No. 84-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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

Petitioners,

-against-

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

Respondents.

BRIEF OF RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS

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QUESTIONS PRESENTED

1. Are challenges in this Court to rulings made a decade ago in this action now barred?

2. May a party held in contempt for violating an injunction, avoid sanctions on the basis of a claim that the sanctions are not authorized by the statute on which the underlying injunction was based?

3. Assuming the Court concludes that questions concerning the scope of Title VII remedies should be addressed, does Title VII of the Civil Rights Act of 1964 require that a court's remedial order, entered after a finding of consistent and egregious racial discrimination, always be so narrowly drawn as to preclude granting prospective race-conscious relief benefiting individuals who have not been specifically identified as the victims of the defendant's unlawful discrimination?

4. Does the fifth amendment bar a court from enforcing its remedial orders by imposing civil contempt sanctions containing race-conscious provisions which benefit persons who are not necessarily the identified victims of unlawful discrimination?

5. Assuming the Court concludes that rulings made ten years ago are still open for review: Did the district court properly conclude (a) that petitioners had violated Title VII of the Civil Rights Act of 1964 and (b) that the court had authority to appoint an administrator to oversee the day-to-day implementation of that court's remedial orders?

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STATEMENT OF THE CASE

I. *Preliminary Statement*

The contempt orders before the Court constitute the most recent in a two decade-long, judicially supervised effort to compel Local 28 of the Sheet Metal Workers International Association ("Local 28") and its Joint Apprenticeship Committee ("JAC") to comply with local, state and federal fair employment laws. Since 1964, Local 28 and the JAC (collectively referred to as "the Local" or "petitioners") have been found repeatedly to have discriminated unlawfully against minorities, to have "consistently and egregiously" violated the fair employment laws and to have "defied" enforcement orders (A. 212, 215).[1] Nevertheless, they now are asking the Court to rewrite that history. They claim that the ten-year old liability determination of the district court was wrong, that important elements of the district court's long-standing remedial order are unauthorized and that they should not have been held in contempt.

The United States government[2] initiated this case in 1971, established liability, urged the remedial measures adopted by the court and repeatedly defended all of the court's remedial and coercive orders (JA. 5-8, 157-61, 275-83, 372-74). The Equal Employment Opportunity Commission ("EEOC"), which is represented in this Court by the Solicitor General,[3] agrees with

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[1] The designation "A. ____" refers to pages in the appendix to the Petition for Writ of Certiorari. The designation "JA. ____" refers to pages of the Joint Appendix.

[2] This action was filed on June 29, 1971, on behalf of the United States (JA. 372, 344). In April 1974, as a result of the 1972 amendments to Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e-6(c), the Equal Employment Opportunity Commission was substituted for the United States as plaintiff. (JA. 344).

[3] Because the argument of the United States in this case is set forth in briefs filed in four separate cases currently before the Court and the EEOC appears in only this case, respondent will refer to the United States or the EEOC, as the case may be, as simply the "Solicitor." The form of citation used for referring to the Solicitor's briefs in the four cases is as follows:

Brief for the EEOC in No. 84-1656, *Local 28 v. EEOC* — Sol. Loc. 28 Br. ___

(footnote continued)

respondents City of New York ("City") and New York State Division of Human Rights ("State") that petitioners properly were held in civil contempt and that the sanctions ordered constituted, with an important exception, appropriate civil contempt remedies. Nonetheless, the Solicitor now contends that the 29% goal, and the race-conscious aspects of the contempt order it too joined in seeking, are beyond the power of the district court.

The contempt orders draw their significance from the facts found and the extensive prior proceedings in this case. Because neither the petitioners nor the Solicitor have adequately described the facts and prior proceedings, respondent restates them below.

II. *Proceedings Against Local 28 Prior to This Federal Court Action.*

Local 28 was formed in 1913 under an international union constitution which contemplated the establishment of racially segregated "white local union(s)" and, if necessary, black "auxiliary local unions." The black unions were to be "subordinate to the established and affiliated white local union" (A. 322, JA. 318). Although racial restrictions were deleted from the international constitution in 1946, Local 28 retained its racially exclusive character until 1969, long after the effective date of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") (JA. 314, 333-34). The union did not waver in its racially restrictive admissions practices except under court orders (A. 411, JA. 320, A. 215, 300, 182, 125, 119, 111, 108). See also *New York State Commission for Human Rights v. Farrell*, 47 Misc. 2d 799, 263 N.Y.S. 2d 250 (Sup. Ct. N.Y. Co. 1965).

In 1964, the New York State Commission For Human Rights[4] found petitioners guilty of a continuing pattern of unlawful

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Amicus curiae brief for the United States in No. 84-1999, *Local 93 v. City of Cleveland*	Sol. Loc. 93 Br. ____
Amicus curiae brief for the United States in No. 84-1340, *Wygant v. Jackson Board of Education*	Sol. Wygant Br. ____
Amicus curiae brief for the United States in No. 85-177, *Orr v. Turner*	Sol. Orr Br. ____

[4] In 1968, the State Commission was reorganized and renamed the New York State Division of Human Rights. *See* 1968 N.Y. Laws ch. 958.

discriminatory practices caused by pervasive nepotism within the union as well as a naked policy of not admitting blacks (JA. 381, 407). It ordered petitioners to "cease and desist from denying to . . . Negroes because of their race . . . the right to be admitted to . . . the sheet metal apprenticeship program"[5] (JA. 388).

Because the Local ignored its order, later that year the Commission commenced a proceeding in the New York State Supreme Court to force compliance (A. 411). Justice Jacob Markowitz confirmed that the Local had violated the New York Law Against Discrimination. He supervised negotiations aimed at racially integrating the union and creating a remedial program which substituted an objective apprentice selection procedure for the existing nepotistic selection system (A 415, 421). Justice Markowitz ultimately entered an order, entitled the "Corrected Fifth Draft of Standards for the Admission of Apprentices" ("Corrected Fifth Draft"), which provided for selection of apprentices on the basis of education, written test scores and personal interviews (A. 427, 431). He rejected Local 28's suggestion that "some preference" be given applicants with familial ties to union members (A. 421). The parties also negotiated an agreement, approved by the court, requiring the JAC to indenture two 65-person apprenticeship classes. *See Farrell*, 47 Misc. 2d at 799. As these agreements were reached, Justice Markowitz noted that the adopted plan "was the result of the unusual cooperative spirit" of the parties (A. 425; *see also* A. 440). Although not acknowledged by petitioners, "by 1965, Justice Markowitz' praise had turned to fury" (A. 139) because the union had disregarded its court-ordered obligations. Claiming unemployment among its members, the union reduced the size of the second apprentice class from 65 to 30. In his decision ordering the union to comply with his previous order, Justice Markowitz declared: "[t]he union, unilaterally, is attempting to halt or severely limit the process of its legally required integration . . . ." *Farrell*, 47 Misc. 2d at 800. By 1969, however, the union had devised a means of circumventing Justice Markowitz's prohibition of nepotism in the selection of apprentices: it began paying for pre-examination training sessions for

[5] Participation in the apprenticeship program is the principal means of admission to membership in Local 28 (A. 325, JA. 303).

relatives of union members (A. 352). Furthermore, in the areas governing access to work in the construction sheet metal trade that had not been specifically addressed by Justice Markowitz, the union's policy of racial exclusion continued unchecked. *See* p. 5, *infra*.

III. *Federal Court Proceedings Prior to the Contempt Motion*

In June 1971, the United States Department of Justice, pursuant to Title VII, filed this suit against the Local to enjoin a pattern and practice of discrimination against black and Spanish surnamed individuals ("minorities") who sought membership in Local 28 and training and job opportunities in the sheet metal trade in New York City. At that time (seven years after the State had first taken action), minorities constituted 1.63% of the union's membership (JA. 323). The City intervened and alleged, *inter alia*, that the union and JAC were violating the City's fair employment practices ordinance, B1-7.0 of the New York City Administrative Code ("NYC Code § ____"), and were frustrating the City's efforts, through its contract compliance program, to increase training opportunities for minorities.[6]

A. *Judge Gurfein's Consent Orders*

In early 1974, work stoppages occurred on New York City and New York City Board of Education construction sites. They were aimed at preventing sheet metal contractors from employing minority trainees on City and Board of Education funded construction projects. In response, the Sheet Metal Contractors Association ("Contractors Association") sought a court order in this action restraining Local 28 from engaging in such work stoppages[7] (JA. 355). As a result of this court action, the late United States District Judge Murray Gurfein, in April and July,

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[6] The Local joined the State as a third party defendant but the State was realigned as a plaintiff (A. 319).

[7] As of 1974, Local 28 was the only union local in New York City that refused to participate voluntarily in the New York Plan For Training, the program that provides for the training and employment of minority "trainees" on federal and New York State construction projects in New York City (JA. 354, 320).

1974, entered consent orders which required the JAC to indenture at least 40 minority apprentices by September 30, 1974 (JA. 363-64, 356). The union did not meet the September 30 deadline. It did little to comply with Judge Gurfein's orders until it faced the immediate threat of a contempt finding[8] (A. 352, JA. 345-47, 356-58).

B. *Liability Determination*

Following a trial in 1975 before the late United States District Judge Henry Werker, the court found that petitioners had intentionally discriminated against minorities in violation of both Title VII and NYC Code § B1-7.0 by administering discriminatory entrance examinations; excluding persons who lacked a high school diploma; offering cram courses to the sons and nephews of union members but not to minority applicants; refusing to accept blowpipe sheet metal workers for membership because most such workers were members of minority groups; consistently discriminating in favor of white applicants seeking to transfer into Local 28 from sister locals; refusing to administer journeyman examinations because of their concern that minority candidates would do well, and, instead, issuing work permits to nonmembers on a discriminatory basis; and failing to organize nonunion sheet metal shops owned by or employing minorities (A. 330-50).

On the basis of these findings and a recognition that the "record in both state and federal court against these defendants is replete with instances of . . . bad faith attempts to prevent or delay affirmative action" (A. 352), the court, on August 29, 1975, entered, pursuant to Fed. R. Civ. P. 54, an Order and Judgment ("O&J"). It enjoined petitioners from all violations of Title VII and ordered them to achieve, by July 1, 1981, a remedial goal of 29% minority membership (JA. 142, A. 305, 354). This goal was based on the

[8] Petitioners refer to these consent orders when they declare that "racial hiring pursuant to fixed and intransigent percentages has been involved in this action even before the entry of the O&J in 1975." Pet. Br. at 5 n.7. While claiming that "these orders were complied with," (*id.*) petitioners neglect to acknowledge that, as the court of appeals observed, compliance occurred "under heavy pressure" (A. 215). Petitioners also contend that they "objected" to Judge Gurfein's orders, Pet. Br. at 42, a contention which is unsupported by the record (JA. 356-58).

relevant minority labor pool in New York City (A. 300, 305, 353-54). The court also ordered petitioners to eliminate the diploma requirement for the apprenticeship program, to offer non-discriminatory entrance exams for journeymen and apprentices, and to allow transfers and issue temporary work permits on a non-discriminatory basis (A. 354-56, 301-04, 308-10). Petitioners were required to engage in extensive recruitment and publicity campaigns in minority neighborhoods in order to dispel Local 28's reputation for discrimination and to ensure a broad applicant pool (A. 355, 312). They were also directed to maintain records regarding applications, requests for transfer, inquiries about permit slips and hiring (A. 355, 310-11). The court appointed an administrator to supervise compliance with its decree (A. 355, 305-07).

C. *The First Appeal (1976)*

On appeal, the Court of Appeals for the Second Circuit affirmed, finding ample evidence that petitioners "consistently and egregiously violated Title VII" (A. 212). Indeed, the Local "[did] not even make a serious effort to contest the finding of Title VII violations" in this initial appeal (A. 215). The court upheld the 29% 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. 221-22). It also upheld the requirement that entrance examinations be validated and ruled that the testing schedules and recruitment requirements imposed by the district court were appropriate exercises of the district court's discretion (A. 222). The court modified the relief ordered by eliminating any provision that "might be interpreted to permit white-minority ratios for the apprenticeship program after the adoption of valid, job-related entrance tests" (A. 225). It concluded that the appointment of an administrator with broad powers was "clearly appropriate," given petitioners' failure to change their membership practices pursuant to the prior orders of the district court and the New York State court (A. 220).

The Local did not seek review in this Court of the court of appeals' judgment, which finally determined all issues in the action.

D. *Entry of RAAPO*

On January 19, 1977, following the court of appeals' affirmance, the district court issued a revised affirmative action program and order ("RAAPO") (A. 182). Among other things, RAAPO granted the Local an additional year in which to meet the 29% membership goal. The court ordered the Local to make "substantial and regular" progress every year in admitting minorities to Local 28 (A. 183). Modifications were also made to provide that, during a time of widespread unemployment in the industry, apprentices would share equitably in available employment opportunities in the industry (A. 183-84). The court ordered the JAC to take all reasonable steps to insure that apprentices receive adequate employment opportunities and to indenture two classes of apprentices each year, the size of each class to be determined by the JAC, subject to review by the administrator (A. 192-93).

E. *The Second Appeal (1977)*

The union and JAC appealed six provisions of RAAPO, including the apprenticeship indenture requirement and a provision granting certain oversight powers to the administrator (A. 165). They also challenged the imposition of the goal and, on the basis of the intervening decision of this Court in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), disputed the 1975 finding of liability (A. 164-68). The court of appeals rejected petitioners' arguments based on *Hazelwood*, affirmed RAAPO in its entirety and upheld the administrator's powers (A. 160, 165-68). Once again, the Local did not seek a writ of certiorari from this Court, even though Judge Meskill in dissent invited them to do so (A. 170 n.1).

IV. *The Contempt Proceedings*

In 1982, the City and State, recognizing that Local 28 would not achieve the 29% goal by July 1 because it had failed to comply with several substantive provisions of the O&J and RAAPO, moved for an order holding petitioners in contempt. The union and JAC cross-moved for an order terminating the O&J and RAAPO.

A. *The First Contempt Decision (1982)*

Following a hearing, the district court found that the Local had "impeded the entry of minorities into Local 28 in contravention of the prior orders of this court" (A. 149-50).[9] Judge Werker held them in contempt for violating the O&J and RAAPO by a) underutilizing the apprentice program to the detriment of minorities; b) failing to undertake, as required by RAAPO, a general publicity campaign intended to dispel petitioners' reputation for discrimination; c) failing to maintain and submit records and reports; d) issuing work permits without prior authorization of the administrator; and e) entering into an agreement amending their collective bargaining contract by adding a provision that discriminates against Local 28's minority members by protecting members aged fifty-two or over during periods of high unemployment. The cumulative effect of these contemptuous acts, the district court ruled, was that the Local failed even to approach the 29% goal, a benchmark of progress toward integration and equal employment opportunity[10] (A. 155-56).

The first contempt holding was based in part on the district court's finding that petitioners had deliberately underutilized the apprenticeship program in order to limit minority membership and employment opportunities. The court found that the JAC trained substantially fewer apprentices after entry of the O&J than before. The court rejected the Local's contention that the underutilization of the apprenticeship program resulted from a downturn in the economy. To the contrary, the average number

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[9] Petitioners' assertion, Pet. Br. at 9, that they had achieved a minority membership in Local 28 of 14.9% by April 1982 was rejected by both the district court and the court of appeals (A. 9). Petitioners' own April 1982 census showed its minority membership to be only 10.8%. Similarly, petitioners' claim that 45% of their apprentice classes are made up of minorities, Pet. Br. at 9, is misleading. Only since January 1981 have petitioners indentured apprenticeship classes consisting of 45% minorities (A. 37).

[10] Although Local 28's total minority journeyman and apprentice membership was then only 10.8%, more than 18 percentage points below the ultimate goal petitioners had been ordered to reach by July 1, 1982, the district court did not base its finding of contempt upon petitioners' failure to reach the goal (A. 155). Instead the court focused on the union's failure to make regular and substantial progress toward integrating minorities into its membership (A. 155-56).

of hours and weeks worked per year by Local 28 journeymen members steadily increased from 1975 to 1981 (A. 16, 151). In fact, by 1981, employment opportunities so exceeded the available supply of Local 28 journeymen that Local 28 was compelled to issue an extraordinary number of work permits to non-member sheet metal workers, most of whom were white (A. 16). Thus, the court concluded that during the years after entry of the O&J, Local 28 deliberately shifted employment opportunities from apprentices to predominantly white, incumbent journeymen.[11] That the ratio of journeymen to apprentices rose from 7:1 before the O&J was entered to 18:1 by 1981, well above the industry standard of 4:1, demonstrated the extent of the shift (A. 16).[12]

The court based its finding that petitioners issued permits without the administrator's approval upon evidence that Local 28 had done so thirteen times between March and June 1981. Of the thirteen unauthorized permit men, only one was minority. These contemptuous acts were particularly significant given the district court's earlier finding, after trial, that Local 28 had used the permit system to restrict the size of its membership with the illegal effect of denying minorities access to employment opportunities in the sheet metal industry (A. 345-46).

Local 28 was also held in contempt for entering into a Memorandum of Agreement with the Contractors Association to guarantee older (age 52 or older) sheet metal workers one of every four jobs during periods of high unemployment (the "older workers' provision"). The district court concluded that this provision violated the O&J since it had the foreseeable consequence of disadvantaging the predominantly young minority members of the union (A. 155).

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[11] Petitioners erroneously assert, Pet. Br. at 9, that the administrator approved each apprentice class. What petitioners mistakenly refer to are the reports ultimately submitted to the administrator informing him of the number of apprentices in the JAC program (A. 42 n.3). The administrator neither approved nor disapproved individual apprentice classes.

[12] As the majority opinion of the court of appeals illustrates (A. 22-24), neither petitioners' argument nor Judge Winter's dissent demonstrates that the underulitization finding was clearly erroneous. Fed. R. Civ. P. 52(a); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

Finally, petitioners were held in contempt for violating the provisions of the O&J and RAAPO requiring them to devise and implement a written plan for an effective general publicity campaign designed to dispel their reputation for discrimination in minority communities (A. 152-53). The general publicity plan required by the O&J and RAAPO was never formulated, much less implemented (A. 152). Finally, the union and JAC were held in contempt for failing, since 1976, to comply with the important reporting requirements of the O&J and RAAPO and with the administrator's request for information relevant to the implementation of RAAPO (A. 154-55).

The district court denied petitioners' cross-motion to terminate the O&J and RAAPO, finding that their purposes had not been achieved and that these orders had not caused the Local unexpected or undue hardship (A. 157).

B. *The Second Contempt Decision (1983)*

On April 11, 1983, the City brought a proceeding against the Local for additional violations of the O&J and RAAPO. After a hearing, the administrator found that the Local had again acted contemptuously by failing to provide data required by the O&J and RAAPO, failing to send copies of the O&J and RAAPO to all new contractors in the manner ordered by the administrator, and failing to provide accurate reports of hours worked by apprentices (A. 127, 128-38). The district court adopted the administrator's findings and again held the Local in contempt (A. 125).

C. *The Fund Order*

To remedy petitioners' past noncompliance, Judge Werker imposed a fine of $150,000 for the first series of contemptuous acts and additional fines of $.02 per hour for each journeyman and apprentice hour worked for the second series of contemptuous acts (A. 113, 114). These fines are to be placed in an interest-bearing Local 28 Employment, Training, Education and Recruitment Fund (the "Fund") to be used, among other things, to provide financial assistance to contractors otherwise unable to meet a 4:1 journeyman-to-apprentice ratio, to provide incentive or matching funds to attract additional funding from governmental or private job training programs, to establish a tutorial program for

minority first year apprentices, and to create summer or part-time sheet metal jobs for minority youths who have had vocational training (A. 116-18). The Fund is to "remain in existence until the [new minority membership] goal set forth in the Amended Affirmative Action Program and Order ("AAAPO") . . . is achieved and until the Court determines that it is no longer necessary" (A. 114). The Fund is subject to AAAPO, which provides that Local 28 may provide whites with the benefits afforded under the program to minorities (A. 76, 118, 253). Upon termination, any sums that remain are to be returned to the union (A. 116).

D. *AAAPO*

Because the remedial purposes of RAAPO had not been achieved and because of the Local's contemptuous conduct, the district court on November 4, 1983, entered a new replacement order, AAAPO (A. 53, 111). AAAPO modified RAAPO in a number of respects. It adjusted the minority membership goal from 29% to 29.23% to reflect Local 28's expanded jurisdiction (due to the merger of several unions into Local 28) and a population change in the relevant labor pool (A. 54, 122-23). It extended the deadline for meeting the goal until August 31, 1987 (A. 55). It also required that one minority applicant be indentured into the apprenticeship program for each white applicant indentured and that (unless this provision were waived by plaintiffs) the JACs assign each Local 28 contractor one apprentice for every four journeymen (A. 57).

E. *The Third Appeal (1984)*

Petitioners appealed to the court of appeals from the contempt orders, the Fund order and the order adopting AAAPO. They did not appeal the denial of their cross motion to terminate the O&J and RAAPO (A. 12), nor did they contend that the 1975 findings of liability were erroneous or that the administrator should not continue in office.[13] By a 2-1 vote, the court of appeals affirmed all of the district court's findings of contempt against

[13] The Local argued that the administrator's powers should be curtailed to limit his authority to adjudication of disputes under AAAPO. *See* Brief for Appellants Local 28 and the JAC at 92.

the Local, except the finding based on the older workers' provision.[14] It also affirmed the contempt remedies, including establishment of the Fund. With respect to the first contempt proceeding, the court of appeals held that the evidence "solidly supports Judge Werker's conclusion that defendants underutilized the apprenticeship program . . . ." (A. 17). The court concluded, "[p]articularly in light of the determined resistance by Local 28 to all efforts to integrate its membership, . . . the combination of violations found by Judge Werker . . . amply demonstrates the union's foot-dragging egregious noncompliance . . . and adequately supports his findings of civil contempt against both Local 28 and the JAC" (A. 24). With respect to the second contempt proceeding, the court held that the district court's determination was supported by "clear and convincing evidence which showed that defendants had not been reasonably diligent in attempting to comply with the orders of the court and the Administrator" (A. 22).

The court affirmed AAAPO with two modifications: it set aside the requirement that one minority apprentice be indentured for every white, concluding that the ratio was unnecessary in order to assure progress toward the goal, and it modified AAAPO to permit the use of validated selection procedures before the 29.23% membership goal is reached. In addition, the court concluded that the Fund was an appropriate coercive and compensatory contempt remedy. The district court had aimed the relief at the apprenticeship program, where it would be most effective, and the Fund would compensate those who had suffered the most from defendants' contemptuous conduct. It also noted the Fund's coercive aspects and observed that its operation would cease and any remaining monies would be returned when the Local reached the 29.23% goal (A. 26).

For the third time, the court reaffirmed the 29.23% membership goal, finding that it met the court of appeals' two-pronged

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[14] The court of appeals did not overturn the finding that the provision violated the O&J, but concluded that "the older workers' provision was never implemented, and therefore did not have any effect—discriminatory or otherwise—on nonwhites" (A. 17). It remanded this issue for further fact finding and directed that if the provision were found to discriminate, the district court should "strike it from the collective bargaining agreement. . ." (A. 19). Since this finding was the sole basis for the orders directed at sheet metal contractors, the court of appeals vacated the district court's orders as to them (A. 37).

test for the validity of a temporary, race-conscious affirmative action remedy (A. 29). First, the remedy was designed to correct a long, continuing and egregious pattern of race discrimination. Second, the remedy "will not unnecessarily trammel the rights of any readily ascertainable group of non-minority individuals" (A. 32).

Finally, the court rejected the Local's attempt to curtail the powers of the administrator (A. 36)

This judgment of the court of appeals affirming the contempt orders is here on review.

SUMMARY OF ARGUMENT

Ten years ago, after finding a pervasive pattern of racial exclusion and noting a record of past noncompliance with court orders directing the union to end discrimination, the district court entered a series of comprehensive remedial orders. These orders were intended to do more than restate the proscriptions of Title VII against discrimination and compensate individuals specifically harmed by the union's prior conduct. They were also designed to insure, through the imposition of effective remedial measures, that the union did not return to its discriminatory ways.

Given the union's failure to "clean house," the court determined that the imposition of a remedial racial goal was "essential" and directed that "regular and substantial progress" be made toward reaching it. The goal was essential because the practices, habits and customs within the union had, for generations, made racial exclusion a fixed part of its members' daily lives and expectations. Because access to admission, membership, training and employment in the trade ordinarily was obtained through informal contacts among union members, the district judge in this case knew that he would have no greater success than the judges who preceded him in altering the indifference within the union to fair employment laws unless substantial numbers of minority workers were to become part of the informal mutual support system that pervades the trade.

1. The district court determined liability and established the numerical goal and the office of the administrator a decade ago. The legitimacy of these determinations was upheld by the court

of appeals and no further review was sought. Accordingly, *res judicata* bars further review of the correctness of these rulings, which, in any event, were correctly made.

2. The court of appeals correctly concluded that the district court acted properly in holding petitioners in civil contempt. It noted 1) that the effect of the combined violations found by the district court operated to prefer the largely white group of journeymen over the racially integrated group of apprentices and 2) that the union historically "resisted . . . all efforts to integrate its membership" (A. 24).

The court of appeals also correctly concluded that the sanctions imposed were designed to coerce compliance with the two remedial orders of the district court. The sanctions imposed were designed to assure plaintiffs and the intended beneficiaries of the remedial orders that, unlike prior judicial orders directing the union to comply with the fair employment laws, the O&J and RAAPO would be obeyed. The sanctions were also intended to provide compensatory relief to the class of persons harmed by petitioners' persistent discriminatory conduct. The numerical goal is an integral part of the sanctions imposed: it is a means of verifying whether petitioners have discharged their legal obligation to eradicate the effects of prior discrimination and whether they have thereby purged themselves of contempt.

3. Section 706(g) of Title VII arms courts with authority to enter effective remedial orders which will work to achieve the Act's purposes. That authority includes the power to order *prospective* race-conscious remedies, such as the relief ordered in this case, that extend benefits to individuals who are not necessarily the identified victims of prior unlawful discrimination. The plain language of Title VII, its legislative history and court decisions confirm that courts possess authority to enter such orders.

This Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984), is not to the contrary. It concerned awards of *retrospective*, make-whole relief which affected the seniority expectations of white workers while not advancing Title VII's primary purpose of achieving equality of opportunity and barring future racial discrimination. In contrast, the remedies

ordered here are *prospective* remedies which advance the primary purposes of Title VII, do not implicate the seniority expectations of other workers, and only minimally affect the interests of white applicants and members of Local 28.

A rule that bars courts from granting prospective race-conscious relief to individuals who have not been specifically identified as the victims of the defendant's unlawful discrimination disserves the central purposes of Title VII "to achieve equality of opportunity and to remove barriers that have operated in the past to favor identifiable groups of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). If the statute were interpreted to limit relief in all cases to identified victims, employers or labor organizations bent on avoiding the command of Title VII would be encouraged to "bury their dead" by discouraging submission of applications by individuals of the unwanted race, sex, religion or national origin; failing to retain applications submitted by those persistent enough to complete and submit them; maintaining an informal, word-of-mouth system of job referrals to which white workers, by virtue of familial and friendship ties, have greater access; and adopting a range of other schemes which assure perpetuation of exclusionary practices while minimizing identification of victims of the discriminatory system. The facts of this case illustrate why the application of inflexible, "victim-specific" strictures, which petitioners and the Solicitor urge the Court to read into section 706(g), will undermine rather than foster the central purposes of this historic legislation. Congress did not intend this result.

I. PETITIONERS' CHALLENGES TO RULINGS MADE A DECADE AGO ARE UNTIMELY

Petitioners challenge, *inter alia*, the district court's original findings of race discrimination, its imposition in the O&J and RAAPO (now AAAPO) of race-conscious remedies, including a 29% goal, and its establishment of the office of the administrator. These rulings, made a decade ago, were twice affirmed by the court of appeals. No review was sought in this Court within the proper time limits and accordingly, these rulings are *res judicata*. They may not be resurrected for review by petitioners' challenge

to the court of appeals' affirmance of the district court's 1982 contempt finding.[15]

Petitioners failed to seek review in this Court of these decisions and they cannot do so now. Sup. Ct. R. 20 and 28 U.S.C. § 2101 require that certiorari be sought no later than ninety days after entry of the judgment to be reviewed. The 1976 and 1977 appeals finally determined all of the issues then in the case, including the finding of liability and the validity of the goal and the office of the administrator. As this Court has stated, "the judgment. . . was final and appealable. Since [it was not appealed] we cannot now consider whether the judgment was in error." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 n.5 (1980); *accord Pasadena Board of Education v. Spangler*, 427 U.S. 424, 432 (1976).[16]

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[15] In any event, petitioners did not challenge below the determination of their liability under *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977), or the continuation of the administrator in office. For this reason alone, the Court should not consider these issues. *See* Sol. Loc. 28 Br. at 17, 22. *Brandon v. Holt*, 105 S.Ct. 873, 879 n.25 (1985); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 759-61 n.6 (1984); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Petitioners erroneously contend that respondents "never questioned the appealability" in the court of appeals of the issues of the legality of the goal and the administrator, Pet. Reply Br. on the Pet. for Cert. at 7. The State argued in the court of appeals that "the inquiry on appeal should be limited to [petitioners'] challenges to the specific remedial provisions *added by the AAAPO*." Brief for Plaintiff-Appellee State Division of Human Rights, at 33 (emphasis added). *See also* Brief for the EEOC at 16. The court of appeals agreed that its previous decisions in this case were reason enough to dispose of petitioners' arguments concerning the goal and the administrator (A. 29, 31).

[16] The denial of petitioners' motion to terminate the O&J by the district court, not appealed to the court of appeals, clearly is not before this Court. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978). In any event, the motion to terminate did not revive petitioners' right to challenge the finding of liability, imposition of the goal or the office of the administrator. Although *res judicata* does not apply when a motion to modify is made after a final judgment, *Arizona v. California*, 460 U.S. 605, 619 (1983), the moving party must demonstrate sufficiently changed conditions of law or fact to warrant relief. *Id.* at 624-25. Petitioners could not allege that the applicable statute, Title VII, had changed since entry of the decree, *System Fed'n No. 91 v. Wright*, 364 U.S.

(footnote continued)

Because the 1976 and 1977 judgments of the court of appeals were final and review was not timely sought in this Court, *res judicata* bars further litigation of all issues that were or could have been decided by those judgments.[17] As the Court succinctly stated in *Arizona v. California*:

> [L]itigation proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which, after appeal, the binding finality of *res judicata* and collateral estoppel will attach.

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642 (1961), nor did they present any new factual circumstances justifying relief from the judgment (A. 157). This Court's decision in *Stotts*, 467 U.S. 561, does not justify a modification of the judgment: *Stotts* did not change the interpretation given Title VII, but merely applied existing law. *See* Point III, *infra*. Moreover, even if *Stotts* had changed the decisional law interpreting Title VII, petitioners could not use the decision as a basis for excusing their failure to appeal the 1976 and 1977 judgments as they were free, following the judgments, to seek a ruling from this Court that race-conscious remedies were not permissible. When they chose not to use that opportunity, the judgment became *res judicata*.

Moreover, "modification is not a means by which a losing litigant can attack the court's decree collaterally." 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2962 at 600-01 (1973); *accord* 7 J. Moore, *Moore's Federal Practice* ¶ 60.27[2] at 274 (2d ed. 1985) (Fed. R. Civ. P. 60(b) (6) "cannot be used as a substitute for appeal. Absent exceptional and compelling circumstances, failure to obtain relief through the usual channels of appeal is not another reason justifying relief."); *McKnight v. United States Steel Corp.*, 726 F.2d 333, 338 (7th Cir. 1984); *House v. Secretary of Health & Human Services*, 688 F.2d 7, 9 (2d Cir. 1982). *See System Fed'n No. 91*, 364 U.S. at 647-48; *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932); *Restatement (Second) Judgments* § 73 at 197-98 (1982).

[17] Even applying the more flexible law of the case doctrine, *see* 1B *Moore's Federal Practice* ¶ 0.405[2] at 188-90, the Solicitor agrees with the State that many of the issues raised by petitioners may not be reviewed by this Court. *See, e.g.*, Sol. Loc. 28 Br. at 16-17 (the 1975 liability finding) and Sol. Loc. 28 Br. at 21-22 (challenge to the administrator's appointment and powers). The Solicitor's logic applies equally to review of the goal and other race-conscious relief affirmed in 1976 and 1977. It was certainly forseeable when the race-conscious relief was imposed in 1975 that failure to make real and substantial progress toward the goal would be met with stern measures. There was thus no excuse for the union's failure to seek review of the race-conscious relief in 1976.

460 U.S. 605, 619 (1983).[18] *See also Federated Department Stores v. Moitie*, 452 U.S. 394, 398-99 (1981).

Further, "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948); *accord United States v. Rylander*, 460 U.S. 752, 756-57 (1983). The Third Circuit has explained the reasons for this rule:

> If a civil contemnor could raise on appeal any substantive defense to the underlying order by disobeying it, the time limits specified in [the Federal rules] would easily be set to naught [,] . . . present[ing] the prospect of perpetual relitigation, and thus destroy[ing] the finality of judgments of both appellate and trial courts.

Halderman v. Pennhurst State School & Hospital, 673 F.2d 628, 637 (3d Cir. 1982) (*en banc*), *cert. denied*, 465 U.S. 1038 (1984).

The rule that a party may not relitigate in a contempt proceeding an issue previously decided is simply an application of ordinary *res judicata* principles. *United States v. Secor*, 476 F.2d 766, 770 (2d Cir. 1973) ("To permit such a collateral attack would be to make a mockery of the well settled doctrine of *res judicata*."). *See also Daly v. United States*, 393 F.2d 873, 876 (8th Cir. 1968); *World's Finest Chocolate Inc. v. World Candies, Inc.*, 409 F. Supp. 840, 844 (N.D. Ill. 1976), *aff'd*, 559 F.2d 1226 (7th Cir. 1977), and cases cited therein.

Petitioners attempt to avoid the application of *res judicata* by citing cases permitting a party to challenge both a civil contempt

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[18] *Arizona v. California*, cited by the Solicitor in support of his contention that *res judicata* is inapplicable here, actually supports the State's view that the court of appeals' 1976 and 1977 judgments bar review of the matters resolved therein.

In *Arizona v. California*, this Court, in the exercise of its original jurisdiction, decided to apply *res judicata* principles rather than law of the case to preclude relitigation of factual and legal issues long ago decided, even though the decree involved was not final. 460 U.S. at 618-19; *id.* at 644 (Brennan J., concurring in part and dissenting in part).

finding and an underlying temporary restraining order or preliminary injunction. Pet. Br. at 36, n.25. These cases are irrelevant when a party violates an unappealed *permanent* injunction:

> *[W]here, instead of a temporary injunction, a permanent injunction is violated, the interest in enforcement consists not only of the need to maintain respect for court orders and for judicial procedures, but also of the need to avoid repetitious litigation.* This latter interest, the interest which the doctrine of res judicata serves in all of its applications, militates in favor of barring collateral attacks upon permanent injunctions in civil contempt proceedings as well as in criminal ones.

NLRB v. Local 282, International Brotherhood of Teamsters, 428 F.2d 994, 999 (2d Cir. 1970) (emphasis added).[19]

The adjustment of the 29% goal to 29.23% in AAAPO by the district court in August 1983 (A. 119), did not remove the issue of the legality of the imposition of the goal from the reach of *res judicata*. As the district court noted, "[t]he new goal of 29.23% essentially is the same as the goal set in 1975" (A. 123). Petitioners may not avoid the effects of *res judicata* by challenging what is essentially a reiteration of a prior order. *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952); *Class v. Norton*, 505 F.2d 123, 125 (2d Cir. 1974); *Sidney v. Zah*, 718 F.2d 1453, 1457 (9th Cir. 1983).

Nor may petitioners avoid the consequences of *res judicata* by citing intervening decisional law, even from this Court:

> [T]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the

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[19] The district court's retention of jurisdiction did not transform the O&J and RAAPO into a non-final judgment and order, the provisions of which might still be subject to review. *See Special Project, The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 846 (1978). The retention of jurisdiction simply permits the district court, without finding subsequent violations of Title VII, to modify the remedies it ordered "to effectuate the equal employment opportunities for nonwhites and other appropriate relief" (A. 316). *See Morrow v. Crisler*, 491 F.2d 1053, 1055 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974).

> judgment may have been wrong or rested on a legal principle subsequently overruled in another case.

Federated Department Stores, Inc., v. Moitie, 452 U.S. at 398. *See also Nevada v. United States*, 463 U.S. 110, 130 (1983), (citing *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) ("The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties *upon any ground whatever* . . . .") (emphasis added)). Therefore, even assuming, *arguendo*, that petitioners and the Solicitor are correct in their interpretation of the Court's decision in *Stotts*, 467 U.S. 561, *but see* p. 48, *infra*, the imposition of the goal and other race-conscious relief contained in AAAPO nevertheless must be affirmed.

Accordingly, petitioners are barred from relitigating in this Court issues decided by the court of appeals in 1976 and 1977.

II. AAAPO AND THE FUND ARE APPROPRIATE EXERCISES OF CIVIL CONTEMPT POWERS

Petitioners contend that they were held in contempt for failure to meet the 29% goal, Pet. Br. at 40, and that their due process rights were violated because the sanctions imposed under the Fund order were, in petitioners' view, criminal contempt sanctions. *Id.* at 39. The Solicitor argues that, while the Local was properly held in civil contempt and the fines imposed were proper overall, the race-conscious aspects of the Fund order are contrary to the express dictates of §706(g) of Title VII and should be excised. We address these contentions here.

A. Clear and Convincing Evidence Supports the Contempt Findings Below

The district court based the contempt findings[20] upon various and repeated clear violations of the O&J and RAAPO which demonstrate the Local's unflagging and unabashed commitment

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[20] The propriety of the findings underlying the second contempt judgment is not before this Court inasmuch as the petition does not raise it as an issue. *See* Sup. Ct. R. 21.1(a); *Berkemer v. McCarty*, 104 S.Ct. 3138, 3153 n.38 (1984). Nonetheless, in that proceeding, the evidence establishing the Local's noncompliance was so overwhelming that petitioners offered only token opposition (A. 22).

to impede the entry of minorities into Local 28 (A. 125-26, 155). Those orders were designed to prohibit petitioners from discriminating further against minorities seeking union membership and "to assist in the achievement of the [29%] goal" (A. 123). Contrary to the assertions of the Solicitor and petitioners, Sol. Loc. 28 Br. at 8, Pet. Br. at 40, neither the district court nor the court of appeals rested the contempt finding on petitioners' failure to meet the 29 percent minority membership goal by the date prescribed in the RAAPO. Citing no less than seven separate violations, see pp. 8-10 and 12, *supra*, those courts agreed that "the collective effect of these violations has been to thwart achievement of the 29 percent goal of non-white membership in Local 28 established by the court in 1975" (A. 155-56).

The findings underlying the first contempt order are supported by "clear and convincing evidence." *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir.), *cert. denied*, 454 U.S. 832 (1981). Except for the charge that petitioners underutilized the apprenticeship program, petitioners virtually conceded below and concede here the other violations cited – issuance of unauthorized work permits, failure to propose and conduct a general publicity campaign and failure to maintain and submit vital records (A. 13,23).

Petitioners' contention that the record does not support a finding that they underutilized the apprenticeship program was exhaustively examined and rejected by the court of appeals (A. 15-16). Additionally, as we have already shown, the record supports the finding that the Local had underutilized the apprenticeship program to the detriment of minorities. See pp. 8-9, *supra*. At this stage of the litigation, review by this Court of the sufficiency of the evidence is neither warranted nor appropriate. *See National Collegiate Athletic Association v. Board of Regents*, 104 S. Ct. 2948, 2959 n.15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

The underutilization of the apprenticeship program coupled with the three other violations cited by the court of appeals in support of the first contempt order unequivocally established that petitioners attempted to defeat two of the central provisions of the RAAPO: "to assure that substantial and regular progress is made toward this goal. . ." and "to assure apprentices of Local

28 share equitably in all available employment opportunities" (A. 183-84).[21]

B. The Fund and AAAPO Constitute a Precisely Crafted Civil Contempt Sanction Rather Than a Criminal Penalty

The gravamen of civil contempt is its remedial purpose. *See Penfield Co. v. SEC*, 330 U.S. 585 (1947); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911). Civil contempt sanctions may be imposed "for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947). The provisions of the Fund and AAAPO reflect the district court's exercise of its power "to grant the relief that is necessary to effect compliance with its decree[s]." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949); *see Milliken v. Bradley*, 433 U.S. 267 (1977). Here, after petitioners violated not only numerous specific provisions of the O&J and RAAPO, but just as importantly their unambiguous objective, full remedial relief was necessary to secure compliance with the underlying decrees. *McComb*, 336 U.S. at 193. That this was the court's purpose may be seen from the fact that the Fund order and AAAPO permit petitioners to purge themselves of contempt. *Shillitani v. United States*, 384 U.S. 364 (1966). The Fund order expressly terminates and money remaining in the Fund is to be returned to petitioners once they attain the goal and thereby demonstrate the eradication of prior discrimination and its effects (A. 114).[22] AAAPO contains a similar provision (A. 55).[23]

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[21] Even if this Court were to disagree with the lower courts' underutilization finding, the first contempt judgment should be upheld because it is supported by at least three other violations and the district court did not place primary emphasis on the underutilization finding (A. 155).

[22] The goal is thus an integral part of the Fund because it operates as a signal of when petitioners have purged themselves of contempt.

[23] Petitioners incorrectly contend that the Fund is not a coercive sanction because its termination is also contingent upon the court's determination that the Fund is no longer necessary. This case is indistinguishable from *Shillitani* where the petitioner was sentenced to prison for two years *or* until the further order of

(footnote continued)

The terms of the Fund and AAAPO are based on experience and are reasonably crafted to coerce petitioners to admit minority members and, in so doing, to remedy the consequences of petitioners' contemptuous acts. The Fund is aimed at increasing minority membership in Local 28 by augmenting the pool of qualified minority applicants for the apprenticeship program (A. 116), ¶¶6b,c,i,j. To this end, some provisions require the creation of support services for minority apprentices, including tutorial and counseling services (A. 116), ¶¶6a,d; educational stipends (A. 117), ¶6e; and low-interest loans for apprentices who demonstrate financial need.[24] *Id.*, ¶6f. Other provisions are designed to stimulate an overall increase in employment opportunities so that more minority apprentices may be hired. Thus, paragraph 6(h) provides financial reimbursements to any employer who demonstrates it cannot afford to hire additional apprentice to meet the 1:4 apprentice-to-journeyman requirement of AAAPO, and paragraphs 6(i) and 6(j) are directed at generating more training and employment opportunities, which will increase minority employment and membership in Local 28 (A. 116-18).

Furthermore, paragraph 6(b) of the Fund, which requires creation of part-time and summer sheet metal jobs for qualified minority vocational students, when coupled with the general publicity requirement of AAAPO, is intended to operate to develop the interest and awareness of minority youth in sheet

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the court. 384 U.S. at 360. Rejecting the petitioner's characterization of that contempt sanction as a criminal penalty, this Court held that the clear intent of the sentence was to obtain answers to the questions for the grand jury—"to coerce, rather than punish." *Id.* at 370. Likewise, no doubt exists that if petitioners comply with the 29.23% minority membership goal, the court will terminate the Fund and petitioners will be permitted to recover any monies remaining (A. 114, 116). Here too, the purpose is to coerce, rather than punish. *See Doyle v. London Guar. & Accident Co.*, 204 U.S. 599, 603 (1906).

[24] These services also counter-balance partially the deeply entrenched system of mutual self-help among the white members that has long been a characteristic of this union, see p. 51 n.55, *infra*, JA 402-03 and A.140, which has operated to disadvantage minorities seeking admission and employment. Until minorities are fully integrated into the union in substantial numbers, the tradition within the union to "take care of its own" will, as this Court has recognized in the school desegregation cases, continue to perpetuate the effects of the union's racially segregated past. *See*, e.g., *United States v. Montgomery Board of Education*, 395 U.S. 225, 227 (1969).

metal jobs. These programs aim to counteract Local 28's self-imposed isolation from minority communities. Paragraphs 6(g) and 6(e) seek to maintain minority membership by encouraging development of advanced skills by minority apprentices and journeymen who are unemployed (A. 117). Similarly, the 1:4 apprentice-to-journeyman requirement contained in AAAPO will ensure that the Local will not again circumvent the requirement that apprentices share equitably in all job opportunities (A. 34). Operating together, the provisions of the Fund represent a well-designed plan to reverse Local 28's racially discriminatory admission practices by increasing minority participation in the Local's activities.

Likewise, the 29.23% minority membership goal coerces petitioners to comply with the O&J and AAAPO and serves as the only objective measure of petitioners' progress toward integration. The goal is necessary, "particularly in light of the determined resistance by Local 28 to all efforts to integrate its membership. . .," and its "foot-dragging egregious noncompliance with the O&J and RAAPO" (A. 24) *See* pp. 49-52, *infra*.[25]

The compensatory character of the Fund is also apparent. That some compensation is appropriate was evident from the nature of the violations. Underutilization of the apprenticeship program has resulted in the unwarranted rejection of minority applicants. The Local's failure to conduct a general publicity campaign perpetuated the Local's discriminatory reputation among minorities who might otherwise have been attracted to the sheet metal trade. Its failure to submit timely and accurate reports deprived the court of the ability to monitor the Local's compliance and as a result weakened the entire remedial scheme. Its unauthorized issuance of work permits as well as the issuance

[25] The other contempt sanctions sustained by the court of appeals, the requirement that petitioners pay for computerized record-keeping and the assessment of attorney fees and expenses, are readily identifiable as civil contempt sanctions. Sol. Loc. 28 Br. at 14-15. Petitioners do not dispute this point. The computerized record-keeping provision clearly coerces compliance with the record-keeping requirement of the court's orders, while the award of fees and expenses compensates plaintiffs for the costs of litigating the contempt proceedings. *Gompers*, 221 U.S. at 445.

of over 200 permits harmed minority journeymen who are not affiliated with favored sister locals and is symptomatic of continued discriminatory practices. The overall effect of these contumacious acts has been to undermine the remedial plan outlined in the O&J and RAAPO. As a direct consequence, the Local has injured the class of minorities interested in becoming sheet metal workers, the intended beneficiaries of the O&J and RAAPO.

The Fund is designed to compensate these injured persons by attracting qualified minorities to the apprenticeship program, fostering an improved working environment for new and existing minority apprentices and journeymen, and providing strong support services to assist the progress of each of these groups. The Fund thereby works "to compensate those who had suffered most from defendants' contemptuous underutilization of the apprenticeship program" (A. 26). It does so "not with a money award, but by improving the route they most frequently travel in seeking union membership." *Id.* The compensatory feature of the Fund is justified because petitioners' dogged failure to comply with the O&J and RAAPO has frustrated the relief awarded to plaintiffs, economically injured the intended beneficiaries of those orders, and caused monetary damages to be unquantifiable (A. 154, 128, 23).

Petitioners also contend that the sanctions imposed exceed the standards for permissible contempt sanctions "because nothing is payable to any complainant or related to any actual loss." Pet. Br. at 39. Petitioners view the civil contempt power too narrowly. By necessity, the district court exercised civil contempt power commensurate in scope, force and ingenuity with the "determined resistance" and "foot-dragging egregious noncompliance" (A. 24) it sought to remedy. *Hutto v. Finney*, 437 U.S. 678 (1978); *United States v. United Mine Workers*, 330 U.S. at 303. A compensatory contempt sanction need not compensate a party for the precise amount of his loss. For example, in *McComb*, 336 U.S. at 193-95, unpaid wages were awarded to nonparty employees and in *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455 (1931), the compensatory relief awarded exceeded the injured parties' losses.[26]

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[26] Other characteristics of the contempt proceeding establish that it was civil in nature. In this regard, the contempt action was between the original parties,

(footnote continued)

See also Hutto v. Finney, 437 U.S. at 691 (a civil contempt fine may combine compensatory and coercive characteristics).

A perfect match between the contempt sanction and the injury inflicted is not required as long as the sanction is reasonably directed at securing compliance with the court's orders, *id.*, or compensating the class of persons injured by the defendants' contempt. In this case, the remedy imposed did both. Accordingly, AAAPO and the Fund are appropriate civil contempt sanctions.

C. The Civil Contempt Sanctions Imposed Are Not Limited by Title VII

A federal court has "inherent power" to prevent obstruction of its authority by acts of "force, guile or otherwise." *United States v. Armour & Co.*, 398 U.S. 268, 274 (1970) (Douglas J., dissenting). These powers are rooted in common law, Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161 (1908), and are essential to the operation of the judiciary:

> The inherent powers of federal courts are those which "are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 34 (1812). The most prominent of these is the contempt sanction, "which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court. . . ." *Cooke v. United States*, 267 U.S. 517, 539 (1925); see 4 W. Blackstone, Commentaries 282-285. Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.

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and was instituted and tried as part of the main civil proceeding. *Gompers*, 221 U.S. at 445. In addition, the district court awarded costs to plaintiffs as compensation for their successful prosecution of the contempt proceedings. *Id.* at 447. Furthermore, the first order of the district court imposing contempt fines expressly relied upon civil contempt guidelines articulated by this Court in *United Mine Workers*, 330 U.S. at 304: the character and magnitude of the harm threatened by continued contumacy, the probable effectiveness of any suggested sanction in bringing about the desired result, and the consequent seriousness of the burden to defendants (A. 156).

Roadway Express, Inc. v. Piper , 447 U.S. 752, 764 (1980); *see also Ex Parte Robinson*, 86 U.S. 505 (1873).[27]

Inherent judicial powers are independent of statutory causes of action and, unless specifically limited by statute,[28] are fully available to render complete justice. *McComb*, 336 U.S. at 193; *Porter v. Warner Holding Co.*, 328 U.S. 398 (1946). Otherwise, the scope of inherent powers is broad, flexible, and limited only by the traditional usage of the particular power[29] and the Constitution. *Milliken v. Bradley*, 418 U.S. 717; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 406 (1971) (Harlan, J., concurring). It follows that inherent powers are not to be laid aside by questionable inferences from or doubtful constructions of statutory provisions. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836).

Anyone who is covered by the terms of an injunction is subject to sanctions for violations of its provisions unless the injunction was "transparently invalid or had only a frivolous pretense to validity." *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967). It can hardly be said that the race-conscious provisions imposed in the O&J and RAAPO were "transparently invalid"

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[27]Decisions discussing the judiciary's parallel inherent authority to award equitable relief shed additional light on the scope of the civil contempt power. *See Roadway Express, Inc. v. Piper; compare Hecht Co. v. Bowles*, 321 U.S. 321 (1944), *with Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[28] Although several statutory provisions including 42 U.S.C. § 2000h and of the Fed. R. Crim. P. 42 limit the exercise of criminal contempt power, there is no similar restraint on the exercise of civil contempt power.

[29] As demonstrated above, the sanctions fashioned are consistent with the traditional usages of civil contempt to coerce compliance and compensate losses. Apparently, the Solicitor misunderstands the purpose of civil contempt power: he suggests that the district court should have designed sanctions to penalize the "union's leaders," rather than innocent whites. Sol. Loc. 28 Br. at 31. As we discussed earlier, punishment is not the purpose of civil contempt. Here, the court properly fashioned a remedy to secure compliance with the O&J and RAAPO and AAAPO. Although as the Solicitor argues, imprisonment may have been a permissible coercive sanction, the district court had discretion to fashion sanctions other than imprisonment. *See Hutto v. Finney*, 437 U.S. at 691.

or that they had "only a frivolous pretense to validity," *id.*, for prior to the district court's imposition of contempt sanctions (as well as subsequently) every court of appeals had held that such remedies are authorized by Title VII. See n. 49, *infra* at 44. In fact, as shown below, a court has broad powers under Title VII to grant complete relief for identified discrimination and it may order relief that extends to individuals who are not the proven victims of discrimination.

Petitioners argue that 42 U.S.C. § 2000h precludes courts from awarding compensatory relief as a *civil* contempt sanction in contempt proceedings arising out of a Title VII action. Pet. Br. at 38. They press this contention despite their express recognition that section 2000h only governs "criminal contempt proceedings under the Act." Pet. Br. at 37. Moreover, section 2000h expressly provides that the section does not affect a court's power to impose civil contempt sanctions "to secure compliance with or prevent obstruction of. . . any lawful writ, process, order, rule, decree or command of the court. . . ." Civil contempt sanctions, whether coercive or compensatory, are designed "to secure compliance with or prevent obstruction of" court orders. *See McComb*, 336 U.S. at 193-95; *Leman* 284 U.S. at 455. The district court thus properly awarded compensatory as well as coercive relief as sanctions for petitioners' contemptuous conduct.

III. THE RACE-CONSCIOUS REMEDIES IMPOSED BY THE COURT BELOW COMPORT WITH TITLE VII AND THE FIFTH AMENDMENT

We have already shown that any effort to revisit the district court's decision fixing the goal is barred by the strong policy favoring repose in litigation. *See* Point I, *supra*. We have also shown that the goal is an integral part of the Fund order and that the Court's establishment of the goal, as well as the other race-conscious aspects of the Fund order, constitute an appropriate exercise of the district court's contempt power. *See* Point II, *supra*. The district court's legal predicate for imposition of the goal set forth in AAAPO and the race-conscious aspects of the Fund order should not be reconsidered absent a clear showing that such

remedies when imposed as contempt sanctions are barred by Title VII or the fifth amendment of the Constitution.[30] See p. 27-28, *supra*. As shown below, far from barring such remedies, both Title VII and the Constitution authorize the use of race-conscious remedies in appropriate cases and the beneficiaries of such remedies may include other persons besides the identifiable victims of illegal discrimination.

A. The Race-conscious Remedies Ordered By The District Court Are Authorized Under Title VII

1. *A remedy furthering the primary objective of Title VII of eradicating discrimination and its continuing effects is within the scope of section 706(g) of the Act*

"[T]he scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365 (1977). Because race-conscious remedies such as those imposed below are necessary to achieve Title VII's primary purpose of eradicating discrimination and its effects, they are well within the scope of remedies authorized by Title VII.

The primary purpose of Congress in enacting Title VII in 1964 was prospectively to remedy the economic disadvantages resulting from race discrimination that blacks have suffered in our economy. *United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979) (citing 110 Cong. Rec. 6548 (1964) (remarks of Senator Humphrey)). *Accord* 29 C.F.R. § 1608.1b (1985). Congress was not, as petitioners and the Solicitor suggest, Pet. Br. at 17-18; Sol. Loc 93 Br. at 7-9, solely, or even primarily, concerned with the retrospective matter of remedying the injuries suffered by proven victims of discrimination. Thus, much of the congressional debate emphasized the high rate of unemployment among blacks,

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[30] Moreover, the relief imposed by the district court was designed to remedy not only violations of Title VII but also violations of the NYC Code § B1-7.0 (A. 321, 350-51). Petitioners have not challenged the permissibility of the goal and the Fund order under the New York City ordinance, and, indeed, there is no section in the ordinance that even arguably suggests that its broad remedial provisions are limited by a victim-specific principle. See appendix to this brief. The existence of an independent state ground for the remedies is an additional reason for affirming the judgment. *See Michigan v. Long*, 463 U.S. 1032, 1038 (1983).

110 Cong. Rec. 6547, 7204 (1964) (remarks of Senator Clark), particularly in comparison with white unemployment rates. *Id.* at 6547 (remarks of Senator Humphrey).[31] "Congress feared that the goals of the Civil Rights Act [of 1964] — the integration of blacks into the mainstream of American society — could not be achieved" unless the increasing rate of black unemployment was reversed. *Weber*, 443 U.S. at 202. Congress therefore passed Title VII "to open up employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 Cong. Rec. 6548 (remarks of Senator Humphrey), cited in *Weber*, 443 U.S. at 203.

This Court has repeatedly recognized that Congress' primary purpose in passing Title VII was "to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs*, 401 U.S. at 429-30; *accord Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *Fullilove v. Klutznick*, 448 U.S. 448, 499 (1980) (Powell, J., concurring). Put differently, Congress' main purpose was to eradicate discrimination and "the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle*, 422 at 417-418, 421 (citing *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)); *accord Dothard v. Rawlinson*, 433 U.S. 321, 328 (1977). This goal was "of the highest priority." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

When Congress amended Title VII in 1972, it again sought to eliminate the economic disparity between whites and minorities, a disparity dramatized by statistics showing that far more blacks than whites were unemployed, that blacks who were employed were far more likely to have low-paying jobs, and that the median income of white families was about 75% higher than that of minority families. S. Rep. No. 415, 92d Cong., 1st Sess.

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[31] Congress hoped that the passage of the Act would eliminate a "severe inequality in employment [that] is felt both on a personal and on the national level." *See* H. Rep. No. 914, Part 2, 88th Cong., 2d Sess. (additional views of McCulloch, *et al.*) *reprinted in* 1964 U.S. Code Cong. & Ad. News 2487, 2514. The national costs of this inequality were perceived as including additional expenses for "unemployment compensation, relief, disease and crime." *Id.* at 2515.

6 (1971), *reprinted in* Subcomm. on Labor of the Comm. on Labor & Pub. Welfare, 92d Cong. 2d Sess.: Legislative History of the Equal Employment Opportunity Act of 1972 Comm. Print (1972) at 410, 415, 417 ("*1972 Leg. Hist.*"). Congress strengthened Title VII to eliminate that disparity. *Id.* at 417. *See also* H. Rep. No. 238, 92 Cong., 1st Sess. 3 (1971), 1972 Leg. Hist. at 64 ("minority groups are not obtaining their rightful place in our society"). Title VII was also enacted to make whole proven victims of discrimination for economic injuries they suffered as a result of discriminatory conduct. *Franks*, 424 U.S. at 763, 767 and n.27; *Albemarle*, 422 U.S. at 418-419; *Teamsters*, 431 U.S. at 364. This, however, was only "a secondary, fallback purpose." *Ford Motor Co. v. EEOC*, 458 U.S. at 230. Obviously, case-by-case adjudications aimed solely at compensating identified victims of discrimination will not result in the prompt removal of racial barriers or prevent future discrimination.

This Court has firmly held that a district court's remedial powers under the Act must be determined not just by its make whole purposes but by the primary purpose of "achiev[ing] equal employment opportunity and ... remov[ing] the barriers that have operated to favor white male employees over other employees. *Teamsters*, 431 U.S. at 364-65; *Franks*, 424 U.S. at 768 n.28, 770, 771; *Albemarle*, 422 U.S. at 417-21. A district court should therefore exercise its discretion under section 706(g) "to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." *Franks*, 424 U.S. at 770-71 (citing *Albemarle*, 422 U.S. at 421). Relief is to be denied "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy *and* making persons whole for injuries suffered through past discrimination." *Id.* (emphasis added).

As demonstrated below, a holding that section 706(g), under the circumstances presented here, bars prospective, race-conscious remedial relief carefully designed to remedy the effects of decades of unrelenting discrimination would frustrate Title VII's primary purpose of bringing about equality of opportunity.

2. *Section 706(g) grants district courts broad equitable authority to impose goals and other race-conscious relief necessary to remedy proven discrimination*

The first part of section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides that:

> 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 appropriate, which may include, but is not limited to*, reinstatement or hiring of employees, with or without back pay ... *or any other equitable relief as the court deems appropriate*. (emphasis added).

As reflected by its broad language, section 706(g) was intended to confer extremely broad equitable powers upon district courts to enable them to remedy unlawful discriminatory conduct and its effects.[32] *Teamsters*, 431 U.S. at 364; *Franks*, 424 U.S. at 771; *Albemarle*, 422 U.S. at 421. The federal courts have freely exercised the discretion conferred by section 706(g) to assure that employers found to be in violation of the Act eliminate their discriminatory practices and the effects of those practices. *Teamsters*, 431 U.S. at 361 n.47; *see Fullilove*, 448 U.S.at 510-13 (Powell, J., concurring).[33]

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[32] Section 706(g), as amended in 1972, is fully applicable to this action. *See Bradley v. School Bd.*, 416 U.S. 696 (1974). The amendments to section 706 were inapplicable only to proceedings filed with the EEOC prior to the effective date of the amendment, not to suits such as this one filed by the Justice Department pursuant to section 707 of the 1964 Act, 42 U.S.C. § 2000e-6, Equal Employment Opportunity Act of 1972, Public Law No. 88-352 § 14; 1972 U.S. Code Cong. & Ad. News 2166 (section-by-section analysis § 10). *See Franks*, 424 U.S. at 764 n.21 (relying upon 1972 amendments and legislative history in determining appropriate remedy under section 706(g) for pre-1972 discrimination).

[33] Contrary to the Solicitor's contention, Sol. Loc. 93 Br. at 8 n.5, the principles developed under section 10(c) of the NLRA, 29 U.S.C. § 160(c), "guide, but do not bind, courts tailoring remedies under Title VII." *Ford Motor Co. v. EEOC*, 458 U.S. at 226-28. *See Franks*, 424 U.S. at 769 n.29. But even under section 10(c), while punitive sanctions are barred, the Board may "remove[] or avoid[]

(footnote continued)

Petitioners and the Solicitor argue, however, that the last sentence of section 706(g) limits a district court's equitable powers under Title VII by depriving it of the authority to terminate the effects of discrimination unless the relief benefits only proven victims of discrimination. The contention does not withstand scrutiny.

a. *The plain language of section 706(g) demonstrates that race-conscious relief may benefit persons who are not proven victims of discrimination*

The last sentence of section 706(g) bars a court from ordering "admission . . . of *an individual* as a member of a union . . . *if such individual was refused admission* . . . for any reason other than discrimination on account of race . . . ." 42 U.S.C. 2000e-5(g) (emphasis added). The plain language of the sentence demonstrates that it is not a bar to race-conscious relief designed to remedy proven discrimination. First, a goal does not order the admission of "an individual," but instead directs that the union take steps to increase its overall minority membership. If Congress had intended to bar judicial relief benefitting unspecified members of a group, as opposed to relief running to specific individuals, it could plainly have done so. That is precisely the language Congress used in section 703(j) ("group or individual"). *See* n. 35 *infra* at 35. Second, the sentence only bars orders that grant relief to individuals who were "refused admission" to a union; under the orders in this case, eligibility for union membership under the prescribed goal is not dependent upon prior rejection by the union. Third, the sentence obviously addresses only the situation in which an individual was denied membership for a reason other than discrimination. "[T]he section merely prevents a court from ordering [a union to admit someone unqualified

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the consequences of violations where those consequences are of a kind to thwart the purpose of the Act". *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651, 655 (1961), (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938)). "The task of the NLRB in applying § 10(c) is 'to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice'." *Franks*, 424 U.S. at 769 citing *Local 60, United Bhd. of Carpenters*, 365 U.S. at 657 (Harlan, J., concurring)). The remedial relief imposed below will further the primary purpose of Title VII and is "designed to recreate the conditions" that would have existed absent discrimination against minorities.

for membership] and has nothing to do with prospective class-wide relief." *Stotts*, 104 S. Ct. at 2609 (Blackmun, J., dissenting).[34]

b. *The legislative history of Title VII supports the plain meaning construction of 706(g)*

The 1964 legislative history supports the "plain meaning" interpretation of the last sentence of § 706(g). It demonstrates that the sentence was added to ensure that the Act would not impair an employer's right to make personnel decisions on *non*-discriminatory grounds. *See Stotts*, 104 S. Ct. at 2608-09 (Blackmun, J., dissenting); *EEOC v. American Telephone & Telegraph*, 556 F.2d 167, 177-78 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). Section 707(e) of H.R. 7152, 88th Cong., 1st Sess. (1963), the predecessor to section 706(g), barred judicial relief to an individual "if such individual was ... refused employment or advancement or was suspended or discharged for cause." H.R. Rep. No. 914, 88th Cong., 1st Sess. (*"H.R. Rep. No. 914"*) *reprinted in* EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 2012 (*"1964 Leg. Hist."*). After it was amended to its current version, the sponsor, Representative Celler, stated that the purpose of both the original and amended versions was to clarify that an employer would not violate the statute by denying employment on grounds other than unlawful discrimination. 110 Cong. Rec. 2567 (1964) *see* H.R. Rep. No. 914, *1964 Leg. Hist.* at 2029; *see also* 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); *id.* at 2568, 2570 (1964) (remarks of Rep. Gill).

When Congress amended Title VII in 1972, it was still of the view that the last sentence of section 706(g) barred only relief aimed at non-discriminatory employment decisions and not race-conscious relief to remedy systemic discrimination. Thus, the Conference committee report stated that "the provisions of existing

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[34] The Solicitor professes that the sentence bars preferences to persons "not 'refused employment or . . . suspended or discharged' as a result of discrimination." Sol. Loc. 93 Br. at 8-9, (quoting section 706(g)). The Solicitor General distorts the sentence. Its bar to preference is limited to persons who were "refused employment [or membership]" for a reason other than discrimination, and does not prevent relief benefitting persons who were not refused employment at all.

law prohibiting court ordered remedies based on any adverse action except unlawful employment practices under Title VII are retained." Conf. Rep. No. 899, 92d Cong., 2d Sess. 19 (1972), 1972 Leg. Hist. at 1839.[35]

Virtually none of the legislative statements quoted by petitioners or by the Solicitor General lend any support to their claim that Congress intended in 1964 to prohibit temporary race-conscious relief designed to redress proven discrimination. Rather, consistent with the language and principles of sections 703(j) and 706(g), the statements quoted reflected Congress' intent that the Act not be interpreted to impose liability for a failure to adopt a quota or for racial imbalance without more,[36] to require employers to hire particular individuals who had not been subject to discrimination,[37] to authorize the EEOC or the courts to require employers to attain racial balance irrespective of past discrimination,[38] or to impose *permanent* quotas to remedy proven discrimination.[39] None of those situations is presented here.

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[35] Section 703(j) does not bar a court from imposing race-conscious relief. That section provides that the Act shall not be interpreted to require an employer "to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of [a racial] imbalance [in the work force]". 42 U.S.C. 2000e-2(j). Under the section, employers cannot be required to institute a preferential system in order to avoid Title VII liability. *Weber*, 443 U.S. at 207 n.7. By its terms, the section bars only preferential treatment designed to remedy an imbalance, 110 Cong. Rec. 8921 (1964), *1964 Leg. Hist.* at 3189-90 (remarks of Sen. Williams), not judicial relief premised upon a finding that the racial imbalance is attributable to past discrimination. If Congress had intended to bar race-conscious measures designed to remedy past systemic discrimination rather than to redress a racial imbalance, it would have said so. *See Weber*, 443 U.S. at 206.

[36] 110 Cong. Rec. 7207 (1964) (Mem. of Justice Dep't); *id.* at 1540, 15,876 (Rep. Lindsay); *id.* at 8921 (Sen. Williams); *id.* at 2558 (Rep. Goodell); *id.* at 5092, 11,848 (Sen. Humphrey); *id.* at 7213 (Clark–Case Interpretive Memorandum).

[37] 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); *id.* at 14,465 (Bipartisan Civ. Rights Newsletter); *id.* at 7214 (Clark–Case Interpretive Memorandum).

[38] 110 Cong. Rec. 14,465 (1964) (Bipartisan Civ. Rights Newsletter); *id.* at 1600 (Rep. Minish); *id.* at 1518 (remarks of Rep. Celler).

[39] 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); *id.* at 6566 (Mem. by Repub. members of H. Jud. Comm.); *id.* at 14,465 (Bipartisan Civ. Rights Newsletter).

where the courts have, in a proven instance of persistent discrimination, ordered prospective, temporary race-based remedies designed to correct past discrimination.[40]

When Congress amended Title VII in 1972, it reaffirmed that race-conscious relief is within the arsenal of remedies authorized by section 706(g). In the course of strengthening the statute, Congress took several steps that touched directly upon section 706(g). The full significance of those steps, however, cannot be appreciated without an understanding of the backdrop to the amendments.

In 1965, President Johnson had issued Executive Order No. 11246. 30 Fed. Reg. 12,319 (1965), 42 U.S.C. § 2000e note. The Executive Order created the Office of Federal Contract Compliance and required federal contractors to engage in affirmative action to ensure equal opportunity. *Id.* Pursuant to the Executive Order, the Department of Labor in 1967 established the Philadelphia Plan. *Contractors Association v. Secretary of Labor*, 442 F.2d 159, 163 n.7 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). That Plan, as revised in 1969, required federal construction contractors subject to the Executive Order to make good faith efforts to attain numerical goals for the employment of minorities. *Id* at 162-63. The requirement was extended to non-construction contractors in 1970. *Id.* The Plan was found consistent with Title VII by both the Attorney General, 42 Op. Atty. Gen. 405, 411 (1969), and the federal courts. *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Contractors*

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[40] Indeed, in 1972, Senators Allott, Humphrey, Mansfield, Williams, Clark and Case all voted against proposed amendments to Title VII that would have barred the imposition of goals. 118 Cong. Rec. 1676, 4918 (1972), *1972 Leg. Hist.* at 1074, 1716-17; *see infra* at 39 to 40. This is strong evidence that in 1964 these Senators did not believe that Title VII barred the use of temporary remedial goals.

Similarly, many of the members of the 1964 Congress who voted in favor of Title VII later opposed a rider that would have barred the use of goals under the Philadelphia Plan, *see* p. 37 n.41, *infra*, and emphasized that the use of programs such as the Philadelphia Plan was necessary if equal employment opportunity was to become a reality in the United States. *See* 115 Cong. Rec. 40,740-746 (1969) (remarks of Sens. Bayh, Javits, Griffin, and Scott); 115 Cong. Rec. 40,905, 40,908-909, 40,915, 40,917-919, 40,921 (1969) (remarks of Reps. Anderson, Bow, Ford, Fraser, Hawkins, McGregor, Reid and Ryan).

Association, 442 F.2d at 159. *See generally Regents of the University of California v. Bakke*, 438 U.S. 265, 354 n.28 (1978)(Brennan, Marshall, White and Blackmun, JJ.); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi L. Rev. 723 (1972).[41]

Both the Department of Justice and the EEOC, the two federal agencies charged with enforcement responsibilities under Title VII, maintained consistently that race-conscious remedies were permissible under Title VII. In appropriate cases they sought court orders, consent decrees, and conciliation agreements containing such provisions. *See, e.g., United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); 118 Cong. Rec. 1665 (1972), *1972 Leg. Hist.* at 1072 (press release summarizing consent decrees); 118 Cong. Rec. 1662-64, *1972 Leg. Hist.* at 1045 (remarks of Sen. Ervin criticizing EEOC for "requiring employers to practice discrimination in reverse by. . . [use of] percentages, quotas, goals or ranges"). See also p. 43 n. 48, *infra*. Furthermore, the courts, acting under section 706(g), had, where necessary, imposed race-conscious remedies in order to redress proven discrimination. *See, e.g., Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972) (applying Title VII analysis in action based on fourteenth amendment); *Ironworkers Local No. 86*, 443 F.2d 554; *United States v. Sheetmetal Workers Local 36*, 416 F.2d 123, 133 (8th Cir. 1969); *Local 53, International Association of Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), *aff'g*, 294 F. Supp. 368 (E.D. La. 1968); *Thorn v. Richardson*, 4 F.E.P. Cases 299, 303 (W.D. Wash. 1971); *United States v. Local 638*, 337 F. Supp. 217 (S.D.N.Y. 1972) (preliminary injunction); *United States v. Sheet Metal Workers, Local 10*, 3 CCH Empl. Prac. Dec. ¶ 8,068 (D.N.J. 1970) (preliminary injunction); *NAACP v. Allen*, 340 F. Supp. 703, 705-06 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974) (fourteenth amendment); *Buckner v. Goodyear*

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[41] The Senate rejected a rider to a supplemental appropriations bill that would have barred programs like the Philadelphia Plan. *See* 115 Cong. Rec. 39,961 (1969) (remarks of Sen. Hruska). Although the Senate initially passed the rider, *id.* at 40,039, it was subsequently rejected by the House, *id.* at 40,921, and, upon reconsideration, by the Senate, *id.* at 40,749. *See* Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723 (1972).

Tire & Rubber Co., 339 F. Supp. 1108, 1125 (N.D. Ala. 1972), *aff'd without opinion*, 476 F.2d 1287 (5th Cir. 1973).[42]

By the time Congress considered the 1972 amendments to Title VII, it was fully aware of the judicial decisions approving the use of goals or ratios, H.R. Rep. No. 238, 92d Cong., 1st Sess. 8 n.2 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 5 n.1 (1971); 118 Cong. Rec. 1662-76 (1972), *1972 Leg. Hist.* 1046-1072, of the Attorney General's opinion upholding goals and timetables, and of the Justice Department's and EEOC's view that goals and ratios were permissible under Title VII. 118 Cong. Rec. 7166 (1972), *1972 Leg. Hist.* at 1844; H.R. Rep. No. 238, 92nd Cong., 1st Sess. 16 (1971). Thus, had Congress simply left section 706(g) untouched when it amended Title VII in 1972, its refusal to amend the section would have constituted a ratification of those decisions. *Bob Jones University v. United States*, 461 U.S. 574, 599 (1983); *id.* at 607 (Powell, J., concurring); *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Congress did far more. First, in order "to give the courts wide discretion, as has generally been exercised under existing law, in fashioning the most complete relief possible," 118 Cong. Rec. 7168 (1972), it reaffirmed the breadth of section 706(g) and added language expanding its scope. The section was amended to authorize

> such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay. . . *or any other equitable relief as the court deems appropriate.*

42 U.S.C. § 2000e-5(g) (underscored language added in 1972).

Next, Congress expressly ratified decisions that had interpreted Title VII:

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[42] Contrary to *amicus curiae* Operating Engineers Local 542's contention, Op. Eng. Br. at p 14-15 n.10, the court in *Castro v. Beecher*, 334 F. Supp. 930 (D. Mass. 1971), *aff'd in part* and *rev'd in part*, 459 F.2d 725 (1st Cir. 1972), did not hold that Title VII barred race-conscious relief. *Id.* at 733. The district court did not doubt its authority to impose remedial goals. It merely declined to exercise its authority under the facts as they then appeared. 334 F. Supp at 950; 459 F.2d at 737. Indeed, *Beecher* was not even a Title VII action. *See* 459 F.2d at 733.

> In any area where the new law does not address itself, or in any areas 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.

118 Cong. Rec. 7167 (1972), *1972 Leg. Hist.* at 1844.[43] By this statement, Congress ratified the decisions authorizing goals. The ratification was fully applicable to decisions authorizing race-conscious relief under section 706(g), *cf. Stotts*, 104 S.Ct. at 2590 n.15, inasmuch as the amendment expanded rather than curtailed the scope of the section.

The Senate's rejection of two amendments offered by Senator Ervin further underscored its approval of goals as a means of remedying past discrimination. His first amendment would have barred any "department, agency or officer of the United States from requiring employers to practice discrimination in reverse". 118 Cong. Rec. 1662 (1972), *1972 Leg. Hist.* at 1017. The second would have made section 703(j) applicable to the Executive Order and other statutes in addition to Title VII. 118 Cong. Rec. 4917 (1972), *1972 Leg. Hist.* at 1681. Senators Javits and Williams, respectively the Republican and Democratic floor leaders in the Senate, argued against the amendments, 118 Cong. Rec. 1661-76, 4917-18. (1972), *1972 Leg. Hist.* at 1046-48, 1070-73. In opposing them, Senator Javits highlighted three court decisions and two consent decrees that had expressly recognized the right of executive agencies and the courts to require race-conscious hiring. 118 Cong. Rec. 1665-1676, *1972 Leg. Hist.* at 1048-1070. Senators Javits and Williams stated that the first amendment would have barred courts as well as executive agencies from imposing race-conscious goals.[44] 118 Cong. Rec. 1616, *1972 Leg. Hist.*

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[43] The next paragraph of the statement, 118 Cong. Rec. 7168 (1972), stressed that full make whole relief was within the scope of section 706(g); it did not state that such relief exhausted the relief available under the section.

[44] The amendment would not simply have deprived OFCC and the EEOC of the authority to require contractors to adopt goals, as contended by amicus Local 542 in its brief at 10. As Senator Javits argued, the amendment would have barred the Justice Department or the EEOC from seeking judicial goals

(footnote continued)

at 1046-47, 1072-73. The amendments were rejected, 118 Cong. Rec. 1676, 4918, *1972 Leg. Hist.* at 1074, 1681, thereby demonstrating the Senate's belief that goals were a necessary means of remedying the effects of discrimination. *Stotts*, 104 S. Ct. 2576, 2609-10 (Blackmun, J., dissenting.)[45]

The House emphatically endorsed continued use of remedial goals and timetables under Title VII. In discussing the advisability of consolidating enforcement of Executive Order 11246 and Title VII in a single agency, the House Report stated that "affirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination." H.R. Rep. No. 238, 92d Sess. Cong., 1st Sess. 16 (1971), *1972 Leg. Hist.* at 76. Given Congress' acute awareness that "affirmative action" under the Executive Order included the imposition of goals and timetables, *see, e.g.*, 117 Cong. Rec. at 31,965-67 (1971), *1972 Leg. Hist.* at 210-11(remarks of Rep. Green); 117 Cong. Rec. 31,965-66 (1971), *1972 Leg. Hist.* at 212 (remarks of Rep. Hawkins), the Report is strong evidence of the House's approval of remedial goals under Title VII. Moreover, like the Senate, the House defeated a bill proposed by Congressman Dent that would have barred quotas or preferential treatment under the Executive Order. 117 Cong. Rec. 32,111 (1971), *1972 Leg. Hist.* 255-56.

The Solicitor General and amicus curiae Operating Engineers Local 542 suggest that statements made by Representatives

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under Title VII. 118 Cong. Rec. 1661, *1972 Leg. Hist.* at 1046. Senator Ervin did not disagree with this characterization. See also 118 Cong. Rec. 1676, *1972 Leg. Hist.* at 1072-73 (remarks of Sen. Williams).

[45] Amicus curiae Operating Engineers Local 542 speculates that a Senator may have voted against the first Ervin amendment simply because he did not want to bar the use of goals under the Executive Order, and that such a vote thus sheds no light on the Senate's intentions as to judicially imposed goals. Op. Eng. Br. at 14-15 n.10. The argument strains credulity. A Senator favoring the wholesale imposition of goals upon federal contractors (irrespective of whether the employers involved had engaged in discrimination) would hardly be opposed to remedial goals judicially imposed only upon proven discriminators. Thus, any Senator who voted against the bill was clearly in favor of judicially imposed goals. See *Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. at 759 n.189.

Erlenborn and Hawkins in 1972 demonstrate their (and the House's) understanding that Title VII prohibited the use of judicially imposed goals. Sol. Loc. 93 Br. at 14 n.11; Op. Eng. Br. at 10-13. Representatives Hawkins and Erlenborn, however, stated only that Title VII barred the establishment of quotas, 117 Cong. Rec. 31,965, 32,099-100 (1972), *1972 Leg. Hist.* at 204, 261, not judicially imposed goals or goals established pursuant to the Executive Order. *Id.* The distinction between quotas and goals was made clear. 117 Cong. Rec. 31,965 (1971), *1972 Leg. Hist.* at 212-13 (remarks of Rep. Hawkins) ("I do not agree that the Philadelphia plan imposes a quota".)[46]

In *Albemarle*, 422 U.S. 405, this Court held that Congress' rejection in 1971 of a narrowing amendment to the back pay provision of section 706(g), and the re-enactment of that provision without change, was, in light of Congress' knowledge of the courts of appeals' construction of the provision, a ratification of the courts of appeals' pre-1972 construction. *Id.* at 414 n.8, 420-21. Similarly, Congress' rejection of the anti-goal amendments and its expansion of section 706(g), with the knowledge that the courts and enforcement agencies had found goals permissible, unequivocally demonstrate that Congress approved the use of race-concious remedies.[47]

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[46] The important distinction between quotas and goals had been debated before. For example, in 1969 Congress considered the "Fannin Amendment" which was intended to prohibit the Department of Labor from implementing the Philadelphia Plan. See 37 n.41, *supra*. Although the debate in both houses of Congress disclosed universal agreement that rigid, inflexible quotas should be eschewed, large majorities favored flexible, race-conscious goals. Congressman Bow explained the distinction as follows:

> [T]he [Philadelphia] plan does not require, nor does it allow, discriminatory hiring practices as implied in the use of the word 'quota'. Instead the plan establishes a range of desirable hiring within which the contractor must set his goal.

115 Cong. Rec. 40,905 (1969). *See also id.* at 40,915 (Rep. McGregor); *id.* at 40,916 (Rep. Rhodes); *id.* at 40,917 (Rep. Hawkins); *id* at 40,919 (Rep. Gerald Ford); *id.* at 40,743 (Sen. Percy).

[47] The Solicitor's argument based upon *INS v. Chadha*, 462 U.S. 919 (1983), misses the point. Only the Senate rejected the Ervin amendment, but *both* houses adopted existing case law interpreting Title VII; *both expanded the breadth*

(footnote continued)

Congress further indicated its approval of affirmative measures when it added Section 717, Pub. L. No. 88-352, Title VII, § 717, as added by Pub. L. No. 92-261, § 11, 86 Stat. 111 (1972), codified as amended at 42 U.S.C. § 2000e-16 (Supp. V. 1981). Section 717 requires, among other things, that each federal department and agency develop an affirmative action plan for employment. The Civil Service Commission "is to review, modify and approve each department or agency developed [plan] with full consideration of particular problems and employment opportunity needs of individual minority group populations within each geographic area." S. Rep. No. 415, 92 Cong., 1st Sess. 15 (1972). The purpose of section 717 was to make the federal government a "model employer." 118 Cong. Rec. 2298 (1972) (statement of Senator Williams). Requiring the federal government to institute affirmative measures is inconsistent with the notion that Congress intended to prohibit, or thought it had already prohibited, court-imposed affirmative remedies for proven violations of Title VII.

3. *The decisions of this Court and the courts of appeals support the use of narrowly tailored race-conscious remedies to redress the effects of past discrimination*

The Court's reasoning in *Weber*, 443 U.S. at 201-05, upholding voluntary, affirmative efforts to eliminate "conspicuous racial imbalance in traditionally segregated job categories", *id.* at 209, is equally applicable here. In *Weber*, the Court held that the goals of eradicating discrimination and integrating blacks into the mainstream of American society would be frustrated by an interpretation of section 703(a) and (d) of Title VII that prohibited voluntary efforts to correct racial imbalance. Such remedies are permissible so long as they are designed to remedy longstanding discrimination and do not unnecessarily trammel the rights of white workers. *Id.* at 208. It follows that a rule prohibiting similar judicial relief against employers or unions which fails to correct

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of section 706(g); and in the face of widespread controversy about, and judicial acceptance of, goals, *both* refused to bar their use.

Moreover, the Solicitor's argument flies in the face of cases holding that the interpretation of a statute may be based upon subsequent Congressional inaction. *E.g.*, *Bob Jones University*, 461 U.S. at 599-601.

an imbalance caused by their own discriminatory conduct would also frustrate the purposes of the Act. As demonstrated in section III (A)(2), at 32-42 *supra*, neither section 706(g) nor section 703(j) bars such judicial relief to redress past discrimination. Accordingly, "an interpretation of the Act that forbade all race-conscious remedial relief would bring about an end completely at variance with the purposes of the statute and must be rejected." *Id.* at 202.[48]

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[48] The Department of Justice and the EEOC, the federal agencies responsible for the enforcement of Title VII, 42 U.S.C. § 2000e-4,5,6,8,12 and 14 (1981), *see* Reorganization Plan No. 1 of 1978, E.O. 12067, 43 Fed. Reg. 19,807 (1978), have throughout the two decades following passage of the Act maintained that goals and other race-conscious means of remedying past discrimination are consistent with Title VII. *E.g.*, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.17 (1985); Policy Statement on Affirmative Action Programs for State and Local Government Agencies, 41 Fed. Reg. 38,814 (1976) (issued by Equal Employment Opportunity Coordinating Council, composed of heads of EEOC, the Department of Justice, the Department of Labor, the Civil Service Commission and the Commission on Civil Rights). *See* 29 C.F.R. § 1607.17 (1982); Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as amended, 29 C.F.R. § 1608.4(c) (1985); 42 Op. Atty. Gen. 37 (1969); *see also* 28 C.F.R. § 42.203(i,j) (1985).

The position previously taken by the United States and the EEOC in this case is consistent with this longstanding policy of both enforcement agencies. Between June 1971 and July 1985, when the Solicitor General filed his response to the petition for a writ of certiorari, *all* of the plaintiffs sought and supported broad remedial court orders which include numerical goals, implementing ratios, and timetables (JA. 372, 275-83, 157-61). Thus for example, in the complaint filed in this action in 1971, former Attorney General Mitchell sought "selection of sufficient apprentices from among qualified nonwhite applicants to overcome the effects of past discrimination" (JA. 374). Following the trial in 1975, the United States Attorney for the Southern District of New York on behalf of the EEOC argued:

> In granting relief under Title VII Courts have wide discretion to fashion the appropriate remedies and broad powers to grant affirmative relief. 42 U.S.C. §§ 2000e-5(g), 2000e-6(a).
>
> * * *
>
> [T]his Court should establish a goal of no less than 30 percent nonwhite membership in Local 28.
>
> * * *

(footnote continued)

This Court has expressed approval of race-conscious, non-victim specific remedies intended to remedy proven employment discrimination. *Fullilove*, 448 U.S. at 510-11 (Powell, J., concurring); *Bakke*, 438 U.S. at 353 n.28 (1978) (Brennan, White, Marshall and Blackmun, JJ.); *id.* at 301-02 (Powell, J.). Similarly, the courts of appeals have *unanimously* approved the use of race-conscious remedies under section 706(g).[49]

In *Albemarle*, 422 U.S. 405, and *Franks*, 424 U.S. 747, the Court found that awards of back pay and retroactive seniority

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> It is clear that "a reasonable preference in favor of minority persons to remedy past discriminatory injustices is permissible."

(JA. 276-77). As recently as July, 1984, the EEOC urged the court of appeals that "the language and legislative history of 706(g) support the Commission's position that carefully tailored prospective race-conscious measures are permissible Title VII remedies" (JA. 8).

The longstanding views of agencies charged with the statute's administration are entitled to great weight. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). As this case indicates, the EEOC has of late shifted ground totally. Its radical shift, so removed in time from the passage of the Act, counsels, at a minimum, that little deference is due to its current view of these matters. Indeed, we submit that deference should continue to be given to the EEOC's unwavering previous position in the absence of either statutory or constitutional erosion of the basis for that position.

[49] *See, e.g., Boston Chapter, N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017, 1026-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Ass'n Against Discrim. in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 279-84 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 631 (2d Cir. 1974); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *United States v. Int'l Union of Elevator Constructors, Local Union No. 5*, 538 F.2d 1012, 1017-20, (3d Cir. 1976); *Chisholm v. United States Postal Serv.* 665 F.2d 482, 498-99 (4th Cir. 1981); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (*en banc*); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 356 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 696-97 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *United States v. City of Chicago*, 549 F.2d 415, 436 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); *United States v. N.L. Indus., Inc.* 479 F.2d 354, 380 (8th Cir. 1973); *Davis v. County of Los Angeles*, 566 F.2d 1334, 1342-44 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); *United States v. Lee Way Motor Freight, Inc.* 625 F.2d 918, 943-45 (10th Cir. 1979); *Paradise v. Prescott*, 767 F.2d 1514, 1527 (11th Cir. 1985); *Thompson v. Sawyer*, 678 F.2d 257, 293-95 (D.C. Cir. 1982).

were necessary to motivate employers to shun practices of dubious legality and to "endeavor to eliminate, at long-last, the vestiges of an unfortunate and ignominious page in this country's history." *Albemarle*, 422 U.S. at 418; *see Franks*, 424 U.S. at 764. Similarly, a rule limiting relief to identifiable victims would serve as a disincentive to employers to take steps to eliminate their discriminatory practices and the effects of those practices. It would create an incentive to ensuring that victims of discrimination were *not* identifiable and would, as the facts of this case illustrate, benefit the most blatant of discriminators. Petitioners could avoid being subjected to any meaningful remedy by the simple expedient of ensuring that their victims could not be identified. They could maintain a nearly all white work force by preserving their discriminatory reputation, thereby discouraging minority applications, *see Teamsters*, 431 U.S. at 365-66, or as petitioners did here, by discouraging minority applicants who called the union or went in person to obtain applications.

The impact of petitioners' discriminatory practices has fallen and will fall upon a whole range of victims whose identity will never be discovered or proven: individuals whose applications were discarded; others who were deterred from applying by the union's reputation; many who never knew about the union because its reputation prevented it from being a subject of conversation in minority communities; some who were unlawfully denied membership but either did not know about this lawsuit or are no longer in a position to join the union; relatives and friends of the foregoing groups, who were deprived of support, or of an opportunity to be informally trained for their own career in sheet metal work. *See* Spiegelman, *Court-Ordered Hiring Quotas After Stotts*, 20 Harv. C.R.-C.L. L. Rev. 339, 369-70 (1985) ("Spiegelman"). Unlike the identities of these individuals, however, the cause of all their injuries has been proven: petitioners' longstanding resistance to fair employment laws and judicial mandates enjoining discrimination. That conduct has established continuing barriers to equal employment opportunity in New York City's sheet metal industry. Consequently,

> the [district] court has not merely the power but the duty to render a decree which will so far as is possible eliminate

> the discriminatory effects of [such conduct] as well as bar discrimination in the future.

Albemarle, 422 U.S. at 418 (citing *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

Petitioners and the Solicitor miscontrue *Albemarle*, *Franks* and *Teamsters*. These cases concern the retrospective, "make-whole" component of Title VII. To the extent that they touched on the prospective component of the Act, those cases disclose approval of the wide discretion Congress accorded the courts to address identified discrimination. Such prospective remedies need not be restricted to the proven victims of discrimination. *Albemarle* involved only the right of specific victims of racial discrimination to an award of backpay.[50] Similarly *Franks* concerned the extent to which retroactive seniority may be awarded "identifiable applicants who were denied employment because of race."[51] 424 U.S. at 750. Its holding was a straightforward application of the make-whole retrospective feature of section 706(g) of the Act, which bars judicial relief for an individual refused employment "for any reason other than discrimination . . . ." *See* pp. 32-42, *supra*. Granting seniority in *Franks*, 424 U.S. 747, to applicants who had been rejected for non-discriminatory reasons would have violated this provision. In contrast, the goal does "not compel [petitioners] to [grant membership to] any particular

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[50] The issue before the Court in *Albemarle* was narrowly framed to address only the claims of identified victims to an award:

> When employees or applicants for employment have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice, what standards should a federal district court follow in deciding whether to award or deny backpay?

422 U.S. at 408.

[51] The Court defined the issue before it as follows:

> This case presents the question of whether identifiable applicants who were denied employment because of race . . . in violation of Title VII . . . may be awarded seniority status retroactive to the dates of their employment.

424 U.S. at 750.

applicants and [does] not require [that petitioners grant membership] to individuals who otherwise would have been rejected or discharged on non-discriminatory grounds." *United States v. City of Buffalo*, No. 85-6212, slip. op. at 9 (2d Cir. December 19, 1985).[52]

In *Teamsters*, the Court held that individual non-applicants could not be awarded seniority unless they could demonstrate that they would have applied but for the union's discriminatory reputation. 431 U.S. at 363. As in *Franks*, the Court's holding was an application of the principle that a court may not award make-whole relief to a particular individual who had not been subjected to actual discrimination.

In *Teamsters*, the Court touched on the prospective component of the Act. It noted that

> [t]he federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of § 707(a) eliminate their discriminatory practices and the effects

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[52] The Court also held in *Franks* that relief that will further a central purpose of the Act is not to be denied because innocent persons will be adversely affected by the relief. *Franks*, 424 U.S. at 777-78. "A sharing of the burden of past discrimination is presumptively necessary" and "is entirely consistent with any fair characterization of equity jurisdiction." *Id.* at 777. Although the principle was invoked in *Franks* in connection with the make-whole purpose of the Act, it applies *a fortiori* with respect to the Act's "primary" purpose. *See Franks*, 424 U.S. at 783 n.2 (Powell, J.)

Justice Powell's partial dissent in *Franks* was based on his view that the majority opinion failed to accord district courts adequate flexibility to award or decline to award retroactive competitive seniority to identified victims of discrimination. *See* 424 U.S. at 788. Justice Powell acknowledged that such an award advances the "make-whole" purpose, but maintained that since such a grant "causes only a rearrangement of employees along the seniority ladder without any resulting increase in cost to the employer, Title VII's 'primary objective' of eradicating discrimination is not served at all." *Id.* At the same time, the seniority award adversely affects the seniority expectations of innocent third parties, expectations that were accorded special recognition by Congress. *See id.* at 791. In contrast, the relief ordered below furthers the primary objectives of the Act by removing the barriers to equal employment opportunity caused by the union's past and present discriminatory practices, broadening the pool of workers available for employment in the sheet metal industry and ensuring that future job opportunities are more equitably shared.

> therefrom . . . . In this case prospective relief was incorporated in the parties' consent decree. See n.4, *supra*.

431 U.S. at 361 n.47. The footnote to which the Court referred reveals that the "company obligated itself to hire one Negro or Spanish-surnamed person for every white person hired." *Id.* at 330 n.4.

The only issue in *Stotts*, 104 S. Ct. 2576, was whether retroactive seniority could be awarded to readily identifiable individuals who had not been proven to be victims of discrimination. In fact, as the EEOC aptly commented to the court of appeals, "[s]ince the [Supreme] Court's entire discussion [of § 706(g) in *Stotts*] is carefully limited to the improper award of '*make-whole*' relief, it is clear that the Court consciously avoided addressing the broader question of the availability of *prospective* race conscious relief" (emphasis in the original) (JA. 7). Consistent with *Teamsters* and *Franks*, this Court held that under the policy embodied in section 706(g), retroactive seniority could not be awarded to specific individuals who were not proven victims of discrimination.

4. *The race-conscious remedies imposed by the court below further the purposes of Title VII and are fully supported by the record*

Title VII permits a court to impose race-conscious relief that is not restricted to the proven victims of discrimination, although this Court's decisions counsel that orders which include such remedies should not be entered lightly or routinely. *See Weber*, 443 U.S. 193; *Fullilove*, 448 U.S. 448. Of course, a court may not impose a remedy — any remedy — over the objection of the defendant except upon a finding of unlawful discrimination. *See Swann*, 402 U.S. at 28; *Milliken*, 418 U.S. at 744-45. The remedy imposed should extend no further than is reasonably necessary to cure the identified discrimination. *See Fullilove*, 448 U.S. at 483; *Milliken*, 433 U.S. at 280-81. Where the remedy imposed contains race-conscious features, it should be limited and properly tailored to cure the effects of prior discrimination. *See Fullilove*, 448 at 484. In this regard, a district court should consider factors such as "(i) the efficacy of alternative remedies . . .(ii) the planned duration of the remedy. . . (iii) the relationship between the percentage of minority workers to be employed and

percentage of minority group members in the relevant population or work force . . . and (iv) the availability of waiver provisions if the hiring plan could not be met." *Fullilove*, 448 U.S. at 510-11 (Powell, J., concurring). The district court should also be mindful of the effect of the order on third parties and its order should not "unnecessarily trammel" the interests of white workers. *Weber*, 443 U.S. at 208; *accord Fullilove*, 448 U.S. at 514 (Powell, J., concurring).

The relief imposed by the district court in 1982 and 1983 encompasses all of these considerations. It was necessitated by decades of discrimination that numerous previous judicial and administrative mandates had failed to cure.

The evidence adduced in the contempt proceedings dramatized the continued need for a goal, as well as for the additional race-conscious relief contained in the Fund order.[53] Twenty years after the state court proceedings, twelve years after the Justice Department had brought suit, and eight years after the district court had enjoined the union from continuing its discriminatory practices, petitioners were still deliberately impeding the entry of minorities into Local 28. Indeed, one would be hard-pressed to find more compelling circumstances favoring imposition of race-conscious remedies than the situation in this case.

Petitioner's discriminatory practices and policies, in the face of federal and state laws and injunctions barring such discrimination, make it unmistakably clear that something more is needed to prevent future discrimination and to assure integration of the union than injunctive remedies that merely track statutory prohibitions, *see Morrow v. Chrisler*, 491 F.2d 1053, 1055 (5th Cir.) (*en banc*), *cert. denied*, 419 U.S. 895 (1974); *Morrow v. Dillard*, 580 F.2d 1284, 1295-96 (5th Cir. 1978); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974), and that require the union to conduct vigorous recruiting and publicity campaigns. The plain lesson which the courts below have drawn from petitioners' past conduct is that,

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[53] Likewise, the record before the district court in 1975 demonstrated that an order which did not include race-conscious provisions would not be effective. The court found that "the imposition of a remedial racial goal in conjunction with an admission preference in favor of nonwhites is essential to place defendants in a position of compliance . . ." (A. 352).

at least for now, the union simply cannot be trusted to make decisions in a non-discriminatory fashion or to comply with injunctions directing it to reach out to minority communities for new members. Bias-free admission decisions can be assured only by a directive requiring the union to make regular and substantial progress toward reaching a level of minority membership that parallels minority representation in the relevant work force.

Employment opportunities in the sheet metal industry in the New York City metropolitan area are to a great degree restricted to members of Local 28[54] (A. 322-24, 326). Thus, equality of employment opportunity in the sheet metal industry in New York City cannot be achieved until the union "removes the barriers [to present job opportunities] that have operated in the past to favor an identifiable group of white employees." *Griggs v. Duke Power Co.*, 401 U.S. at 429-30. Essential to such an objective is increasing minority membership in the union to the level it would have reached absent past discriminatory practices.

Such thoroughgoing relief is also necessary to dispel the union's discriminatory reputation, earned over decades of unlawful discrimination (A. 151, 350). Relief must assure potential minority applicants that submission of an application will not be an act of futility. *Association Against Discrimination v. City of Bridgeport*, 479 F. Supp. 101 (D. Conn. 1979), *on remand from* 594 F.2d 306, 311 n.13 (2d Cir. 1979); *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971) (*en banc*) *cert. denied*, 406 U.S. 950 (1972); *see Bridgeport Guardians, Inc. v. Civil Service Commission*, 354 F. Supp. 778, 797 (D. Conn.), *aff'd in part, rev'd in part*, 482 F.2d 133 (2d Cir. 1973). Only by changing "the outward and visible signs of yesterday's racial distinctions" can the union's "reputation as an all-white organization," *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974), be overcome so that a recruitment program can operate without being impaired by the lingering effects of the union's discriminatory past. *See Mims v. Wilson*, 514 F.2d 106 (5th Cir. 1975); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974); *Carter v. Gallagher*, 452 F.2d at 315. Expanding

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[54] While petitioners maintain that Local 28 is a "small union," Pet. Br. at 3, it is the largest labor organization in the construction sheet metal trade in the New York metropolitan area. Its members are employed on virtually every major construction involving sheet metal in New York City (JA. 406).

the minority work force also ensures that minority members will learn of job opportunities through word-of-mouth, the major means of job recruitment, on a more equal basis.[55] *See* Blumrosen, *The Duty of Fair Recruitment*, 22 Rutgers L. Rev. 465, 490 (1968).

Because of Local 28's past discrimination, minority persons who become members of the union are compelled to work in environments that are virtually all white. Such employees are frequently faced with an indifferent if not a hostile workplace and with a union whose membership (and leadership) are unsympathetic to claims of discriminatory treatment (JA. 405). These effects of past discrimination will not significantly abate, therefore, unless the union is directed to accept a significant number of additional minority members (A. 351). *See Taylor v. Jones*, 489 F. Supp. 498 (E.D. Ark. 1980), *aff'd*, 683 F.2d 1193 (8th Cir. 1981); *see Spiegelman*, at 364-84.

In its 1964 decision, the New York State Commission For Human Rights likened Local 28 to "the medieval guilds" (JA. 402). In guild-like fashion, union members maintain informal, mutual support systems to help each other find and retain employment. *See* n. 55, *supra*. Because of the Local's tradition of racial exclusion and its longstanding commitment to preferring the relatives and friends of its members, minority apprentices are at a decided disadvantage when seeking or keeping employment. As noted above, p. 23, *supra*, the provisions of the Fund address this reality.

The remedial provisions here under review were carefully arrived at and contain great flexibility to deal with changing circumstances. In imposing its order, the district court fixed the 29.23% goal to reflect the representation of minority members between the ages of 18-24 in the relevant labor market[56] (A 119-123). The O&J, AAAPO and the Fund order are all temporary.

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[55] As petitioners note, "referral and hiring was done informally through word of mouth and contacts with other members, apprentices and contractors" (Pet. Br. at 4 n.5).

[56] Likewise, the district court exhibited great care in fixing the goal in 1975 (A. 353-54). In both instances the court of appeals affirmed the findings of the district court (A. 168, 33).

They will expire, and court supervision of the admission process will terminate, when the proportion of minority union members approximates the proportion of minorities in the relevant labor market (A. 54-55).

The goal only minimally impairs the rights of non-minority union members and applicants, if at all, because the court has insisted that the Local fully utilize the apprenticeship program, thereby opening more opportunities for all. *See Weber*, 443 U.S. at 280; *Fullilove*, 448 U.S. at 514-15 (Powell, J.). As modified by the court of appeals, AAAPO does not require indenture of any specific ratio of minority apprentices. No incumbent union member or readily identifiable applicant will be displaced from the union or from any job. No unqualified minority persons will become members of the union or obtain job employment opportunities by virtue of the district court's order. The goal merely ensures that competition for sheet metal jobs will not continue to be limited to members of a pool artificially restricted by the union's past discriminatory acts (A. 54).

The Fund order and AAAPO do not impose any burden on white union members or applicants, as AAAPO expressly provides that the union may provide precisely the same services to whites (A-76, 118). Many provisions of the Fund order, particularly those which provide for financial assistance to employers that cannot otherwise meet the 1:4 apprentice to journeyman requirement of AAAPO, and for incentive or matching funds to attract additional funding for job training programs, are entirely race-neutral and operate to the benefit of whites and non-white apprentices alike. Similarly, the 1:4 apprentice-to-journeyman ratio is itself not race-conscious and does not unnecessarily trammel the interests of white journeymen. Adherence to the ratio, which is based upon the standard in the industry (A. 34, 66), will simply ensure that a reasonable share of present job opportunities will be afforded to an apprentice pool untainted by past discrimination. Moreover, given that the primary route into the union (and to journeyman status) is through the apprenticeship program, the 1:4 ratio will expedite the transition from a union whose journeyman ranks were formed by discrimination to one that is truly integrated and free from the effects of past discrimination (A. 66-67).

The goal's flexibility is evidenced by the court's two prior modifications of the goal, see pp. 7, 11, *supra*, and its express refusal to hold the union in contempt for not meeting the goal in 1982. However, the goal *is* meaningful. The district court has repeatedly admonished that the Local is under an obligation to assure "regular and substantial progress" (A. 305, 183, 54) every year toward achieving the goal. Through imposition of fines, the court hoped that the Local "will conclude that it is too expensive to continue to violate the court's order and will make real and substantial effort to bring an end to the obvious and pernicious discriminatory practices that permeate this trade" (A. 112).

This Court stated in *Weber*:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long, 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierachy.

443 U.S. at 204. It would be even more ironic if Title VII were held to bar one of its major objectives: remedying traditional patterns of segregation caused by decades of purposeful, egregious discrimination.

B. The Remedies Imposed Comport with the Equal Protection Component of The Due Process Clause of The Fifth Amendment

Nothing in the equal protection component of the Fifth Amendment's due process clause deprives the district court of authority to impose the remedies it ordered in this case. Racial classifications imposed to eliminate the continuing effects of unlawful discrimination, and to bar similar discrimination in the future, are constitutional. Thus, the Court has ruled that a medical school may properly consider the race of its applicants, at least when a proper body has found that discrimination has impaired the ability of minority group members to compete for

entry into the program. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Powell, J.); *id.* at 355 (Brennan, White, Marshall, and Blackmun, JJ.). Similarly, in school desegregation cases, the Court has upheld the assignment of students and faculty on the basis of race, when necessary to eliminate "root and branch" the continuing effects of racial discrimination. *Swann*, 402 U.S. at 18-21; *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46 (1971); *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969); *see also United Jewish Organization v. Carey*, 430 U.S. 144, 159-62 (1977). And in its most recent pronouncement on the constitutionality of race-conscious remedies, this Court upheld a federal law requiring that at least ten percent of federal funds for public works projects be awarded to construction companies owned or controlled by members of minority groups. *Fullilove*, 448 U.S. 448 (Burger, C.J., joined by White and Powell, JJ.); *id.* at 495 (Powell, J.); *id.* at 517 (Marshall, J., joined by Brennan and Blackmun, JJ.).[54]

Contrary to the contentions of the Solicitor and petitioners, this Court has upheld relief benefitting members of groups that have suffered discrimination, irrespective of whether the individuals receiving the benefit had themselves been victims of that discrimination. Thus, in *Fullilove*, the Court upheld the ten percent set-aside although minority contractors were eligible under the set-aside whether or not they could make an individualized showing that they suffered from the continuing effects of discrimination. *See Fullilove*, 448 U.S. at 520 n.4 (Marshall, J., joined by Brennan and Blackmun); *id.* at 530 n.12 (Stewart, J., dissenting); *id.* at 540-41 and 541 n.13 (Stevens, J., dissenting); *see also* 448 U.S. at 479-80 (Burger, C.J.). And under *Bakke*, 438 U.S. at 265, a candidate's race can be considered

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[54] Remedial decrees incorporating racial classifications may be justified by statutory as well as constitutional violations. *Fullilove*, 448 U.S. at 483 (Burger, J., joined by White and Powell, JJ.), citing *Franks*, 424 U.S. 747 (1976), *Teamsters*, 431 U.S. 324 (1977), and *Albermarle*, 422 U.S. 405. *Accord United Jewish Organization*, 430 U.S. at 147-165 (White, J., joined by Brennan, Blackmun and Stevens, JJ.).

whether or not he had himself suffered discrimination that impaired his ability to compete for admission to the school. *Id.* at 366 (Brennan, White, Blackmun, Marshall, JJ.); *id.* at 315-320 (Powell, J.).

Similarly, the Court has upheld race-conscious relief designed to remedy proven discrimination even when those adversely affected by the remedy have not been responsible for, or the beneficiaries of, acts of discrimination. Thus, in *Fullilove*, the set-aside was upheld despite the recognition that such "[r]ace conscious remedies, popularly referred to as affirmative-action programs, almost invariably affect some innocent persons." *Fullilove*, 448 U.S. at 506-07 n.8, 514-517 (Powell, J., concurring). "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.* at 484 (Burger, C.J., joined by White and Powell, JJ.) (citing *Franks*, 424 U.S. at 777, *Albemarle*, 422 U.S. at 405, and *United Jewish Organization*, 430 U.S. at 144); *accord Fullilove*, 448 U.S. at 518 (Marshall, J.); *Bakke*, 438 U.S. at 325; *United Jewish Organization*, 430 U.S. at 177 n.5 (Brennan, J., concurring). *See also Franks*, 442 U.S. at 774.

The specific race-conscious measures imposed below are constitutional. They are remedies designed to serve important governmental objectives and are substantially related to achievement of those objectives. *Bakke*, 438 U.S. at 359 (Brennan, White, Marshall and Blackmun, JJ.); *see also Fullilove*, 448 U.S. at 519 (Marshall, J., joined by Brennan and Blackman, JJ.). They are also narrowly drawn to further a compelling governmental interest.[55] *Fullilove*, 448 U.S. at 496, 498 (Powell, J.); *cf. Bakke*, 438 U.S. at 305 (Powell, J.). Both the adjusted goal of 29.23 percent, and the Fund order were designed to overcome the effects of identified discrimination, and to assure that the union would not continue to discriminate. This Court has held those purposes to be legitimate, substantial and compelling. *Bob Jones University*, 461

[55] The Court has not required that remedial plans be limited "to the least restrictive means of implementation . . . [T]he choice of remedies to redress racial discrimination is a 'balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *Fullilove*, 448 U.S. at 508 (Powell J., concurring) (citing *Franks*, 424 U.S. at 794 (Powell, J.)).

U.S. at 594-95 (1983); *Fullilove*, 448 U.S. at 496, 497 (Powell, J.); *id.* at 475-76 (Burger, C.J., joined by White and Powell, JJ.); *id.* at 542-43 (Stevens, J.); *Bakke*, 438 U.S. at 407 (Powell, J.); *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).

The means employed by the district court were narrowly drawn to redress the effects of the union's long history of discrimination and are substantially related to achievement of that goal. This Court has often upheld the use of numerical race-based ratios to fashion relief for discriminatory practices. *Fullilove*, 448 U.S. at 453 (Burger C.J., joined by White and Powell, JJ., concurring); *id.* at 482 (Powell, J., concurring);[56] *Id.* at 517 (Marshall, J. joined by Brennan and Blackman, JJ.); *United Jewish Organization*, 430 U.S. at 147; *Swann*, 402 U.S. at 18 21; *Bakke*, 438 U.S. at 269 (Powell, J.). As demonstrated in Point IIIA, the remedies imposed by the district court are flexible, and the burden imposed upon whites by the race-conscious remedies is the minimum necessary to redress the exclusion of minorities from Local 28 and the JAC. The remedies are thus consistent with the governing principles formulated by this court. *See Fullilove*, 448 U.S. at 448; *Bakke*, 438 U.S. at 269.[57]

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[56] The reasoning by which this Court sustained Congress' race-conscious remedy in *Fullilove* is fully applicable to judicial race-conscious remedies imposed to redress proven discrimination. Like the *Fullilove* set-aside, judicially imposed goals have been authorized by Congress. Point IIIA, *supra*. Moreover, a district court's authority to eliminate the effects of past discrimination is as broad as Congress' authority. *Fullilove*, 448 U.S. at 510-14 (Powell, J.); *North Carolina State Bd. of Ed. v. Swann*, 402 U.S. 43, 46 (1971). Indeed, the need for race-conscious remedies is even greater here inasmuch as the remedy was imposed only against a specific union that had been expressly found to have engaged in a long history of race discrimination. In *Fullilove*, the set-aside benefitted contractors who had not been subjected to discrimination and adversely affected many contractors that had never discriminated.

[57] Title VII is not a bill of attainder, as the Act does not apply to "named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial. . . ." *United States v. Lovett*, 328 U.S. 303, 315 (1946). Section 706(g) does not single out any specific class of persons who, because of past activities, are "ineluctably designated" for punishment. 104 S.Ct. 3348, 3353 (1984), (citing *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 87 (1961)); *see United States*

(footnote continued)

IV. THE CREATION OF THE OFFICE OF ADMINISTRATOR WAS PROPER

Local 28 objects to the office of the administrator, claiming that, in light of what it characterizes as its "established record of adherence to [court] orders," the creation of the office was not the least intrusive remedy, and that the administrator is a receiver supplanting the Local's right to self-government. Pet. Br. at 42. Local 28 also argues that the powers delegated to the administrator resulted in an abdication of judicial powers. We have shown that these claims are untimely, *see* Point I, *supra*. In addition, these belated arguments fail on the merits.[58]

The Local's argument that there "was no basis" for appointing the administrator in 1975 because "[b]y 1975, Local 28 had an established record of adherence to orders," Pet. Br. at 42, is belied by the repeated findings of the courts below. See pp. 3, and 5-6, *supra*. Indeed, the Local's record of "past recalcitrance" (A. 220), "bad faith" (A. 214) and "foot-dragging" (A. 24) over

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v. *Lovett*, 328 U.S. at 322-23 (Frankfurter, J., concurring). Moreover, race-conscious remedies do not punish any person, but rather confer a benefit on members of a class judicially determined to have been excluded from employment opportunities by practices that violate Title VII. "That burdens are placed on citizens by federal authority does not make those burdens punishment." *Selective Serv. Sys. v. Minn. Public Int. Research Group*, 104 S. Ct. at 3355 (citing *Nixon v. Admin. of General Services*, 433 U.S. 425, 470 (1977)). Here, no person is permanently deprived of the opportunity to engage in the vocation of his choice, *see Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex Parte Garland*, 71 U.S. (4 Wall) 333 (1867), and thus, section 706(g) "is in no sense punitive; it authorizes no punishment in any normal or general acceptance of that familiar term." *Selective Serv. Sys.*, 104 S. Ct. at 3360 (Powell, J., concurring).

[58] The court of appeals rejected petitioners' attempt to limit the powers of the administrator to adjudicating disputes under AAAPO, see pp. 11 n.13, 13, *supra*, Sol. Loc. 28 Br. at 22, as both untimely and meritless. It stated that:

> Local 28's complaint that the obligations imposed by AAAPO will interfere with its right to self government need not detain us. . . . We have rejected this contention on previous appeals [citation omitted], and we reiterate that the government of Local 28 will be returned to its members as soon as it ends its unlawful discrimination against nonwhites. Until that time, the government of Local 28 must remain subject to the supervision of the district court and the administrator.

(A. 31).

the past twenty years demonstrates the need for continuous oversight of the "process of its legally required integration," *supra* at 3. *Accord Albermarle*, 422 U.S. at 418; *see* Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 835 (1978) ("Special Project"); Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 60 Cornell L. Rev. 53 (1974) ("Harris").

Courts have often upheld the appointment of an administrator or special master to oversee the implementation of judgments in complex civil rights cases where the defendant has failed to comply with court orders requiring changes in existing practices and conditions. *See New York State Association for Retarded Children v. Carey*, 706 F.2d 956, 962-63 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Ruiz v. Estelle*, 679 F.2d 1115, 1159-63 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Gary W. v. State of Louisiana*, 601 F.2d 240, 244-45 (5th Cir. 1979). Moreover, the special difficulties inherent in monitoring compliance with a decree aimed at the construction industry particularly justify the office of the administrator. Harris, 60 Cornell L. Rev. at 62-63. *See* cases cited in Pet. Br. at 44 n. 32.

The Local's argument that the administrator is a receiver supplanting the Local's right to self-government is frivolous. Unlike a receiver, the administrator has not replaced Local 28's officers. *See* Special Project, 78 Colum. L. Rev. at 835-37. The powers granted the administrator did not interfere in any way with Local 28's self-governance. Local 28 retains complete autonomy regarding its own elections and the collective bargaining process. To the extent that the administrator monitors admission to union membership or employment, such monitoring is fully justified by Local 28's "past recalcitrance" in response to court orders (A. 220).

In any event, as the court of appeals stated in 1976, "[w]hile union self-government is desirable and is, indeed, an ideal to which the law aspires, 29 U.S.C. § 401, [the] interest in union self-government cannot immunize Local 28 from the consequences of its actions" (A. 220). The principle of union self-governance has never been allowed to override requirements imposed by the labor laws or any other law. *See Wirtz v. Local 153, Glass Bottle Blowers Association*, 389 U.S. 463, 471 (1968)

(the freedom allowed unions to conduct their own elections is reserved for those elections which conform to the democratic principles written into 29 U.S.C. § 401); *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 857-59 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977) (collectively bargained agreements may be overidden if they "either violate[ ] Title VII or [are] inadequate in some particular to cure the effects of past discrimination").

Further, the administrator's appointment has not resulted, as Local 28 claims, in an abdication of judicial power.[59] First, the administrator was appointed *after* liability was determined to oversee implementation of the O&J and RAAPO (now AAAPO). Thus, cases which concern the appointment of special masters to determine liability, such as *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), Pet. Br. at 45, are inapposite.[60] *See* Special Project, 78 Colum. L. Rev. at 807. Second, because the administrator was appointed by the district court, is responsible to that court and is subject to review by that court, his appointment is not, as the union strains to argue, Pet. Br. at 45-46, in violation of Article III, Section 1, of the United States Constitution. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76-80 (1982); *United States v. Raddatz*, 447 U.S. 667, 681-84 (1980).

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[59] A district court's authority to appoint an administrator stems not only from Fed. R. Civ. P. 53, as petitioners contend, Pet. Br. at 45, but also from the court's inherent power

> to provide [itself] with appropriate instruments required for the performance of [its] duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners.

In Re Peterson, 253 U.S. 300, 312-13 (1920); *see also Ruiz v. Estelle*, 679 F.2d at 1159-61, and cases cited therein at 1161 n.240.

[60] Indeed, *La Buy* supports the proposition that masters are particularly appropriate for making post-liability determinations. 352 U.S. at 249.

In sum, the appointment of the administrator in 1975 was proper, and because Local 28 has continued to refuse to comply with court orders, the district court's extension of the administrator's term in AAAPO was clearly appropriate.

V. PETITIONERS' CHALLENGE TO ITS LIABILITY AND THE GOAL, BASED ON HAZELWOOD SCHOOL DISTRICT v. UNITED STATES, 433 U.S. 299 (1977), IS MERITLESS

Local 28 also quarrels with evidentiary determinations regarding statistics which the district court made over ten years ago. It contends that liability was improperly found and the 29% goal was improperly established because the appropriate percentage in the labor force which the district court found failed to discount disparities due to pre-Act discrimination and incorrectly drew the geographical boundaries of the labor market. Pet. Br. at 35. In support of these contentions, it points to this Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), but relies almost exclusively on the views set forth in the dissenting opinion which Judge Meskill wrote in the 1977 appeal in this case. The union is now foreclosed from asserting these claims. *See* Point I, *supra*. These claims are also meritless.

The 1975 findings of discrimination were consistent with *Hazelwood*. In *Hazelwood*, this Court declared that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." 433 U.S. at 307-08. The Court observed, however, that an employer might rebut this proof by presenting proof that from the effective date of Title VII forward it made all of its employment decisions in a wholly nondiscriminatory way. *Id.* at 309. *Accord Teamsters*,431 U.S. at 360. This Court also noted that what employment figures prove depends on which figures are compared. *Id.* at 310. The Court counseled that this is a factual determination which is to be made initially in the district court. *Id.* at 312.

In this case, few statistical comparisons were made because, as the district court found, the Local failed to maintain statistics as required by the EEOC regulations (A. 331, 329). Liability was not based on inferences that could be drawn from racial disparities between the proportion of minorities in the labor

market and in the union. Instead, liability was based on "direct and overwhelming evidence of purposeful racial discrimination over a period of many years" (A. 169), which began before the passage of the 1964 Civil Rights Act, and continued long after this case was initiated. *See*, pp. 2-3, 5 *supra*; Sol. Loc. 28 Br. at 18; A. 333 n.12 and A. 169, n.8, 212-15.

The 29 percent goal established by the district court a decade ago as a measure of when equality of opportunity within the Local could be achieved was based on a finding that the appropriate geographic area from which the membership of the union is drawn matched the geographic boundaries of the union's jurisdiction (A. 353). The local did not contest this finding at the time the decision was rendered.

Petitioners eventually raised this issue on their second appeal in 1977, but, as the court of appeals observed, simply did not show that a significant number of union members resided outside New York City (A. 168). Accordingly, the court of appeals affirmed the district court's finding (A. 168).[61] It is factual findings such as these, concurred in by two lower courts, which this Court has often stated that it is reluctant to disturn. *E.g.*, *Rogers v. Lodge*, 458 U.S. at 623; *see National Collegiate Athletic Association v. Board of Regents*, 104 S.Ct. at 2959 n.15 (1984).

[61] In view of the expanded jurisdiction of the union, the district court in August 1983 adjusted the goal and fixed it at 29.23%. Although, in the district court, the Local sought to prove that the adjusted goal should be fixed at 21.7% (A. 120), it now contends that "there is no evidence in the record from which the correct percentage [goal] could be derived" (Pet. Br. at 36), and urges a hiring goal of 16.2%. *Id.* at 36 n.26. The district court weighed conflicting evidence on this issue — indeed, New York City requested a 33% to 41% goal (A. 120) — and selected an "intermediate figure", *Hazelwood*, 433 at 312, of 29.23% (A. 122). The court of appeals affirmed (A. 33).

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

§ Bl-7.0 Unlawful discriminatory practices: l. It shall be an unlawful discriminatory practice:

* * *

(c) For a labor organization, because of the age, race, creed, color, national origin or sex of any individual to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

* * *

§ Bl-8.0 Procedure.

* * *

[Subdiv. 2]

(c) If, upon all the evidence at the hearing, the commission, or such members as may be designated, shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this title, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a program, apprenticeship training program, on-the-job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, evaluating application for membership in a club that is not distinctly private without discrimination based on race, creed, color, national origin or sex, payment of compensatory damages to the person aggrieved by such practice, as, in the judgment of the commission will effectuate the purposes of this title, and including a requirement for report of the manner of compliance. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful discriminatory practice, the commission shall state its findings of fact and shall issue

and cause to be served on the complainant an order dismissing the said complaint as to such respondent. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereof. (Amended by L.L. 1984, No. 63, Oct. 24).