

No. _____

In The
SUPREME COURT OF THE
UNITED STATES

TIMOTHY D. POPE,

Petitioner,

v.

STATE OF ALABAMA, ALABAMA
DEPARTMENT OF CORRECTIONS, the
ALABAMA STATE PERSONNEL DEPARTMENT,
JACKIE GRAHAM, in her official capacity as
Director of the Alabama State Personnel
Department, and RICHARD F. ALLEN, in his
official capacity as Commissioner of the Alabama
Department of Corrections,

Respondents.

**On Petition for a Writ Of Certiorari To The
United States Court Of Appeals For The
Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

Michael E. Rosman
Counsel of Record
Center for Individual
Rights
1233 20th St. NW, Suite 300
Washington, DC 20036
(202) 833-8400

Raymond P. Fitzpatrick, Jr.
1929 Third Ave. North
Suite 600
Birmingham, AL 35203
(205) 320-2255

QUESTION PRESENTED

1. In *Martin v. Wilks*, 490 U.S. 755 (1989), this Court held that the plaintiffs were not barred from challenging race-based employment decisions made pursuant to a judicial decree in a prior case. Here, the court below nonetheless held that a race-based employment decision passed muster under this Court's strict scrutiny test precisely *because* it was made pursuant to a judicial decree in a prior case (even though the relevant portion of the decree was eventually dissolved because it required unconstitutional acts). Did the court below err?

2. Does following the aforementioned judicial decree, which specifically precluded hiring non-African Americans unless certain African Americans declined the position, constitute a legitimate, non-discriminatory reason for refusing to hire the non-African American under Title VII?

3. Are the factual findings and conclusions from a court decision more than thirty years earlier adequate to demonstrate the manifest imbalance in a traditionally-segregated job category required by *Johnson v. Transportation Agency*, 480 U.S. 616 (1987)?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	v
DECISIONS OF THE COURT BELOW	1
JURISDICTION OF THIS COURT	1
RELEVANT PROVISIONS	1
STATEMENT OF THE CASE	2
A. Pope’s Promotion And Its Rescission .	2
B. The <i>Frazer</i> Litigation	4
C. Proceedings In The Courts Below	9
REASONS FOR GRANTING THE PETITION	13
I. THIS COURT SHOULD RESOLVE THE AMBIGUITIES IN ITS CASES OVER THE EFFECT OF A JUDICIAL ORDER THAT REQUIRES CONDUCT THAT WOULD OTHERWISE LEAD TO LIABILITY	15

II.	THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A DISPUTE IN THE LOWER COURTS OVER WHETHER COMPLIANCE WITH A JUDICIAL DECREE IS A COMPLETE DEFENSE TO A CLAIM OF DISCRIMINATION .	25
III.	THIS COURT SHOULD RESOLVE OTHER CONFLICTS RAISED BY THE ANALYSIS OF THE COURT BELOW	28
IV.	THE PROPER INCENTIVES FOR ELIMINATING OLD DECREES IS AN IMPORTANT ISSUE THAT DESERVES THIS COURT'S ATTENTION	31
	CONCLUSION	34

APPENDIX

DISTRICT COURT OPINION	A1
COURT OF APPEALS OPINION	A37
OPINION DENYING REHEARING	A45
COMPLAINT (SELECTED EXHIBIT)	A47

ANSWER OF DEPARTMENT OF CORRECTIONS, <i>et ano.</i>	A60
ANSWER OF STATE OF ALABAMA, <i>et al.</i>	A66
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, EXHIBIT D: <i>FRAZER</i> DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	A73
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, EXHIBIT E: EXCERPTS OF <i>FRAZER</i> DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT	A80
EXCERPTS OF AFFIDAVIT OF ALICE ANN BYRNE	A107
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	A111

TABLE OF CITED AUTHORITIES

Cases

<i>Brunet v. City of Columbus</i> , 1 F.3d 390 (6 th Cir. 1993)	26, 27, 30
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986) . .	10
<i>Citizens Concerned About Our Children v. School Bd. of Broward</i> , 193 F.3d 1285 (11 th Cir. 1999)	11
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989)	10, 19
<i>Cooper v. Parrish</i> , 203 F.3d 937 (6 th Cir. 2000)	33
<i>Dean v. City of Shreveport</i> , 438 F.3d 448 (5 th Cir. 2006)	27, 28
<i>Frederick County Fruit Growers Ass'n v. Martin</i> , 968 F.2d 1265 (D.C. Cir. 1992)	13
<i>GTE Sylvania, Inc. v. Consumers Union of the U.S.</i> , 445 U.S. 375 (1980)	10-13, 15, 16, 19, 25
<i>Hammon v. Barry</i> , 826 F.2d 73 (D.C. Cir. 1987)	30

<i>Hart v. Community School Board No. 1</i> , 536 F. Supp. 2d 274 (E.D.N.Y. 2008)	32
<i>Horne v. Flores</i> , 129 S. Ct. 2579 (2009)	32
<i>In re Birmingham Reverse Discrimination Employment Litigation</i> , 20 F.3d 1525 (11 th Cir. 1994), <i>cert den.</i> , 514 U.S. 1065 (1995)	24
<i>Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers Of America v. Johnson Controls, Inc.</i> , 499 U.S. 187 (1991)	23
<i>Johnson v. California</i> , 543 U.S. 499 (2005) . . .	10
<i>Johnson v. Transportation Agency</i> , 480 U.S. 616 (1987)	i, 12, 29
<i>Martin v. Wilks</i> , 490 U.S. 755 (1989)	i, 11, 13, 14, 19-26
<i>Martinez v. City of St. Louis</i> , 539 F.3d 857 (8 th Cir. 2008)	26
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	29
<i>Parents Involved In Community Schools v. Seattle School Dist. No. 1</i> , 127 S. Ct. 2738 (2007)	10

<i>Ricci v. DeStefano</i> , 129 S. Ct. 2658 (2009) .	23, 30
<i>Rufo v. Inmates of Suffolk County Jail</i> , 502 U.S. 367 (1992)	29
<i>Trans World Airlines v. Thurston</i> , 469 U.S. 111 (1985)	29
<i>United States v. Flowers</i> , 2007 WL 2725264 (M.D. Ala. Sept. 17, 2007), <i>aff'd</i> , 2008 WL 2440028 (11 th Cir. June 18, 2008), <i>cert.</i> <i>denied</i> , 129 S. Ct. 763 (2008)	5, 7, 31
<i>United States v. Flowers</i> , 372 F. Supp. 2d 1319 (M.D. Ala. 2005)	7, 8
<i>United States v. Flowers</i> , 444 F. Supp. 2d 1192 (M.D. Ala. 2006)	9
<i>United States v. Frazer</i> , 1976 WL 729 (M.D. Ala. Aug. 20, 1976)	7
<i>United States v. Frazer</i> , 317 F. Supp. 1079 (M.D. Ala. 1970)	4-6
<i>W.R. Grace & Co. v. Local Union 759</i> , 461 U.S. 757 (1983)	13, 16-19, 25, 31
<i>Wisconsin v. City of New York</i> , 517 U.S. 1 (1996)	23

Constitutional and Statutory Provisions

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 11

42 U.S.C. § 2000e-2(a) 1

42 U.S.C. § 2000e-2(l) 28

42 U.S.C. § 2000e-2(n) 24, 25

42 U.S.C. §§ 2000e, *et seq.* i, 12-14, 17, 33

5 U.S.C. § 552 15, 16

Fed. R. Civ. P. 60(b) 14

U.S. Const. amend. XIV, § 1 1, 11, 13, 23

DECISIONS OF THE COURT BELOW

The decision of the District Court in this matter can be found at 2008 WL 2874483. The opinion of the Eleventh Circuit Court of Appeals is unpublished. The order denying the petition for rehearing en banc is also unpublished.

JURISDICTION OF THIS COURT

The opinion of the court below was filed on July 17, 2009. A timely petition for rehearing was filed, and it was denied on September 11, 2009. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, states:

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The facts of this matter are set forth in the complaint, most of the allegations of which were admitted by defendants in their answers and none of which were refuted by them in their motion for dismissal and/or summary judgment.

A. Pope's Promotion And Its Rescission

Plaintiff Timothy Pope is a white male who, in 2002, was employed as a Correctional Officer I for the Alabama Department of Corrections. In August 2002, while working at the Draper Correctional Facility in Montgomery County, Alabama, he received notice that his name was on

a certificate of eligible candidates promulgated by respondent Alabama Department of Personnel for a position as Correctional Officer II in Bibb County. He was asked to, and did, contact the warden at Bibb County to express his interest in the open position, which represented a promotion for him. A50 (¶¶ 9-10), A61 (¶¶ 9-10), A112 (¶¶ 1-2). (All “A__” citations are to the accompanying appendix.)

On or about September 3, 2002, Pope interviewed for the position. The panel interviewing him was led by Warden Cheryl Price, a black female, and two Captains at the Bibb facility, one white and one black. A51 (¶ 11), A61 (¶ 11), A112-13 (¶ 3).

On September 19, 2002, Warden Price offered the position to Pope, and Pope accepted. The position was to begin on October 5, 2002, and Price’s assistant, Jacqueline Owens, sent him congratulations shortly thereafter. A51 (¶ 12), A58, A61-62 (¶ 12), A113 (¶ 4).

Plaintiff lived approximately eighty (80) miles from the Bibb Facility. Accordingly, in the next few days, he broke his lease (at some financial cost), and executed a new lease on a dwelling in the Birmingham area. A51-52 (¶ 13).

On September 25, 2002, after Pope completed his relocation, Warden Price contacted the plaintiff by telephone and rescinded the offer of promotion.

Price explained that the State Personnel Department precluded the Corrections Department from hiring a white male. Subsequently, Pope emailed the Office of the Attorney General complaining about the matter, and the Corrections Department's General Counsel, Andrew Redd, responded in writing in a letter dated December 4, 2002. Mr. Redd conceded that Pope had been selected as the most qualified candidate by Warden Price, but explained that the Personnel Department had rejected Pope's promotion because it was not in compliance with a judicial order in *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970) that "does not permit the promotion of a lower-ranking certified white candidate over a higher ranking black candidate" except under narrow circumstances (the "no bypass rule"). A52-54 (¶¶ 14, 16), A62 (¶¶ 14, 16), A69 (¶ 16), A113 (¶ 5).

Plaintiff filed a complaint with the EEOC in October 2002 and received a notice of right to sue in December 2002. A54 (¶ 17), A62 (¶ 17), A69 (¶ 17), A113-14 (¶¶ 6-7). He filed this action in the District Court on February 21, 2003 against the State of Alabama, the state Departments of Corrections and Personnel, and the heads of those departments (the "State Defendants"). A6, A66-72, A114 (¶ 8).

B. The *Frazer* Litigation

A few days later, Pope moved to intervene in the *Frazer* litigation in order to procure an order

terminating the no bypass rule. *United States v. Flowers*, 2007 WL 2725264, *1 (M.D. Ala. Sept. 17, 2007), *aff'd*, 2008 WL 2440028 (11th Cir. June 18, 2008), *cert. denied*, 129 S. Ct. 763 (2008). The *Frazer* litigation had been commenced by the United States in 1968, seeking an injunction requiring Alabama state agencies receiving federal financial assistance to conform to the non-discrimination conditions attached to that assistance. *United States v. Frazer*, 317 F. Supp. 1079, 1081 & n.1 (M.D. Ala. 1970). Among the findings the court made at that time was that the State of Alabama's hiring practices generally utilized examinations. Those who passed the examinations were placed on a register of eligibles for the position in question, and were ranked on that register based upon their grades (as modified by a veterans' preference). *Id.* at 1085. The State then followed the "rule of three," under which "the appointing authority need not select the highest ranking individual available, but must select one from among the top three." *Id.* Alternatively, appointing officers could cancel the certificate if they preferred not to hire any of the three. *Id.* at 1086.

The district court in *Frazer* found that the defendants (which included members of the Alabama State Personnel Board and the head of the Personnel Department) had passed over qualified African American applicants for lower-ranking whites. *Id.* Accordingly, part of the remedial order

entered by the *Frazer* Court in 1970 was that “Negro applicants shall be appointed to positions . . . when [they] are listed on a Certification of Eligibles, unless higher-ranking white applicants on the certificate are appointed to fill the vacancy . . . or unless the defendants determine that the Negro applicant is not qualified to perform the duties of the position, or is otherwise not fit for the position.” It further precluded the defendants from “appoint[ing] or offer[ing] a position to a lower-ranking white applicant on a certificate in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher-ranking Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is otherwise unfit for it, or is unavailable.” *Id.* at 1091.

Under this no bypass rule, appointing officers retained their discretion (1) to hire a better qualified but lower-ranking non-white (African American, Asian American, non-white Hispanic, etc.) over any higher-ranking applicant (including an African American) or (2) to hire a better qualified but lower-ranking white over any non-African American. But they lacked the discretion to hire a better qualified but lower-ranking white applicant over a higher-ranking African American applicant (short of the African American applicant being entirely unqualified, unfit, or unavailable).

In 1976, after the heads of other state agencies (including the Department of Corrections) were added as defendants, the *Frazer* Court made further findings of discrimination. *United States v. Frazer*, 1976 WL 729 (M.D. Ala. Aug. 20, 1976). In its remedial order, the court reaffirmed all of the provisions of the 1970 decree, *id.* at *6 (¶ 2), but it did not extend those provisions (including the no bypass rule) to any of the new defendants (including the head of the Department of Corrections).

According to the State Defendants, they suspected in early 2002 (some months before they offered, and then rescinded, a promotion to Pope) that the no bypass rule was no longer constitutional. The Personnel Department retained several experts in May 2002, and a study was completed, and an initial draft report written, in August and September 2002. A108 (¶¶ 4-5). After the Personnel Department consulted with the United States about the results of this study, the United States and the *Frazer* defendants jointly moved in May 2003 for an order terminating the no bypass rule. A109 (¶ 10); *United States v. Flowers*, 372 F. Supp. 2d 1319, 1323 (M.D. Ala. 2005). (This was approximately three months after Pope had filed his motion to intervene to seek the same result. After that motion was granted, in January 2004, Pope filed his own complaint and motion to terminate the no bypass rule. *United States v. Flowers*, 2007 WL 2725264, *1 (M.D. Ala. Sept. 17,

2007).)

The *Frazer* Court eventually treated the motions to terminate as preliminary injunction motions seeking to temporarily enjoin the no bypass rule. *United States v. Flowers*, 372 F. Supp. 2d 1319, 1324 (M.D. Ala. 2005). (Although now known by the name just cited, because of a change in the relevant state official, the parties in this case have continued to refer to the litigation in which the no bypass rule was ordered as the *Frazer* litigation. A5 n.1.) On May 20, 2005, the court issued an opinion and order preliminarily enjoining the no bypass rule. The court concluded that the *Frazer* defendants and Pope had established “a significant change . . . in factual conditions [and] in law.” *Id.* at 1325 (quoting *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992)) (brackets and ellipsis as in *Flowers*). As to the latter, the court found that the no bypass rule was “race-conscience [sic], indeterminate, [and] across the board” and was “on its face, unconstitutional.” *Id.* at 1326.

In September 2005, the *Frazer* defendants moved for summary judgment on the question of terminating the no bypass rule. The *Frazer* defendants did not rely solely on their expert reports or changed factual circumstances for this motion. They also asserted that “even if the Court determines that a compelling governmental interest exists, the no bypass rule remains facially unconstitutional because it is not sufficiently

narrowly tailored in that it lacks any durational limit or provision for court review or reauthorization; it is inflexible in its application; and it has an intolerable impact on innocent third parties.” A77-78 (¶ 4). *See also* A89 (“In other words, after *Croson*, the Supreme Court’s position on affirmative action was sufficiently settled to provide the grounds for modification under *Rufo* and Rule 60(b) for changed legal circumstances.”), A84-85, A89-106 (arguing that the no bypass rule was not narrowly tailored because of its duration, inflexibility, and effect on innocent third parties).

The *Frazer* court granted the motions to permanently terminate the no bypass rule in June 2006. *United States v. Flowers*, 444 F. Supp. 2d 1192, 1194 (M.D. Ala. 2006).

C. Proceedings In The Courts Below

After the permanent termination of the no bypass rule, the litigants in *Pope* returned to that case. (They had temporarily suspended activity in the case while the future of the no bypass rule was litigated in the *Frazer* litigation. A8 n.3.) On April 9, 2008, the defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) and/or for summary judgment pursuant to Rule 56. A111-21. Given their position in the *Frazer* litigation – particularly that the no bypass rule was not narrowly tailored because, *inter alia*, it lacked any durational limit, was inflexible in its application,

and unduly affected innocent third parties, and that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) created a standard for constitutionality that required modification of the rule – the State Defendants did not try to argue that the no bypass rule met strict scrutiny in September 2002, when they rescinded Pope’s promotion on racial grounds. Rather, the sole basis for their motion was something they called the “collateral bar doctrine,” which they derived from this Court’s decision in *GTE Sylvania, Inc. v. Consumers Union of the U.S.*, 445 U.S. 375 (1980). A117 (¶ 17) (“In sum, the collateral bar doctrine embodied in *GTE Sylvania* operates as a complete defense to Pope’s claims”).

Accordingly, the State Defendants made no effort to show that the undisputed facts demonstrated a compelling interest in remedying the continuing effects in 2002 of past discrimination, as would have been their burden had that been a basis for their summary judgment motion. *Johnson v. California*, 543 U.S. 499, 505 (2005) (“Under strict scrutiny, the government has the burden . . .”); *Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2752 (2007) (“In order to satisfy this searching standard of review [*viz.*, strict scrutiny], the school districts must demonstrate that the use of individual racial classifications in the assignment plans here is ‘narrowly tailored’ to achieve a ‘compelling’ government interest”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (moving party on

summary judgment bears burden of apprising the court the basis for its motion and the evidence on which it relies).

The district court granted defendants' motion for summary judgment, albeit not on the "collateral bar" doctrine espoused by the State Defendants. To the contrary, the district court correctly found that *Martin v. Wilks*, 490 U.S. 755 (1989) had "rejected the 'impermissible collateral attack' rule and allowed the Caucasian firefighters to litigate the merits of their Title VII and equal protection claims." A13. Nonetheless, the district court ruled that the existence of the *Frazer* decree was dispositive because "no matter which statutory highway Pope travels in his endeavor to reach intentional discrimination, be it § 1983 or Title VII, the State Defendants' adherence to the court-ordered no bypass rule is a roadblock to recovery" A19. As to the Equal Protection Clause and Section 1983, and relying upon an earlier Eleventh Circuit decision (*Citizens Concerned About Our Children v. School Bd. of Broward*, 193 F.3d 1285 (11th Cir. 1999)), which itself had relied upon *GTE Sylvania*, the district court held that complying with the *Frazer* decree was itself a compelling governmental interest. A19-A23. (The district court also noted a second compelling interest, to wit, the remedying of the discrimination in the 1960's and early 1970's identified in the *Frazer* decisions. A22-23 n.7. The district court did not analyze whether the no bypass rule was narrowly-

tailored to achieve that interest.)

The district court further found that denial of the promotion to Pope was narrowly-tailored to achieve the goal of compliance with the no bypass rule because it was “the only choice available.” A23.

As to Title VII, the district court, curiously enough, did not directly rely upon *GTE Sylvania* and the State Defendants’ compliance with the no bypass rule. Rather, it concluded that there was “no dispute that race was ‘taken into account’ in the decision to deny Pope the promotion.” A29. It then concluded, relying on this Court’s opinion in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), that compliance with the court order was “a legitimate and nondiscriminatory reason for taking an adverse employment action.” A30. In considering *Johnson*’s two-part inquiry into the legitimacy of an affirmative action plan – *viz.*, that there be a manifest imbalance in a traditionally segregated job category and that the plan not unnecessarily trammel the rights of nonminorities – the district court concluded that the findings of fact in *Frazer* were sufficient, by themselves, to meet the first part of the inquiry. A32-34. The district court then found that the no bypass rule did not “unnecessarily trammel” the rights of nonminorities. A34-35.

Pope appealed the final judgment dismissing his case to the Eleventh Circuit, which affirmed

that judgment. The Eleventh Circuit essentially agreed with the district court that compliance with a judicial order constituted a compelling governmental interest for Equal Protection Clause purposes. A43. The court offered no reason based in the statutory text or Title VII case law why compliance with the *Frazer* decree would undermine a claim for discrimination under Title VII, but nonetheless affirmed the district court's judgment dismissing that claim. *Id.* The Eleventh Circuit rejected Pope's petition for rehearing en banc. A46.

REASONS FOR GRANTING THE PETITION

This case gives this Court an opportunity to resolve the tension in three of its opinions: *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. 375 (1980), *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), and *Martin v. Wilks*, 490 U.S. 755 (1989). *See, e.g., Frederick County Fruit Growers Ass'n v. Martin*, 968 F.2d 1265, 1271-72 (D.C. Cir. 1992) (noting, but expressing no opinion concerning, "any possible tension between *Martin v. Wilks*, which might require that the growers be given an opportunity to establish that the Secretary [of Labor] is denying them their legal right to an interpretation of the 1978 regulation that is not arbitrary and capricious, and *GTE Sylvania v. Consumers Union*, . . . which suggests that the Secretary's compliance with a court order would be a complete defense to such a

claim.”).

As shown above, the court below essentially resolved any tension among these cases by greatly limiting the kinds of relief that a party can obtain in the independent lawsuit suit authorized by *Martin v. Wilks*. In essence, the court below held that a party not bound by an earlier court order can challenge that order in a subsequent suit, but can obtain nothing more than reformation (or rescission) of the earlier order. That is, the court below reduced the independent action authorized by *Martin* into an alternative equivalent to moving to intervene and seeking a modification of the order pursuant to Rule 60(b), Fed. R. Civ. P. While this is one possible way of resolving the tension between these cases, it is not the only one (nor, Pope believes, the best one) that the lower courts have reached in cases where conduct taken pursuant to a prior order is challenged. This Court should grant the petition to resolve the split in how such suits have been handled in the circuit courts.

Finally, the court below appears to have adopted the district court’s view that 30-year-old findings of past discrimination are sufficient to demonstrate the “manifest imbalance” required by Title VII for engaging in race-conscious remedial employment decisions. (The court below offered no additional reason beyond the district court’s analysis for dismissing the Title VII claim, and thus appears to have adopted that rationale.) This, too,

creates a circuit split that this Court should resolve.

I. THIS COURT SHOULD RESOLVE THE
AMBIGUITIES IN ITS CASES OVER THE
EFFECT OF A JUDICIAL ORDER THAT
REQUIRES CONDUCT THAT WOULD
OTHERWISE LEAD TO LIABILITY

The courts below (and the State Defendants) have emphasized that parties are required to obey judicial orders. That much is certainly true. The different question in this case is whether any party can be liable for conduct taken pursuant to a judicial order that causes harm to an innocent third person. This Court's precedents do not yield a clear answer to that question.

In *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. 375 (1980), this Court considered whether an injunction in a different lawsuit, precluding the Consumer Product Safety Commission ("CPSC") from disclosing certain documents, required the dismissal of a lawsuit under the Freedom Of Information Act ("FOIA") seeking production of those documents from the CPSC. Noting that the FOIA statute only gave courts the authority to order the production of records "improperly withheld," *id.* at 384 (*quoting* 5 U.S.C. § 552(a)(4)(B)), this Court held that the documents in question were not "improperly" withheld because (1) that term referred to the improper exercise of discretion, and (2) in obeying

a court order, the CPSC had not exercised the kind of discretion to which the statute referred. *Id.* at 386. This Court also stated that its interpretation of “improperly” was “further supported by the established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed.” *Id.* Finally, this Court held that its interpretation of “improperly” was correct because “there is nothing in the legislative history to suggest that in adopting [FOIA] . . . , Congress intended to require an agency to commit contempt of court in order to release documents.” *Id.* at 387.

Thus, this Court in *GTE Sylvania* interpreted only FOIA, and only the primary remedy that FOIA affords the public: an order requiring disclosure of documents. This Court did not address, for example, whether the FOIA requesters would be entitled to attorneys’ fees if the prior order were later dissolved or reversed and the documents produced.

In *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), this Court began to address whether any kind of liability might be imposed on those following court orders. The Equal Employment Opportunity Commission (“EEOC”) had investigated W.R. Grace’s employment practices and concluded that there was reasonable cause to believe that Grace had discriminated against women and African Americans in violation

of Title VII. The EEOC also concluded that Grace's seniority system, mandated by a collective bargaining agreement, was also unlawful. *Id.* at 759. The EEOC and Grace entered into a conciliation agreement that required the company to prevent men from exercising shift preference seniority to displace women with less seniority, and to maintain the proportion of women in its plant in the event of layoffs, even though both provisions required the company to deviate from its collective bargaining agreement. *Id.* at 760.

A district court upheld the provisions of the conciliation agreement and concluded that they were "binding upon all the parties to this action" and that, with regards to any conflict between the collective bargaining agreement and the conciliation agreement, "the provisions of the conciliation agreement are controlling and all parties to this action shall abide thereby." *Id.* at 761 n.2. More employees were subsequently laid off, and, pursuant to the district court's order, Grace followed the terms of the conciliation agreement. When the court of appeals reversed the district court, Grace restored the laid off men to the positions to which they were entitled under the collective bargaining agreement. Male employees sought backpay in arbitration, including for the layoffs that occurred after the district court's order. Although the first arbitrator ruled that the male employee should be denied backpay because "it would be inequitable to penalize the Company for

conduct that complied with an outstanding court order,” *id.* at 762, a subsequent arbitrator ruled to the contrary with respect to other male employees and ordered backpay. Although the latter arbitrator “accepted [Grace’s] contention that it had acted in good faith in following the conciliation agreement,” he “[i]n essence, . . . interpreted the collective-bargaining agreement as providing that the District Court’s order did not extinguish the Company’s liability for its breach.” *Id.* at 763-64.

Giving deference to the second arbitrator, this Court upheld his awards. This Court specifically considered whether enforcement of the awards would offend public policy, and it stated that “[i]t is beyond question that obedience to judicial orders is an important public policy,” and that “[a]n injunction issued by a court acting within its jurisdiction must be obeyed until the injunction is vacated or withdrawn.” *Id.* at 766. Moreover, this Court assumed (despite its own reservations) that the district court order was the equivalent of an injunction. *Id.* at 768 n.11. It nonetheless held that the arbitrator did not require anyone to violate the District Court order because it “neither mandated layoffs nor required layoffs be conducted according to the collective-bargaining agreement.” *Id.* at 768-69. Rather, “[t]he award simply held, retrospectively, that the employees were entitled to damages for the prior breach of the seniority provisions.” *Id.* at 769. This Court concluded that “placing the Company in this position with respect

to the court order [is not] so unfair as to violate public policy” because “[o]beying injunctions often is a costly affair.” *Id.* at 770. This Court noted that losses were bound to occur given the alleged prior discrimination against women, and “[t]he issue is whether the Company or the Union members should bear the burden of those losses.” *Id.*

Thus, one of the questions left open by *GTE* *Sylvania* – whether a litigant can ever be liable for conduct required by a court order – was answered in the affirmative in *W.R. Grace*. To be sure, this Court relied upon the unique circumstances of the case, including the company’s own behavior in entering into a conciliation agreement inconsistent with its collective bargaining agreement obligations, and its failure to seek a stay from the district court pending review by the court of appeals. *Id.* at 767, 769. But it did not hold that such “voluntary” assumption of risk (in the face of an EEOC investigation and finding), or such a failure to seek temporary relief, was needed to uphold a non-contempt remedy for the harms caused by obeying a court order. *Id.* at 767 n.9.¹

Finally, in *Martin v. Wilks*, 490 U.S. 755 (1989), this Court held that the existence of a

¹ Here, as noted, the State Defendants did nothing at all to seek modification or termination of the no bypass rule for at least thirteen years after this Court’s decision in *Croson*, which unambiguously adopted the strict scrutiny standard for race-based preferences.

consent decree did not preclude those adversely affected by that decree (but not involved in the litigation in which it was entered) from challenging the conduct required by the decree. The plaintiffs' claim in *Martin* was that "the City [of Birmingham] and the [Jefferson County Personnel] Board were making promotion decisions on the basis of race in reliance on certain consent decrees, and that these decisions constituted impermissible racial discrimination in violation of the Constitution and federal statutes." *Id.* at 758. The district court had held that the plaintiffs "were precluded from challenging employment decisions taken pursuant to the decrees," and this Court held that this holding "contravene[d] the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Id.* at 758-59.

Thus, the opening paragraph of *Martin* certainly suggests that plaintiffs there were *not* limited (contrary to the apparent interpretation of the lower courts in this case) to seeking a prospective injunction against the continuation of the consent decrees. Rather, the plaintiffs' challenge in *Martin* was to employment decisions made *in the past* pursuant to the decree, and the district court had precluded them from challenging those past decisions. *See also id.* at 760 ("The Board and the City admitted to making race-conscious employment decisions, but argued that the decisions were unassailable because they were

made pursuant to the consent decrees.”); *id.* at 761 n.1 (noting that the dissenting judge in the Eleventh Circuit had also concluded that the lawsuit was not barred, but “distinguished . . . between claims for prospective relief and claims for backpay, the latter being barred . . . by the City’s good-faith reliance on the decrees.”).

This Court concluded as follows:

No one can seriously contend that an employer might successfully defend against a Title VII claim by one group of employees on the ground that its actions were required by a decree entered in a suit brought against it by another, if the later group did not have adequate notice or knowledge of the earlier suit.

Id. at 767. Thus, again, while no specific remedies were discussed, this Court held that it was permitting a challenge to employment decisions that “*were* required by a decree” – *i.e.*, ones that took place in the past. Notably, in this passage, this Court did not distinguish between kinds of decrees (consent, litigated, or some combination of the two). *See also id.* at 788 n.27 (Steven, J., dissenting) (“For purposes of determining whether an employer can be held liable for intentional discrimination merely for complying with the terms of a consent decree, however, it is appropriate to treat the consent

decree as a judicial order. . . . Most significantly, violation of a consent decree is punishable as criminal contempt"); *id.* at 791 n.30 (“[T]he reasoning in the Court’s opinion today would seem equally applicable to litigated orders and consent decrees.”). A21 n.6.

Four justices dissented. Interestingly, the dissenters agreed with the Court that non-parties to a prior litigation could not be barred from challenging decisions made pursuant to a decree entered in that litigation. *Id.* at 769-70 (Stevens, J., dissenting). The dissenters believed, however, that the grounds for challenging the validity of a decree were limited (*id.* at 771, 783), and that a judgment could have a practical effect limiting the non-parties’ rights (*id.* at 769-70). As to the latter, the dissenters believed that the District Court had not ruled that the plaintiffs were *barred* from challenging actions taken pursuant to a decree, but rather that actions taken pursuant to the decree were not made “with the requisite racially discriminatory intent.” *Id.* at 779 n.15; *see also id.* at 782 n.20, 789. After concluding that the record did not support any basis for challenging the decree on the narrow grounds the dissenters believed permissible (*id.* at 783-87), the dissent concluded that the district court had correctly concluded that the decree’s existence negated elements of the claim of discrimination. Specifically, the dissenters believed that “the fact that an employer is acting under court compulsion may be evidence that the

employer is acting in good faith and without discriminatory intent.” *Id.* at 788. *See also id.* at 790 (“[I]t would be ‘unconscionable’ to conclude that obedience to an order remedying a Title VII violation could subject a defendant to additional liability.”).²

This Court responded to the dissent as follows:

² Of course, this Court has long rejected the *Martin* dissent’s suggestion that differential treatment is not “intentional discrimination” simply because the actor engaging in such treatment has a reason for doing so that might demonstrate its “good faith.” *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009) (good-faith fear of disparate-impact liability inadequate to defeat a claim for intentional discrimination); *Int’l Union, United Automobile, Aerospace & Agricultural Implement Workers Of America v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (policy of excluding women capable of becoming pregnant from jobs involving exposure to lead violated Title VII; “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination”). Indeed, a “good faith” exception to intentional discrimination would render the entire “strict scrutiny” analysis under the Equal Protection Clause pointless; the very purpose of that exercise is to assess the reason provided by the state actor for engaging in racially disparate treatment. *Wisconsin v. City of New York*, 517 U.S. 1, 18 n.8 (1996) (“Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government.”).

[E]ither the fact that the disputed employment decisions are being made pursuant to a consent decree is a defense to respondents' Title VII claims or it is not. If it is a defense to challenges to employment practices which would otherwise violate Title VII, it is very difficult to see why respondents are not being "bound" by the decree.

Id. at 765 n.6. This Court, then, did not limit its holding to a rejection of the "no collateral attack" defense. Rather, it equated *any* defense based upon compliance with a decree with binding non-parties to the decree, and it held that such non-parties could not be so bound. It further rejected the dissent's suggestion that there was no intentional discrimination because the employer was acting pursuant to a decree. After remand and a trial in the district court, the Eleventh Circuit concluded that the employment decisions were, in fact, unconstitutional and remanded the case to the district court so that it "should provide appropriate relief." *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1549 (11th Cir. 1994), *cert den.*, 514 U.S. 1065 (1995).³

³ In Section 108 of the Civil Rights Act of 1991, Congress precluded certain individuals from challenging "an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a
(continued...)

Of course, the Court did not specifically hold that compliance with a decree is not a compelling governmental interest, and that was the holding of the court below in this case. But given the tension between its holding and this Court's rationale in *Martin*, and the gaps still remaining from this Court's opinions in *GTE Sylvania*, *W.R. Grace*, and *Martin*, the petition should be granted.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A DISPUTE IN THE LOWER COURTS OVER WHETHER COMPLIANCE WITH A JUDICIAL DECREE IS A COMPLETE DEFENSE TO A CLAIM OF DISCRIMINATION

Several lower courts have precluded any

³(...continued)
claim of employment discrimination" (42 U.S.C. § 2000e-2(n)) provided that certain conditions relating to due process with respect to the precluded individuals were met. 42 U.S.C. §§ 2000e-2(n)(1)(B), 2000e-2(n)(2)(D). No one has suggested (and it would be absurd to suggest) that the conditions in that section were met with respect to Pope, or that Pope is precluded from suing because of that section. A14 n.5. Indeed, the decision of the court below seems to render Section 108 entirely superfluous. Since that provision does not alter the standards for intervention (42 U.S.C. § 2000e-2(n)(2)(A)), it primarily precludes challenges to past employment practices implementing certain judgments when its conditions are met. The court below's holding essentially precludes challenges to those practices *regardless* of whether Section 108's conditions are met.

claim for retrospective relief (*i.e.*, relief for past conduct) when state employers are acting pursuant to a prior judicial decree. Others have permitted plaintiffs alleging racial discrimination based upon such conduct to obtain that relief. This Court should grant the petition to resolve this split.

Thus, for example, the court below relied upon the Eighth Circuit's decision in *Martinez v. City of St. Louis*, 539 F.3d 857 (8th Cir. 2008). According to the Eighth Circuit, this Court in *Martin* "simply remanded to permit plaintiffs to challenge the decree's validity." *Id.* at 861. Accordingly, the Eighth Circuit held, it was error to "grant[] monetary and equitable relief for the City's hiring decisions before the dissolution of the decree." *Id.*

On the other hand, both the Fifth and Sixth Circuits have permitted plaintiffs challenging past discriminatory employment decisions made pursuant to a judicial decree to seek (and obtain) retrospective relief. Thus, in *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), a 1989 consent decree from an earlier lawsuit (entered into after a number of rulings by the District Court) provided that the number of male and female appointments as firefighters would be in proportion to the proportions of males and females passing the entry level test. *Id.* at 395. When men who sat for the firefighter exams in 1990 lost seniority to female candidates because of the consent decree, they sued

alleging that the “the consent decree discriminated against [them] on the basis of their gender in violation of the Equal Protection Clause.” *Id.* at 395. After it concluded that the consent decree was indeed discriminatory, the district court ordered adjustments to seniority so that the male plaintiffs were made whole. *Id.* at 396. The Sixth Circuit affirmed that retrospective make-whole remedy. *Id.* at 412-13.

Similarly, in *Dean v. City of Shreveport*, 438 F.3d 448 (5th Cir. 2006), the Fifth Circuit considered a claim by white firefighters that a hiring process adopted pursuant to a 1980 consent decree discriminated against them when they applied for positions between 2000 and 2002. The 1980 decree had an interim hiring goal of requiring at least 50% of all vacancies to be filled by qualified black applicants and 15% to be filled by qualified female applicants. *Id.* at 452. All agreed that the City’s hiring process “was adopted solely to comply with the goals of the decree.” *Id.* at 454. Although the Fifth Circuit concluded that there was adequate evidence of past discrimination to support the entry of the consent decree in 1980, it also held that issues of fact remained over whether past discrimination still warranted a race-conscious remedy when the plaintiffs were denied employment in 2000 and 2002. *Id.* at 455-58. (Conspicuously, it did *not* suggest that evidence of whether such remedies were needed in 2004, when the district court had ruled, or in 2006, at the time

it was writing, was relevant.) Nor did the Fifth Circuit's narrow-tailoring analysis suggest that the only relevant consideration was whether the City's hiring process was required to comply with the consent decree. To the contrary. *Id.* at 459 (that strong remedial measures were needed "may have been true in 1980. . . . [But] [t]o the extent the district court focused on whether the remedies were necessary in 1980, instead of between 2000 and 2002, it erred.")

The Fifth Circuit also held that the hiring process violated Title VII, and specifically 42 U.S.C. § 2000e-2(1) (prohibiting the use of separate cut off scores). *Dean*, 438 F.3d at 463. It remanded the case "for further proceedings concerning the entitlement of each individual [plaintiff] to relief." *Id.* at 465.

It is clear that the lower courts take different approaches to the use of judicial decrees as a defense to claims of discrimination. This Court should grant the petition to resolve this dispute.

III. THIS COURT SHOULD RESOLVE OTHER CONFLICTS RAISED BY THE ANALYSIS OF THE COURT BELOW

Three other anomalies and/or conflicts are raised by the analysis of the court below. The need to resolve each of these issues further militates in favor of granting the petition.

First, under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992), decrees should be modified when “one or more of the obligations placed upon the parties has become impermissible under federal law.” Under the analysis of the court below, though, complying with an obligation of a consent decree is always permissible (since it meets strict scrutiny). This, of course, cannot be because it would mean that decrees could never be modified. And if the court below held only that compliance with a judicial decree is compelling for *past* (and not future) conduct, the question then becomes why.

Second, the decisions of the courts below demonstrate the tension between *Johnson v. Transportation Agency*, 480 U.S. 616 (1989) and *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). The district court held that “there is no dispute that race was ‘taken into account’ in the decision to deny Pope the promotion,” but nonetheless held that “compliance with a court order is a legitimate and nondiscriminatory reason for taking an adverse employment action” under the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A29-30 (*citing Johnson*, 480 U.S. at 626). But *Thurston* held that “the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination,” *Thurston*, 469 U.S. at 121, and surely the no bypass rule and its application here -- sufficient to demonstrate that

“race was ‘taken into account’” – constitutes direct evidence. Characterizing compliance with a race-conscious decree as a “nondiscriminatory reason” (as opposed to a defense for clearly discriminatory conduct) makes no sense at all. *Cf. Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009) (“Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense.”).

Third, to the extent that the courts below held that reliance upon the judicial findings of discrimination in the 1960's and 1970's constituted an adequate basis for upholding a discriminatory decision made in 2002 made pursuant to a judicial decree, their conclusion is inconsistent with other circuit courts. *Compare* A22-23 n.7 and A33 (“[T]he court finds that the prior determination of past discrimination by the *Frazer* court satisfies the *Johnson* inquiry that the remedial action be supported by a manifest imbalance”) *with Brunet*, 1 F.3d at 409 (“the discriminatory policy against women in the Columbus fire department prior to 1975 is too remote to support a compelling governmental interest to justify the affirmative action plan embodied in the [1989] consent decree”) and *Hammon v. Barry*, 826 F.2d 73, 77 (D.C. Cir. 1987) (policy of segregation in the fire department in the 1950's did not support a race-conscious hiring program in the 1980's; “something more recent should serve as a predicate for remedial action *right now*”) (emphasis in original).

IV. THE PROPER INCENTIVES FOR ELIMINATING OLD DECREES IS AN IMPORTANT ISSUE THAT DESERVES THIS COURT'S ATTENTION

In the end, the courts below (as well as the defendants) believed that it was improper to “punish” the defendants for following a facially-valid judicial decree. *E.g.*, A38. The problem with this analysis is the notion that defendants would have been “punished” if they were required to pay backpay or provide other equitable relief. They would not be, any more than their obligation to pay Pope’s reasonable attorney fees in the *Frazer* litigation constituted “punishment” for having complied with a consent decree. *United States v. Flowers*, 2007 WL 2725264 (M.D. Ala. Sept. 17, 2007) (awarding fees to Pope), *aff’d*, 2008 WL 2440028 (11th Cir. June 18, 2008), *cert. denied*, 129 S. Ct. 763 (2008).

Timothy Pope suffered a loss: he was denied a promotion because he was white. The question in this case, and scores of other cases in which old judicial decrees are used as a “defense” is who should bear that loss, Pope or the State? *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770 (1983) (“[t]he issue is whether the Company or the Union members should bear the burden of those losses [resulting from following a district court’s order]”).

This Court recently has recognized some of the perverse incentives associated with decrees issued as part of institutional reform litigation. *Horne v. Flores*, 129 S. Ct. 2579, 2593-94 (2009). Blanket immunity for any action taken pursuant to a decree is an incentive that runs counter to the long-term goal this Court has stated for such decrees: promptly returning responsibility for discharging a State's basic obligations to the State. *Id.* at 2595. Courts themselves rarely take the initiative to return control to local officials, and, for many government officials, the rule provided by the lower court in this case will militate in favor of delaying any effort to seek a return of that control. *E.g., Hart v. Community School Board No. 1*, 536 F. Supp. 2d 274, 279-80 (E.D.N.Y. 2008) (Weinstein, J.) (NYC Department of Education first seeks termination of a 1974 decree in 2008 after Asian Indians had been denied admission pursuant to decree; court notes that it had previously issued orders in 1990 suggesting that it was undesirable for a federal court to continue supervising a local school district, and in 2000 doubting its continuing jurisdiction, and that the district itself had gone from being "overwhelmingly white" to less than 41% white); *id.* at 284 (after noting that "[t]he court has no jurisdiction over the case," the Court still expresses its concern about rusting gates and the need for paint "to improve the morale of those entering the school").

A contrary rule, one that permitted liability

if the acts in question violated other legal norms, would provide a very modest incentive in the other direction: it would encourage local officials to seek termination or modification of judicial decrees as early as possible. Nor would it expose state and local governments to excessive judgments (especially in comparison to the attorneys' fees to which the lower courts have concluded such defendants are already exposed). In many cases, of course, the fact that a decree is outdated, and should be modified or terminated, does not also mean that the underlying conduct is itself even potentially illegal. Even when it might be, as here, plaintiffs must still demonstrate that the conduct injured them and was illegal at the time of the injury. Here, for example, to prevail, Pope must demonstrate that the no bypass rule was illegal in 2002. In cases where the challenge is made shortly after a litigated decree is entered, such demonstrations obviously will be difficult.

Moreover, in many cases, various immunities likely will apply. Eleventh Amendment immunity provides the States themselves with a defense to compensatory damages except where they have waived that immunity or (as in Title VII) where Congress has abrogated it. Common law quasi-judicial immunity (and/or qualified immunity) may apply to individuals sued in their individual capacity. *E.g.*, *Cooper v. Parrish*, 203 F.3d 937, 950 (6th Cir. 2000) (quasi-judicial immunity applied to investigators effecting a temporary restraining

order).

The continuing existence of old judicial decrees whose propriety is questionable militates in favor of granting this petition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Michael E. Rosman
Counsel of Record
Center for Individual Rights
1233 20th St. NW, Suite 300
Washington, DC 20036
(202) 833-8400

Raymond P. Fitzpatrick, Jr.
1929 Third Ave. North Suite 600
Birmingham, AL 35203
(205) 320-2255

Attorneys for Petitioner