NO. 84-1656

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION AND LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

*Petitioners,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF FOR RESPONDENT THE CITY OF NEW YORK

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## Questions Presented

1. Whether as a remedy in an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or as a civil contempt remedy for violations of a Title VII judgment, a court may award race-conscious relief not limited to benefitting proven victims of the prior discrimination, where the proven discrimination was intentional and egregious, compliance with remedial orders has been, at best, grudging, and at worst, totally lacking, and where the effects of the discrimination remain vigorous more than ten years after entry of the District Court's original findings of discrimination.

2. Whether race-conscious remedies violate the equal protectino guarantee of the Due Process Clause of the Fifth Amendment.

3. Whether the proof in this case supported the 1982 contempt findings and the findings of discrimination made in 1975 and sustained on appeal in 1976 and 1977.

4. Whether the contempt remedies imposed in this case were appropriate sanctions for findings of civil contempt.

5. Whether the District Court properly exercised its discretion in appointing an administrator in 1975 to supervise compliance with its orders in this case and in continuing his term of office in 1983.

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## Statement of the Case

For over twenty years respondents the City of New York (the "City") and the New York State Division of Human Rights (the "State") have worked to open membership in Local 28 of the Sheet Metal Workers' International Association ("Local 28" or the "union") to non-whites.* In proceedings before the State Commission for Human Rights, the City Commission on Human Rights, the New York State Supreme Court and the United States District Court, respondents have sought to bring petitioners Local 28 and the Joint Apprenticeship Committee ("JAC") into compliance with City, State and federal laws guaranteeing equal employment opportunity, and to prevent them from obstructing the City's efforts to implement Presidential and Mayoral executive orders which require contractors employed by the City to act affirmatively to open employment opportunities to previously excluded groups. The sorry history of petitioners' consistent and intentional resistance to those efforts is a regrettable testament to the need for the Employment, Training, Education and Recruitment Fund which, *inter alia*, petitioners are seeking to have this Court overturn.

The need for this Fund has been well documented by numerous decisions of the District Court throughout the course of this litigation and reaffirmed by three decisions of the Second Circuit Court of Appeals. Petitioners' attempts to portray themselves as innocent victims suffering under unjustly imposed draconian remedies cannot with-

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*The term "non-whites," when used in this brief, refers to black and Spanish sur-named individuals.

stand scrutiny. Indeed the facts supporting the 1975 findings of intentional discrimination and the 1982 and 1983 contempt decisions are virtually undisputed (A 13, 20, 215; JA 210-13, 248-51; Pet. Br. on Merits at i, ii, 35-37).

## I. Local 28's History of Intentional Racial Exclusion

The Sheet Metal Workers' International Union (the "International") was formed in the last quarter of the nineteenth century (JA 403, 404).* Until 1946, it Constitution and Ritual provided for the establishment of "white local union(s)" and authorized each of these locals to organize an "auxiliary" local union "subordinate to the ... white local," when there was a "sufficient number of eligible Negro applicants" (A 322).

Local 28 was established in 1913 as the "white local union" representing most sheet metal workers in New York City (A 322).** Since 1913, Local 28 has grown to dominate work in the construction sheet metal trade in New York City (JA 406). The District Court found that Local 28 had "substantial, if not complete control, of job opportunities" among the sheet metal contractors with which it main-

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* References to "A" are to the Appendix to petitioners' Petition for Writ of Certiorari. References to "JA" are to the Joint Appendix filed with petitioner's Brief on the Merits.

** Between November 1981 and March 1982, Local 28 merged with five, largely white, sister locals and now represents sheet metal workers in New York City, in Nassau and Suffolk Counties in New York State and in Essex, Passaic, Hudson and Bergen Counties in New Jersey (A 129, 157).

tains collective bargaining agreements (A 324). Local 28 has used its control over opportunities to work in the trade to severely restrict the number of individuals who are authorized to work on jobs that are subject to its contracts (A 346; JA 406), and has sought consistently to favor the sons, relatives and friends of its members whenever it accords new opportunities for membership (A 330; JA 407).* Although the provision of the International's Constitution and Ritual providing for "auxiliary" locals was deleted in 1946, Local 28 steadfastly refused to admit any non-whites until it was forced to do so by court order in November 1964 (A 411; JA 393).

## II. Proceedings Before the New York State Commission for Human Rights and the New York State Supreme Court

On January 2, 1963, the New York State Attorney General instituted a proceeding before the State Commission for Human Rights (the "State Commission"), charging Local 28 and the JAC with discrimination against blacks in the designation and approval of applicants for sheet metal apprenticeship and training (JA

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*An individual can gain membership in Local 28 via: (1) graduation from the apprenticeship program administered by the JAC; (2) transfer directly from a "sister" union; (3) taking and passing a battery of journeyman level tests administered by the union's Examining Board; and (4) admission at the time a non-union sheet metal shop is organized by Local 28, upon certification by the employer that the shop's workers perform at journeyman standards (A 212). In addition, during periods of full employment within the trade, the union issues temporary "identification slips," or "permits," which entitle non-members to work within the union's jurisdiction. Roughly 90% of Local 28 journeymen enter through the apprenticeship program (A 120).

378, 393). The State Commission's efforts to remedy the unlawful discriminatory practices complained of through informal means were unsuccessful (JA 379).

Following public hearings, the State Commission found that Local 28 and the JAC had "denied to or withheld from qualified Negroes because of their race and color the right to be admitted to or to participate in their sheet metal apprentice training program . . ." (JA 387). Specifically, the State Commission found that admission to the apprenticeship program was left to the "exclusive judgment of Local 28" (JA 406).* Apart from an 18-23 age requirement, apprentices were selected solely on the basis of a personal interview and those applicants who appeared with union sponsorship— largely relatives and friends of union members— were routinely selected (JA 383-84, 386, 406). The State Commission noted that in 1964, at least 80% of all apprentices in the entire apprenticeship training program were relatives of Local 28 members (JA 386), and found that "virtually the only way of gaining admission into Local 28 is through apprenticeship" (JA 407). The State Commission concluded that petitioners' nepotistic admission system operated as an impenetrable barrier for non-whites (JA 407-08).

The State Commission ordered Local 28 and the JAC to "cease and desist" from future discriminatory conduct in violation of the New York Law Against Discrimination (JA 388). The union and the JAC were directed to establish objective written standards and a validated aptitude test for the selection of apprentices and to maintain rec-

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* John Mulhearn, Recording Secretary of Local 28, testified: I take the applications and I appoint the boys, period." *See* Exhibit Volume to Joint Appendix filed with Second Circuit Court of Appeals on October 10, 1975 at 919.

ords that would permit the State Commission to monitor compliance with its order (JA 388-91).

Subsequently, in June 1964, the State Commission commenced enforcement proceedings against Local 28 and the JAC in New York State Supreme Court (A 412). New York State Supreme Court Justice Markowitz affirmed all of the State Commission's findings and held a series of conferences with the parties to develop a negotiated remedial program "in the hope that the desirable objectives [of the State laws against discrimination] might be achieved by conciliation and agreement rather than by the force of law" (A 414, 415).

Even though the union's nepotistic practices had been identified as a primary source of unlawful discrimination, the union siezed upon the conciliation process as an opportunity to gain the Court's approval of its practice of granting preferences to the sons and sons-in-law of union members (A 421). The Court found this preference racially discriminatory and in violation of the New York State Constitution and State law (A 421). Ultimately, with the Court's active participation, the parties developed, and petitioners agreed to be bound by, a "Corrected Fifth Draft of Standards for the Admission of Apprentices" which set forth objective standards for, *inter alia*, apprentice selection, training, admission fees and length of apprenticeship (A 427-40). In addition, the Court secured the agreement of the union to indenture apprentice classes on a regular basis (A 440).

Despite their obligation to indenture apprentice classes on a regular basis, and the parties' agreement that a class of 65 apprentices would be admitted in September, 1965, petitioners unilaterally suspended the processing of applications for that class. *State Commission for Human*

*Rights* v. *Farrell*, 47 Misc 2d 244, 245, 262 NYS 2d 526, 527-28 (Sup. Ct. N.Y. Co.), *aff'd*, 24 AD 2d 128, 264 NYS 2d 489 (1st Dep't 1965). The State Commission was forced to bring an enforcement proceeding in the New York State Supreme Court, and the Court ordered Local 28 and the JAC to enter the apprentice class of 65 members by October 30, 1965. *Id.* When the union requested reconsideration of the order, seeking to reduce the class size from 65 to 30, the Court flatly refused and castigated the union for refusing "except for token gestures, to further the integration process. . . ." *State Commission for Human Rights* v. *Farrell*, 47 Misc 2d 799, 800, 263 NYS 2d 250, 252 (Sup. Ct. NY. Co. 1965).

Petitioners' pattern of resistance to integration continued unabated. In 1967, the State Commission again requested a hearing before the New York State Supreme Court upon learning that petitioners were planning to ignore the results of the most recent apprenticeship examination and administer an entirely new test, on the ground that non-whites had received "unfair tutoring" and passed in unreasonably high numbers. *State Commission for Human Rights* v. *Farrell*, 52 Misc 2d 936, 277 NYS 2d 287 (Sup. Ct. NY. Co. 1967). The Court found no evidence of unfair tutoring and ordered petitioners to indenture the apprentices on the basis of the examination results. *State Commission* v. *Farrell*, 52 Misc 2d at 942-43, 277 NYS 2d at 293-94. The New York Supreme Court's decision was affirmed on appeal by both the Appellate Division and the New York Court of Appeals. *See State Commission for Human Rights* v. *Farrell*, 27 AD2d 327, 278 NYS 2d 982 (1st Dep't), *aff'd*, 19 NY2d 974, 281 NYS 2d 521, 228 NE2d 691 (1967). Nonetheless, petitioners found a way to circumvent these decisions and the entire thrust of the State Supreme Court's

injunction—they began subsidizing "cram courses" for friends and relatives of union members preparing to take the apprenticeship examination (A 214, 352).

### III. The Federal Action

Petitioners' continuing failure to comply with the injunction of the New York State Supreme Court led to the 1971 commencement of this action by the United States Department of Justice (the "Government") pursuant to Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.*, and Presidential Executive Order 11246 (JA 372). The complaint alleged that petitioners had engaged in a pattern and practice of discrimination by failing to recruit non-whites for membership, failing to admit non-whites into the union, refusing to permit Local 28 contractors to fulfill their affirmative action obligations under Executive Order 11246 and "failing and refusing to take reasonable steps to eliminate the effects of their past discriminatory policies and practices" (JA 372-73). The Government requested that the District Court enjoin petitioners' continuing refusal to treat non-whites on the same basis as whites and mandate the "selection of sufficient apprentices from among qualified non-white applicants to overcome the effects of past discrimination" (JA 373-74).

Shortly after the filing of this action, the New York City Commission on Human Rights commenced an administrative proceeding against Local 28 alleging that the union had violated the City Human Rights Law by engaging in racially discriminatory apprenticeship, membership,

and job referral practices (A 393).* On June 2, 1972, the City moved to intervene in the instant action on the basis that, *inter alia*, such intervention was necessary to ensure compliance with the City Human Rights Law and Mayoral Executive Order 20 (A 393). The unopposed motion was granted (A 393).

Following the 1974 strikes and work stoppages which marked petitioners' refusal to accept trainees referred to Local 28 contractors pursuant to Executive Order 11246 and EO 20 (A 326; JA 320, 354-55), the District Court issued several injunctive orders. In an interim order entered on April 9, 1974 and effective through June 30, 1974, the District Court (Gurfein, J.) required the JAC to provide advanced placement in the apprenticeship program for six minority individuals who had been referred as trainees on four City construction sites (JA 366).

This order was superseded by a more comprehensive order entered on July 2, 1974 (JA 363). The July order required that by September 1974 the JAC assign for employment a new class of 60 apprentices which would include 20 minority and 40 non-minority apprentices, and that it process up to 20 applications for advanced placement in the apprenticeship program (JA 363). The JAC undertook only minimal efforts to comply with the District

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* The proceeding was based, in part, on the refusal by Local 28 and the JAC to comply with Mayoral Executive Order 20 ("EO 20") (A 326; JA 320, 354). Enacted by Mayor John V. Lindsay in 1970, EO 20 required that contractors on City sites employ one "minority trainee" for every four journeymen employed and was enacted to increase the representation of non-whites in the construction trades in accordance with the dictates of Presidential Executive Orders 11246 and 11375 (JA 354). Local 28 was the only local in the City which refused to comply with EO 20 (A 326; JA 320, 354).

Court's July order and informal efforts by respondents' counsel to secure compliance were unsuccessful (JA 356-58). Only under threat of contempt citations did petitioners eventually comply (A 215; JA 342).

After a three-week trial, Judge Werker concluded that petitioners had engaged in a pattern of intentional discrimination which operated to block non-whites from all routes to admission to membership in Local 28. The Court concluded that the petitioners' recruitment, selection, training and admission practices violated both Title VII and the City Human Rights Law (A 350-51).*

The apprenticeship program is the primary method by which new members gain entrance to Local 28 (A 120, 151, 325; JA 303). Between 1967 and 1973, non-white participation in the apprenticeship program *fell* from 21.8% to 9.8% (A 327).** The Court found that this was the result of utilizing a discriminatory apprenticeship entrance examination (A 338) and unlawfully excluding all apprenticeship applicants who did not possess a high school diploma (A 340). The Court further found that petitioners had discriminated against non-whites by expending union funds to prepare relatives and friends of members for the apprenticeship examination (A 352).

The District Court addressed at length the intentionally discriminatory practices of Local 28 that precluded non-

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*As the City details here, even an indulgent reading of Judge Werker's decision on liability could not lead an unbiased reader to conclude, as the petitioners have, that petitioners were found in violation of Title VII, "largely for obeying the... (order of) the State Court." Pet. Br. on Merits at 5.

**It subsequently rose to 13.99% in 1974 as a consequence of judicial intervention (A 327; JA 320, 363).

whites from obtaining direct admission to membership status as journeymen. After observing that qualified non-white sheet metal workers existed in large percentages in other construction locals in New York City, and noting the near total absence of such workers among the membership of Local 28 (A 342-44), the District Court found that Local 28 denied access to qualified non-whites by: (1) failing to administer journeyman examinations and using journeyman examinations which had not been validated pursuant to EEOC Guidelines; (2) selectively organizing non-union sheet metal shops with few, if any, non-white employees, and/or admitting from those shops only white employees; and (3) accepting whites from affiliated sister locals as transfer members while refusing transfers of non-whites. Local 28's refusal to open its ranks to experienced non-union sheet metal workers served, in conjunction with its discrimination in the apprenticeship program, to maintain Local 28 as an almost entirely white union (A 344-51).

Although the sheet metal industry experienced a significant expansion between 1967 and 1972, Local 28 administered only two journeyman entrance examinations during that entire period (A 344-45). This exclusionary practice resulted in a critical shortage of workers which became so severe that the Sheet Metal and Air Conditioning Contractors' Association of New York City ("Contractors' Association") was forced to seek relief by initiating arbitration proceedings against Local 28 (A 344-45). The journeyman tests ultimately administered in 1968 and 1969 were solely the result of arbitration awards mandating that Local 28 admit new members (A 344-45). In addition to finding that the refusal to administer journeyman examinations denied non-whites access to the industry (A 346), the

District Court also found that the 1968 test had an adverse racial impact. All of the 25 candidates who passed were white (A 345).

Although the shortage of workers continued, Local 28 refused to administer a journeyman test in 1970 and instead increased the available manpower by issuing hundreds of "identification slips," or "permits" (A 346).* Between 1968 and 1972 the number of permits issued by Local 28 rose from between 150 and 200 to between 400 and 500, and all but one of the permits were issued to whites, many of whom were members of allied construction unions (A 346). Local 28 conceded that these men did not possess skills equal to those of journeyman sheet metal workers in Local 28, and had not been required to take a test as a prerequisite to working in Local 28 (JA 287-88). The District Court found that although Local 28 requested temporary workers from sister locals throughout the country, it never once contacted the Blowpipe Division of Local Union 400, IASMW, a union of workers with sheet metal skills, which was comprised almost entirely of non-whites (A 346-48). The District Court also found that the president of Local 28 had misled qualified non-whites into believing that they could only work with Local 28 by taking and passing the journeyman test (A 349).

The District Court found that since 1963, in violation of the International's Constitution and Ritual, Local 28 had a policy of accepting transfers only of former members of Local 28 (A 350; JA 284-85). Since the membership of Local 28 was entirely white prior to the time this policy was

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* Rather than expand its membership, Local 28 also recalled pensioners to work and, in addition, offered an extraordinary amount of overtime work to its journeyman members (A 346; JA 286, 316-17, 338-39).

instituted, non-whites were automatically excluded from consideration for transfer (A 350). The District Court found that during the period 1967 through 1972, 57 white persons were permitted to transfer into Local 28. No non-whites were allowed to transfer during that period, although a number tried to gain admission (A 349).

No non-whites became members of Local 28 through the organization of non-union shops prior to a 1973 agreement among the parties in this case (A 347). The union's proferred explanation—that it was not aware of non-union shops owned by or employing non-whites and had no policy restricting organizing to white shops—was rejected by the District Court as incredible (A 347). The District Court found that it was common knowledge in the industry that Local 28 avoided organizing non-white shops and, more specifically, that Local 28 refused to organize blowpipe contractors precisely because their members were non-white (A 214, 348).

## IV. Early District Court Efforts to Remedy Petitioners' Discriminatory Conduct

In fashioning relief to remedy the multifaceted and clear pattern of intentional discrimination by Local 28 and the JAC, the District Court took note that "[t]he record in both state and federal court against [petitioners] is replete with instances of their bad faith efforts to prevent or delay affirmative action" (A 352). In light of petitioners' failure to take "any meaningful steps to eradicate the effects of [their] past discrimination," (A 352), the District Court concluded that "the imposition of a remedial racial goal in conjunction with an admission preference in favor of non-whites is essential to place [petitioners] in a position of compliance with the 1964 Civil Rights Act" (A 352).

The District Court relied on the 1970 Census conducted by the Department of Commerce for the calculation of the goal (A 353-54; JA 254-74). "[A]fter full consideration of the depressed condition of the construction industry [in 1975], and in the firm belief that a gradual but steady influx of non-whites [would] produce the most stable membership," the District Court ordered that petitioners achieve a combined union and apprenticeship program membership of 29% by July 1, 1981 (A 354 & n.30).

The goal was only one feature of the comprehensive program ordered by Judge Werker to remedy petitioners' discriminatory practices. In his August 1975 Order and Judgment ("O&J"), in addition to enjoining all of the specific recruitment, selection, training and admission practices which he found discriminatory, and imposing the goal, Judge Werker appointed an administrator to work with the parties in developing and implementing a program that would facilitate achievement of the goal (A 300-07). The O&J required that the program include at least the following: 1) provision for a professionally validated journeyman examination to be administered at least once a year; 2) provision for a professionally validated apprenticeship entrance examination to be administered at least once a year; 3) provision for detailed record keeping by Local 28 and the JAC including maintenance of separate records for whites and non-whites regarding the overall composition of the Local 28 work force and hours worked, individuals who apply for, take, and pass the apprenticeship and journeyman examinations and persons who seek to transfer into Local 28 or obtain permits; and 4) provision for a program of advertising and publicity in order to dispel petitioners' reputation for discrimination in the non-white community (A 308-13).

As is evident, the District Court determined, based on the history of petitioners' failure to comply with earlier State and federal court orders, that Local 28 and the JAC would not take any meaningful steps to end their unlawful discrimination against non-whites without a closely monitored and comprehensive program. Accordingly, the O&J required development of a plan that would keep the paths to union membership open and assure steady progress toward the level of non-white membership that would have existed in the absence of the pattern and practice of discrimination engaged in by Local 28 and the JAC.

The Affirmative Action Program ("AAP") entered in November 1975 pursuant to the O&J included all of the above components, each developed in great detail (A 230-54). It also set forth interim percentage goals (A 232), and provided that selection from among applicants who passed the apprenticeship and journeyman examinations was to be made according to a white non-white ratio to be determined by the parties (A 234, 245). The AAP further provided that Local 28 could issue permits only with the express consent of the Administrator (A 241).

In 1976, the Court of Appeals affirmed Judge Werker's findings of discrimination against Local 28 and the JAC, finding that (A 212):

> [t]here is ample evidence that all the routes into Local 28 have been blocked to minority group members as a result of discriminatory practices by Local 28 and the JAC. The trial record in this case is voluminous and the facts before the district court were more than adequate to sustain its findings. Local 28 and the JAC have consistently and egregiously violated Title VII.

In view of petitioners' "long and persistent pattern of discrimination," the Court of Appeals upheld the 29% membership goal as a temporary remedy, distinguishing it from "a quota used to bump incumbents or hinder promotion of present members of the work force" (A 222). The Court also approved the appointment of the Administrator (A 219). Like Judge Werker, the Court of Appeals concluded that (A 220):

> [t]he apparent failure of the New York court order to change Local 28's membership practices to an appreciable extent and the rather reluctant response made by Local 28 to Judge Gurfein's orders convince us that it is necessary for a court-appointed administrator to exercise day-to-day oversight of the union's affairs.

The Court declined to permit the permanent use of any implementing ratios (A 223-25), although the interim use of such ratios pending the development of job-related tests was approved (A 225).* The petitioners did not seek review in this Court.

In response to the 1976 opinion of the Court of Appeals, and to changed conditions in the sheet metal industry, the District Court entered a Revised Affirmative Action Program and Order ("RAAPO") in 1977 (A 183) For the most part, RAAPO carried forward the plan outlined in the AAP. The most significant difference was that the date for attaining the 29% goal was moved to 1982, and the interim goals adjusted accordingly, because the District Court had determined that depressed conditions in the sheet metal industry made achievement of the 29% goal

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* None of the orders to which the petitioners are now subject require that apprentices or journeymen be admitted pursuant to a white/non-white ratio.

by 1981 impracticable (A 183-84; JA 164-65). RAAPO also provided that apprentice classes be indentured twice annually and that the JAC forward its recommendations for class size to the Administrator no less than 90 days before the indenture of each class (A 192). With respect to publicity, RAAPO, like the AAP, required publicity campaigns prior to each journeyman and apprenticeship examination (A 203). It further required that prompt development of a general publicity campaign in efforts to enlarge the pool of eligible non-white applicants to Local 28 (A 203-04).*

In an October 1977 opinion, the Court of Appeals upheld RAAPO in its entirety (A 160). The Court of Appeals considered, but rejected by a divided vote, the union's contention that the 29% membership goal was excessive because it was based on the non-white percentage of the labor pool in New York City rather than a wider geographic area (A 167). Again, petitioners did not seek review in this Court.

## V. The 1982 Contempt Proceeding

Between 1974 and 1982, the total non-white membership of Local 28 increased from 3.19% (A 165) to 10.8% (A 9), a mere 7.5 percentage points. The non-white journeyman membership in 1982 was only 6% (A 151). Petitioners had not come close to attaining the 29% non-white membership goal which, assuming compliance with RAAPO, they were expected to reach in July 1982. Nor had they sought to have the goal modified or to be relieved from any obliga-

*As Judge Werker noted in his 1975 opinion, Local 28's reputation for nepotism prevented non-whites from even attempting to contact the JAC regarding membership opportunities (A330 n.9).

tion under RAAPO. By 1982, it was clear that the failure to even approach the goal was the direct result of specific acts by petitioners in violation of the O&J and RAAPO and orders of the Administrator (A 453, 462-63; JA 130-32). Thus, in April 1982, the City and State moved for an order holding petitioners in contempt for violations of those orders. Petitioners cross-moved for an order terminating the O&J and RAAPO.

The Court conducted an evidentiary hearing on the motion and cross-motion and, in a decision rendered on August 16, 1982, found that petitioners had "impeded the entry of non-whites into Local 28 in contravention of [the Court's]prior orders" (A 150). Specifically, the Court found that defendants had (A 151-55):

1. underutilized the apprenticeship program, which is the primary method of entry into the union and thus the most promising source of non-white members;

2. failed to design or undertake the general publicity campaign which the District Court had found necessary to dispel petitioners' reputation for discrimination in the non-white community;

3. failed to maintain and submit records and reports essential to monitoring compliance with the O&J and RAAPO;

4. issued work permits without prior authorization of the Administrator as required by RAAPO; and

5. amended their collective bargaining agreement by adding a provision which discriminated

against Local 28's non-white journeyman members.

Although petitioners had failed to even come close to meeting the 29% goal, the District Court expressly declined to hold them in contempt on that basis (A 155-56). The Court indicated, however, that it was convinced that Local 28 and the JAC had failed to make good faith efforts to attain the goal (A 155-56). The District Court denied petitioners' cross-motion to terminate the O&J and RAAPO because the purpose of those orders had not yet been achieved (A 157).

**A. Underutilization of the Apprenticeship Program**

Despite the apprenticeship program's critical importance in bringing non-whites into the union in numbers sufficient to achieve steady progress toward the goal, petitioners trained substantially fewer apprentices after the District Court issued its 1975 O&J than before (A 484-85; JA 74). At the same time that the number of apprentices trained decreased, the ratio of journeymen to apprentices employed by Local 28 contractors rose as high as 18:1 (A 16), and the average number of hours worked per year by Local 28 journeymen steadily increased (JA 74).* Between July of 1981 and March of 1982, employment oppor-

*The Bureau of Apprenticeship, U.S. Department of Labor National Aprenticeship and Training standards for the Sheet Metal Industry recognized that an appropriate apprentice-to-journeyman ratio is 1:4 (JA 71). Local 28 agreed to employ that ratio when it registered its apprenticeship program with the New York State Department of Labor (A 16).

tunities so exceeded the available supply of Local 28 journeymen that Local 28 was compelled to issue over 200 work permits to non-member sheet metal workers to meet employers' needs (A 16).* This was precisely the method by which Local 28 and the JAC had closed their doors to new members in the late 60's and early 70's and which the District Court found to be discriminatory (A 346). The District Court rejected petitioners' contention that the underutilization was the result of an economic slowdown and found that petitioners, still intent on resisting integration, had once again shifted employment opportunities from apprentices to its predominantly white, incumbent journeymen (A 151, 156).**

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* In the decision holding petitioners in contempt (A 150-57), the District Court incorrectly compared the number of apprentices *enrolled* in all four years of the apprenticeship program between 1971 and 1975 with the number of new apprentices *indentured* between 1976 and 1981 (A 16, 151). However, the record reflects that the correct statistics support the finding that the JAC trained more apprentices between 1971 and 1975 than it trained between 1976 and 1981 (A 484-85; JA 74). Moreover, as the Court of Appeals majority noted, the finding of underutilization was not based on that finding alone (A 16, 151).

** Despite petitioners' obligation under RAAPO to inform respondents and the Administrator of the size of the apprentice classes 60 days prior to indenture, they failed to provide the required information (A 15, 23, 143, 192, 462, 475). Respondents and the Administrator were therefore unable to timely review the apprentice class sizes. Petitioners' assertion that the Administrator approved each apprentice class is erroneous. *See* Pet. Brief on Merits at 9. The reports petitioners point to in support of this contention (A 42 n. 3), were those submitted monthly informing the Administrator of the number of apprentices in the JAC program and not the reports required to be submitted twice annually prior to the indenture of each class (A 23).

### B. Failure to Implement a General Publicity Campaign

The O&J (A 312) and RAAPO (A 203-04) required Local 28 and the JAC to devise and implement a written plan for an effective general publicity campaign designed to dispel their reputation for discrimination in non-white communities. This requirement is separate and distinct from the advertising and publicity campaigns which the union must conduct prior to each apprenticeship and journeyman examination (A 203). This was intended to ensure that when opportunities to take the apprenticeship and journeyman examinations arose, non-whites would no longer feel that applications to Local 28 were futile. *See* Exhibit Volume to 1982 Appeal to the Second Circuit, Docket No. 82-6241 ("EV") at 174-75. Despite repeated requests, and in direct contravention of RAAPO, petitioners neither formulated nor implemented any such plan (A 152, 455, 471-72).

### C. Record Keeping and Reporting Violations

Accurate reporting and record keeping is "absolutely vital to the effective monitoring and implementation of the RAAPO by the Administrator, the parties and the court" (A 154). The record supporting the 1982 contempt made clear that petitioners had failed to comply with RAAPO's reporting requirements and with specific requests for information by the Administrator (A 154, 158 n.8, 458-59, 472-74; EV at 71-74, 218-36, 466, 474-91). Judge Werker stated that this failure evidenced petitioners' "blatant disregard for their obligation to provide the appropriate parties to this suit with the information per-

tinent to the enforcement of the O&J and the RAAPO" (A 154-55).*

### D. Unauthorized Work Permits

In July 1975, the District Court held that Local 28 utilized the permit system to restrict the size of its membership and that this practice illegally denied non-whites access to employment opportunities in the sheet metal industry (A 346). In order to monitor any future grants of permits, the O&J and RAAPO prohibited Local 28 from issuing any work permits except with the "express written consent of the Administrator . . ." (A 191, 315). Nonetheless, in violation of those orders, in March 1981, Local 28 again began issuing permits without the Administrator's written authorization. Before respondents discovered this, Local 28 had granted thirteen unauthorized permits, and only one was to a non-white (A 153-54, 460). Presumably, the entire 200 plus permits issued between July 1981 and March 1982 would have been issued without the prior approval required by the O&J and RAAPO had respondents not become aware of this activity.

### E. The Collective Bargaining Agreement

Under the O&J, petitioners are permanently enjoined from engaging in "any act or practice which has the purpose or the effect of discriminating in . . . terms, con-

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*Disregard for record keeping obligations was by 1982 a predictable behavior pattern for petitioners. Failures by petitioners to keep the records required by the New York State Supreme Court pursuant to the Corrected Fifth Draft prevented the District Court from conducting thorough analyses of apprenticeship examinations between 1964 and 1975 and the 1969 journeyman examination (A 331, 345; JA 312).

ditions or privileges of employment against any individual or class of individuals on the basis of race, color or national origin" (A 301). In violation of the O&J, Local 28 and the Contractors' Association amended their Collective Bargaining Agreement by adding a Memorandum of Agreement which provided (A 155):

> During periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field.

The District Court, based on expert testimony, found that this provision (the "older workers' provivision") had a disparate impact on the predominantly non-white young members of Local 28, was not justified by business necessity, and was therefore discriminatory (A 155).

To remedy the effects of petitioners' contumacious conduct, the District Court ordered Local 28, the JAC and the Contractors' Association to pay a fine of $150,000 into a fund (the "Fund"). The Fund was to be used to increase the non-white membership of the apprentice program in order to compensate for the years when Local 28's underutilization of the apprenticeship program severely impeded the entry of non-whites (A 156). The District Court also concluded that additional fines to coerce compliance with the orders of the Court and the Administrator were needed. Judge Werker decided, however, that those fines would not be imposed until the Administrator submitted a program for the Fund and a report analyzing the need to modify RAAPO in view of the facts that petitioners' failure to abide by its terms had rendered the 1982 date for attainment of the goal meaningless (A 156-57).

## VI. The 1983 Contempt Proceeding

Less than one year following the District Court's 1982 contempt decision, the City brought a proceeding before the Administrator charging Local 28 and the JAC with additional violations of the O&J and RAAPO (JA 16-20, 21-30). After a hearing, the Administrator found that Local 28 had violated the record keeping requirements of the O&J and RAAPO regarding transfers by failing to include in its reports any data regarding the new journeymen and apprentices who had become Local 28 members by virtue of Local 28's merger with five, predominantly white, sister sheet metal locals in 1981 and 1982 (A 129-32, 157). The Administrator noted that Local 28 had made no effort to inform the parties of the mergers or provide information about their effect on Local 28's membership until requested to do so by the Administrator (A 130). The Administrator also found that Local 28 had violated both the spirit and the letter of the District Court's record keeping requirements by failing to develop a system which provided verification controls to ensure that the reported data was accurate (A 132-33). Finally, the Administrator found that Local 28 had not met its obligation to serve copies of the O&J and RAAPO on contractors who signed collective bargaining agreements with Local 28 subsequent to November 1981, as required by his directive of November 20, 1981 (A 133-35).

With respect to the JAC, the Administrator found that its failure to provide accurate reports of the hours worked by Local 28 journeymen and apprentices deprived respondents and the Administrator of data that was essential to evaluating whether journeymen and apprentices were sharing equally in available employment opportunities (A 136).

In conclusion, the Administrator stated that the violations by Local 28 and the JAC were "part of a pattern of disregard for state and federal court orders and . . . a continuation of conduct which led the Court to find [petitioners] in contempt on August 16, 1982" (A 138). The District Court adopted all of the Administrator's findings (A 125-26).

Convinced that the violations underlying the 1983 contempt decision evidenced petitioners' continuing failure to appreciate the importance and necessity of compliance with its orders, the District Court imposed further coercive fines, the amount to be determined in conjunction with the establishment of the Fund. To remedy petitioners' failure to develop a comprehensive system of record keeping, the District Court ordered Local 28 and the JAC to finance a computerized record keeping system to be developed and maintained by an independent management firm (A 126).

## VII. AAAPO and the Fund

On August 31, 1983 the District Court entered an order establishing the Employment, Training, Education and Recruitment Fund (the "Fund") to receive petitioners' $150,000 compensatory fine and coercive fines of $.02 per hour for each journeyman and apprentice hour worked, which had been imposed on the basis of the two contempt decisions (A 113-14).*

The Fund will support a program designed to increase non-white membership in Local 28 and will be terminated

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* The Fund is also supported by the City, which has paid its attorney's fees from the two contempt proceedings into the Fund (A 115).

when the Court determines it is no longer necessary (A 114, 116-18). In order to increase the pool of qualified non-white applicants for apprenticeship, the Fund will compensate Local 28 members for their services as liaisons to vocational schools, create part-time work for youths with sheet metal training and provide low-interest loans for first term non-white apprentices who would otherwise be unable to afford to enter the Local 28 apprenticeship program (A 116-17). The Fund will also support a program of tutoring and counseling for non-white apprentices so that they may enjoy the services which have always been readily available to white apprentices through fathers, uncles and friends (A 116-17). In order to maximize employment opportunities for all apprentices, the Fund will provide financial assistance to contractors unable to afford to meet the 1:4 apprentice to journeyman ratio, as well as matching funds to attract outside funding (A 117). Should petitioners desire, they are free to establish an identical program for whites (A 118).*

In November 1983, the District Court replaced RAAPO with an Amended Affirmative Action Program and Order ("AAAPO"), having concluded that violations of its prior orders had been so egregious that a new approach to apprentice selection was required (A 53, 111-12). Because petitioners had not succeeded in remedying the effects of their prior discriminatory conduct under RAAPO, AAAPO continued in effect the non-white membership

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*The Fund offers assistance almost identical to that provided to a very limited number of non-white Local 28 apprentices through a government-sponsored program which has been extremely successful in helping non-white Local 28 apprentices complete their training and obtain jobs as skilled journeymen. *See* City's Motion to Lift Stay Order of Court of Appeals, filed in the Second Circuit on April 5, 1984, at 2-3.

goal and the office of the Administrator (A 54, 74-75). It was adjusted to 29.23% to reflect the increase in membership due to the merger and an increase in the non-white population of the relevant labor pool (A 54, 122-23). The projected attainment date is now August 31, 1987 (A 55). AAAPO also replaces the apprenticeship aptitude examination with an Apprentice Selection Board, comprised of a representative each of the Court, petitioners and respondents. The Board is to establish standards and procedures for apprentice admission, (A 57-58, 112), and will remain until replaced by a validated apprenticeship examination (A 58-60). AAAPO requires the JAC to assign each Local 28 contractor one apprentice for every four journeymen (A 60-61, 66-67), unless the contractor obtains a written waiver of the 1:4 ratio from respondents (A 67). These provisions are aimed at ensuring the maximum participation of non-whites in the apprenticeship program and preventing repetition of petitioners' pattern of underutilization. Finally, AAAPO requires more detailed reporting than did RAAPO and, in accordance with the remedy ordered pursuant to the 1983 contempt decision, requires petitioners to establish computerized record keeping under the supervision of an expert selected by respondents (A 70-74). As originally enacted, AAAPO required apprentices to be indentured on the basis of one non-white for each white (A 57).*

## VIII. The 1985 Court of Appeals Decision

The Court of Appeals affirmed all of the contempt findings made by the District Court except the finding based

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* As explained, *infra*, at p.27, this provision was eliminated by the Court of Appeals (A 36-37).

on the older workers' provision (A 13-24).* The Court also affirmed all but one of the remedies ordered by the District Court following the contempt decisions (A 25-37).

The Court of Appeals, by a divided vote, rejected the petitioners' argument that the 29.23% goal was an impermissible quota (A 31-33). Instead, it stated that it had twice before upheld race-conscious goals in this case as appropriate in view of petitioners' "clear cut pattern of long-continued and egregious racial discrimination," (A 31), and laid responsibility for the need to continue the goal at petitioners' feet "because it has been their foot-dragging resistance to compliance with the prior orders that has caused the District Court to extend the non-white membership goal until 1987" (A 32-33).

The Court of Appeals affirmed the 1 to 4 apprentice to journeyman ratio as necessary to ensure that there will be no further underutilization of the apprenticeship program by petitioners (A 33-34). The Court also upheld the institution of the Apprentice Selection Board to replace tests whose validity could not be demonstrated to respondents' satisfaction and modified AAAPO to permit the use of validated selection procedures before the 29.23% goal is reached (A 34-35). The Court of Appeals reversed only the requirement that apprentices be indentured on the basis of one non-white for each white, concluding that the other provisions of AAAPO and the Fund

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*The Court of Appeals reversed the finding of contempt insofar as it was based on the older workers' provision, finding that even though petitioners and the Contractors' Association had agreed to the provision it had never been implemented, and thus its effect was still unknown. (A 17-19, 37).

are sufficient to ensure that petitioners will, at long last, do what is necessary to integrate their union in compliance with the law (A 36-37).

## Summary of Argument

### (1)

In this case, the petitioner union has been branded by the Court of Appeals for the Second Circuit as having acted "in bad faith" in circumventing the order of a state court, practiced "blatant . . . discrimination" against non-white Blowpipe workers and "consistently and egregiously violated Title VII." *EEOC* v. *Local 638*, 532 F2d 821, 826-27 (2d Cir. 1976) (A 212, 214, 215). A year later, the Court of Appeals characterized the discrimination practiced by the union as encompassing "direct methods employed to deny members of racial minorities entrance to the union." *EEOC* v. *Local 638*, 565 F2d 31, 36 n.8 (2d Cir. 1977) (A 169). Finally, in its most recent opinion, the Court of Appeals referred to the union's "determined resistance . . . to all efforts to integrate its membership," and its "foot-dragging egregious noncompliance" with the orders of the District Court. *EEOC* v. *Local 638*, 753 F2d 1172, 1183 (2d Cir. 1985) (A 24).

Consistent with the purposes of Title VII and what we believe to be the proper policies of this Nation, employment opportunities should be based, not on race or creed, but on the abilities of the individual. In most instances, other means of erasing discrimination are both more effective and desirable. For instance, random selection of apprentices, through the use of lotteries, might help to

overcome the effects of discrimination. Similarly, section 343-8.1 of the New York City Administrative Code requires that City agencies seek to ensure that 10% of their construction contracts are awarded to businesses which have a work force containing 25% or more economically disadvantaged workers, or which have performed substantial amounts of their work in poverty areas. However, the City is opposed, as a matter of public policy, to the use of racial employment quotas, or goals, which if coupled with sanctions and timetables, are the functional equivalent of quotas.

Accordingly, this Brief addresses itself only to the legality of the Fund for minority recruitment and training. In this case, petitioners' discriminatory animus is so strong, its history of non-compliance with court mandates is so extensive and the ingenuity with which it has devised schemes to defeat integration is so malevolent, that the Fund is required.

The City agrees with the following positions of the Government and the State: 1) that petitioners were properly adjudged in civil contempt; 2) that the challenge to the 1975 finding that petitioners had practiced discrimination against non-whites in violation of Title VII is not properly before the Court, and that in any event there is no basis for setting aside that finding; and 3) that consideration of the propriety of the appointment of an administrator in 1975 and the continuance of his office in 1983 are not properly before the Court and in any event the District Court properly acted within its discretion. The City also joins the State's argument that the Fund is a proper exercise of the Court's contempt power and

not limited by the provisions of Title VII. We are separately briefing the Title VII and Fifth Amendment implications of the Fund.

**(2)**

Race-conscious remedies are within the remedial powers of the District Court under Title VII, 42 U.S.C. 2000e *et seq.* The legislative history of Title VII shows that section 706(g), 42 U.S.C. 2000e-5(g), was not intended to preclude the District Court from awarding prospective, race-conscious relief but rather to assure that no relief be granted to one fired or not hired for a reason other than discrimination outlawed by Title VII. Prior opinions of this Court are consistent with this interpretation of section 706(g), *see Franks* v. *Bowman Transportation Co.*, 424 US 747 (1976); *Teamsters* v. *United States*, 431 US 324 (1977), and the Courts of Appeals have uniformly approved race-conscious remedies not necessarily benefitting only proven victims of discrimination. The long history of petitioners' intentional discrimination and avoidance of judicial mandates confirms the necessity of providing for the Fund.

The Fund satisfies the equal protection component of the Fifth Amendment. This Court has long recognized that courts may fashion race-conscious remedies to eradicate illegal discrimination, and that such remedies are constitutional. *See Swann* v. *Charlotte Mecklenburg Board of Education*, 402 US 1 (1971); *United Jewish Organizations of Williamsburg, Inc.* v. *Carey*, 430 US 144 (1977). *See also Fullilove* v. *Klutznick*, 448 US 448 (1980). The cited decisions indicate that such remedies need not inure only to the benefit of identified victims of discrimination.

In light of the long history of egregious discrimination and contemptuous conduct by petitioners, the Fund is "necessary" to the accomplishment of a "constitutionally permissible" and "substantial" purpose. *Regents of the University of California* v. *Bakke*, 438 US 265, 305 (1978) (Powell, J.).

## POINT I

**Under the Facts of this Case, Which Reveal a History of Both Flagrant, Intentional Discrimination and Consistent Foot-Dragging in Response to Efforts to Remedy the Effects of Petitioners' Illegal Discrimination, the Order of the District Court providing for the Fund is a Proper Exercise of the Court's Remedial and Contempt Powers and is Consistent with the Provisions of Title VII.**

### (1)

Both the petitioners and the Government, in arguing that Title VII limits the award of race-conscious relief to instances of make-whole relief, rely substantially on the decision of this Court in *Firefighters Local Union No. 1784* v. *Stotts*, —— US ——, 104 S Ct 2576 (1984). There this Court necessarily spoke only of make-whole relief in the context of a bona fide seniority system. Congress has given seniority systems special and explicit statutory protection under section 703(h) of Title VII. 42 U.S.C. 2000-2(h). *See Teamsters* v. *United States*, 431 US 324, 348-53 (1977). To extend the language of the opinion to stand for the proposition that race-conscious relief may not be

awarded under Title VII, without discussion of the unanimous holdings of the Courts of Appeals to the contrary, *see Stotts*, 104 S Ct at 2606 (Blackmun, J., dissenting), and without consideration of a record of egregious, intentional discrimination as is presented here, would be inappropriate for a court bound by the constraints of Article III. In this case, the Court of Appeals for the Second Circuit refused to take such an expansive reading of *Stotts* (A 30-31), as have other Courts of Appeals. *See* Brief of United States as Amicus Curiae in *Local Number 93 v. City of Cleveland*, Docket No. 84-1999, at 17 nn. 13 & 14. Accordingly, the issue of the permissible scope of prospective, race-conscious remedies intended not to "make whole" individual victims of discrimination but to both correct the class-wide effects of prior "patterns or practices" of discrimination and prevent their continuation in the future, is an open issue in this Court.

**(2)**

The central thesis of the Government is that section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), limits the power of a district court to awarding race-conscious remedies to identified victims of discrimination. The provision states, in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appro-

> priate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. * * * *No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title* (emphasis added).

The Government urges that the italicized language, consistent with the legislative history of Title VII, limits the court to make whole relief for proven victims of discrimination. Brief of United States as Amicus Curiae, *Local Number 93* v. *City of Cleveland*, Docket No. 84-1999, at 6-19. The legislative history upon which the Government relies shows that the quoted language, which on its face relates only to retroactive rather than prospective relief, was intended to address the problem of awarding retroactive relief in "mixed motive" cases where the employer had a legitimate reason for not employing a particular individual. The language first appeared in the bill reported out of the House Judiciary Committee in 1964. *See* H.R. 7152, 707e, *reprinted in* EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 ("Legislative History"), at 2012 (1968). At that time the sentence provided that a court shall not grant relief to an individual refused employment, su-

spended or discharged "for cause." *See* 29 U.S.C. 160(c) (parallel provision precludes National Labor Relations Board from granting relief to individual who "was suspended or discharged for cause"). While the "for cause" provision was subsequently deleted and substituted with the language "for any reason other than discrimination on account of race, color, religion, sex, or national origin," there is no indication that the amendment was intended to accomplish anything other than to avoid a requirement that the employer satisfy a formal definition of "cause." In introducing this amendment Representative Celler explained (110 Cong. Rec. 2567 [1964]):

> [T]he purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize "other"—than discrimination on the grounds of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion or national origin.

Congressman Gill similarly stated that under 706(g) as amended (110 Cong. Rec. 2570 [1964]):

> [W]e would not interfere with discharges for ineptness or drunkeness. We would not interfere with unfair labor practices that are covered under other acts. We would limit orders under this act to the purposes of this act.

In the Senate, Hubert Humphrey stated of the last sentence of 706(g) (then 707c) (110 Cong. Rec. 6549 [1964]):

> [It] makes clear what is implicit throughout the whole title: namely, that employers may hire and

> fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex or national origin.

*See also* 110 Cong. Rec. 7214 (1964) (Clark-Case interpretative memorandum on Title VII).

In *EEOC* v. *AT&T*, 556 F2d 167 (3d Cir. 1977), *cert. denied sub nom. Alliance of Independent Telephone Unions* v. *EEOC*, 438 US 915 (1978), the Court of Appeals for the Third Circuit rejected the specific argument made here by the Government. The Court of Appeals traced the legislative history of the provision and held that it confirmed that the purpose of the last sentence of 706(g) was to "preserve[] the employer's defense that the non-hire, discharge, or non-promotion was for a cause other than discrimination." *EEOC* v. *AT&T*, 556 F2d at 175-77. Accordingly, Courts of Appeals have held that under the last sentence of 706(g), an employer would not be liable for back pay or other retroactive relief if he could prove that the individual would not have been hired or promoted even without the influence of the discriminatory motive. *See Stotts*, 104 S Ct at 2608-09 (Blackmun, J., dissenting), and cases cited therein.

In *Stotts*, 104 S Ct at 2589-90, Justice White, in holding that make-whole relief is available only to those who have been shown to be the actual victims of discrimination, remarked that various members of Congress had expressed fear that under Title VII an employer would be required to maintain a particular racial balance in its workplace. *See, e.g.*, 110 Cong. Rec. 7212, 7213 (1964) (Clark-Case interpretive memorandum on Title VII); 110 Cong. Rec. 4764 (1964) (remarks of Sen. Ervin and Sen. Hill); H.R. Rep. No. 914, (minority report), 88th Cong., 1st Sess., *reprinted in* 1964 U.S. Code Cong. Ad. News 2431, 2441. However, this con-

cern led to the passage of section 703-j, 42 U.S.C. 2000e2(j). *See* 110 Cong. Rec. 12723 (1964) (comments of Sen. Humphrey); 110 Cong. Rec. 12819 (1964) (explanation of changes to House bill by Sen. Dirksen); Legislative History, at 1008. This provision has been interpreted as defining liability under Title VII; accordingly, it does not restrict the use of race-conscious remedies. *See United Steelworkers of America* v. *Weber*, 443 US 193, 205 n.5 (1979); *United States* v. *International Union of Elevator Constructors*, 538 F2d 1012, 1019 (3d Cir. 1976); *Rios* v. *Enterprise Association Steamfitters Local 638*, 501 F2d 622, 630-31 (2d Cir. 1974); *United States* v. *Local Union No. 212*, 472 F2d 634, 636 (6th Cir. 1973). *See also Teamsters*, 431 US at 339-40 n.20 ([s]ection 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population); *Cf. Swann* v. *Charlotte Mecklenburg Board of Education*, 402 US 1, 17 (1971) (42 U.S.C. 2000e-6 does not limit remedial power of federal courts).

Any doubt about the power of the judiciary to award prospective, race-conscious relief was, even if then still in doubt, confirmed by the legislative history of the Equal Employment Opportunity Act of 1972, Public L. No. 92-261. That act substantially amended Title VII to provide, *inter alia*, for coverage of State and local employees and for increased duties and responsibilities to the Equal Employment Opportunity Commission. *See* H.R. Rep. No. 92-238, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137. However, during debate in the Senate, Senator Ervin proposed two amendments* to the Senate ver-

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* Amendment No. 829 would have provided that:

> No department, agency, or officer of the United States shall require an employer to practice discrimination in

*(Footnote continued on following page)*

sion of the House bill. While Senator Ervin complained of the actions of the Office of Federal Contract Compliance, he also sought to prevent the EEOC in enforcing Title VII from continuing to enter orders "requiring employers to practice discrimination in reverse." Subcommittee On Labor 92d Cong., 2d Sess. *reprinted in* EEOC Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 Legislative History"), at 1045 (1972). He did not believe that "you can enforce laws against discrimination in employment by commanding and requiring discrimination in employment." *Id.* Senator Javits, leading the opposition to Senator Ervin's proposed amendements, pointed out that amendment No. 829 would necessarily limit the power of a court to issue race-conscious remedies. *Id.* at 1046. He stated that the amendment "would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment. . . ." *Id.* at 1048. He then had two court decisions printed in the record. In the second, *United States* v. *Ironworkers Local 86*, 443 F2d 544 (9th Cir.), *cert. denied*, 404 US 984 (1971), the Court of Appeals rejected an argument

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*(Footnote continued from preceding page)*

> reverse by employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges.

Amendment No. 907 would have amended section 703(j) to provide that: "[n]othing contained in this title, *Executive Order 11216 or any other statute or executive order*" would require an employer to grant preferential treatment. Subcommittee On Labor, 92d *Cong.*, 2d *Sess.*, *reprinted in* EEOC, Legislative History of the Equal Employment Opportunity Act of 1972, at 1017, 1681 (1972).

that race-conscious relief was precluded by 703(j). The Court also held that 706(g) contained no limit on a court's power to issue affirmative relief which it might deem appropriate to eliminate the vestiges of past discrimination and to terminate discriminatory practices. 443 F2d at 552-554. Senator Ervin's amendment No. 829 was defeated by a two-thirds majority. 1972 Legislative History, at 1074.* Rather, the final version of 706(g) affirmed the broad remedial powers of the court upon a finding of discrimination by expressly stating that the court, in ordering affirmative action, could, in addition to enumerated powers, order "any other equitable relief as the court deems appropriate."

Finally, in a report submitted by the Chairman of the Senate Committee on Labor and Public Welfare on the amended version of the House bill (H.R. 1746), it was stated (1972 Legislative History, at 1844):

> In any area where the new law does not address itself, or in any area where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

The Government urges that this legislative history is irrelevant to the scope of a court's remedial power under Title VII. First, it urges that a law cannot be amended or repealed except by another statute; we agree with this

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* Senator Ervin's second amendment, No. 907, was likewise defeated by a two-thirds vote of the Senate. 1972 Legislative History, at 1716-17.

self-evident proposition. However, the rejection of Senator Ervin's proposed amendments is an indication of Congressional agreement that a federal court may properly apply race-conscious, prospective relief under Title VII. *See EEOC* v. *AT&T*, 556 F2d at 177; *United States* v. *International Union of Elevator Constructors*, 538 F2d at 1019-20. *See also Bakke*, 438 US at 353-54 n.28 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part). *Cf. Runyon* v. *McCrary*, 427 US 173, 174-75 (1976). Nor is this a case of reliance on "congressional silence alone" to show legislative adoption of judicial precedent. *See, e.g., Boys Markets, Inc.* v. *Retail Clerks Union*, 398 US 235, 241 (1970). Rather, we have spirited debate clearly showing a rejection of the statutory interpretation now tendered by petitioners and the Government.

**(3)**

The decisions of this Court prior to *Stotts* do not support the Government's and petitioners' view of a court's remedial powers under Title VII. The Government places great weight on this Court's decisions in *Franks* v. *Bowman Transportation Co.*, 424 US 747 (1976), and *Teamsters* v. *United States*, 431 US 324 (1977). In *Franks*, this Court held that section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), does not preclude make-whole relief in the form of an award of retroactive seniority to those shown to have been victims of illegal discrimination, and that such award is within the remedial powers of the District Court set out in section 706(g) of Title VII. 424 US at 777-79. The Court did not have before it, or in any way comment upon, the type of prospective, race-conscious relief implicated in this case. However, the decision, in dis-

cussing the propriety of an award of retroactive seniority, reconfirmed the broad remedial powers of the district courts set out in section 706(g). *Id.* at 763-66, 770.

Similarly in *Teamsters*, this Court was concerned with the effect of section 703(h), in that instance on liability, and held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 US at 355-56. While this Court then went on to discuss remedy, nothing in its discussion indicates that prospective relief under Title VII is impermissible if it inures to the benefit of persons other than actual victims. Rather, *Teamsters* dealt only with individual, retroactive relief. However, this Court recognized that class-wide prospective and individual retroactive relief required different showings in a pattern or practice case: prospective relief may be granted upon a mere finding of a violation; individual, retroactive relief could be awarded only after a showing that the claimant applied for a job during the period of discrimination, or, because of the discriminatory practices, failed to apply. *Id.* at 361, 362, 368. While concerned with retroactive relief, this Court in *Teamsters* noted that the federal courts have freely exercised their "broad equitable discretion to devise prospective relief" to eliminate discriminatory practices and their effects, and noted that the prospective relief in *Teamsters* had been incorporated in a consent decree.

This Court, while recognizing that the make-whole provisions of Title VII are a central component of the statutory scheme, *see Albemarle Paper Co. v. Moody*, 422 US 405, 419-421 (1975), and that the goal of Title VII is to assure that individuals be judged for employment

purposes on their abilities rather than on membership in a racial or other class, *see Los Angeles Department of Water and Power* v. *Manhart*, 435 US 702, 708 (1978), has made clear that Title VII is intended to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Albemarle*, 422 US at 417 (quoting *Griggs* v. *Duke Power Co.*, 401 US 424, 429-430 [1971]). *See also* Section 707 of Title VII, 42 U.S.C. 2000e-6 (Equal Employment Opportunity Commission may bring civil action where any person is engaged in pattern or practice of resistance to rights secured by Title VII, and may request such relief as is necessary to ensure full enjoyment of such rights). Prospective remedies are well within the power of the district courts, and four members of this Court, including the author of *Stotts*, have stated that under Title VII, preferential treatment may be required for those "likely disadvantaged by social discrimination . . . even without a requirement of . . . a case-by-case determination that those to be benefitted suffered from racial discrimination." *Bakke*, 438 US at 366 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part). The Courts of Appeals have indicated their approval of prospective, race-conscious remedies not limited to proven victims of discrimination. *See, e.g., Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F2d 1017, 1026-28 (1st Cir. 1974), *cert. denied*, 421 US 910 (1975); *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F2d 256, 282 (2d Cir. 1981), *cert. denied*, 455 US 988 (1982); *United States* v. *International Union of Elevator Constructors*, 538 F2d 1012, 1017-20 (3d Cir. 1976); *Chisolm* v. *United States Postal Service*, 665 F2d 482, 498-99 (4th Cir. 1981); *United States* v. *City of Chicago*, 663 F2d 1354

(7th Cir. 1981) (en banc); *United States* v. *Ironworkers Local 86*, 443 F2d 544 (9th Cir. 1971), *cert. denied*, 404 US 984 (1971); *United States* v. *Lee Way Motor Freight*, 625 F2d 918, 943-45 (10th Cir. 1979). *See also Thompson* v. *Sawyer*, 678 F2d 257, 294 (10th Cir. 1982) (interim goals approved); *United States* v. *City of Alexandria*, 614 F2d 1358, 1363-66 (5th Cir. 1980) (consent decree). The Courts of Appeals have upheld race-conscious remedies because, under appropriate circumstances, they may be necessary to put an end to the effects of prior discriminatory practices, which is the express purpose of a pattern or practice case. *Cf. United States* v. *International Brotherhood of Electrical Workers*, 428 F2d 144, 149-50 (6th Cir. 1970).

The history of petitioners' discrimination and avoidance of court orders makes clear the necessity of the Fund. Their response to the State Court finding of illegal discrimination, and to the requirement that an objective apprenticeship selection procedure be implemented, was to use union funds to prepare friends and relatives of union members for the apprenticeship entrance examinations (A 214). Rather than organize the predominantly black blowpipe industry, they issued permits to white sister locals (A 214-15). Years later, petitioners were held in contempt for, *inter alia*, reducing the size of their apprenticeship program to keep new members out, failing to carry out a general publicity campaign to recruit non-whites, and failing to develop a comprehensive and reliable reporting system or file the reports crucial to evaluating compliance with the very orders they repeatedly violated (A 9-10, 151-57). The Fund is, at this juncture, the least that can be done to ensure that petitioners remedy the effects of their discrimination in a way that is meaningful.

The Fund meets this Court's criteria for race-conscious remedies. It is temporary, *United Steelworkers of America* v. *Weber*, 443 US 193, 208 (1979); *Fullilove* v. *Klutznick*, 448 US 448, 510, 513 (Powell, J. concurring) (1980), and narrowly tailored to remedy the effects of the favoritism shown by petitioners to relatives and friends, their underutilization of the apprenticeship program and their failure to undertake the publicity campaign required by RAAPO. *Fullilove*, 448 US at 483 (Burger, C.J.), 498, 510, 513-14 (Powell, J.). Its imposition follows the failure of numerous alternative remedies. *Fullilove*, 448 US at 510, 511 (Powell, J.). Perhaps most important, the Fund has no negative impact on anyone. *Weber*, 443 US 208; *Regents of the University of California* v. *Bakke*, 438 US 265, 318 n.52 (Powell, J.) (1978). Moreover, petitioners are free to provide identical services to whites and, to the extent that this does not diminish the Fund's effectiveness in achieving its purposes, may use money from the Fund to do so (A 76, 118).*

## POINT II

### The Fund Satisfies the Equal Protection Guarantee of the Fifth Amendment Because it Is Necessary to the Accomplishment of a Constitutionally Permissible and Substantial Purpose.

The first 28 pages of this brief are devoted to a detailed account of 20 years of outrageously discriminatory conduct by petitioners. The purpose of the Fund is to eliminate continuing effects of that discrimination and open

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* The Fund is supported by precedent. The statute approved by this Court in *Fullilove* required grantees of federal funds and their prime contractors to provide minority business enterprises with financial and technical assistance as needed. 448 US 448, 481 (1980). *See also Southern Illinois Builders Association* v. *Ogilvie*, 471 F2d 680 (7th Cir. 1972).

membership in Local 28 to non-whites. The history of this litigation compels the conclusion that the Fund is essential to the accomplishment of that task, and thus is constitutional.

**(1)**

This Court has long recognized that courts are empowered to employ the full range of their traditional powers of equity in fashioning remedies to eradicate the effects of identified discrimination and that the use of racial classifications toward that end may be necessary and is constitutional. This principle was implicitly recognized in *Green* v. *County School Board of New Kent County*, 391 US 430 (1968), which held that a race-neutral system of pupil assignment, adopted by the New Kent County School Board more than ten years after it was ordered by this Court to cease maintenance of officially segregated schools, was inadequate to meet the Board's obligation to remedy segregation. This Court in *Green* stressed that courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 391 US at 438 n.4 (quoting *Louisiania* v. *United States*, 380 US 145, 154 [1965]).

In *United States* v. *Montgomery County Board of Education*, 395 US 225 (1969), this Court went further and upheld the constitutionality of race-based remedies to eliminate segregation among school faculty and staff. In *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 US 1, 16-31 (1971),this Court again gave explicit expression to the companion prinicples that the task of a court in framing a remedy for intentional discrimination is to "correct, by a balancing of the individual and collective interests, the con-

dition that offends" and that the use of flexible race-conscious measures to do so is constitutional if "reasonable, feasible and workable." 402 US at 16, 19, 25, 31. *See also McDaniel* v. *Barresi*, 402 US 39, 41 (1971); *North Carolina State Board of Education* v. *Swann*, 402 US 43, 46 (1971).

Moving beyond the area of school desegregation, this Court again held race-conscious remedies for discrimination constitutional when it approved New York State's right to deliberately create or preserve black majorities in reapportioning voting districts to ensure compliance with federal voting rights laws, even though the reapportionment was voluntary and not a measure required to remedy a constitutional or statutory violation. *See United Jewish Organizations of Williamsburg, Inc.* v. *Carey*, 430 US 144 (1977). And one year later, in *Regents of the University of California* v. *Bakke*, 438 US 265, 320 (Powell, J.), 325, 355-56 Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part) (1978), five Justices of this Court unequivocally held that a state medical school may take race into consideration in its admissions program when there has been an appropriate determination that particular minority groups have suffered discrimination impairing their ability to compete for admission.

Most recently, in *Fullilove* v. *Klutznick*, 448 US 448, 482-83 (Burger, C.J., joined by White and Powell, JJ., 495, 496 n.1 (Powell, J., concurring), 522 (Marshall, J., joined by Brennan and Blackmun, J.J., concurring), 525 n.4 (Stewart, J., dissenting) (1979) this Court upheld the constitutionality of a federal statute establishing a racial preference; the statute required, *inter alia*, that at least ten percent of federal funds for any local public works

project be awarded to construction companies owned or operated by members of minority groups. The statute rested on evidence of pervasive discrimination in the construction trades, and was not a remedy for specific instances of identified discrimination.

Contrary to the assertions of petitioners and the Government, there is no support for the contention that race-conscious remedies must inure to the benefit of "identifiable" victims of discrimination if they are to be constitutional. *See, e.g., Swann*, 402 US at 16-31; *United Jewish Organizations*, 430 US at 154-68; *Fullilove*, 448 US 448. The race-conscious relief approved in these cases has not been limited to providing retroactive, compensatory or restitutionary relief to specific individuals injured by past acts of discrimination. Rather, the approved relief has been designed to operate prospectively at a systemic level to dismantle formerly segregated systems and to ensure integration. Such relief is indispensable in cases such as this where petitioners' discriminatory reputation has deterred job applications from individuals "unwilling to subject themselves to the humiliation of explicit and certain rejection." *International Brotherhood of Teamsters* v. *United States*, 431 US 324, 365 (1977).*

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* In a parallel context, this Court has sanctioned gender-based State and Congressional measures enacted with the express purpose of redressing general societal ills born of longstanding discriminatory treatment. *See, e.g., Califano* v. *Webster*, 430 US 313 (1977); *Schlesinger* v. *Ballard*, 419 US 498 (1975); *Kahn* v. *Shevin*, 416 US 351 (1974).

**(2)**

The Fund satisfies the strict level of scrutiny utilized by this Court in analyzing equal protection challenges to race-conscious remedies: these remedies are "necessary" to the accomplishment of a "constitutionally permissible" and "substantial" purpose. *Bakke*, 438 US at 305 (Powell, J.).*

The purpose of the Fund—the eradication of the effects of petitioners' blatant discriminatory practices—has been found by this Court to be "constitutional" and "substantial" under equal protection analysis. *Fullilove*, 448 US at 476 (Burger, CJ., joined by White and Powell, JJ.), 496, 497, 508 (Powell, J., concurring), 542-43 (Stevens, J., dissenting), 528 (Stewart, J. dissenting); *Bakke*, 438 US at 307 (Powell, J.); *McDaniel* v. *Barresi*, 402 US at 41; *Weber*, 443 US at 202-04, 208.

And, as required by the Constitution, the Fund is necessary to provide non-whites with the support that has for so long been available only to the white relatives and friends of Local 28 members because of petitioners' exclusionary practices.** The record is replete with examples of Local

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* The appropriate analysis to apply in determining whether a particular remedy satisfies constitutional standards remains an open question in this Court. Since the Fund meets the traditional strict scrutiny standard, and exceeds all lesser standards, there is no need for the Court to decide this issue.

** The means selected to remedy discrimination must be narrowly drawn, but need not be the least restrictive means of redress. *Fullilove*, 448 US at 498, 508. The choice is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." *Id.* at 508 (Powell, J., concurring) (quoting *Franks* v. *Bowman Transportation Co.* 424 US 747, 794 [1976]).

28's animosity toward non-whites and petitioners' willingness to violate State and federal court orders. There is no point in reiterating all of the tatics used by petitioners to defeat the State and District Courts' attempts to integrate Local 28. Nor is there any dispute that the efforts have thus far been unsuccessful. After almost 20 years under court orders, as of April 1982, Local 28 was still 89.2% white (A 9). The petitioners and the Government would have this Court believe that by simply removing identified barriers to non-white employment, Local 28 will become an integrated union. The record in this case demonstrates that this is not so. The lesson of Local 28 is that it is not enough to identify and remove obvious roadblocks to non-white union membership because petitioners will simply resort to discriminatory measures which are not expressly prohibited. The Fund is crucial if Local 28 is to become an integrated union.

## CONCLUSION

**The Judgment of the Court of Appeals Should Be Affirmed Except that Portion of the Judgment Which Upheld the 29.23% Goal. In Addition, the Court Should Remand the Matter to the District Court for the Consideration of Additional Sanctions in View of the Egregious Conduct of the Petitioners.**

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Respectfully submitted,

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