No. 06-1139

In The
Supreme Court of the United States

JANELL RUTHERFORD, et al.,

Petitioners,

v.

CITY OF CLEVELAND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. Did an otherwise lawful Amended Consent Decree, entered into after years of contested litigation and following repeated judicial findings of discrimination, become unconstitutional in the final two years prior to its natural expiration, where the mandates of the Amended Consent Decree immediately ceased as soon as the racial composition of the police department reached the percentage of minority applicants in the relevant labor pool?

2. Is an otherwise lawful Amended Consent Decree rendered unlawful because of a provision extending the life of the Amended Consent Decree if a sufficient number of officers (70) are not hired in a given year *and* the work force has not yet reached parity with the qualified labor pool?

3. Under any circumstances, should a political subdivision be answerable in money damages based upon good faith compliance with a lawful Amended Consent Decree, which expired, per a sunset provision in 1994, following an adjudication by the District Judge that same year confirming the constitutionality of the application of the Amended Consent Decree over a final round of police appointments?

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STATEMENT OF THE CASE

On October 12, 1972, a small group of minority Cleveland police officers organized as the "Shield Club" challenged the systematic racial discrimination in the City's recruitment, testing, screening and hiring practices for new police officers, as well as in the assignment, treatment and promotion practices of current officers. [R. 97, October 12, 2000 Order at 3-4, Apx. 71-72.] As the District Court acknowledged, by the time Judge Thomas made judicial findings in the *Shield Club* litigation, the Supreme Court had made it the law of the land that District Court judges had the "*duty* to develop and implement remedial measures designed to end such discrimination." [*Id.*, emphasis added.]

For several years of contentious litigation, the City vigorously defended the charges brought by the Shield Club and lost. The assertions of Appellants notwithstanding, Judge Thomas expressly determined that the City had, for many years, systematically discriminated against African-American and Hispanic applicants and employees. Accordingly, in 1977, the City entered into a Consent Decree regarding hiring and promotions in its Police Department. [R. 79, *Defendants' Motion for Partial Summary Judgment*, Ex. B, Apx. 817-24.]

In 1984, the Shield Club moved to extend the Consent Decree because the City had not met the original Decree's goals. [*Id.*, Ex. D, p. 1, Apx. 826.] The City opposed this Motion as did the two unions representing Cleveland's police officers. Again, the City was unsuccessful. After *six* full days of hearing before Judge Thomas, the City agreed to execute an Amended Consent Decree on December 21, 1984 ("ACD"). The ACD both extended the length of the race-conscious remedy and lowered the ultimate remedial

goal. [*Id.*, Ex. K, Apx. 856-63.] Through the application of the ACD's remedial relief, which included race-conscious *and* race neutral measures, the minority population of the City's police force slowly rose until the remedial goal was achieved in 1994. At that time, pursuant to its terms, the ACD was dissolved.

Despite the City's vigorous defense to the *Shield Club* claims, and despite the City's strict compliance with the decrees adopted by the District Court, a handful of individuals representing the conditionally certified patrol officer class of 1992 (the "Plaintiff-Class" or "Petitioners") sought damages from the City as a result of the City's compliance with the Amended Decree. Try as they might, however, the Plaintiff-Class was unable to dispute that affirmative action consent decrees are not, per se, illegal. Indeed, this Court recently reaffirmed that remedying past discrimination is a "permissible justification for raced-based governmental action." *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). If ever a consent decree were to pass constitutional muster, it is the one presently before this Court. The District Court and the Sixth Circuit rightly granted and affirmed judgment in the City of Cleveland's favor to prevent the people of Cleveland from being penalized for their commitment to erasing the effects of pervasive discrimination and their compliance with the directives of a federal court.

STATEMENT OF THE FACTS/ PROCEEDINGS BELOW

In the *Shield Club* case, plaintiffs alleged racial discrimination in Cleveland's Police Department ("CPD") against African-Americans and Hispanics. *Shield Club v. City of Cleveland*, 370 F. Supp. 251 (N.D. Ohio 1972).

During the course of this contentious litigation, Judge Thomas issued several orders identifying pervasive racial discrimination in the CPD.

A. Judge Thomas' 1972 Order

In an Order dated December 21, 1972, Judge Thomas held that the 1972 patrol officer entrance examination had a significant racially discriminatory impact upon African-American and Hispanic applicants. *Id.* Because the City could not demonstrate that its test was job-related, Judge Thomas concluded that the appropriate remedy was to direct the CPD to appoint a certain number of African-Americans and Hispanics to the position of patrol officer. *Id.* Judge Thomas also directed the City to employ a validation study and to create an examination that was job-related. *Id.* at 256.

B. Judge Thomas' 1974 Orders

On July 6, 1974, Judge Thomas concluded that the screening procedures used by the CPD had a racially disparate impact upon those few minorities who passed the examination. *Shield Club v. City of Cleveland*, No. C72-1088, 1974 U.S. Dist. LEXIS 7736, at *1 (N.D. Ohio July 6, 1974). In light of the "statistical disparities" evidencing race discrimination, Judge Thomas directed the CPD to institute new screening procedures in order "to devise and to administer screening procedures as racially neutral as the February 1974 entrance examination." *Id.* at *2-4.

Additionally, Judge Thomas held that the CPD must implement an objective plan for administering and publicizing available assignments. *Id.* at *10. Judge Thomas found that the CPD had discriminated in the use of promotional criteria, including examinations and seniority

credit. *Shield Club v. City of Cleveland*, No. C72-1088 (N.D. Ohio July 6, 1974). Accordingly, Judge Thomas directed the City to create new promotional eligibility lists and new promotional examinations, which were to be job-related and validated.

C. Judge Thomas' 1976 Orders

In September 1976, Judge Thomas issued an Order in which he expressly stated that the CPD *intentionally discriminated* in the administration of assignments and transfers. He stated:

> [T]he continuing marked under-representation of minority police officers . . . without explanation or justification, requires the conclusion, now made, *that the Chief of Police had and continues to have a racially discriminatory purpose in perpetuating such marked under representation, and in administering the transfer and assignment process.*

Shield Club v. City of Cleveland, No. C72-1088, 1976 U.S. Dist. LEXIS 13053, at *11 (N.D. Ohio Sept. 27, 1976) (emphasis added). In a second Order issued in September 1976, Judge Thomas found *intentional discrimination* in the making of certain sergeant promotions. *Shield Club v. City of Cleveland*, No. C72-1088 (N.D. Ohio Sept. 29, 1976).

D. The 1977 Consent Decree

1. The terms of the Decree.

On November 11, 1977, following approximately five years of litigation, the City ultimately agreed to enter into a Consent Decree, which was subsequently approved by

Judge Thomas. [R. 79, *Defendants' MPSJ*, Ex. B, Apx. 817-24.]

The Decree was designed to govern the CPD's hiring, transfer and promotion practices. Its very purpose was to "effectuate an effective prospective remedy designed to eliminate *all* vestiges of race discrimination within the [CPD]." [*Id.* ¶1, Apx. 817.] The Consent Decree read:

> This Order follows upon an extended history of hearings, findings, and orders in C72-1088, including but not limited to the following: an order dated December 21, 1972 *finding discrimination in the 1972 entrance examination* (370 F. Supp. 251); an order dated July 6, 1974 *finding discrimination in the defendants' recruitment practices and defendants' post-examination screening practices* (8 E.P.D. ¶ 9614); an order also dated July 6, 1974 finding *discrimination in the 1973 promotional criteria* (examinations and seniority credit) (8 E.P.D. ¶ 9606); an order dated September 27, 1976 finding *intentional discrimination in the administration of assignments and transfers* (14 E.P.D. ¶ 7763); and an order dated September 29, 1976 finding *intentional discrimination in the making of certain Sergeant promotions* in 1975.

[*Id.* ¶2, Apx. 817-18, emphasis added.] It further provided that "[a]s reflected by the entire record in C72-1088 and C77-346, there has been a history of race discrimination in the hiring practices and in the promotion practices of the [CPD]." [*Id.* ¶3, Apx. 818, emphasis added.] As a consequence, the Decree mandated various remedies in an effort to ameliorate "the present effects of past discrimination." [*Id.* ¶¶12, 17, Apx. 819-23.]

With respect to recruitment and hiring, the Decree required the CPD to create a minority recruitment unit

and implement an "intensified recruitment effort" to increase the number of minority applicants. [*Id.* ¶13, Apx.821-22.] The Decree further obligated the City to use "only such selection criteria . . . as are non-discriminatory and demonstrably job-related." [*Id.* ¶9, Apx. 819.] The City also agreed to establish a minority hiring goal of not less than 35.8%; establish an appropriate timetable for achieving that goal; and agreed to hire no less than three minorities for every four non-minority hires. [*Id.* ¶¶9-12, Apx. 819-21.] Critically, in 1977, only *9.2%* of the City's police officers were minorities. [*Id.*, Ex. C, Apx. 825.]

2. The 1977 Consent Decree Approval Hearing.

Judge Thomas held an approval hearing to review the Consent Decree in late 1977. At that hearing, Judge Thomas analyzed whether the *Shield Club* plaintiffs had established a pattern of historic discrimination. Judge Thomas acknowledged his previous ruling, in which he stated that "the entire record [did] not convince [him] that the plaintiffs [had] established a historic pattern of racial discrimination in the [CPD]." *Shield Club*, No. C72-1088, at *9 (N.D. Ohio July 6, 1974). But, Judge Thomas emphasized that such "finding [was] *not engraved in stone*." [R. 81, *Plaintiffs' Memorandum in Opposition to Defendants' MPSJ*, Ex. E, p. 48, Apx. 959.]

In light of his numerous findings of discrimination, Judge Thomas concluded that "to go all through what evidence was spread on this record for five years" was not necessary. He determined that the record before him was sufficient to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." [*Id.*] He expressed that due to "the complexity, expense and likely duration of such litigation . . . and all

other factors relevant to a full and fair assessment of the wisdom of the proposed compromise," a hearing was not merited. [*Id.*] Therefore, on the basis of his previous rulings and the City's admission of race discrimination, Judge Thomas signed the Decree on November 11, 1977.

E. The 1984 Amended Consent Decree

1. The Shield Club's Motion to Modify the Consent Decree.

On October 25, 1984, the *Shield Club* plaintiffs filed a Motion to Modify and Extend the Consent Decree. [R. 79, *Defendants' MPSJ,* Ex. D, p. 1, Apx. 826.] They claimed that extension was necessary because the City had not met the Decree's goals. [*Id.*] By 1984, only 20.8% of the City's police officers were minority. [*Id.*, Ex. C, Apx. 825.] The City, the FOP and the Cleveland Police Patrolmen's Association opposed plaintiffs' Motion, arguing that the City would not consent to an extension of the Decree and the Court lacked the power to impose such an extension. [*Id.*, Ex. F, p. 4, Apx. 846.]

On November 29, 1984, Judge Thomas denied the *Shield Club* plaintiffs' Motion as it related to promotional practices. Yet, Judge Thomas determined that the Shield Club had raised an issue of fact which might warrant extension of the Consent Decree. [*Id.*, Ex. J, Apx. 852-55.] As a result, the Court conducted six days of hearings in November and December of 1984 to determine whether extended race-conscious relief was required. At the conclusion of hearings, the parties entered into an Amended Consent Decree on December 21, 1984. [*Id.*, Ex. K, Apx. 856-63.]

2. The Terms of the 1984 Amended Consent Decree.

The Amended Decree pertained only to the CPD's hiring practices. The parties agreed that the ACD was intended to "finally and fully resolve these actions so as to preclude any further requests for extension and/or modification . . . " [*Id.*, Ex. K, p. 1, Apx. 856.] Like the original Decree, the ACD directed the City to use "only such selection criteria . . . as are non-discriminatory and demonstrably job-related." [*Id.* ¶2, Apx. 857.]

In pertinent part, to "partially remedy the present effects of past-discrimination," the Amended Decree directed that:

> [t]emporarily and until such time as 33% of the police officers employed by the City are minorities or until December 31, 1992 (eight years), whichever time or event occurs first, defendants shall hire no less than three minority police patrol officers for every four non-minority police patrol officers. . . .

[*Id.* ¶4(a), Apx. 858.] Furthermore, the Amended Decree provided that if the City failed to hire a minimum number of 70 patrol officers in any of the eight calendar years beginning January 1, 1985, and ending December 31, 1992, the hiring ratio described above would continue "in full force and effect for one additional year for each year in which the City shall fail to hire the minimum number of police patrol officers, *unless the City has otherwise achieved the 33% level* . . . " [*Id.* ¶4(b), Apx. 859.] The Amended Decree also authorized the continued use of the one-in-three rule and the use of separate eligibility lists for minority and non-minority candidates. [*Id.* ¶4(c), Apx. 859-60.] Finally, the Amended Decree provided that "[t]he Court's jurisdiction shall not be extended beyond the

periods defined in Paragraphs 4(a) and 4(b), notwithstanding the fact that the purpose of this amended consent decree may not have been fully achieved." [*Id.* ¶11, Apx. 863.]

3. The extension and ultimate termination of the Amended Consent Decree.

After 1984, there were two years in which the City did not hire 70 patrol officers. In 1986, the City hired a total of 48 officers and in 1991, the City hired 64 officers. [R. 77, *Plaintiffs' MPSJ*, Defendants' Admissions, Req. # 23, 29, Apx. 573-74.] Consequently, by its terms, the ACD continued in effect until 1994, at which time the City finally achieved the 33% goal. [R. 79, *Defendants' MPSJ*, Ex. E, p. 3, Apx. 842.] Specifically, Judge Thomas officially terminated the Amended Decree in December 1994, in response to an unopposed motion filed by the FOP. [R. 79, *Defendants' MPSJ*, Ex. M, ¶1, Apx. 864.]

F. The Present Litigation: Janell Rutherford, et al.

1. The Complaint and TRO Hearing.

The Plaintiff-Class filed this class action Complaint and a Motion for a Temporary Restraining Order and for a Preliminary Injunction on May 17, 1994. [*Dist. Ct. Docket Sheet*, Apx. 1; R. 13, *Amended Complaint*, Apx. 37.] At an oral hearing before Judge Thomas on May 18, 1994, the Plaintiff-Class' counsel argued that injunctive relief was necessary to prevent the appointment and hiring of police officers who were certified from a 1992 eligibility list. In denying injunctive relief, Judge Thomas considered whether the Plaintiff-Class had established that the minority hiring preferences in the Amended Decree deprived

them of any basic constitutional rights. [R. 79, *Defendants' MPSJ*, Ex. N, Apx. 874-77.] After reviewing the Supreme Court's decisions in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), and *Local No. 93 International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), and this Court's decisions in *United Black Firefighters Ass'n v. Akron*, 976 F.2d 999 (6th Cir. 1992), and *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013 (6th Cir. 1994), Judge Thomas concluded that "this Court in its consent decrees and in the several *adjudications* that preceded the 1977 consent decree made numerous findings of past discrimination." [R. 79, *Defendants' MPSJ*, Ex. N, pp. 117-19, Apx. 875-77, emphasis added.] In other words, unlike in *Croson* and *United Black Firefighters*, Judge Thomas concluded that "this Court's past discrimination predicate" served as a "constitutional basis for the hiring preference that [he] imposed in the 1977 order and again in the amended December 21, 1984 order." [*Id.*]

2. The Amended Complaint.

On June 3, 1994, the Plaintiff-Class filed a First Amended Complaint. [R. 13, Apx. 37-68.] The Amended Complaint set forth causes of action for violation of rights established by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and several state law claims. With respect to the Amended Decree, the Plaintiff-Class essentially challenged the validity of the extension of the race-conscious remedy into 1994. In other words, the Plaintiff-Class claimed that the extension of the Amended Decree into 1994 meant that the City hired from an improper

1992 eligibility list in reviewing their applications for police officer positions during that year. [R. 97, *2000 Order* at 30-31, Apx. 98-99.]

3. The District Court grants summary judgment on the constitutionality of the Amended Consent Decree and a Unanimous Sixth Circuit Affirms.

On June 1, 2000, both the Plaintiff-Class and the City filed Motions for Partial Summary Judgment with respect to the constitutionality of the Amended Decree. [R. 77 and 79, Apx. 529-85, 783-816.] By Order dated October 12, 2000, the District Court granted the City's Motion, thereby dismissing the Plaintiff-Class' Equal Protection claims. [R. 97, *2000 Order*, Apx. 69-162.] The District Court held that the City's compliance with the Amended Decree in selecting police officers from the 1992 eligibility list was constitutional. The District Court ruled that the race-conscious relief was supported by a compelling interest to eradicate the present effects of the CPD's past discrimination, and the remedy was narrowly tailored to achieve that goal. [*Id.*][1]

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[1] In so holding, the District Court analyzed the racial composition of the "qualified labor pool" at several relevant points during the life of the Amended Decree. [*Id.* at 25-26, Apx. 93-94.] The City defined the qualified labor pool as the percentage of minorities who *took* the police officer entrance examination – a definition the City supported with the expert testimony of Dr. Gerald V. Barrett. [R. 79, *Defendants' MPSJ*, Ex. S, Apx. 880-81.] On the other hand, the Plaintiff-Class argued that the qualified labor pool is based on the percentage of minorities who "*passed*" the entrance examination. However, despite the opportunity to do so, the Plaintiff-Class presented *no* evidence to support that definition. [R. 79, *Defendants' MPSJ*, Apx. 810.]

On appeal, a unanimous Sixth Circuit (with two Judges writing concurring opinions) affirmed and thereafter denied a motion for rehearing en banc. The appellate court held:

> On Appellant's reverse discrimination claim, the City's history of racial discrimination against minorities – as evidenced by its own admission of discrimination, judicial findings, and statistical disparities – provided the City defendants with a compelling interest in implementing the CPD's temporary race-based hiring plan. Given several important features of the plan, especially its sunset provision and flexibility, we also find that the plan was narrowly tailored, and thus survives the strict judicial scrutiny required by the Supreme Court's equal protection jurisprudence.

REASONS FOR DENYING THE WRIT

THE DISTRICT COURT PROPERLY GRANTED AND THE SIXTH CIRCUIT PROPERLY AFFIRMED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AS THE RACE-CONSCIOUS REMEDY INCORPORATED INTO THE 1984 ACD WAS SUPPORTED BY A COMPELLING INTEREST AND WAS NARROWLY TAILORED TO FURTHER THAT INTEREST.

Implementation of race-conscious measures narrowly tailored to achieve a compelling interest do not violate the Equal Protection Clause. *Grutter v. Bollinger*, 539 U.S. at 328; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 507. In *United States v. Paradise*, 480 U.S. 149 (1987), this Court emphasized:

> *[i]n determining whether this order was "narrowly tailored," we must acknowledge the respect*

> *owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment.* A district court has 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' 'Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'

Paradise, 480 U.S. at 184 (emphasis added) (internal citations omitted). The Supreme Court explained that "[t]he district court has firsthand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *Id.* (internal citations omitted).

A. The Race-Conscious Remedy Incorporated into the 1984 Amended Consent Decree Was Supported by the Compelling Interest of Remedying the Present Effects of the Extensive Past Discrimination in the City of Cleveland's Police Department.

The governmental entity in question must "identify precisely the compelling state interest that might be able to overcome the general presumption against racial classification." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)). The governmental entity must do more than present mere speculation of past *societal* discrimination. *Id.* at 735. Rather, the governmental entity must present a "strong basis in evidence" that its "concern is

with remedying past discrimination." *Croson*, 488 U.S. at 493, 500.[2]

A party may demonstrate a strong basis in evidence by establishing that a court or another competent body made a contemporaneous or antecedent finding of past discrimination. *See, e.g.*, *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring) (agreeing that contemporaneous or antecedent findings of past discrimination is one way to demonstrate a strong basis in evidence, but finding that it is "not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan."). A party may also demonstrate a strong basis in evidence by producing evidence that approaches a prima facie case of a constitutional or statutory violation. *See Croson*, 488 U.S. at 500 (finding the race-conscious remedy unjustified because there was "nothing approaching a prima facie case of a constitutional or statutory violation" to support a conclusion that a remedial action was necessary").

1. The 1977 Consent Decree was supported by strong and convincing evidence of race discrimination in the City of Cleveland's Police Department.

After reviewing the record history of the *Shield Club* litigation, the District Court determined that the 1977 Consent Decree was supported by a compelling

[2] The District and Appellate Courts noted that there was some ambiguity in the relevant precedent regarding the appropriate allocation of the burdens of proof in these cases, particularly after this Court's decision in *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). [R. 97, *2000 Order*, p. 43 fn. 12, Apx. 111.] In this case, the point is moot, as the District Court and Sixth Circuit Court held that the Amended Decree was constitutional no matter how the burden of proof is allocated.

governmental interest. As a whole, Judge Thomas' decisions establish there was egregious and pervasive discrimination in the CPD, including: (1) discrimination in the 1972 entrance exam; (2) discrimination in recruitment practices and screening procedures; (3) discrimination in promotion criteria; (4) discrimination in assignments and transfers; and (5) discrimination in sergeant promotions. [R. 79, *Defendants' MPSJ*, Ex. B, ¶¶2-3, Apx. 817-18; R. 97, *2000 Order* at 48-49, Apx. 116-17.] Indeed, in a 1976 order, Judge Thomas specifically found that Cleveland's "chief of police had and continues to *have a racially discriminatory purpose in perpetuating such marked underrepresentation and in* administering the transfer and assignment process." (14 E.P.D. ¶7763 at 35).

In addition, Judge Thomas also determined that the 1972 examination resulted in a gross statistical disparity resulting in under-representation of minorities. In *Shield Club v. City of Cleveland*, 370 F.Supp. 251, 254 (N.D. Ohio 1972), Judge Thomas held that Plaintiffs were "entitled to injunctive relief" because the test operated as a "built in headwind" for minority groups. For example, in 1974, Judge Thomas found that although 39% of those who passed the exam for patrol officer were minorities, less than 9% of the City's police force was minority at the time. *Shield Club v. City of Cleveland*, 1974 U.S. Dist. LEXIS 7736, 8 E.P.D. ¶9614 (N.D. Ohio 1974 at 5) He made these statistical findings at the same time he determined that police officials did intentionally discriminate in recruitment practices, post examination screening procedures, utilizing promotional criteria, in making substantive promotion decisions and in the administration of assignments and transfers. 14 E.P.D. ¶7763 at 35. Thus, the 1977 Consent Decree was directly supported by compelling

findings of discrimination permeating virtually every personnel decision made in Cleveland's police department.

2. The 1984 ACD was supported by a compelling interest to remedy the lingering effects of the CPD's historical discrimination against minorities.

In 1984, Judge Thomas had the opportunity to re-evaluate the contents of the Consent Decree over the course of a *six-day evidentiary hearing* in light of the Shield Club's Motion to Modify and Extend the Consent Decree. [R. 79, *Defendants' MPSJ*, Ex. D, Apx. 826-39.] Following the completion of that hearing, the parties eliminated the portion of the Consent Decree relating to promotions, demonstrating the parties' recognition that the original hiring goal had not been satisfied. But, the parties recommended, and Judge Thomas approved, a *reduction* in the minority composition goal (*i.e.*, 35.8% to 33.0%).

The Plaintiff-Class' main contention is that evidence of discrimination in the early 1970s was too remote in time to justify the extension of a race-conscious remedy in 1984 and beyond. According to Petitioner, because there was no "reasonably current" evidence that the City *continued* to discriminate against minorities, there was no compelling interest to justify the Amended Decree or its extension to 1994. (*Id.* at 24.) This argument wholly distorts the applicable precedent and the factual record supporting the extension of the race-conscious remedy in 1984.

In *Adarand*, this Court decisively emphasized that:

> we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' The unhappy persistence of *both* the practice *and the lingering*

> *effects* of racial discrimination against minority groups in this country is an unfortunate reality, *and government is not disqualified from acting in response to it.*

Adarand, 515 U.S. at 237 (emphasis added) (citation omitted). Not one case cited by the Plaintiff-Class stands for the proposition that a race-conscious remedy is *only* constitutional if it is supported by evidence that a public entity has *recently* discriminated (or *currently* discriminates) against a protected class. Rather, a government may take race-conscious relief to remedy or eradicate the *present effects* of *past discrimination*. *See Paradise*, 480 U.S. at 167.

As observed by the Sixth Circuit, in affirming summary judgment:

> Appellants also argue that even if there was a compelling interest justifying the race-based remedy in 1977 and 1984, surely there was no such interest in 1993 and 1994. As evidence, they point to the convergence of the CPD's minority police force percentage to the 33% target. Yet, in determining whether the governmental body had a compelling interest, a reviewing court should focus on the evidence of discrimination existing at the time the body enacted the race-based remedy. *See Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (holding that "the institution that makes the racial distinction must have had a strong basis in evidence to conclude that remedial action was necessary, *before* it embarks on an affirmative-action program.") (internal quotation omitted, emphasis in original) . . . Here, the historical and contemporaneous evidence of discrimination in the 1970s and 1980s provided the *Shield Club* parties and the district court with a strong basis

in evidence for the necessity of the original consent decree in 1977 and its amendment in 1984.

Judge Thomas did not order a race-conscious remedy in 1984 based solely on findings of discrimination after the 1970's. Rather, it was the disparity between the number of minority and non-minority police officers that caused Judge Thomas in 1984 to conclude that the CPD's past discrimination *had not yet been remedied*. [R. 79, *Defendants' MPSJ*, Ex. J, Apx. 852-55.] Thus, as the City (and its noted expert Dr. Barrett) argued, in 1982, although the minority qualified labor pool was 49%, only 19.7% of the City's police officers were minority. [*See* Table 2, *supra*; R. 79, *Defendants' MPSJ*, Ex. C, Apx. 825.] This gross disparity continued in 1989 (qualified labor pool of 53% compared to a police force of only 25% minorities); 1992 (41.5% compared to 29.6%); and 1994 (40.9% compared to 31.9%). [*Id.*] This unremedied disparity more than justified the continuation of the race-conscious relief in 1984.

Significantly, the Plaintiff-Class' own statistical analysis – an analysis it proffered without expert testimony – also convincingly establishes that a compelling interest existed to extend the race-conscious relief to eradicate the continued disparity in the City's police force. Using the Plaintiff-Class' approach that the qualified labor pool includes only those minority candidates who "*passed*" the examination, in 1982, the minority qualified labor pool was 47.3%. [R. 79, *Defendants' MPSJ*, Ex. E, Apx. 840-42.] Again, however, minorities only represented 19.7% of the City's police force at that time. In 1989, the Plaintiff-Class' qualified labor pool was 45.6%, while the police force's minority population was only 25%. [*Id.*] Even in 1992, when the Plaintiff-Class alleges that the qualified labor pool was 30.6%, the minority population in the City's police force was below that figure. [R. 79, *Defendants'*

MPSJ, Exs. C and E, Apx. 825, 840-42.] Finally, according to the Plaintiff-Class' theory, it was not until mid-1994 that the qualified labor pool matched the minority population on the City's police force (*i.e.*, 33.7% qualified labor pool compared with 33.7% minority population). [*Id.*]

At no time prior to the termination of the decree did the percentage of minorities in the police department ever equal the percentage of minorities in the qualified applicant pool. In other words, the ACD accomplished precisely what it set out to do; once the statistical disparity ended, so too did the Consent Decree.

B. The Race-Conscious Remedy Incorporated into the 1984 ACD Was Narrowly Tailored to Remedy the Present Effects of the Extensive Past Discrimination in the City of Cleveland's Police Department.

The District Court correctly decided that the race-conscious remedy incorporated into the 1984 Amended Consent Decree was narrowly tailored. To determine whether race-conscious measures are narrowly tailored, courts consider the following factors:

(1) the necessity for the [race-based] relief and the efficacy of alternative remedies;

(2) the flexibility and duration of the relief; including the availability of waiver provisions;

(3) the relationship of the numerical goals to the relevant labor market; and

(4) the impact of the relief on the rights of third parties.

1. The necessity for the race-based relief and the efficacy of alternative remedies.

There is no question that the purpose of race-conscious relief in the 1977 and 1984 consent decrees was to eradicate the present effects of the CPD's discrimination against African-Americans and Hispanics. Specifically, by definition, the race-conscious remedy benefited only groups judicially determined to be victims of the City's discrimination: African-Americans and Hispanics. [R. 79, *Defendants' MPSJ*, Ex. B, ¶7, Apx. 818.]

The race-conscious relief of hiring three minorities for every four non-minorities, or a hiring ratio of approximately 42.85%, was not only necessary, but as discussed below, it was rationally related to the relevant labor market. The Plaintiff-Class asserts that this hiring ratio was unlawful because it exceeded the ultimate hiring goal of 33%. Contrary to this contention, provisions of consent decrees which call for a hiring "ratio" at a larger percentage than the percentage ultimately set forth as the overall goal are valid and constitutional. In *Paradise*, this Court approved a court order which required that 50% of the hirees be minorities until 25% of the work force were minorities. In rejecting a challenge to that framework, the Court noted:

> The Government suggests that the one-for-one requirement is arbitrary because it bears no relationship to the 25% minority labor pool relevant here. This argument ignores that the 50% figure is not itself the goal; rather it represents the *speed* at which the goal of 25% will be achieved.

480 U.S. at 179-80 (emphasis added). Here, the 42.85% hiring ratio was far more closely related to the ultimate goal than was even the case in *Paradise*.

The most telling argument supporting the constitutionality of the ACD is this single, indisputable fact,

highlighted by the District Court and Sixth Circuit: even given the remedy under the ACD, with all of its component parts, the minority representation among Cleveland police officers did not reach the level of minority representation in the relevant labor market until 1994. [R. 79, *Defendants' MPSJ*, Exs. C and E, Apx. 825, 840-42.]

As the Sixth Circuit noted in its affirmance,

> Appellants point to the fact that in 1992, the percentage of minorities in the CPD (29.6%) was closely approaching the 33% target . . . Of course, *any* responsible race-based hiring plan should have as its ultimate goal the attainment of the target at the natural end of the life of the plan. The fact that the percentage of minorities on the CPD's police force was approaching the 33% target near the end of the plan is a testament to the plan's efficacy, not its unconstitutionality.

2. The flexibility of the relief including the availability of waiver provisions.

The Amended Decree was flexible as it did not require the City at any time to hire minority police officers when no officers were needed. *Paradise*, 480 U.S. at 177-78). The decree *only* provided that if the City did not hire 70 employees in any given year, the life of the consent decree would extend for another year. In fact, as evidence of flexibility, Justice Powell, concurring in *Local 28 of Sheet Metal Workers v. EEOC*, 478 U.S. 421, 487-88 (1986), noted that "[a]dditional flexibility is evidenced by the fact that this goal, originally set to be achieved by 1981, has been twice delayed and is now set for 1987."

Furthermore, the Amended Decree is flexible in that it did not require, and indeed precluded, the hiring of unqualified individuals. In fact, by its terms, the Amended

Decree provided that if the City exhausted the pool of qualified candidates, it was required to administer new entrance examinations and prepare new lists. [R. 79, *Defendants' MPSJ*, Ex. K, ¶5(c), Apx. 860-61.]

3. The duration of the relief.

The Plaintiff-Class' argument that the duration of the race-conscious remedy was too long is discredited by the very precedent upon which it relies. In each and every one of those cases, the court was faced with a challenge to an *ongoing* race-conscious remedy, many of which had *already* attained or surpassed their goal or there was no evidentiary predicate to justify ongoing relief. *See, e.g., Adarand*, 515 U.S. at 200; *See also* Cases Cited in Cert Petition: *Quinn v. City of Boston*, 325 F.3d 18 (1st Cir. 2003) (Parity between minority population in labor and job pool achieved *prior* to hirings); *Maryland Troopers Assoc., Inc. v. Evans*, 993 F.2d 1072 (4th Cir. 1993) (No "strong basis in evidence" to warrant race conscious remedy. Accordingly, Court did not even reach question of whether consent decree narrowly tailored); *Dean v. City of Shreveport*, 438 F.3d 448 (5th Cir. 2006) (Case remanded because no evidence of qualified labor pool or any relevant workforce statistics for hiring years at issue. Decree also lacked a sunset provision); *Bennett v. Arrington (In re Birmingham Reverse Discrimination Employment Litigation)*, 20 F.3d 1525 (11th Cir. Ala. 1994) (No statistical evidence of relevant labor market and decree had no sunset provision). What specifically troubled these courts was that although these race-conscious remedies had been ongoing for numerous years, they contained no sunset provisions, or the decree continued after the goals had been met.

Here, at the time of the extension of the race-conscious remedy in 1984, the statistical evidence revealed

that the effects of the City's past discrimination remained unremedied and that the remedial goals had not yet been met. [Table 2; R. 79, *Defendants' MPSJ*, Exs. C and E, Apx. 825, 840-42.] Clearly, the extension of the decree through 1994 did not present issues of constitutional dimension.

4. The relationship of the numerical goals to the relevant labor market.

The City presented uncontroverted evidence that the ACD's workforce goal was relevant to the appropriately defined labor market. Dr. Barrett testified that the qualified applicant pool is properly considered to be those individuals who met the posted qualifications for the exam and demonstrated sufficient interest by actually sitting for and completing the exam itself. [R. 79, *Defendants' MPSJ*, Ex. S, ¶¶4-6, Apx. 880-81.] This, Dr. Barrett concluded, is the appropriate definition of the qualified applicant pool for Cleveland Police entry exams, and thus the relevant labor market to which the force should be compared. [*Id.*] Even a cursory review of the relevant portion of Table 2 establishes that the Amended Decree's 33% numerical goal was related to this relevant labor market. (In fact, it could be logically argued that the 33% goal was *too low*.)

The City's Qualified Labor Pool (from Table 2)

YEAR	% of Minorities Who Qualified to Sit For & Took Civil Service Test	% of Minorities in the CPD
1982	49.10%	19.70%
1989	52.30%	25.00%
1992	41.50%	29.60%
1994	41.00%	31.90%

Citing no legal precedent or expert testimony, the Plaintiff-Class maintains its position that the qualified labor pool must be based on the percentage of minorities who "passed" the entrance examination. [R. 97, *2000 Order*, p. 26, Apx. 94.] As the District Court and Sixth Circuit reasoned, however, the Plaintiff-Class' definition is premised on a critical factual and logical flaw: that the examination's cutoff score is more than just an administrative tool to aid the selection process and somehow reflects an applicant's qualifications to perform as a police officer.[3]

Significantly, even when the relevant labor market is narrowed to a comparison of only those who "passed" the exam, the evidence establishes that the Amended Decree's numerical goal was directly tailored to the relevant labor market.

The Plaintiff-Class' Qualified Labor Pool (from Table 2)

YEAR	% of Minorities Who "Passed" Civil Service Test	% of Minorities in the CPD
1982	47.30%	19.70%
1989	45.60%	25.00%
1992	30.60%	29.60%
1994	33.70%	31.90%

[3] Numerous courts have recognized that the "passing score" has little meaning beyond its administrative usefulness. *See Contreras v. Los Angeles*, 656 F.2d 1267 (9th Cir. 1981); *Bryant v. City of Chicago*, 200 F.3d 1092, 1099 (7th Cir. 2000), *cert. denied*, 531 U.S. 821 (2000); *Lanning v. SEPTA*, 181 F.3d 478, 492-93 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000); *Guardians Ass'n v. City of New York*, 630 F.2d 79, 105 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

After the 1994 patrol officer examination, the qualified labor pool was 33.7%, while for the very first time, the percentage of minorities on the City's police force also reached 33.7%. Accordingly, even under the Plaintiff-Class' theory, the hiring goal and ultimate workforce composition goal were quite well tailored to the results of the 1992 examination.

5. The impact of the relief on the rights of third parties.

This Court has recognized that race-conscious relief in hiring is different from similar relief applied to promotions, layoffs or recalls. *Paradise*, 480 U.S. at 183; *Wygant*, 476 U.S. at 283. The Sixth Circuit noted that:

> Although initial employment opportunities coupled with hiring goals may burden some innocent individuals, they do not impose the same type of intrusive injuries that layoffs, which result in loss of job expectancy, security, and seniority, involve.

(*Wygant*, 476 U.S. at 283 (stating that the denial of future employment is not as intrusive as the loss of an existing job)).

While non-minority applicants are by definition burdened by any race-conscious remedy, this Court will tolerate burdens that are "acceptable" or "minor" to remedy past discrimination. *Wygant*, 476 U.S. at 283. There is no evidence that any of the Plaintiff-Class members in this case were precluded from sitting for future civil service examinations, and in fact, several of the named class members were subsequently hired as police officers. [R. 97, *2000 Order*, p. 93, Apx. 160.] Finally, from

1994 forward, the Plaintiff-Class no longer suffered any burden because the race-conscious remedy was dissolved.

C. The Two Year Extension of the 1984 ACD's Provisions, Underscores the Decree's Flexibility and Provides No Basis to Invalidate the ACD or Penalize the City for its Good Faith Compliance.

Petitioners rest four (4) of their six (6) Questions Presented to this Court on the fact that the terms of Amended Consent Decree triggered a two year extension of the ACD. In that regard, Petitioners argue that the ACD was not narrowly tailored in that it provided for such an extension. However, as detailed below, the provision in question was purposefully drawn to ensure that the goals were reached as quickly as possible.

Under its terms, the ACD was set to expire on the earlier of December 31, 1992, or when minorities constituted 33% of the Police Department. In addition, the ACD provided that for every four (4) non-minorities hired, three (3) minorities were to be hired. Of course, the ACD required that the only "qualified" candidates were to be hired. In addition, the ACD provided that in the event that the City was to hire less than seventy (70) officers in a given year, the terms of the decree were to be extended for an additional year. However, in accordance with the basic terms of the ACD, the decree was to terminate when minorities constituted 33% of the Police Department.

A race-conscious plan "cannot continue in perpetuity" but must have a logical stopping date. *City of Richmond v. Croson*, 488 U.S. 469, 498 (1989). Here, the ACD had just such a "logical date" and was flexible enough to permit earlier termination if the goals were met. "An explicit or immediately foreseeable end date has never been required

for an affirmative action plan to be valid." *Doe v. Kamehameha Schools*, 470 F.3d 827 (9th Cir. 2006), citing to *Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987).

Where a race-conscious plan has an expiration date, but is not sufficiently flexible to provide for its earlier termination if its goals are met, such a decree is most likely to be found not to be narrowly tailored. *See, e.g., Davis v. San Francisco*, 890 F.2d 1438 (9th Cir. 1989) ("The decree does not however, contain any provision to stop the use of its promotion mechanism when its valid promotion objectives have been met. . . . [W]e modify the seven-year duration of the decree to seven years or sooner upon the accomplishment of the objectives or the goals of the consent decree". 890 F.2d at 1549.) Similarly, in *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training*, 94 F.3d 1366 (9th Cir. 1996) the Court accepted as narrowly tailored a proposal of the Plaintiff's to establish a gender-conscious plan that would terminate when the goal of having women constitute 20% of the apprentices was met.

The ACD meets these standards. It had a stated end date, and would terminate sooner if its goals were accomplished. Plaintiff-Class' primary argument is that the provision allowing for an extension in the event less than seventy (70) officers were hired was not narrowly tailored.

The provision for an extension in the event seventy (70) officers were not hired in a given year is reasonable, logical, and very closely tied to having the Respondent achieve the stated goals. If the economic conditions faced by the City were such that its hiring would be reduced, or the City were simply to thwart the purposes of the ACD by limiting its hiring, the goals would not be reached. The extension was designed to merely make it more likely that the goals would be met in as reasonable a time as possible.

It cannot be forgotten that once the goals were accomplished, the ACD would terminate – whenever that might be. Moreover, the history of this and related litigation gives further reason for the ACD to have been structured in that fashion. The City acknowledged that its position earlier in this and related litigation changed as the cases progressed from recalcitrant to intent on remedying past discrimination. Its own counsel has stated to the Justices of this very Court as follows:

> "[W]hen this case was filed in 1980, the City of Cleveland had eight years at that point of litigating these types of cases, and eight years of having judges rule against the City of Cleveland. . . . You don't have to beat us on the head. We finally learned what we had to do and what we had to try to do to comply with the law, and it was the intent of the City to comply with the law".

Local No. 93 International Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 506 (1986).

It was thus with reasonable caution and attention to the historical facts and background that the extension provision was included in the ACD. Without such a provision, the reasonable goals might not be attained if the size of entry classes of patrolmen was less than anticipated. As noted by the Sixth Circuit below:

> [W]e find that the minimum-70-officer rule made sense for several reasons, including (a) the possibility of financial hardships causing the City to fall short in remedying past discrimination (which was one of the reasons for amending the original consent decree); and (b) the possibility (given the City's prior history of discrimination) that the City might try to thwart the goals of the consent decree by simply freezing hiring or hiring only a relatively few number of officers during the eight-year period of the consent decree.

> *See, e.g., McNamara v. City of Chicago*, 138 F.3d 1219, 1223 (7th Cir. 1998) (noting hiring freeze by the city immediately after it agreed to hire a percentage of minorities for fire department . . .)

The extension provision of the ACD was not designed to delay the termination of the decree but rather served as an assurance that if the goals were not reached because of a decrease in the number of new patrolmen hired in a given year, the goal would not be thwarted. Indeed, that was exactly the problem facing the courts during the litigation history of *United States v. Paradise*, 480 U.S. 149 (1987). There, one of the arguments faced by the District Court in its Order of 1975, in affirming its 1972 Order implementing race-conscious hiring, was to prohibit the Defendant Alabama Department of Public Safety from limiting the hiring class so as to delay the meeting of the goals. (There, the hiring ratio was 1-for-1, initially set to remain in effect until 25% of the troopers were African-American).

There is no basis for Plaintiff-Class' contention that permitting the decree to be applicable for the 1994 class was unconstitutional. The goals had not yet been met, due in part to a decrease in the hiring of patrolmen. Moreover, there was no magic to the 1992 expiration date. Plainly, the constitutionality of the ACD does not depend on whether it expired in 1992 or 1994. Rather, it is the open-endedness of consent decrees that may run afoul of the Constitution. Where, as here, a Consent Decree has a firm expiration date that can be extended for extremely limited seasons designed to promote the achievement of stated goals, the Consent Decree remains narrowly tailored as to duration.

CONCLUSION

The ACD expired in 1994 just as the racial composition of Cleveland's police force reached parity with the relevant labor pool. The Petitioner class, after failing to convince the District Court of its entitlement to injunctive relief in May, 1994 (and after the court reaffirmed the lawful continued application of the ACD) amended its complaint to seek damages against the City based on its compliance with the terms of the ACD. The City's police force has been free of any preferential hiring mandates for well over a decade. It is respectfully submitted that the admittedly lawful ACD – as applied for one hiring cycle in 1994 before its natural expiration, presents a uniquely inappropriate scenario for Supreme Court review.

For the foregoing reasons, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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