

The Burger Court Opinion Writing Database

Firefighters v. Cleveland

478 U.S. 501 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



111
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

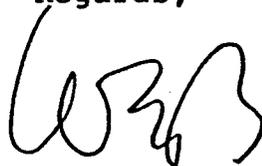
March 10, 1986

RE: No. 84-1999 - Local 93 v. Cleveland

MEMORANDUM TO THE CONFERENCE:

I "passed" at Conference on this case. I now vote to
reverse.

Regards,



.82 MAR 10 6 32 A

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

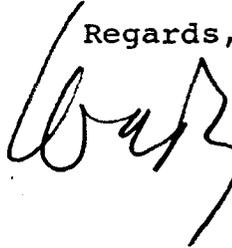
June 18, 1986

RE: 84-1999 - Local 93 v. Cleveland

Dear Bill:

I join.

Regards,



Justice Rehnquist

Copies to the Conference

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: MAY 25 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
CIATION OF FIREFIGHTERS, AFL-CIO
C. L. C., PETITIONER *v.* CITY
OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[May —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether § 706(g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(g), precludes the entry of a consent decree which provides relief that may benefit individuals who were not the actual victims of the defendant's discriminatory practices.

I

On October 23, 1980, the *Vanguards of Cleveland* (the *Vanguards*), an organization of black and Hispanic firefighters employed by the City of Cleveland, filed a complaint charging the City and various municipal officials (hereinafter referred to collectively as the City) with discrimination on the basis of race and national origin "in the hiring, assignment and promotion of firefighters within the City of Cleveland Fire Department." App. 6. The *Vanguards* sued on behalf of a class of blacks and Hispanics consisting of firefighters already employed by the City, applicants for employment, and "all blacks and Hispanics who in the future will apply for employment or will be employed as firemen by the Cleveland Fire Department." *Id.*, at 8.

The *Vanguards* claimed that the City had violated the rights of the plaintiff class under the Thirteenth and

To: The Chief Justice
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: WMA 87 100

STYLISTIC CHANGES THROUGHOUT.
 SEE PAGES:

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
 CIATION OF FIREFIGHTERS, AFL-CIO
 C. L. C., PETITIONER *v.* CITY
 OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE SIXTH CIRCUIT

[June —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether § 706(g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(g), precludes the entry of a consent decree which provides relief that may benefit individuals who were not the actual victims of the defendant's discriminatory practices.

I

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The Vanguard claimed that the City had violated the rights of the plaintiff class under the Thirteenth and

To: The Chief Justice
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: _____ JUN 23 1986

12, 14, 16-19
 (fn. renumbered after fn. 8)

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
 CIATION OF FIREFIGHTERS, AFL-CIO
 C. L. C., PETITIONER *v.* CITY
 OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE SIXTH CIRCUIT

[June —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether § 706(g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(g), precludes the entry of a consent decree which provides relief that may benefit individuals who were not the actual victims of the defendant's discriminatory practices.

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The Vanguard claimed that the City had violated the rights of the plaintiff class under the Thirteenth and

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: _____ JUN 26 1986

23-25

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
CIATION OF FIREFIGHTERS, AFL-CIO
C. L. C., PETITIONER *v.* CITY
OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether § 706(g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(g), precludes the entry of a consent decree which provides relief that may benefit individuals who were not the actual victims of the defendant's discriminatory practices.

I

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The Vanguarders claimed that the City had violated the rights of the plaintiff class under the Thirteenth and

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

JUN 27 1986

Recirculated: _____

23, 24

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
CIATION OF FIREFIGHTERS, AFL-CIO
C. L. C., PETITIONER *v.* CITY
OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether § 706(g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(g), precludes the entry of a consent decree which provides relief that may benefit individuals who were not the actual victims of the defendant's discriminatory practices.

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The *Vanguards* claimed that the City had violated the rights of the plaintiff class under the Thirteenth and

Supreme Court of the United States
Washington, D. C. 20543

7113
July 1, 1986

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

MEMORANDUM TO THE CONFERENCE

Held for No. 84-1999, Local 93 v. City of Cleveland:
No. 85-177, Orr v. Turner

Respondents brought a class action against the Air Force for alleged racial discrimination against civilian black employees and applicants for employment at a Florida Air Force base. In 1981, the Air Force settled the case by entering into a consent decree. Under the terms of the decree, the Air Force agreed "to make every good faith effort" to reach and maintain specified racial proportions for specific job categories, and to fill supervisory positions with blacks "in proportion to the percentage of blacks in the occupancy category where the vacancy arises." The phrase "good faith effort" is defined as "every necessary and appropriate step ... to realize the specified objectives." A special master was appointed to oversee compliance with the terms of the decree.

In 1983, the plaintiffs' monitoring committee filed a complaint on behalf of Raymond Little alleging that the Air Force's failure to promote Little to a supervisory position violated the terms of the consent decree. The special master found that the Air Force had not made "every good faith effort" to fill supervisory positions with blacks as required by the decree and ordered that Little be placed in a then vacant supervisory position and awarded back pay. The District Court adopted the special master's finding.

The Court of Appeals affirmed, concluding that the record amply supported the District Court's determination that the Government had failed to make a good faith effort to comply with the terms of the consent decree. The court rejected the Government's argument that "good faith efforts" had been made if the individual promoted was the best qualified for the position, since this interpretation would render the good faith requirement meaningless. The court declined, however, to specify what steps are sufficient to meet the good faith requirement of the consent decree since, in the court's view, the Government had failed to show that it had made any effort to meet the goals established by the decree. The court specifically rejected the government's assertion that the special master had construed the good faith provision to require "the Secretary to hire or promote only class members until the 'goals' are met."

Supreme Court of the United States
Washington, D. C. 20543

July 1, 1986

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

MEMORANDUM TO THE CONFERENCE

Held for No. 84-1999, Local 93 v. Cleveland:
No. 85-1592, Burke v. Massachusetts Ass'n of Afro-American
Police

Petitioners, a group of white Boston police officers, contend that CAI erred in upholding the District Court's denial of their motion to intervene in Massachusetts Ass'n of Afro-American Police (MAAP) v. Boston Police Dept., et al.

MAAP began in 1978 when respondents, black Boston police officers, filed a Title VII action against the City of Boston and its Police Department, alleging that the Department's promotion practices were discriminatory. In 1980, without conceding that it had committed discriminatory acts, the defendants entered into a consent decree which established goals for the promotion of black officers.

In 1984, petitioners moved to intervene in MAAP, arguing that our decision in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), had worked a substantial change in the law since the entry of the decree that justified intervention and reconsideration of the decree. Specifically, petitioners argued that Stotts made clear that §706(g) prohibits the entry of consent decrees that require an employer to favor minority over non-minority employees who have not themselves been actual victims of the employer's past discrimination. The District Court rejected this argument.

CAI affirmed. The court first noted the similarity between this case and Devereaux v. Geary, cert. pending, No. 85-492 (Hold Memo Dated 7/1/86). The court observed that in Devereaux it had rejected the argument that Stotts should be read to mean that §706(g) limits the authority of courts to enter Title VII consent decrees and that thus the District Court had abused its discretion in refusing to permit belated intervention on the basis of Stotts. The court was able to identify only one potentially significant distinction between the instant case and Devereaux: in Devereaux the consent decree contained a stipulation that the defendants had previously violated Title VII, while in Burke -- as in Stotts -- the Boston Police Department had made no such concession. The court found that this distinction did not warrant granting the motion to intervene.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: JUN 16 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
CIATION OF FIREFIGHTERS, AFL-CIO
C. L. C., PETITIONER *v.* CITY
OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June —, 1986]

JUSTICE WHITE, dissenting.

For several reasons, I am unable to join either the Court's opinion or judgment.

The Court's opinion, as presently written, squarely holds that when a group of disaffected employees sues the employer claiming racial discrimination, Title VII permits the employer to settle with the plaintiffs and agree to racial hiring and promotion quotas and have the settlement embodied in a consent decree, without there being any admission, evidence, or finding of prior racial discrimination in hiring or promotions. This is quite far from my understanding of Title VII law. That Title forbids racially discriminatory employment practices. The general proscription of § 703 is that an employer may not discriminate against either blacks or whites in either hiring or promotion. An employer may not, without violating Title VII, simply decide for itself or in agreement with its employees to have a racially balanced work force and displace employees of either race to make room for employees of another race. Even without displacing any present employees, Title VII would forbid quota hiring or promotion such as reserving every third vacancy or promotion for a black, or for a white for that matter. And if this is the case, it would be wholly untenable to permit a

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1-3

Circulated: _____

Recirculated: JUN 27 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
CIATION OF FIREFIGHTERS, AFL-CIO
C. L. C., PETITIONER *v.* CITY
OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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[June —, 1986]

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/ omission

Under the present law, an employer may adopt or be ordered to adopt racially discriminatory hiring or promotion practices favoring actual or putative employees of a particular race only as a remedy for its own prior discriminatory practices disfavoring members of that race. As the Court's opinion is now written, it pays scant attention to this neces-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 30, 1986

84-1999 - Local 93 v. City of Cleveland

Dear Bill,

I have just now seen Sandra's offering in this case, and I am considering whether to say something about it. I request that this case go over to a later date.

Sincerely yours,



Justice Brennan

Copies to the Conference

JUN 30 1986

1-2
SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
CIATION OF FIREFIGHTERS, AFL-CIO
C. L. C., PETITIONER *v.* CITY
OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[July 1, 1986]

JUSTICE WHITE, dissenting.

For several reasons, I am unable to join either the Court's opinion or judgment.

Title VII forbids racially discriminatory employment practices. The general proscription of § 703 is that an employer may not discriminate against either blacks or whites in either hiring or promotion. An employer may not, without violating Title VII, simply decide for itself or in agreement with its employees to have a racially balanced work force and displace employees of any race to make room for employees of another race. Even without displacing any present employees, Title VII would forbid quota hiring or promotion such as reserving every third vacancy or promotion for a black, or for a white for that matter. And if this is the case, it must be wholly untenable to permit a court to enter a consent decree requiring conduct that would violate Title VII.

Under the present law, an employer may adopt or be ordered to adopt racially discriminatory hiring or promotion practices favoring actual or putative employees of a particular race only as a remedy for its own prior discriminatory practices disfavoring members of that race. As the Court's opinion is now written, it pays scant attention to this necessary predicate for race conscious practices, whether judicially

SEE PAGES THROUGHOUT.
SEE PAGES: 2

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
CIATION OF FIREFIGHTERS, AFL-CIO
C. L. C., PETITIONER *v.* CITY
OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[July 2, 1986]

JUSTICE WHITE, dissenting.

For several reasons, I am unable to join either the Court's opinion or judgment.

Title VII forbids racially discriminatory employment practices. The general proscription of § 703 is that an employer may not discriminate against either blacks or whites in either hiring or promotion. An employer may not, without violating Title VII, simply decide for itself or in agreement with its employees to have a racially balanced work force and displace employees of any race to make room for employees of another race. Even without displacing any present employees, Title VII would forbid quota hiring or promotion such as reserving every third vacancy or promotion for a black, or for a white for that matter. And if this is the case, it must be wholly untenable to permit a court to enter a consent decree requiring conduct that would violate Title VII.

Under the present law, an employer may adopt or be ordered to adopt racially discriminatory hiring or promotion practices favoring actual or putative employees of a particular race only as a remedy for its own prior discriminatory practices disfavoring members of that race. The Court's opinion pays scant attention to this necessary predicate for race conscious practices, whether judicially imposed or volun-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 27, 1986

Re: No. 84-1999 - Local Number 93, International
Association of Firefighters, AFL-CIO C.L.C. v.
City of Cleveland, et al.

Dear Bill:

Please join me.

Sincerely,

T.M.

T.M.

Justice Brennan

cc: The Conference

HB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 2, 1986

Re: No. 84-1999, Local Number 93, International Ass'n
of Firefighters, AFL-CIO v. City of Cleveland

Dear Bill:

Please join me.

Sincerely,

Harry

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 6, 1986

84-1999 Local 93 v. City of Cleveland

Dear Chief:

At least for now, my vote is to agree with Sandra's position. There is a difference between the approval by a court of an agreement between the parties, and an order of a court that is contested by the employer.

Although I think it likely, under the consent decree, that non-minority members of the union will be discriminated against in promotions, the record does not make this clear. Nor is any member of the union making a claim. I therefore agree with Sandra that this is an issue that should be left open for consideration on remand.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

82 198-2 VII:31

RECEIVED
MAR 10 1986

June 19, 1986

84-1999 Local 93 v. City of Cleveland

Dear Sandra:

Here is a draft of a letter to Bill Brennan that incorporates suggested changes that I believe - if made - would enable us to join all of Bill's opinion except (in my case) Part III.

As the change you want on p. 12, line 4, is not one that I would require, and the change on p. 16, line 3, is your idea, it occurs to me that perhaps this letter should come from you rather than me. I do not, however, object to these suggested changes, and so I am willing to send the entire letter as drafted - though I would be happy to defer to you.

Of course, we could write separately, making clear that we do not disagree.

Sincerely,

Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 20, 1986

84-1999 Local 93 v. City of Cleveland

Dear Bill:

You have limited the issue in this case to whether a consent decree is an "order of the court" and therefore subject to the limits of §706(g) of Title VII. You conclude that a consent decree is not an order of the court. I will join your judgment and hope to join all of your opinion, except Part III. I do have a number of suggestions, primarily for the purpose of clarification.

1. You rely on Weber and cite it several times. Weber has some relevance, but - as you note at p. 14 - it involved a private employer while this case involves a public employer subject to the Fourteenth Amendment. Therefore, Weber does not answer one of the major issues left open in your opinion for remand. This could be made clear by inclusion of language along the following lines (possibly on p. 14 where you are discussing Weber):

"Of course, Weber involved a private employer, while this case involves a public employer subject to the requirements of the Fourteenth Amendment. As we explained infra, at 28-29, we leave the application of the Fourteenth Amendment to the underlying agreement for resolution on remand."

There are a couple of places where I think that it would be helpful to emphasize that the City, even though not limited by §706(g) in agreeing to a consent decree, is nevertheless limited in what it can agree to by other provisions of Title VII and by the Fourteenth Amendment. I suggest the following additions:

2. On p. 12, line 4, I suggest substituting "The Court holds" for "We hold."

3. I suggest the following insert on p. 14, line 7, or perhaps in a footnote on the same page:

"This case, of course, involves a public employer whose voluntary actions are subject to the strictures of the Fourteenth Amendment as well as to the limitations of §703 of Title VII. In the posture in which this case comes to us, we have no occasion to address the circumstances, if any, in which voluntary action by a public employer that is permissible under §703 would nonetheless be barred by the Fourteenth Amendment. Nor need we decide what limits §703 places on an employer's ability to agree to race-conscious relief in a voluntary settlement that is not embodied in a consent decree, or what showing the employer would be required to make concerning possible prior discrimination on its part against nonwhites in order to defeat a challenge by white employees based on §703. Cf. Wygant. In any event, there may be instances in which a public employer, consistent with both the Fourteenth Amendment as interpreted in Wygant and §703 as interpreted in Weber, could voluntarily agree to take race-conscious measures in pursuance of a legitimate remedial purpose. The only issue before us, therefore, is whether, assuming arguendo that §706(g) would bar a court from ordering such race-conscious relief after trial in some of these instances, §706(g) also bars a court from approving a consent decree entered into by the employer and providing for such relief."

4. On p. 16, line 3, insert the following new paragraph:

"Because this Court's cases do not treat consent decrees as judicial decrees in all respects and for all purposes, we think that the language of §706(g) does not so clearly include consent decrees as to preclude resort to the voluminous legislative history of Title VII. The issue is whether when Congress used the phrase "No order of the court shall require" in §706(g) it unmistakably intended to refer to consent decrees. In addition to the fact that consent decrees have contractual as well as judicial fea-

tures, the use of the verb "require" in §706(g) suggests that it was the coercive aspect of a judicial decree that Congress had in mind. We turn, therefore, to the legislative history, since the language of §706(g) does not clearly settle the matter."

5. I suggest deleting the first sentence of the paragraph on p. 17 and replacing it with the following:

"The legislative history pertaining specifically to §706(g) suggests that it was drafted with this concern in mind and, in fact, that a principal purpose of the last sentence of §706(g) was to protect the managerial prerogatives of employers and unions."

I also hope the citation to the discussion of the legislative history in Local 28 following this sentence will be deleted.

6. The last sentence of the paragraph on p. 17, beginning "Thus, even if" should be changed to read:

"Thus, whatever the extent of the limits §706(g) places on the power of federal courts to compel employers and unions to take certain actions that the employers or unions oppose and would not otherwise take, §706(g) by itself does not restrict the ability of employers or unions to enter into voluntary agreements providing for race-conscious remedial action. The limits on such agreements must be found outside §706(g)."

7. In the second sentence of footnote 9, after the word "latitude," could you insert the words "under Title VII"?

8. In footnote 10, I suggest deleting the second sentence and replacing it with the following: "Section 706(g), by its own terms, limits courts, not employers or unions, and focuses on preserving certain management prerogatives from interference by the federal courts." At the end of the fourth sentence of footnote 10, replace the period with a comma, and add the words "and, in cases involving governmental employers, by the Fourteenth Amendment." Then, following the citation to Weber, add a citation to Wygant.

Part III, in addition to addressing Stotts, speaks rather broadly about consent decrees in general. You may be

entirely right, but I would not be comfortable joining this section.

In sum, subject to the changes I suggest, I will join your well written opinion except Part III.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1986

84-1999 Local 93 v. City of Cleveland

Dear Bill:

Thank you for making the clarifying changes that I requested.

Accordingly, I now join your opinion for the Court except for Part III.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

Bill: Our clerks are collaborating on possible changes in Part III that will enable me to join it also.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1986

84-1999 Local 93 v. City of Cleveland

Dear Bill:

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Sincerely,



Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 26, 1986

84-1999 Local 93 v. City of Cleveland

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 2, 1986

Re: No. 84-1999 Local Number 93, International
Assoc. of Firefighters v. City
of Cleveland

Dear Bill,

In due course I will circulate a dissent in this case.

Sincerely,



Justice Brennan

cc: The Conference

JUN 11 1986

Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: JUN 10 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
 CIATION OF FIREFIGHTERS, AFL-CIO
 C. L. C., PETITIONER *v.* CITY
 OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE SIXTH CIRCUIT

[June —, 1986]

JUSTICE REHNQUIST, dissenting.

Petitioners challenge a District Court decree that ordered preferential treatment in promotions for minority firefighters at the expense of non-minority firefighters who would have been promoted under the City's existing seniority system. There was no requirement in the decree that the minority beneficiaries have been victims of the City's allegedly discriminatory policies. One would have thought that this question was governed by our opinion only two Terms ago in *Firefighters v. Stotts*, 467 U. S. 561, 578-579 (1984), in which we said:

"If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster. This much is clear from *Franks v. Bowman Transportation Co.*, 424 U. S. 747 (1976), and *Teamsters v. United States*, [431 U. S. 324 (1977)]. *Teamsters*, however, also made clear that mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him. . . . Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination and no award

STYLISTIC CHANGES THROUGHOUT

Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: Justice Rehnquist

Circulated: _____
 JUN 24 1986

Recirculated: _____

P. |
 2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
 CIATION OF FIREFIGHTERS, AFL-CIO
 C. L. C., PETITIONER *v.* CITY
 OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE SIXTH CIRCUIT

[June —, 1986]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE
 joins, dissenting. |

Petitioners challenge a District Court decree that ordered preferential treatment in promotions for minority firefighters at the expense of nonminority firefighters who would have been promoted under the City's existing seniority system. There was no requirement in the decree that the minority beneficiaries have been victims of the City's allegedly discriminatory policies. One would have thought that this question was governed by our opinion only two Terms ago in *Firefighters v. Stotts*, 467 U. S. 561, 578-579 (1984), in which we said:

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Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: JUN 27 1986

pp. 2-6

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO
C. L. C., PETITIONER *v.* CITY
OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June —, 1986]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE join, dissenting.

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C. L. C., PETITIONER *v.* CITY
OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[July 1, 1986]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE
joins, dissenting.

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(A)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 27, 1986

Re: 84-1999 - Local 93, International
Ass'n v. City of Cleveland

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 28, 1986

No. 84-1999 Local 93 v. City of Cleveland

MEMORANDUM TO THE CONFERENCE

I passed at Conference to consider further the questions raised in this case. I am inclined to think the sole question that need be decided is whether a consent decree is a court order for purposes of §706(g). If not, then even if the last sentence of §706(g) places limitations on a federal court's power to award race-conscious relief to persons who have not been shown to be the victims of violations of Title VII, those limitations have no application in this case. It seems to me that the legislative history that has been cited to us suggests that Congress was concerned, both in 1964 and in 1972, with the possibility that courts might order employers or unions to remedy proven violations of Title VII by adopting quotas, and with the possibility that Title VII might be interpreted as mandating quotas even in the absence of proven violations. The first concern may well have resulted in limitations on race-conscious relief embodied in the last sentence of §706(g), see Firefighters Local No. 1784 v. Stotts, -- U.S. --, -- (1984), and the second is expressed in the provisions of §703(j). See United Steelworkers v. Weber, 443 U.S. 193, 205, n. 5 (1979). But neither of these concerns is present where a voluntary settlement between plaintiff and defendant provides for these forms of relief, because in that situation, by definition, it is the agreement of the parties rather than the force of federal law that creates the obligation to furnish race-conscious relief. Even where a voluntary settlement is submitted to a federal court in the form of a consent decree, that remains true. The obligation is created by the agreement of the parties. While the federal court may retain jurisdiction to enforce the decree, I see no indication in the legislative history that the availability of federal enforcement of an obligation, rather than the creation of the obligation

itself, was the focus of congressional concern. This difference, together with the strong congressional preference that Title VII be construed to encourage voluntary compliance, see Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 770-771 (1983), persuades me that Congress did not intend to bar a federal court from approving a consent decree simply because the court might not be able to order the same relief after trial.

Of course, if the relief provided for in a consent decree and agreed to by a public employer violates the Fourteenth Amendment, the decree is unlawful and must be set aside. In this case, I am inclined to think it is unnecessary and inadvisable to reach this question. It is true that the Court of Appeals said that petitioner had standing to challenge the consent decree "on the grounds that it unlawfully infringes upon the constitutional rights of the non-minority firefighters," Pet. App. A-9, and that the court suggested that the Weber analysis would govern its analysis of any Fourteenth Amendment claim. The petition for certiorari presented two questions: whether a district court can adopt a consent decree providing relief that the court could not order as a remedy after trial on a Title VII claim, and whether a municipal employer can voluntarily adopt an affirmative action plan that awards relief to minority employees regardless of whether they were actual victims of past discrimination over the objections of an intervenor union. Neither question was phrased in constitutional terms, and judging from the body of the petition it does not appear that even the second question is a constitutional one. See Pet. for Cert. 7-8. Moreover, the Solicitor General did not suggest review of the constitutional question or brief it, and petitioner's brief includes but one passage suggesting a constitutional claim--and that appears to be a due process claim, not one based on the Equal Protection Clause. See Brief for Petitioner 30-31. At oral argument, both petitioner and the Assistant Attorney General suggested that this was a statutory case, not a constitutional one. Under these circumstances, I think there is little basis for reaching the constitutional question, though I recognize that we have power to do so.

There are also good reasons to refrain from addressing that question, given the posture of this case. JUSTICE POWELL's circulating draft in Wygant v. Jackson Board of Education, No. 84-1340, would seem to indicate that a careful assessment of whether the remedy is narrowly tailored and will not inflict disproportionate harm on the interests of innocent non-victims, or unnecessarily trammel their rights, is essential to resolving the

constitutionality of the affirmative action plan. See circulating draft, at 9-12. The constitutionality of the affirmative action plan, in my view, may therefore turn on the extent of the harm imposed on innocent non-victims, and on the extent to which the beneficiaries of the relief were actual or likely victims of past discrimination. The City suggests that by creating additional promotions it avoided harm to the white firefighters, but on the record before us that is not a question that can be resolved with any confidence. Nor do we know how the second and third phases of the affirmative action plan will affect the promotions available to white firefighters.

In this posture, I think we would do well to merely decide the statutory issue and leave open on remand the constitutional question to be considered after development of the facts.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sandra".

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

Supreme Court of the United States
Washington, D. C. 20543

I all SO'C in AM & now, I'll send
letter, & she
can then
write Bill that
she agrees.

June 19, 1986

Full

No. 84-1999 Local 93 v. City of Cleveland

Dear Lewis,

Your letter looks fine to me. I am perfectly willing to ask for the changes on p. 12 and p. 16 if you prefer. I am also willing to join a separate opinion stating we do not disagree with most of Bill's conclusions. I leave it to you.

I note that on line 2, p. 3 of your letter, the word "employers" should probably be changed to "employees."

Sincerely,

Sandra Day

SO'C agreed I should circulate
& she will agree.

Justice Powell

L.F.P.
6/20

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 26, 1986

No. 84-1999 Local No. 93 v. City of Cleveland

Dear Bill,

Please join me.

Sincerely,



Justice Brennan

Copies to the Conference

JUN 30 1986

Local 93 v. City of Cleveland, No. 84-1999

JUSTICE O'CONNOR, concurring.

I join the Court's opinion. I write separately to emphasize that the Court's holding is a narrow one. The Court holds that the relief provided in a consent decree need not conform to the limits on court-ordered relief imposed by §706(g), whatever those limits may be. Rather, the validity of race-conscious relief provided in a consent decree is to be assessed for consistency with the provisions of §703, such as §703(a) and §703(d), which were at issue in Steelworkers v. Weber, 443 U.S. 193 (1979), and, in the case of a public employer, for consistency with the Fourteenth Amendment. As the Court explains, nonminority employees therefore remain free to challenge the race-conscious measures contemplated by a proposed consent decree as violative of their rights under §703 or the Fourteenth Amendment. Even if nonminority employees do not object to the consent decree, a court should not approve a consent decree that on its face provides for racially preferential treatment that would clearly violate §703 or the Fourteenth Amendment. Finally, the Court refrains from deciding "what showing [an] employer would be required to make concerning prior discrimination on its part against minorities in order to defeat a challenge by nonminority employees based on

JUN 30 1986

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
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C. L. C., PETITIONER *v.* CITY
OF CLEVELAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[July 1, 1986]

JUSTICE O'CONNOR, concurring.

I join the Court's opinion. I write separately to emphasize that the Court's holding is a narrow one. The Court holds that the relief provided in a consent decree need not conform to the limits on court-ordered relief imposed by § 706(g), whatever those limits may be. Rather, the validity of race-conscious relief provided in a consent decree is to be assessed for consistency with the provisions of § 703, such as § 703(a) and § 703(d), which were at issue in *Steelworkers v. Weber*, 443 U. S. 193 (1979), and, in the case of a public employer, for consistency with the Fourteenth Amendment. As the Court explains, nonminority employees therefore remain free to challenge the race-conscious measures contemplated by a proposed consent decree as violative of their rights under § 703 or the Fourteenth Amendment. Even if nonminority employees do not object to the consent decree, a court should not approve a consent decree that on its face provides for racially preferential treatment that would clearly violate § 703 or the Fourteenth Amendment. Finally, the Court refrains from deciding "what showing [an] employer would be required to make concerning prior discrimination on its part against minorities in order to defeat a challenge by nonminority employees based on § 703." *Ante*, at —, n. 8.

p. 2
JUL 1 1986

SUPREME COURT OF THE UNITED STATES

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSO-
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C. L. C., PETITIONER *v.* CITY
OF CLEVELAND ET AL.ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[July 2, 1986]

JUSTICE O'CONNOR, concurring.

I join the Court's opinion. I write separately to emphasize that the Court's holding is a narrow one. The Court holds that the relief provided in a consent decree need not conform to the limits on court-ordered relief imposed by § 706(g), whatever those limits may be. Rather, the validity of race-conscious relief provided in a consent decree is to be assessed for consistency with the provisions of § 703, such as § 703(a) and § 703(d), which were at issue in *Steelworkers v. Weber*, 443 U. S. 193 (1979), and, in the case of a public employer, for consistency with the Fourteenth Amendment. As the Court explains, nonminority employees therefore remain free to challenge the race-conscious measures contemplated by a proposed consent decree as violative of their rights under § 703 or the Fourteenth Amendment. Even if nonminority employees do not object to the consent decree, a court should not approve a consent decree that on its face provides for racially preferential treatment that would clearly violate § 703 or the Fourteenth Amendment. Finally, the Court refrains from deciding "what showing [an] employer would be required to make concerning prior discrimination on its part against minorities in order to defeat a challenge by nonminority employees based on § 703." *Ante*, at —, n. 8.