No. 06-1139 FEB 12 2007



# In The Supreme Court of the United States

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**JANELL RUTHERFORD, et al.,**
*Petitioners,*

**v.**

**CITY OF CLEVELAND, et al.,**
*Respondents.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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**Edward G. Kramer**
*Counsel of Record*
**David G. Oakley**
**KRAMER & ASSOCIATES, L.P.A.**
**3214 Prospect Avenue, East**
**Cleveland, Ohio 44115**
**(216) 431-5300**

***Counsel for Petitioners***

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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## QUESTIONS PRESENTED

1. Whether the automatic extending of racial quotas in hiring police officers without a showing of a "compelling interest" based on contemporaneous racial discrimination violates the Fourteenth Amendment Equal Protection clause of the United States Constitution.

2. Whether a Consent Decree which automatically extended its provisions including a racial quota for hiring police officers for an additional two years from 1992 to 1994 was not "narrowly tailored" in relationship to the numerical goals of the relevant labor market in violation of the Fourteenth Amendment Equal Protection clause of the United States Constitution.

3. Whether a Consent Decree was not "narrowly tailored" as required by the Fourteenth Amendment Equal Protection clause of the United States Constitution by 1992 when it automatically extended its provisions including a racial quota for hiring police officers for an additional two years even though there had been eighteen years of job related and validated civil service examinations given under its terms.

4. Whether a Consent Decree was not "narrowly tailored" in the duration as required by the Fourteenth Amendment Equal Protection clause of the United States Constitution by 1992 when it automatically extended its term including a racial quota for hiring police officers for an additional two years.

5. Whether a Consent Decree was not "narrowly tailored" in the classification's burden on non-minorities as required by the Fourteenth Amendment Equal Protection clause of the United States Constitution by 1992 when it automatically extended its provisions including a racial quota for hiring police officers for an additional two years.

6. Whether a Consent Decree was not "narrowly tailored" in the flexibility of the numerical goals as required by the Fourteenth Amendment Equal Protection clause of the United States Constitution by 1992 when it automatically extended its provisions including a racial quota for hiring police officers for an additional two years.

## PARTIES TO THE PROCEEDING

***Petitioners*** are class representatives Janell Rutherford, Judy Torres, John Rajic, Kevin Riley, and Richard Dembie and a certified class of persons similarly situated who are non-minorities and took the 1992 Entry-Level Police civil service test given by the City of Cleveland.

***Respondents*** are the City of Cleveland and in their official capacities the Mayor, Police Chief, Director of the Safety Department and members of the Civil Service Commission of the City of Cleveland.

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No.

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# Supreme Court of the United States

JANELL RUTHERFORD, *et al.*,
*Petitioners,*
v.

CITY OF CLEVELAND, *et al.*,
*Respondents.*

**Petition For Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

*Petitioners* Janell Rutherford, Judy Torres, John Rajic, Kevin Riley, and Richard Dembie and a certified class of persons similarly situated who are non-minorities and took the 1992 Entry-Level Police civil service test given by the City of Cleveland respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals is unreported and

is reproduced in the Appendix at App. 1a. The opinion of the District Court granting summary judgment on the constitutionality of the Consent Decree is unreported and is reproduced in the Appendix at App. 41a.

## JURISDICTION

The Court of Appeals judgment was entered on June 1, 2006. A timely petition for rehearing was denied on September 15, 2006. App. at App. 150a. The Honorable John Paul Stevens, Circuit Justice granted two extensions to the Petitioners to file this petition. The second granted the Petitioners until February 12, 2007. This petition is therefore timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT

Petitioners seek review of the ruling of the Sixth Circuit Court of Appeals which held constitutional the imposition of race based affirmative action in hiring of entry level police officers for the City of Cleveland which had been

scheduled to end in 1992, but under the terms of the 1984 Amended Consent Decree ["ACD"] was automatically extended for an additional two years without the municipality providing evidence of a current compelling interest or that the decree continued to meet the constitutional mandates found in the decisions of this court in *United States v. Paradise*, 480 U.S. 149, 169-170 (1987) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989). Judge Rogers in his *Rutherford* concurring opinion proclaimed "[i]n my view, for the reasons given in the majority opinion, we cannot say that the ACD was so clearly unconstitutional as to require the City sua sponte to have sought modification in 1992..." *Rutherford v. City of Cleveland,* Case No. 04-3904 (6th Cir. June 1, 2006) App.39a. *But see*, *Quinn v. City of Boston*, 325 F. 3d 18, 37 (1st Cir. 2003) ("After all, a public employer who consents to the use of race as a factor in order to palliate the lingering effects of past discrimination must maintain continuous oversight in order to ensure that the decree works the least possible harm to other innocent persons competing for employment. Bakke, 438 U.S. at 308, 98 S.Ct. 2733.")

## A. Proceedings Below

In October 1972, litigation began between the Shield Club, the City of Cleveland, and the Fraternal Order of Police in which the Shield Club sued the City for racial discrimination adversely affecting the hiring and promoting of African-American police officers in the Cleveland Police Department. In December 1972, the District Court ordered that based on the number of minorities who passed the 1972 civil service test, "at least 18% (plus or minus one per cent) of the 188 policemen appointed, shall be black or Hispanics." *Shield Club v. City of Cleveland*, 5 EPD Para. 8406 at pg. 7030 (December 21, 1972). On November 11, 1977, the

District Court approved a consent decree governing the hiring and promotion practices of the police department.

Subsequently, on December 21, 1984, the District Court amended the consent decree. ("ACD"). The 1984 ACD only governed the hiring practices of the Cleveland Police Department. By its terms, the ACD would expire either when 33% of the department were minority officers or on December 31, 1992, whichever occurred first. However, for any year that the City did not hire a minimum of seventy officers, the life of the decree would be automatically extended by an additional year unless the City had already achieved the 33% level.

It is this 1984 ACD and its application by the City of Cleveland to the 1992 civil service eligibility list which has been challenged by the Petitioners in this litigation. The challenge is to the constitutionality of the decree as applied to the class between 1992 and 1994.

This action was filed in 1994 by a class of non-minority applicants from the May 18, 1992 civil service eligibility list for the position of police officer for the City of Cleveland. The class filed with their initial complaint a Motion for a Temporary Restraining Order and for a Preliminary Injunction against the City of Cleveland which was denied by the District Court. The class then filed an Amended Complaint that set forth five causes of action: (1) violations of 42 U.S.C. §§ 1981, 1983, and the Equal Protection Clause of the Fourteenth Amendment; (2) violations of § 1983 and the Due Process Clause of the Fourteenth Amendment to the Constitution; (3) violations of § 1985(3) and the Equal Protection and Due Process Clauses; (4) violation of Title VII of the Civil Rights Act of 1964, 42

U.S.C. § 2000e; and (5) violation of Ohio's common law of fraud.

The District Court certified this litigation as a class action comprised of two sub-classes of non-minority applicants from the May 18, 1992 eligibility list. Sub-class A was comprised of applicants who alleged that as a result of the City's hiring pursuant to the 1984 ACD, they were not hired for the position of police officer even though minority candidates who ranked lower than they did on the May 18, 1992 eligibility list were considered and selected for that position. A second Sub-class B was also certified, but the District Court subsequently decertified this subclass and it is not an issue being raised by this petition.

The District Court granted summary judgment against the class based on *Rafferty v. City of Youngstown*, 54 F.3d 278 (6th Cir.), *cert. denied*, 516 U.S. 931, 133 L. Ed. 2d 236, 116 S. Ct. 338 (1995), holding that the case law and statute foreclosed any constitutional challenge to the City's hiring practices under the 1984 ACD. The class appealed this dismissal and the Sixth Circuit Court of Appeals reversed and remanded the case. *Rutherford v. City of Cleveland*, 137 F.3d 905 (6th Cir. 1998).

After the remand, the District Court permitted the parties to conduct discovery regarding the outstanding issues. The parties filed cross motions for partial Summary Judgment on the challenge to the constitutionality of the hiring from the May 18, 1992 eligibility list based on the 1984 ACD. The Court ruled on October 12, 2000 that the hiring from the May 18, 1992 eligibility list using a racial quota was both constitutional and in accord with federal statutory law. *Rutherford v City of Cleveland* Case No. 94

CV 1019 (N.D. Ohio October 12, 2000 ) Appendix at App. 41a. It is this decision and the subsequent Sixth Circuit Court of Appeals Decision in *Rutherford v City of Cleveland* Case No. 04-3904 (6th Cir. June 1, 2006) App. 1a. affirming the constitutionality of the ACD which are the basis for this challenge.

## B. Facts

On the 1992 civil service eligibility list, there were 554 minority applicants out of 1839 persons or 30.1% of all eligible applicants. Out of these 554, a total of 504 minority candidates were considered for the position of police officer by the City. The last non-minority hired from the 1992 Eligibility List was ranked number 455. The last minority hired was ranked number 1370.

The reason that over nine hundred applicants separated the last hired from each racial group was that the City used the ACD to give a racial preference in selecting minority candidates for police officer. Under the 1984 ACD, the City was required to "hire no less than three minority police patrol officers for every four non-minority police patrol officers." This represents a mandated percentage of 42.8% of all hires to be minorities.

The ACD was set to expire either when 33% of the police department were minority officers or on December 31, 1992, whichever occurred first. However, for any year that the City did not hire a minimum of seventy officers, the life of the decree would be automatically extended by an additional year. Regarding the number of police officers hired from 1985 through 1992 there was a total of 677 for an average per year of 84.62.

Petitioners timely brought this litigation after being subjected to the racial quota selection procedures of the ACD after its terms were automatically extended two additional years[1] merely because the inflexible minimum hiring target provision of 70 police officers per year was not achieved in 1986 and 1991. It is interesting to note that the hiring target was missed by only six in 1991, the year before the ACD was scheduled to terminate. This decision, upholding this affirmative action racial selection mandate that lasted twenty-two years, is in conflict with a number of other Courts of Appeals: *Dean v. City of Shreveport,* 438 F.3d 448 (5th Cir 2006); *Quinn v. City of Boston,* 325 F.3d 18 (1st Cir. 2003); *In re Birmingham Reverse Employment Discrimination Litigation*, 20 F.3d 1525 (11th Cir. 1994) and *Maryland Troopers Assoc. v. Evans,* 993 F.2d 1072 (4th Cir. 1993).

The application of the 1984 ACD to the relevant hiring in 1993 and 1994 cannot meet the strict scrutiny analysis in an Equal Protection challenge. *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986). There was no "compelling interest" in maintaining a racial quota after the Decree was supposed to sunset in 1992. None of the victims of the racial discrimination allegedly being practiced by the City in early 1970's were still being assisted by this preferential treatment. Further, the test selection procedures had been validated to avoid unfair discrimination for the previous eighteen years. The record in this case is devoid of evidence of anything but a remote history of discrimination in

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1 If the ACD had terminated at the end of 1992, none of the named plaintiffs or class members would have been subjected to race-based relief because the City did not make the first appointment from the 1992 Eligible List until 2/1/93.

the hiring of police officers by the City of Cleveland. Indeed, there was never any finding of intentional racial discrimination by the Court regarding the Cleveland Police Department even in the 1977 original Consent Decree.

Because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,"*Gratz v. Bollinger*, 539 U.S. 244, 270 (2003), the City bears the burden of demonstrating that its use of a racial quota after two decades of relief is narrowly-tailored to further that compelling interest of remedying past effects or current discrimination. A burden it cannot meet.

Nor can it meet the other prongs of the strict scrutiny analysis. *United States v. Paradise*, 480 U.S. 149, 171 (1987). By 1992, the 1984 Amended Consent Decree could not meet any of the five factors to be considered in the determination of this second prong of the strict scrutiny test: 1) the relationship of the numerical goals to the relevant labor market, 2) the efficacy of alternative, race-neutral remedies and the classification's necessity, 3) the duration, 4) the classification's burden on non-minorities, and 5) the flexibility of the numerical goals. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to decide the limits of affirmative action in the context of employment by state and local governments. The reason for applying strict scrutiny is the recognition that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine

of equality.' " *Shaw v. Reno,* 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100(1943)). This Court has made clear that racial classifications, whatever the motivation for enacting them, are highly suspect and rarely withstand constitutional scrutiny. "[T]he basic principle is straightforward: 'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.' " *Miller v. Johnson*, 515 U.S. 900, 904, 115 (1995) (citation omitted).

The imposition of a racial mandated quota in selection of police officers for over two decades when no finding of intentional discrimination was ever made is counterproductive to the principles of racial equality and the rule of law. As Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Kennedy in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) observed "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." Justice Scalia concurred in the judgment, arguing that racial classifications must be restricted even more narrowly: "[a]t least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb--for example, a prison race riot, requiring temporary segregation of inmates--can justify an exception to the principle embodied in the Fourteenth Amendment that our Constitution is colorblind, and neither knows nor tolerates classes among citizens ...." *Id.* at 521 (citations omitted)

This Court is presently facing similar issues involving affirmative action and its constitutional limits in the context of public schools in *Parents Involved in Community Schools*

*v. Seattle School Dist. No. 1,* 126 S.Ct. 2351 (Mem), 165 L.Ed.2d 277 (2006). The court's opinion in this case is being closely watched and no doubt both litigants and the lower courts will attempt to apply the principles established into matters relating to employment. This case provides a vehicle to answer these important questions and give guidance to applying it to existing court-imposed Consent Decrees in public employment matters. This will promote judicial economy and the development of uniform standards throughout the circuits.

Further, the Sixth Circuit's decision creates a direct conflict with decisions of at least four other circuits requiring this Court to give constitutional guidance to resolve this serious split. The Sixth Circuit approved the City of Cleveland's engaging in race-based quotas without the need of showing that there still existed past effects or current discrimination as required by the *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 507. This litigation provides this Court an opportunity to gauge the constitutional boundaries to limit the need for future litigation on this important question facing the lower courts.

**1. The Court Should Decide Whether the Automatic Extending of Racial Quotas for Additional Two Years in Hiring Police Officers without a Showing of a "Compelling Interest" based on Contemporaneous Racial Discrimination violates the United States Constitution.**

Forged in the crucible of Reconstruction and "[p]urchased at the price of immeasurable human suffering," *Adarand Const., Inc. v. Peña*, 515 U.S. 200, 240 (1995)

(Thomas, J., concurring), the Equal Protection Clause of the Fourteenth Amendment mandates that "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Because the Fourteenth Amendment 'protects persons, not groups,' all governmental action based on race--a group classification long recognized as in most circumstances irrelevant and therefore prohibited--should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)).

The Sixth Circuit decision did not place the burden on the City that it had a compelling interest and that the remedy was narrowly tailored as required by this Court's decision in *Gratz v. Bollinger* 539 U.S. 244, 270 (2003)[2] The City failed to adduce any evidence when the ACD was extended that there was any compelling reason in 1992 two decades after the District Court first imposed a racial quota on hiring that it was still constitutionally required to operate these unfair selection procedures. *Dean v. City of Shreveport,* 438 F.3d at 456-57 (5th Cir 2006) ("If the effects of past discrimination no longer existed when Appellants were denied employment, the City no longer had a compelling interest to justify a

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2. "Even if the ultimate burden of proof were to be placed on the City defendants, we find that they have provided sufficient evidence to meet this burden. Thus, we leave to another day the question of whether parties challenging a remedial race-based plan bear the ultimate burden of proof (as do most parties challenging government action) or rather that burden should be placed on the government-defendants given the important equal protection issues involved." *Rutherford v. City of Cleveland* Case No. 04-3904 (6th Cir. June 1, 2006) App. 14a n5.

race-conscious remedy").

It cannot be disputed that no evidence was submitted by the City prior to the automatic two-year extension of the ACD. The only evidence that existed to meet this obligation of showing a compelling need related to evidence from hearings in 1977 and 1984. This historical review begs the question of whether in 1993 and 1994 could the imposition of racial quotas by the City be constitutionally justified.

In fact, the record in this case is devoid of evidence of anything but a remote history of discrimination in the hiring of police officers by the City of Cleveland. Indeed, there was never any finding of intentional racial discrimination by the City. In 1972, the District Court specifically noted the lack of evidence of intentional discrimination:

> **It is not shown that the racially discriminatory impact of the tests is intentional.** On the contrary, the Civil Service Commission President testified: 'My entire goal was to get the kind of test that would not keep out minority people.' . . .The court concluded and now reaffirms that **because it has not yet been demonstrated that the tests included in the examination are job related**, the defendants have failed to overcome the prima facie showing. *Shield Club v. City of Cleveland*, 5 EPD Para. 8406 at 7028 (December 21, 1972) [emphasis added].

Reviewing the progress of the City in affirmative hiring efforts, the District Court in 1984 when approving the ACD again found no evidence of intentional discrimination

by the City: "The evidence in this hearing and this court's first-hand knowledge of the operation of the consent decree convinces the court that the shortfall in reaching the affirmative action goal of 35.8% minority officers is directly related to fluctuating municipal finances . . . **The evidence indicates and the court finds that the City of Cleveland continues to exercise good faith in carrying out the consent decree** *Shield Club v. City of Cleveland Case* No.72-1088, C-77-346 Slip Op at 8-9 (February 22, 1984)[emphasis added].

Given such good faith and lacking any more recent evidence of discrimination, the extension of the 1984 Consent Decree possibly was not justified. Certainly such evidence cannot be used to justify racial quotas in 1992 and beyond. Petitioners respectfully disagree with the Sixth Circuit conclusion and based on the dictates of *Grutz* argue that a finding of unconstitutionality in this matter would be required since no evidence was adduced to support the ACD in 1992 when it was automatically extend or at the TRO hearing in 1994. The lack of such evidence is not adequate to meet the constitutionally mandated "most exact connection between justification and [racial] classification," *Fullilove v. Klutznick,* 448 U.S. 448, 537(1980).

**2. The Court Should Decide Whether a Consent Decree which Permits an Automatic Extension of its Terms is not "Narrowly Tailored" in Relationship to the Numerical Goals of the Relevant Labor Market in Violation the United States Constitution**

As of 1992 the numerical quota was totally out of

balance with the qualified labor pool. The 1984 Amended Decree's inflexible three "Minority" officers for every four "White" officers meant that almost 43% of new police applicants would be selected by a racial quota. During the same time, the relevant labor pool was *only* 30.6% since only 554 applicants from the eligibility list were "Minority."

The Sixth Circuit decision affirmed the constitutionality of using this rigid racial quota system. *Rutherford v. City of Cleveland* Case No. 04-3904 (6th Cir. June 1, 2006) App. 31a-32a. Compare with *In re Birmingham Reverse Employment Discrimination Litigation*, 20 F.3d 1525, 1548 (11th Cir. 1994) ("The City's rigid approach [50% of all promotions to minority candidates], while administratively convenient, is not a narrowly tailored means to remedy prior discrimination. It is instead an approach designed to achieve government-mandated racial balancing--the perpetuation of discrimination by government. We can imagine nothing less conducive to eliminating the vestiges of past discrimination than a government separating its employees into two categories, black and non-black, and allocating a rigid, inflexible number of promotions to each group, year in and year out. We conclude that the City's use of race in its affirmative action plan is not narrowly tailored to achieve a compelling government interest. Instead, it provides for "blind hiring by the numbers ... amount[ing] to a rigid and impermissible quota system." *Howard,* 871 F.2d at 1009.")

In *Croson*, this Court "recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of

discrimination." *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 501. This Court reiterated, however, that "when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.* (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13).

The 1977 Consent Decree states in item 12(a) that: The [City of Cleveland] shall establish an appropriate minority hiring goal...of 35.8% adopted by the City's 1977 "Affirmative Action Plan" and based upon external labor market figures contained in the 1970 census. *Shield Club v. City of Cleveland* Case No.72-1088, C-77-346 1977.

The 1984 ACD provides that the Decree shall remain in effect "until such time as 33% of the police officers employed by the City are minorities or until December 31, 1992." *Shield Club v. City of Cleveland* Case No.72-1088, C-77-346 1984 Consent Decree.

The 1977 Consent Decree cites the raw labor market figures contained in the 1970 census, rather than relying upon statistics which reflect the actual qualified labor market. The best evidence of the actual labor market is applicant flow data. The City of Cleveland maintained such applicant flow data, which is summarized in the Final Report on the Development and Administration of the 1992 Entry Level Police Examination for the City of Cleveland by N.D. Henderson, Ph.D. at page 42. On the 1992 test, 2035 "White" applicants and 1498 "Minority" applicants took the test. *Id.* Of the individuals that took the test, 1257 "White" applicants received qualifying scores, and 554 "Minority" applicants

received qualifying scores. *Id.* Thus, 1257 "White" applicants and 554 "Minority" applicants were qualified applicants, and thus represent the relevant labor market for the Cleveland Police Department for 1992. *Id.* The comparison of the 1257 "White" applicants and 554 "Minority" applicants reveals that 30.6% of the qualified applicants were "Minority." *Id.* In contrast, the 1984 Amended Consent Decree in effect in 1992 requires a hiring quota of 42.8% "Minority."

The 1984 Amended Consent Decree fails to take into account any of the "winnowing factors" cited in *Hazelwood School Dist. v. United States*, 433 U.S. at 308 n.13 (1977) These factors would be any of the criteria that the Cleveland Police Department set as the qualifications for Police Officer, including age, education, and background factors such as having no felony convictions. Other factors include applicant interest in the job and willingness to relocate to the City of Cleveland for non-resident applicants.

The terms of the 1977 Consent Decree do not define the relevant labor market with clarity. Instead, the 1977 Consent Decree merely alludes to labor market figures from the 1970 census. This labor market is obviously overbroad, as it fails to take into account basic requirements such as age and education. In addition, a geographic area is not specified. Although Petitioners do not challenge the 1977 Consent Decree, the analysis of the labor market used therein is relevant because the 1984 ACD accepts without question the numbers used in the 1977 Consent Decree. The 1984 ACD does not even address the relevant labor market. Rather, it simply incorporates without question the 33% goal derived from the 1970 census. Thus, fourteen years of applicant flow data are simply ignored. The City cannot meet its burden of

production by referring generically to labor market figures from the 1970 census as justification for extending the ACD in 1992.

### 3. The Court Should Decide Whether a Consent Decree which Permits an Automatic Extension of its Terms is not "Narrowly Tailored" as Required by the United States Constitution When It Extended its Racial Quota Even Though There had been Eighteen Years of Job Related and Validated Civil Service Tests.

This Court in *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986) explained that:

> The term "narrowly tailored," so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used.... The classification at issue must "fit" with greater precision than any alternative means.

*Id.* at 279 n.6. The use of validated non-discriminatory testing procedures might be an acceptable alternative to race-based relief. The City had not validated its 1972 test when the original Shield Club litigation was brought against the City. This factor and the statistical disparity between African-American Cleveland police officers and the race of the residents of the City of Cleveland formed the basis for the imposition of the racial quotas challenged in this case. *Rutherford v. City of Cleveland* Case No. 04-3904 (6th Cir.

June 1, 2006) App. 3a-4a. However, ten years prior to the 1984 ACD, this deficiency had been corrected by the City. In 1974, the City of Cleveland constructed a new examination for police officer which was validated for job relatedness and, as the District Court found, was ". . . as free as possible from any cultural racial bias, pursuant to the order of ...[the] court entered on December 21, 1972. *Shield Club v. City of Cleveland*, 8 EPD Para. 9614 at 5635 (September 6, 1974) Nor should the bare fact of a statistical disparity between the race of the workforce and a municipality's population be sufficient to justify twenty-two years of racial quotas. *Maryland Troopers Assoc. v. Evans,* 993 F.2d 1072, 1074 (4th Cir. 1993)("We think that bare statistical comparisons constitute a treacherous rationale for the installation of race preferences, and that the comparisons adduced in this case fall far short of justifying a state-imposed, race-conscious remedy.")

The Sixth Circuit decision rejected the effectiveness of this alternative explaining "[i]n this case, however, the job-validated examinations and screening procedures were not effectively remedying the effects of past discrimination at the time the City entered the ACD. Although the patrol officer examination was validated in 1974, by 1984 the City's proportion of minority officers had only reached 20.8%. The 3:4 hiring ratio simply sped up the City's progress towards achieving its goal of a police workforce made up of 33% minority officers." *Rutherford v. City of Cleveland,* Case No. 04-3904 (6th Cir. June 1, 2006) App. 22a. *But see, In re Birmingham Reverse Employment Discrimination Litigation*, 20 F.3d 1525, 1548-49 (11th Cir. 1994); *See also, Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620 (1974) ("But the simplistic percentage comparisons... lack real meaning in the context of this case.... [T]his is not a

case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded").

This analysis presumes that the constitutionally deficient 33% racial quota was valid. Given such good faith and lacking any more recent evidence of discrimination, the extension of the ACD was not justified. All written entrance examinations for Cleveland Police Officers, beginning with the February 23, 1974 entrance examination through the 1992 entrance examination, were validated for job relatedness.

Sometime after Cleveland began using a validated test, it was not necessary to use race–based relief. The City admits that it had been using written entrance examinations for Cleveland Police Officers that had been validated for job relatedness for *18* years prior to the 1992 test. Using validated tests for this length of time clearly eliminated the need for race-based relief by 1992.

### 4. The Court Should Decide Whether a Consent Decree which Permits an Automatic Extension of its Terms is not "Narrowly Tailored" in its Duration as required by the United States Constitution.

The District Court imposed racial quotas in 1972 in hiring of police officers for the City of Cleveland. *Rutherford v. City of Cleveland,* Case No. 04-3904 (6th Cir. June 1, 2006) App. 3a. A formal Consent Decree was entered into in 1977 and the ACD in 1984. *Id.* at 4a. These racial quota's continued based on an automatic 2 year extension until 1995 when the District Court formally dissolved the ACD some

twenty-three years later. *Rutherford v. City of Cleveland,* Case No. 94 CV 1019(N.D. Ohio October 12, 2000 ) Appendix at 56a.

As Judge Roger's Sixth Circuit concurring opinion observed:

> **First, the ACD arguably had been in place too long to be narrowly tailored.** In an affirmative action plan seeking to remedy past discrimination, there are essentially three possible groups that stand to benefit: (1) those actually discriminated against, (2) those not actually discriminated against but who are members of the same group as those discriminated against and who were around at the time the discrimination took place (justifying a limited remedy of, for example, up to 10 years), and (3) other members of that group at any time (as an extreme example, 75 years after the discrimination). **In this case, the minority recruits are mostly members of the third group because few of them would have been old enough to be hired as a police officer when the discrimination took place in the 1970s.**

*Rutherford v City of Cleveland* Case No. 04-3904 (6th Cir. June 1, 2006) App. 36a. [emphasis added]

The twenty-two year period of racial quotas is simply too long to meet the narrow tailoring requirement under the U.S. Constitution. Whatever evidence of discrimination was too remote to support such affirmative action relief. The approach by the Fifth Circuit in *Dean v. City of Shreveport,*

438 F.3d 448, 461 (5th Cir 2006) provides the proper constitutional standard:

> The durations of the remedies [22 years] in this case are breathtakingly long in comparison to others we have reviewed. *Edwards v. City of Houston*, 78 F.3d 983, 1002 (5th Cir.1996) (en banc), involved a consent decree that allowed a police department to promote a certain number of minority officers to sergeant and lieutenant. The remedy was to last no longer than five years. *Id.* In *Black Fire Fighters Ass'n,* 19 F.3d at 997, we struck down a consent decree that allowed a fire department to promote a certain number of minorities to higher ranking positions. We found the remedy not to be narrowly tailored even though it lasted for only three years. *Id.* Finally, in *Police Ass'n,* 100 F.3d at 1173, we again struck down a race-conscious promotional plan. We found the remedy not to be narrowly tailored even though it was a one-time set of promotions, not an ongoing plan.

*Id.* at 1169.

**5. The Court Should Decide Whether a Consent Decree which Permits an Automatic Extension of its Terms is not "Narrowly Tailored" in the Classification's Burden on Non-Minorities as required by the United States Constitution.**

This *Paradise* factor requires the balancing of the impact of the relief on the rights of third parties. Here, the

application of race-based hiring goals to the 1992 Eligible List drastically affected the rights of the class representatives and class members. The dream of many of these individuals was to become a Cleveland Police Officer. Yet, due to the unwarranted extension of the racial quotas in the 1984 ACD for an additional two years, many of the class members were not even considered for the position of Police Officer. There were 78 minority officers appointed from the 1992 Eligible List who ranked below the last non-minority officer appointed from the List.

Class Representatives Janell Rutherford and Richard Dembie both took the 1996 Cleveland Police Officer test and were subsequently hired after the ACD was dissolved by the District Court. However, their seniority rights and opportunities for promotion have been adversely affected by the imposition of the two-year automatic extension of the ACD. Class Representative Kevin Reilly became a police officer in another suburb, but was denied the opportunity to work in the City of Cleveland with his father a long term Cleveland police officer. As for Julie Torres, a single parent who was 85th on the eligibility list, she has never become a police officer. Ms. Torres is one example of many of the class members who have given up their dream of becoming a Cleveland Police Officer and have moved on to other careers. For them, the impact of the race-based relief caused the denial of their dream..

As Judge Roger's Sixth Circuit opinion observed:

> ...the consent decree was open-ended depending on the actions of the City. By continually hiring fewer than seventy police officers per year, the City could have extended the ACD indefinitely.

> A consent decree that permits affirmative action as an ongoing option, rather than as a limited requirement, should not so easily be maintained by relying on the discriminatory situation faced at the time of the original decree. **The reasonableness of the 70-per-year rule in terms of protecting minorities from city evasion of consent decree requirements does not necessarily imply that the rule is narrowly tailored for purposes of protecting the interests of nonminority applicants adversely affected by the decree.**

*Rutherford v. City of Cleveland,* Case No. 04-3904 (6th Cir. June 1, 2006) App. 37a-38a. [emphasis added]

The combined duration of the 1977 Consent Decree and the 1984 ACD was for a period of seventeen years and six months from November 11, 1977 to May 15, 1995. Race-based hiring quotas were in place for over twenty-two years. There can be no doubt that the extreme length of this remedy significantly and adversely impacted the right of third parties.

**6. The Court Should Decide Whether a Consent Decree which Permits an Automatic Extension of its Terms is not "Narrowly Tailored" in the flexibility of the Numerical Goals as Required by the United States Constitution.**

The 1984 ACD did not have any meaningful waiver provisions in the event that the pool of qualified "Minority" applicants was low for any given year. In fact it contains a provision that specifically provides that "[s]hould the [City of

Cleveland] exhaust the pool of qualified minority applicants from any given list, the [City] shall administer new entrance examinations and shall prepare new eligible list."

In 1992, the City of Cleveland had an African-American Mayor, Police Chief, Safety Director and City Council Safety Committee Chair. During the two year extension of the racial quotas under the ACD, the City of Cleveland considered 504 of the 554 minority applicants on the 1992 eligibility list. Because of the ACD, the City hired minorities who ranked nine hundred positions lower than the last non-minority hired. As the Fourth Circuit warned "[a]ll too easily, invidious racial preferences can wear the mask of remedial measures--a risk that only magnifies as the governmental body gets smaller and more susceptible to interest-group capture." *Maryland Troopers Assoc. v. Evans,* 993 F.2d 1072, 1076 (4th Cir. 1993).

As a result of the ACD, unqualified minority applicants were hired off the 1992 eligibility list. The Petitioners expert, Dr. Bryan Pesta, prepared a report and attachments showing examples of minority candidates who were hired in spite of not even being minimally qualified for the job based upon the background checks and other allegedly nondiscriminatory selection procedures. Dr. Pesta, in his report, that was never rebutted, made a series of findings including that the minorities hired had such negatives "that I would have no problem rejecting, were I the safety director." Applying these standards his report gave the following examples of minority applicants hired by the City of Cleveland from the 1992 eligibility list:

Minority # 77, while employed as a police officer at another municipality , had

placed his service revolver at his girlfriend's head and threatened to kill her. He later threatened to kill himself. Reports indicated that the applicant had a temper, though his MMPI-2 information is missing. Applicant's employment history showed that he was terminated from his position as store detective for Marc Glassman, Inc. The applicants file also revealed four traffic violations and two incidents in the police record. The applicant graduated 363rd in a class of 370, with a GPA of 1.202 and had been tardy 57 days in his senior year.

Minority # 48 reported a voluntary departure from Stouffer's Hotel, but the interview with the former employer revealed that the applicant was in fact terminated for failing to report his involvement in an accident while driving the employer's vehicle. Applicant also reported that he quit Reliable Runners, though he was fired due to a vehicle problem. The police record revealed drunken and disorderly conduct charges. Initially, the applicant was rejected for a composite of unsuitable characteristics, notably the police record, accident record, and employment record. Applicant was reinstated by the Civil Service Commission and subsequently hired.

Minority applicant # 31 had four traffic violations, though he reported only two. These included a reckless operation in 1992. He also had a domestic violence charge and a juvenile violation, neither of which were reported. An

interview with a neighbor noted that applicant had a quick temper, and the police records indicated that applicant was charged with simple assault in November of 1992.

Minority applicant # 45 reported two traffic violations, though his record revealed four. The two reported and the four revealed were all different, thus showing a total of six traffic violations, in addition to a warrant issued in December of 1992 and a six point warning letter in 1990. The MMPI-2 screening report showed that the applicant may not deal with anger effectively if provoked, and may have problems with somatic distress. The City was also notified by an anonymous caller that the applicant sold drugs every evening in a playground.

Minority applicant # 23 had three traffic accidents and police record showed an attempted vandalism charge. Applicant also had six traffic violations, one of which was not reported by him. The unreported violation was a 1992 DUI charge, and the court record of the November 10, 1992 guilty plea is contained within the applicant file. In December of 1992, applicant received a six point warning letter. He was not recommended until Carolyn Allen, the Public Safety Director, intervened.

Using this evidence, the impact of the ACD is apparent since the City instead of undertaking a new test chose to select minority applicants who ranked up to nine

hundred spots lower on the eligibility list than the last non-minority hired. Selection of these applicants not only injured the class members, but residents of Cleveland suffered by the quality of new police officers hired under the ACD.

In addition to the lack of any meaningful waiver provisions, the 1984 ACD was inflexible in other ways. The 1984 ACD requires that 70 persons be hired per year or that year would not be considered towards achieving the goals of the Decree, regardless of the number of minorities hired and regardless of the City's operational needs. This provision fails to take into account that other years were well above the 70 person hiring requirement. Indeed, the average hiring per year for the time period 1985 through 1992 was 84.62 police police officers per year. Therefore, the City of Cleveland hired more officers (and therefore more minorities) than the minimum required per year by the ACD, yet the Decree continued for an additional two years. This lack of flexibility was arbitrary in its effect as it bore no relationship to any legitimate minority hiring goals. *U.S. v. Paradise,* 480 U.S. at 177-78 The 1984 ACD had no provision to account for the natural fluctuations in the City of Cleveland's budget and operational needs. Thus, it was not narrowly tailored as constitutionally required.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

EDWARD G. KRAMER
*COUNSEL OF RECORD*
DAVID G. OAKLEY
KRAMER & ASSOCIATES, L.P.A.
3214 PROSPECT AVENUE, EAST
CLEVELAND, OHIO 44115
(216)431-5300
COUNSEL FOR PETITIONERS