goal would be
24 through a defendant class of the persons on the register
25 of eligibility, who would then be adequate

1 representatives for the potential new hires of the
2 city.

3 QUESTION: Well, during the period '74--'77,
4 were there any employment suits brought against the city
5 other than this one that involved this department?

6 MR. FITZPATRICK: Not to my knowledge, Justice
7 Kennedy, although -- let me, if I may, I think it was
8 within the parameter of Justice O'Connor's question,
9 briefly state that the suits which were brought in '74
10 and '75 were very broad pattern and practice suits, not
11 only against the city of Birmingham, but against the
12 Jefferson County personnel board and some 20 or 25 other
13 municipalities in the Jefferson County area.

14 It alleged -- this was not a fire department
15 suit. The fire department was just one of many, many
16 departments whose employment practices might have been
17 at issue.

18 In fact, during that period of 1976 through
19 '79, the suit was primarily concerned with police
20 officer hiring and firefighter hiring. And to the
21 knowledge of the firefighters, the only thing that this
22 suit was about was just a hiring case involving
23 entry-level firefighters.

24 QUESTION: How many -- how many of the
25 Plaintiffs in this case were represented by counsel

1 during those years?

2 MR. FITZPATRICK: During the hearings? The
3 Respondents were not represented at the hearing.

4 QUESTION: I know. But did they have lawyers
5 or not?

6 MR. FITZPATRICK: No, sir. The Respondents --
7 the Respondents only sought legal counsel after they
8 were in fact denied promotions.

9 QUESTION: well, who was -- It was said that
10 some of the Respondents were consulting with the city
11 people?

12 MR. FITZPATRICK: No. Your Honor, the
13 association, the firefighters' association, which is not
14 a collective bargaining agent, was aware of the pendency
15 of the lawsuit --

16 QUESTION: well, was there any evidence that
17 any of these individuals, the Respondents, were aware?

18 MR. FITZPATRICK: No, sir. There is no such
19 evidence. And --

20 QUESTION: were these Respondents members of
21 that association?

22 MR. FITZPATRICK: The Respondents are all
23 members of the association. At least one of the
24 Respondents was not even employed by the city of
25 Birmingham at the time the suits were filed.

1 The association, though, in our view, is not
2 an adequate representative --

3 QUESTION: well, did the association notify
4 its members or anything, call their attention to this --

5 MR. FITZPATRICK: I don't believe that -- that
6 is not record evidence, but I don't believe the
7 association went out and notified all its members that
8 the litigation was pending and --

9 QUESTION: well I -- I understood from your
10 colleagues on the other side that these Respondents were
11 aware of the litigation --

12 MR. FITZPATRICK: No, sir. Your Honor, the
13 Respondents were not -- the individual Respondents who
14 are before this Court today were not aware of the
15 litigation.

16 The evidence is that the firefighters'
17 association and the union president had knowledge of the
18 pendency of that litigation which he understood to be a
19 hiring case.

20 In fact, during the 1979 trial, no fire
21 department promotional examination was attacked. The
22 trial in '79 which concerned promotional practices was
23 primarily concerned with examinations for promotions in
24 other departments.

25 The -- the trial did involve some promotional

1 devices, screening devices, that were also employed in
2 the fire department, but the principal focus of that
3 trial was on the validity of certain examinations.

4 QUESTION: When -- when would it have become
5 clear that the fire department was implicated in the
6 suit?

7 MR. FITZPATRICK: That fire department
8 promotions were implicated in this suit?

9 QUESTION: Yes.

10 MR. FITZPATRICK: It only -- the only -- the
11 first time that any fire department promotions were
12 specifically mentioned was in the consent decree
13 itself.

14 In fact, the fire chief himself so testified,
15 that he did not know fire -- fire department promotions
16 were implicated in the litigation until a consent decree
17 was entered, and he was given the charge of enforcing it
18 in the fire department. The --

19 QUESTION: Was any of this in the newspapers?

20 MR. FITZPATRICK: Apparently there were some
21 newspaper stories about the filing of this litigation.
22 Yes, sir.

23 QUESTION: You mean this is apparent, you
24 don't think so.

25 MR. FITZPATRICK: The -- the Petitioners have

1 cited newspaper articles in their brief, but --

2 QUESTION: (Inaudible) involved the whole area
3 all around Birmingham, right?

4 MR. FITZPATRICK: Yes, sir. It involved the
5 greater Jefferson County area.

6 QUESTION: And yet the newspapers didn't
7 mention it?

8 MR. FITZPATRICK: No, I didn't say that,
9 Justice Marshall.

10 QUESTION: But that was my question.

11 MR. FITZPATRICK: It's my understanding that
12 the Petitioners have cited newspaper articles in their
13 briefs, and I will take their word for it that their
14 briefs are accurate, although I have not gone back and
15 read those old articles.

16 QUESTION: And that your people can read.

17 MR. FITZPATRICK: Yes, my firefighters, I
18 believe, can read.

19 QUESTION: But they don't know anything about
20 it?

21 MR. FITZPATRICK: Well, we do not believe that
22 a story in the newspaper is an appropriate vehicle upon
23 which to --

24 QUESTION: I didn't say that. I didn't say
25 that -- you said they didn't know about it.

1 MR. FITZPATRICK: They said that they did not
2 know about the particular fact that they were looking
3 for promotional goals in the Birmingham fire and rescue
4 service.

5 QUESTION: But they did know that there was a
6 case pending, which affected the department they were
7 working in.

8 MR. FITZPATRICK: There was a case pending
9 which challenged employment practices in the Jefferson
10 County area.

11 QUESTION: Where they work.

12 MR. FITZPATRICK: Where they work. And they
13 basically thought it was a hiring case, which is where
14 most of the focus was during the mid-1970s.

15 The -- in our view, the need to carefully
16 police affirmative action plans would be -- would be
17 furthered by allowing suits such as those by respondents
18 to go forward.

19 The Court recognized in Fullilove that simply
20 because the Court was approving the set-aside in the
21 context of that case, that it did not preclude further
22 challenges based on specific applications of the
23 set-aside.

24 And we believe that in the context of this
25 case, the policing of affirmative action plans would be

1 furthered by allowing suits such as these to be heard,
2 especially under the facts of this case where the city
3 has been following a 50 percent quota with only a 13
4 percent qualified black applicant pool for promotion.

5 No consideration was given by the city to the
6 relative qualifications of competing black and white
7 candidates. Race was not a plus factor, it was the only
8 factor. And we believe the merits of the case to be
9 heard in the district court are very strong. The --

10 QUESTION: Mr. Fitzpatrick, coming back to
11 your earlier answer, that your clients did not know of
12 the fact that promotions were at issue in this
13 litigation. Is that a matter of record or is this just
14 your personal assurance today?

15 MR. FITZPATRICK: That -- that is my personal
16 assurance today. That matter was not a matter of
17 record. It was not --

18 QUESTION: But isn't it your legal position,
19 Mr. Fitzpatrick, but even if they knew it wouldn't make
20 any difference, because they didn't have any duty to act
21 unless they were served with process?

22 MR. FITZPATRICK: Correct. It is the court,
23 in the Mullane, in the Tulsa, and in the other cases
24 which look at adequacy of notice, does not look at what
25 notice was received but rather what notice was given.

1 In the Tulsa case last term, the Court stated
2 that actual notice is such -- individual notice by mail
3 or such other means as is certain to ensure actual
4 notice.

5 And the burden to give notice upon known
6 interested parties is on the Petitioners in the context
7 of this case, who are the existing parties to the
8 litigation, who certainly could have given notice to
9 their existing employees.

10 QUESTION: well, that's not all you insist
11 upon, not just notice, not just notice that there's this
12 lawsuit pending. You want them joined. I mean, notice
13 that you are hereby going to be bound by the result of
14 this suit, unless -- unless you --

15 MR. FITZPATRICK: Absolutely, Justice. We
16 believe that the mandatory joinder theory is wrong.

17 But even if the Court went to that sort of a
18 theory that there was no adequate notice in the context
19 of this case, but that is correct. We reject and we do
20 not believe that the Court need reach the question of
21 whether notice was given here because there was no duty
22 to intervene, and the mandatory intervention theory
23 should not be accepted. I see my light is on.

24 QUESTION: Thank you, Mr. Fitzpatrick. Mr.
25 Merrill, we'll hear now from you.

1 ORAL ARGUMENT OF THOMAS W. MERRILL

2 ON BEHALF OF THE FEDERAL RESPONDENT

3 MR. MERRILL: Thank you, Mr. Chief Justice,
4 and may it please the Court:

5 Petitioners maintain that Respondents are
6 bound by a consent decree that was entered in a case in
7 which they were not parties, in which they were not in
8 privity with any party. That proposition is, to say the
9 least, striking.

10 QUESTION: May I interrupt right out the
11 outset, Mr. Merrill, because I'd be interested in your
12 views.

13 We use the word "bound" by the decree. In
14 your judgment does that mean the same thing as whether
15 the decree could constitute a defense to a Title VII
16 action?

17 MR. MERRILL: Justice Stevens, I think that
18 the way in which the issue should properly arise in the
19 lawsuits that Respondents have filed would be framed in
20 terms of the McDonnell Douglas and Burdine standard that
21 this Court has laid out.

22 The Respondents would have to show --
23 establish a prima facie case of discrimination, then I
24 assume that the city would impose the decree as a
25 defense.

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QUESTION: Correct.

MR. MERRILL: And at that point, the answer to that defense would be that the decree is either unlawful or else that the city is acting outside the terms of the decree and that the decree is no defense --

QUESTION: But that's quite a different issue than whether the outsiders are bound by the decree. They're not affirmatively obligated to do anything as parties to the decree.

MR. MERRILL: No, they're not bound to do anything under the decree, but they are bound in a collateral -- the Petitioners claim is that of collateral estoppel.

QUESTION: They're not bound, they're just -- there's a defense to their lawsuit out there, which is in the fact that the city has relied on a decree.

And I suppose the defense, as one of the other lawyers suggested, is precisely the same whether it's a litigated decree or a consent decree, as long as it's a bona fide judicial decree.

MR. MERRILL: I would agree with that, Justice Stevens.

QUESTION: So we're really not -- and the question really isn't whether they're bound, the question is whether or not they can challenge the decree

1 in order to anticipate, to defeat this defense.

2 MR. MERRILL: It's an issue of res judicata or
3 collateral estoppel, if you will, as to whether or not
4 the validity of the decree is something as to which the
5 Respondents are collaterally estopped from attacking.

6 Now, a litigated decree would be different, I
7 think, in that it would have some stare decisis effect,
8 at least in the Northern District of Alabama. But in
9 either case, whether it's litigated or consent decree,
10 our position would be that there can be -- collateral
11 estoppel cannot be imposed on someone who is not a party
12 or not privy to the case in which the decree was
13 entered.

14 QUESTION: Mr. Merrill, the federal government
15 supported the entry of the consent decree in this case.
16 Right?

17 MR. MERRILL: That's correct. We did. And we
18 have not subsequently sought to attack the decree, at
19 least as the decree is written on its face.

20 QUESTION: So, indeed, it might constitute a
21 valid defense if suit were permitted by the
22 Respondents.

23 MR. MERRILL: I don't follow your question.

24 QUESTION: Well, it relates to what Justice
25 Stevens was just asking. Suppose these Respondents are

1 allowed now to file their suit and be heard, I assume
2 the government might think the defense is valid, that
3 the consent decree provides a valid defense.

4 MR. MERRILL: The government is obligated by
5 the terms of the decree to defend the decree -- excuse
6 me, defend the decree, and we would not take the
7 position that the decree itself is invalid. I don't
8 think it's open to us to take that position, as
9 signatories to the consent decree.

10 QUESTION: Who do you think has to be named in
11 a hiring suit?

12 MR. MERRILL: Well, that raises an important
13 point that I did want to address, Justice O'Connor.

14 The case has been argued this morning, I
15 think, on an implicit assumption that it's an
16 unqualified good thing to try to get everybody who has
17 any type of interest, however remotely affected,
18 involved in one piece of litigation, and therefore that
19 the relevant choices are this mandatory intervention
20 rule or some kind of mandatory joinder rule.

21 I think that that assumption is open to very
22 serious question. I would caution the Court against
23 endorsing some kind of rule of even mandatory joinder,
24 let alone mandatory intervention in handling Title VII
25 disputes.

1 At the outset -- you can think about the
2 possibilities, the contingencies that face someone like
3 -- like the Individual Respondents at the outset of a
4 lawsuit of this nature.

5 It's not clear whether or not the Plaintiffs,
6 the original Plaintiffs that is, will prevail. If they
7 do prevail it's not clear what type of relief will be
8 ordered.

9 If there's a consent decree, it's not clear
10 that the consent decree is necessarily going to include
11 numerical relief of the nature that it did here. Even
12 if the consent decree contains that type of relief, it's
13 not particularly clear whether any of the Respondents
14 will seek promotions or be eligible for promotions, and
15 it's not clear if they seek promotions whether they'll
16 be promoted or not be promoted.

17 And finally, even if they're not promoted,
18 it's not clear that they would feel sufficiently
19 aggrieved by that decision to want to file a lawsuit.
20 And I think the Court should be cautious about endorsing
21 any type of rule that sort of forces Title VII cases to
22 consider non-right, if you will, contentions as a
23 necessary requirement of litigating those particular
24 lawsuits.

25 QUESTION: So what should the rule be? How

1 would you apply Rule 19 in this context?

2 MR. MERRILL: Well, I think Rule 19 comes to
3 bear by -- comes into play by its terms. When you reach
4 a point where there are identifiable parties who are --
5 who have a significant risk that they will be adversely
6 affected by the particular case. At that point in time,
7 then, Rule 19 requires that those parties be joined.

8 I think -- I think there's an important
9 distinction here between parties who have a cause of
10 action and parties who don't have a cause of action.
11 The Respondents in this particular case at the time of
12 their consent decree did not even have a cause of
13 action, because they had not been denied promotions.

14 And I think that someone who doesn't even have
15 a cause of action is probably not the type of person as
16 to which there should be some mandatory rule of joinder,
17 let alone mandatory intervention.

18 And I think that's the basis on which, for
19 example, the Penn Central case can be distinguished. In
20 the Penn Central case you had somebody who not only had
21 a cause of action but who had gone so far as to file a
22 lawsuit.

23 It was in a different court. And then they
24 sat by while all the other parties went ahead and
25 adjudicated their claims in a different court. That's a

1 far different situation than what you have here, where
2 the claim is that someone who's bound -- someone who
3 doesn't even have a matured cause of action is bound by
4 a consent decree entered into somebody else's case.

5 The fundamental point here, and I think it's
6 one that the Petitioners have consistently glossed over,
7 is that given the strong background of due process that
8 suggests that a party cannot be bound to a case in which
9 they're not a party -- a person can't be bound in a case
10 when they're not a party, not privity -- one would expect
11 if there was to be an exception to that that you would
12 find it in a statute of Congress or in one of the
13 federal rules of civil procedure, and provisions, for
14 example, regarding notice --

15 QUESTION: Mr. Merrill, I thought we'd agreed
16 these parties aren't bound. There's no question of
17 being bound by the decree. It's a question of whether
18 this is a defense to their lawsuit.

19 MR. MERRILL: Well, I'm using that as a
20 shorthand for whether or not collateral estoppel applies
21 --

22 QUESTION: But it's quite -- it's quite a
23 different -- I mean, it's a shorthand, but you're mixing
24 up two very fundamentally different concepts.

25 Because there's no requirement that somebody

1 get notice if they want -- well, there's a big
2 difference between being bound and just wanting to bring
3 a lawsuit.

4 MR. MERRILL: Well, if the issue --
5 technically you're right. The issue is collateral
6 estoppel, and excuse me if I've --

7 QUESTION: See, and that's part of the
8 confusion with the court of appeals' opinion. They
9 sometimes use the word "bound" and then at the end they
10 ask whether the decree can be used as a defense. And
11 they're very different concepts.

12 MR. MERRILL: The issue is whether or not the
13 decree is a defense as to which these Respondents have
14 nothing to say in response.

15 QUESTION: Do you think it's that big a
16 difference, Mr. Merrill? I mean, if two people are
17 litigating over which of the two of them owns my house,
18 I guess I am not bound by that in the sense that it
19 doesn't make me do anything if it comes out wrong.

20 But I'd feel pretty bad if I were if I were
21 obliged to live by whatever the outcome is. Don't you
22 think there's a substantial difference between whether
23 I'm bound in the sense that I have to do something or
24 whether I'm just bound in the sense that whatever the
25 Court says is the law as to be. (Inaudible) if I were

1 you.

2 MR. MERRILL: I think the issue here is
3 collateral estoppel, and I think the issue is an
4 important one, Justice Scalia.---

5 Let me just say something very quickly about
6 the notice issue, because I think the Petitioners'
7 proposition that somehow the intervene or be bound rule
8 satisfies due process glosses over some very important
9 points.

10 First of all, this Court has held in Mullane
11 and related cases not that subjective knowledge is
12 required but that reasonable means must be undertaken in
13 order to assure actual knowledge. And no claim can be
14 made that reasonable means in the Mullane sense were
15 undertaken here in order to provide notice to these
16 particular Respondents.

17 There was publication notice in the newspaper;
18 the publication notice didn't mention the fact that
19 promotions were at issue. It did not mention the fact
20 that there were a numerical -- numerical relief was
21 contemplated by the consent decree.

22 Furthermore, one would think that under the
23 intervene or be bound rule that the relevant thing that
24 the Respondents would have to have notice of was the
25 fact that if they don't intervene they will -- excuse

1 me, be subject to their collateral estoppel -- would be
2 subject to a collateral estoppel contention or that they
3 will be unable to attack the terms of the consent
4 decree.

5 And there was never any suggestion that that
6 type of notice was provided to the individual
7 Respondents in this particular case.

8 I think it's -- one instructive way to think
9 about this proposed rule, this collateral attack rule,
10 is to compare it to the class action procedures of Rule
11 23.

12 Petitioners' argument would in effect
13 transform a class action, Title VII class action, into a
14 double class action. Not only would you have the named
15 and defined class that receives all the procedural
16 protections of Rule 23, but in addition you would have
17 an undefined class with no representative party
18 representing that class, no inquiry into the adequacy of
19 representation, and none of the other protections of
20 notice by Rule 23.

21 And that class would nevertheless also be
22 subject -- or would be unable in the future, to
23 collaterally attack certain provisions of the case that
24 were entered into. Thank you.

25 QUESTION: Thank you, Mr. Merrill. Mr. Joffe,

1 you have three minutes remaining.

2 REBUTTAL ARGUMENT OF ROBERT D. JOFFE

3 MR. JOFFE: The notion that this notice was
4 inadequate comes pretty poorly from the mouth of the
5 United States government which drafted the notice.

6 Mullane and Tulsa do not seem to me to apply
7 here. They deal with the constitutionality of a statute
8 on its face which is intended to apply to all
9 situations, and not with a situation where due process
10 was met in this situation.

11 There's no question Oklahoma could have
12 provided for due process to be determined on a case by
13 case basis. They instead chose a statute and they chose
14 an inadequate statute.

15 In Mullane and Tulsa, the parties did not have
16 notice. It's a very different situation than this one --

17 QUESTION: Yes, but let me ask you a
18 question. Supposing that your opponents wanted to
19 attack this decree as having been fraudulently entered
20 into, that there was a bribe changed hand or something
21 like that, you'd agree there was standing to do that,
22 wouldn't you?

23 MR. JOFFE: Absolutely. Although I think,
24 Your Honor, they should go back to the consent decree
25 court for that, not filing a separate lawsuit, but

1 certainly that could be raised.

2 QUESTION: So it really isn't a question of
3 standing at all or a question of being bound, it's a
4 question of whether it's a good defense, a particular
5 decree.

6 MR. JOFFE: It's a -- that is a question to
7 the damage action. With respect to prospective relief,
8 it's a somewhat different question, and it's a question
9 whether in their separate Title VII case, as opposed to
10 going back into the decree court seeking to intervene on
11 changed circumstances of fact or law. It's a question
12 of whether in this case they can relitigate that.

13 There's no question but that they could have
14 intervened in that proceeding, whether their cause of
15 action had arisen or not. They could have --

16 QUESTION: Maybe it's not just a matter of
17 relitigation. Maybe they have a higher burden. But
18 even if -- you would say that under no circumstances, if
19 there had been no hearing, no matter how wild the decree
20 was, that they couldn't say that this decree violates
21 some standard?

22 MR. JOFFE: If there had been no hearing and
23 notice, I would agree, they could certainly come in and
24 bring their Title VII --

25 QUESTION: Well, maybe the fact that there was

1 a hearing and notice is a defense to their claim rather
2 than one that stops them at the threshold.

3 MR. JOFFE: It's both a defense to their
4 damage claim and it's a reason why they shouldn't be
5 able to relitigate this issue. They, in effect, waived
6 their rights.

7 And essentially, they didn't -- they either
8 waived their rights if they didn't appear at that
9 hearing or they appeared at their hearing through the
10 proxy, the BFA, which was fighting affirmative action
11 tooth and nail and made every argument at that hearing
12 that they -- every substantive argument that they've
13 made throughout the course of this litigation. They
14 were not deprived of anything, Your Honor.

15 As far as whether the denial of intervention
16 was somehow unfair, in NAACP v. New York, this Court
17 affirmed the trial court's denial of information on the
18 basis of a single article in the New York Times, and a
19 15-day delay.

20 The delay was more -- shorter, the notice far
21 more ephemeral than what sat here. And moreover, they
22 could have, of course, applied for cert to this Court
23 from the Eleventh Circuit's affirmance of the denial of
24 certiorari. They chose not, they chose to gamble on the
25 uncertain state of the law and pursue this other

1 lawsuit.

2 The rule which they urge would mean that
3 decrees -- consent decree cases and litigated cases
4 could be attacked in separate proceedings by whoever was
5 affected by them, not matter how much notice they had,
6 how much opportunity they had to be heard. Thank you.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
8 Joffe. The case is submitted.

9 (Whereupon, at 11:05 a.m., the case in the
10 above-entitled matter was submitted.)
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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:

NO. 87-1614 - JOHN W. MARTIN, ET AL. Petitioners V. ROBERT K. WILKS, ET AL.;

NO. 87-1639 - PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL.,

Petitioners V. ROBERT K. WILKS, ET AL.; and

NO. 87-1668 - RICHARD ARRINGTON, JR., ET AL., Petitioners V. ROBERT K. WILKS, ET AL.

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

BY JUDY FREILICHER

(REPORTER)