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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

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PETITIONERS' REPLY BRIEF ON THE MERITS

STATEMENT OF THE CASE

The facts and history of the proceedings are accurately stated in petitioners' brief on the merits. They have been distorted by respondents and certain amici who argue that petitioners have "established a record of intransigent resistance to both the law and judicial decrees which is without parallel in the annals of equal employment litigation." (NAACP Legal Def. & Ed. Fund Br. 49). Such gross distortion is a necessary predicate for respondents' attempts to justify the racial quota and other forms of reverse discrimination imposed by the district court. They argue that different rules apply when dealing with disobedient parties.

By stating the facts in detail, petitioners are not asking this Court to review the 1975 finding of a pattern or practice of discrimination. Instead, petitioners have demonstrated that, quite apart from the lack of legal basis for respondents' argument, this case does not provide a factual basis for treating petitioners differently from other parties. A fair reading of the facts indicates that the tortured history of this litigation is not the result of resistance to integration. It is the product of a series of incorrect and misguided rulings, and intrusive, senseless and expensive regulation. Most significantly, it is the result of fixing a racial quota at a level which could not be achieved without gross reverse discrimination. When the quota was not achieved—as was inevitable—petitioners were blamed and punished.

As petitioners have indicated, the main 1975 findings were the result of petitioners having *obeyed* the earlier state court decree. (Pet. Br. 4-5). That decree had required petitioners to restrict admission to high school graduates, and to hire those who performed best on the entrance examination. The district court acknowledged that the procedures being followed were those mandated by the state court decree (A-328-331), but further stated that the intervening decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1970), outlawed entrance barriers which, though neutral on their face, had an adverse impact upon minorities. Such facts hardly support a conclusion that petitioners acted "intentionally", as is required for imposing any relief under §706(g) of Title VII.

Although other findings of a much less significant nature arguably support the "pattern or practice" findings (and although petitioners have not relitigated these findings in this Court), the record is devoid of factual support for the district court's conclusion that petitioners' actions required the intrusive remedies of a racial quota, an Administrator with supervisory control over them, or a detailed affirmative action program.

In addition, and quite apart from the illegality of *any* quota, the 29% figure – the focal point of the entire affirmative action program – was incorrectly computed by the district court. (Pet. Br. 7-8). In a related case, the percentage was calculated at 16.2% for the same labor market. (Pet. Br. 36 n. 26).

Until after the first contempt proceeding was filed in 1982, the Administrator, who was involved with this matter on almost a day-to-day basis, had never questioned any aspect of petitioners' compliance with the O&J or RAAPO. (JA-38c-d). It was no surprise that the quota had not been achieved. Interim reports and determinations by the Administrator document the reasons. (JA-167; 216-222). Economic chaos confronted the construction industry in New York City; membership in Local 28 had declined dramatically; many union members were unemployed; and union employment was at times as low as 42%. (JA-90). As a result, there was little interest in becoming a member of Local 28 or in becoming a trainee in the apprentice program. Even after completing the program, many dropped out. (JA-88-103; 133-137).

The record disproves the thesis of respondents and various amici that petitioners have continued to engage in racial discrimination and that they have effected "a campaign of evasion and resistance which rivaled in its ingenuity and intransigence the most defiant southern school boards and voting officials of a generation ago." (NAACP Legal Def. & Ed. Fund Br. 49). In fact, in order to attempt to achieve the quota and thereby terminate the endless regulation and financial drain imposed by the O&J and RAAPO, petitioners felt obliged to engage in as much reverse discrimination as was permitted by the respondents and the Administrator.

In March 1978, petitioners sought permission to dispense with the aptitude examination for admission to the apprentice program and to admit a fixed percentage of minorities to each class. Respondents objected, and the plan was not implemented at that time. Nevertheless, petitioners actively recruited minorities such that each class of apprentices between April 1977 and January

1980 consisted of 43%-46% non-whites.[1] When the August 1980 class fell to 33% non-whites, petitioners again pressed for a direct quota in the apprenticeship program. This time all parties agreed, and since at least February 1981, each apprentice class has been 45% non-white.[2] (JA-96-97).

After the first contempt proceeding, petitioners sought a major revision in RAAPO to permit direct racial quotas at all levels of membership, and to end the office of Administrator.[3] The modified program agreed to by all parties was known as MAAPO. It was rejected by the district court. (Pet. Br. 13).[4]

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[1] As reported to the Administrator, minority representation in the apprenticeship program prior to 1981 was as follows:

Date	Non-White	White	Total	% of Non-White
April/1977	33	40	73	45%
April/1978	43	58	101	43%
Aug/1978	49	58	107	46%
Jan/1979	46	60	106	44%
April/1979	49	61	110	45%
Aug/1979	52	68	120	43%
Jan/1980	49	64	113	44%
Aug/1980	52	104	156	33%

(JA-96).

[2] Although the vast majority of union members join through the apprentice program, integration is still a slow process. If each class has 100-150 members, it is evident that integration of a 2,000 member union would take time, even if all apprentices remained in the union, which they do not. (JA-134).

[3] Instead of an Administrator, petitioners recommended that "such eminently qualified and publicly respected persons as Judge Marvin Frankel, Judge Harold Tyler and Honorable Basil Paterson" be considered as the arbitrator under MAAPO. (JA-38i).

[4] MAAPO is not printed in the joint appendix because it was not included in the district court docket or file. Quite obviously, the district judge thought it was filed because his order disapproving it refers to it by paragraph number without, in many cases, describing the substance of the paragraph. (JA-31-38).

(Footnote Continued)

In its statement of the case, the State only briefly and grudgingly mentions, at the end of a footnote, that petitioners have

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Paragraphs 7-9 of MAAPO contain the quotas applicable to the apprenticeship program and approved by the district court. (JA-33). These provisions are as follows:

> 7. In order to meet the objectives of this Modified Program, the parties agree that, at least until the non-white membership of the Local 28 reaches 29%, the JAC shall not use an exam to choose apprentices. Applicants shall be ranked by experience and trade education which shall be confirmed by an interview conducted by the JAC. Those with experience and trade education will be placed at the top of the list. Those with equal experience and education shall be selected by lottery.
>
> 8. The JAC shall indenture a minimum of two classes of apprentices each year until such time as the non-white membership of Local 28 reaches 29%. The classes shall be indentured in February and July of each year. There shall be no fewer than 35 apprentices indentured in each class.
>
> 9. Until such time as the non-white membership of Local 28 reaches 29%, the JAC shall maintain separate white and non-white lists of apprentices, and shall indenture apprentices as follows:
>
> a) for the first three classes indentured after the effective date of this Modified Program, the first 15 apprentices in each class shall be non-white; number 16 and above shall be selected on the basis of one white for each non-white; and
>
> b) for classes four through eight, one white for each non-white; and
>
> c) for classes nine through eleven, the first 15 apprentices in each class shall be non-white; numbers 16 and above shall be selected on the basis of one white for each non-white; and
>
> d) for classes twelve and above, one white for each non-white; and
>
> e) each apprentice who drops out or is terminated during the first term shall be replaced by another apprentice of the same race or, if this is not possible, an additional apprentice of the same race shall be indentured in the next apprentice class.

voluntarily indentured apprentice classes consisting of 45% non-whites. (State Br. 8 n. 9). Even so, the State's footnote incorrectly asserts that the practice began in February 1981. As stated above, it began in 1977; 1981 was the first time it became institutionalized.

The State makes no mention of MAAPO, and the City's brief, which devotes more than 27 printed pages to the facts, makes no mention of any of the efforts by petitioners to obtain permission to directly enlist minorities. These undeniable facts simply do not fit respondents' preconceptions. Instead, the City and State concentrate on events which occurred prior to the finding of liability and creation of the program in 1975, and even events which occurred prior to the Civil Rights Act.

Petitioners have now been twice held in contempt, and punished, for failing to achieve the quota. The district court's finding, and respondents' arguments, that the individual specifications of contempt were the true substance of the proceeding do not withstand scrutiny. Since civil contempt is purely for remedial purposes or to exact compliance with a yet unobeyed order, it is telling to examine the portion of the order which petitioners are being forced to obey—the achievement of the quota. There is no interest in exacting compliance with the purported specifications of contempt because they are no longer timely. Thus, unlike cases where civil contempt is used to force a witness to testify, to end an unlawful work stoppage, or the like, here the particular allegations of contempt are no longer pertinent. For example, the records not submitted are no longer relevant, and the temporary permits issued to workers from sister unions have expired. There is simply nothing to coerce other than achieving the quota, or to punish petitioners for failing to achieve it.[5]

[5] The fines requested by respondents—"$100 per day for the period from July 1, 1977, the date the defendants first failed to meet an interim remedial goal" (A-465)—were clearly punitive and directly tied to the failure to achieve the quota.

The only contempt charge relating to discrimination is the underutilization of apprentices. As the Administrator reported to the district court, however, employers and contractors, who were not subject to the court's orders, controlled whether apprentices or journeymen were actually employed. The assignment of minority members to jobs has never been within the union's control.[6] (JA-175-176). This fact is now totally ignored by respondents.[7]

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[6] By agreeing to paragraph 19 of MAAPO (See n. 4, *supra*), respondents acknowledged that utilization of apprentices was beyond the control of petitioners. It reads as follows:

> *Journeymen/Apprentice Ratio*
>
> 19. a) Defendants recognize that in order to reach the 29% non-white membership goal as soon as possible, it is critically important that employers maintain the lowest possible journeymen to apprentice ratio consistent with safety and proper apprentice training. Defendants shall use best efforts to ensure that throughout the period this Modified Program is in effect, each employer maintains the lowest possible journeymen to apprentice ratio.
>
> b) ____ weeks after the indenture of each class, the JAC shall prepare and transmit to plaintiffs an analysis of each employer's journeymen to apprentice ratio for the preceding six month period. The JAC shall send a questionnaire (Appendix E) to those employers identified by any party. Copies of responses to the questionnaire shall be mailed to plaintiffs on a weekly basis. Thereafter the Contractors' Association shall make available to plaintiffs individual employers to review their hiring practices. This in no way relieves defendants of their obligation pursuant to Paragraph 19(a) to use best efforts.

[7] As Judge Winter noted below in dissent, the issue of underutilization was introduced in the case as an afterthought. It was first mentioned as a ground for contempt in respondents' reply papers and was seized upon by the district judge who obviously recognized that he could not follow the suggestions of the State and City (not the EEOC) and simply hold petitioners in contempt for not achieving the quota. (A-43).

The other specifications of contempt have little or nothing to do with the racial composition of the union. Nevertheless, the district judge concluded that "the collective effect of these violations has been to thwart the achievement of the 29% goal . . . ." (A-155). It is difficult to understand how misidentifying the race of two workers (Pet. Br. 10. n. 12) or failing to serve the O&J on several contractors, for example, affected the realization of the quota. Similarly, agreeing to an executory provision in a labor-management agreement which would have favored older workers in times of unemployment obviously had no effect, because the provision was never implemented. (A-17-18).

Finally, the O&J vested final authority over the utilization of the apprenticeship program with the Administrator, who had the overall responsibility for insuring petitioners' compliance with the program. (A-305-306). The Administrator supervised petitioners' compliance on a daily basis, and dictated or acquiesced in every decision affecting the entrance of minority workers into the union. As Judge Winter wrote:

> My disagreement with the majority stems largely from its failure to address the fact that Local 28 had the approval of the administrator for every act it took that affected the number of minority workers entering the sheet metal industry. The majority's tacit premise thus is that full compliance with the specific terms of the O&J and RAAPO is legally insufficient to avoid sanctions for contempt if the 29% goal is not met. This holding transforms the 29% figure from a goal guiding the administrator's decisions into an inflexible racial quota.

(A-38-39).

Respondents are equally silent on the failure of the Administrator to take any steps until the eve of the deadline for achieving the quota. This fact does not conform with their predispositions and, hence, is ignored.

ARGUMENT

I

COURT-IMPOSED RACIAL QUOTAS AND RACE-CONSCIOUS REMEDIES ARE ILLEGAL UNDER TITLE VII

A. *The Plan Imposes A Quota As That Term Is Defined By Authoritative Agencies*

In 1973, before the entry of the O&J, the EEOC, the Department of Justice, the Civil Service Commission and the Office of Federal Contract Compliance issued a joint memorandum which set forth the operative distinctions between goals and quotas.[8] Memorandum—Permissible Goals and Timetables in State and Local Government Employment Practices, *reprinted in* 2 Empl. Prac. Guide (CCH) ¶3776 (March 23, 1973). A quota system, under these guidelines, is one that:

> would impose a fixed number or percentage which must be attained, or which cannot be exceeded. . . . Under such a quota system, that number would be fixed to reflect the population in the area, or some other numerical base, regardless of the number of potential applicants who meet necessary qualifications. If the employer failed, he would be subject to sanction. *Id.* at 3856.

Contrary to the State's position, the permanency or duration of the order is not a factor in distinguishing between a quota and a goal. The Solicitor agrees. Sol. Br. 24 n. 22 (". . . we characterize any mandatory requirement for a fixed racial percentage as a quota, regardless of whether the percentage must be maintained in perpetuity.").

---

[8] The memorandum on goals and quotas stating the consolidated opinions of three agencies and a department of the executive, which are all charged with enforcement of the Civil Rights Act, is entitled to substantial weight and judicial deference. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945).

A goal, under the guidelines jointly developed, is a "numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the job market." *Id.* Because a goal implies good faith effort, an employer is "not subject to sanctions for failure to achieve the percentage, because he is not expected to displace existing employees or to hire unneeded employees to meet his goal." *Id.* These guidelines have been reaffirmed and consistently followed by the Equal Employment Opportunity Coordinating Council and the Office of Federal Contract Compliance Programs. (Brief of Amicus Curiae, National Association of Manufacturers 6 n. 4.).[9]

Under these standards, quotas and not goals are before the Court in this case. The O&J was written in mandatory terms: "By July 1, 1981, Local 28 and JAC are hereby directed to achieve a non-white percentage of 29% in the combined membership of Local 28. . . ." (A-305). Although the district court, in response to the depressed economic condition of the sheet metal industry, subsequently extended the deadline for achieving the quota by one year (A-183-184), the court never deviated from the overall percentage "regardless of the number of potential applicants." (JA-88-129; 133-137).

In approving certain elements of MAAPO, which was rejected as a result of the Administrator's vigorous opposition to the modified plan which would have achieved the quota and ended his tenure (Pet. Br. 13), the district court expressly stated that the provisions were "quotas". Nevertheless, the court held the quotas justified "because of defendants' egregiously poor performance over the past (6) years." (JA-33).

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[9] *See also*, U.S. Dep't. of Labor, Authority Under Executive Order 11246, *condensed in* 71 BNA LAB. REL. REP.—News & Background Information 366 (July 1, 1969) where the Department of Labor defines a quota as a "*fixed* number or percentage of minority group workers" (emphasis in original) and a goal as a plan which does not require employment of a fixed percentage but only requires a "good faith effort" to come within general "ranges."

Finally, again consistent with the definition of a quota system, the court has imposed sanctions for failure to achieve the percentage (A-155-156), and has stated that if the nonwhite membership of 29.23% is not achieved by August 31, 1987, "defendants will face fines that will threaten their very existence." (A-123). In short, the affirmative action program, in each of its forms since 1975 and the manner in which it has been enforced, has all the hallmarks of an inflexible quota system, which all the parties agree is illegal under Title VII and which the Court has indicated is unconstitutional. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-25 (1971).[10]

B. *The 1964 Congress Barred Quotas And Preferential Race-Conscious Relief*

Respondents have rewritten the legislative history of the Civil Rights Act of 1964, and have read artificial remedial distinctions into the clear Congressional intent and this Court's interpretations of Title VII. For example, they conclude that the frequent remarks of bipartisan supporters of the Civil Rights Act in 1964 forbidding the use of quotas or preferential treatment of minorities were not aimed at limiting a court's remedial powers following a finding of liability for racial discrimination, but rather reflect an intent not to impose liability for a preexisting racial imbalance.

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[10] Petitioners have previously demonstrated that the cases relied upon by the State and certain amici to uphold the quota and race-specific remedies on constitutional grounds are inapposite. Pet. Br. 28-35. Amicus Curiae, National Conference of Black Mayors, Inc., suggests that Congressionally-sanctioned precedent for race-conscious remedies may be found in the Freedman's Bureau Act of 1865, Act of March 3, 1865, Ch. 90, 13 Stat. 507, and its Amendment, Act of July 16, 1866, Ch. 200, 14 Stat. 173. The Freedman's Bureau Act, however, was not race-conscious. By its very terms, it provided emergency relief to "refugees and freedmen from rebel states." In accordance with the stated purpose of the Act, the Bureau provided "immediate and temporary assistance to freedmen and loyal white refugees" and "gave millions of rations to the destitute of both races." R.W. Patrick, *The Reconstruction of the Nation* 34 (1967). *See also*, K.M. Stampp, *The Era of Reconstruction, 1865-1877* 131 (1972); R. M. Hyman, *The Radical Republicans and Reconstruction 1861-1870* 196 (1967); Sol. Gen. Br. as amicus curiae in *Wygant v. Jackson Board of Education*, No. 84-1340 at 14.

The remarks of the bill's most articulate supporters are directly contrary to this restrictive interpretation. As previously set forth (Pet. Br. 21-27), the remarks of Representative Celler, 110 Cong. Rec. 1518, Senator Humphrey, 110 Cong. Rec. 6549, the joint interpretative memorandum issued by Senators Clark and Case, 110 Cong. Rec. 7214 and the House memorandum describing the bill as passed, 110 Cong. Rec. 6566, uniformly state that the federal courts, following a trial and a finding of liability for racial discrimination, could not impose quotas or preferential hiring as Title VII relief.

Additional remarks in the Senate further demonstrate that court-ordered preferential hiring or quotas were not to be imposed even after a finding of intentional discrimination, and that the remedies were limited to enjoining past discriminatory practices and ordering the hiring or reinstatement of identified victims.

Senator Kuchel, one of the opening speakers in support of the bill, dismissed charges that the legislation would permit court-ordered quotas:

> Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to mediate or conciliate the dispute. It would have no opportunity to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued

> by the Federal district court would, of course, be subject to appeal. But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination, which is in fact occurring. 110 Cong. Rec. 6563.

Senator Humphrey introduced an explanation of the House bill which he stated had been read and approved by the bipartisan floor managers from both houses of Congress. The analysis set forth the spectrum of remedies following a federal trial and a finding of liability:

> The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay. . . .
>
> The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. 110 Cong. Rec. 11847.

Senator Keating also stressed that "the bill does not provide in any way for quotas of any kind." 110 Cong. Rec. 8618. He further explained that following judicial findings of discrimination, the court could not order preferential hiring and that such an order would violate Title VII and the Constitution.

> The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups . . .
>
> Title VII does not grant authority to the Federal Government . . .

> An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrimination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution. 110 Cong. Rec. 9113.[11]

C. *The 1972 Amendment To The Civil Rights Act Did Not Authorize Quotas Or Preferential Race-Conscious Remedies*

Respondents argue that in 1972, in passing Amendments to the Civil Rights Act that are inapplicable to this proceeding,[12] Congress *sub silentio* overcame its abhorrence to court-ordered racial quotas and other race-conscious remedies by adding the terms "but not limited to" and "or any other equitable relief as the court deems appropriate" to the remedial provision of Title VII, §706(g), 42 U.S.C. §2000e-5(g).

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[11] None of the opinions of the courts of appeals which respondents and certain amici cite to demonstrate judicial approval of court-ordered preferential hiring contain any significant consideration of the Congress' intent to disallow quotas as a Title VII remedy. (State Br. 38-39; NOW Br. 32 n. 13). Indeed, the most extensive analysis by a circuit judge appears in the dissent filed by Judge Hays in *Rios v. Enterprise Ass'n of Steamfitters, Local 638*, 501 F.2d 622, 634-639 (2d Cir. 1974). He concluded that "nowhere in the 534 hours of Senate debate is there as much as an oblique suggestion that Congress intended to permit court-ordered racial quotas 'to eradicate the effects of past discriminatory practices.' " *Id.* at 636-637.

[12] Petitioners have previously demonstrated that the 1972 legislation did not apply to proceedings which were already in the courts prior to the March 24, 1972 effective date of the Amendments. (Pet. Br. 17 n. 14). This action was filed on June 29, 1971. (JA-372). The State, however, argues that the express limitation on the retroactivity of the Amendments, Pub. L. 92-261 §14, does not apply to "pattern and practice" suits instituted by the Justice Department. (State Br. 32 n. 32). This assertion is erroneous.

(Footnote Continued)

The sole expressed view of Congress, which relates to this language, however, indicates that it did not intend to authorize quotas, or to sanction class-wide remedies to unidentified victims of discrimination. The explanation of §706(g), as amended, is contained in the section-by-section analysis prepared by Senators Williams and Javits:

> Section 706(g)—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, reinstatement or hiring, with or without backpay, as will effectuate the policies of the Act. Backpay is limited to that which accrues from a date not more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person(s) would operate to reduce the backpay otherwise allowable.

One of the primary purposes of the 1972 legislation was to transfer jurisdiction over pattern and practice suits from the Justice Department to the EEOC. As specifically provided in amended §707(e) of Title VII, 42 U.S.C. §2000e-6(e), the transfer of jurisdiction over pattern or practice suits to the EEOC was effective on March 24, 1972. Section 707(d), 42 U.S.C. 2000e-6(d), further provided that the transfer would not affect suits commenced prior to the date of transfer.

Absent a clear Congressional mandate as to retroactivity, statutes are to be applied prospectively. *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner of Internal Revenue*, 323 U.S. 141, 164 (1944); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944); *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 198-199 (1913); *Winfree v. Northern Pac. Ry. Co.*, 227 U.S. 296, 301-302 (1913); *United States v. American Sugar Refining Co.*, 202 U.S. 563, 5[illegible] (1906); *Reynolds v. M'Arthur*, 27 U.S. (2 Pet.) 417, 435 (1829); *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413-414 (1806).

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168.

The debates before the Ninety-Second Congress which passed the 1972 Amendments also demonstrate that both Houses of Congress were of the view that Title VII already banned racial quotas as a remedy for past discrimination, and that the Amendments reaffirmed their commitment to exclude such quotas from the Civil Rights Act.

In rejecting amendments that would have specifically banned quotas, the debate indicates that Congress regarded the proposals as superfluous, and an attempt to abolish "Philadelphia Plan" affirmative action programs, which did not impose quotas and did not derive their authority from Title VII, but from Executive Order 11246.[13]

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[13] The Philadelphia Plan, affirmed in *Contractors Association v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), was promulgated under Executive Order 11246, 30 Fed. Reg. 12,319 (1965), which required contractors under federally-funded construction projects to agree to affirmative action programs for minority manpower utilization in exchange for the right to bid on projects. The Court of Appeals specifically held that the Plan did not constitute a quota system, which would be illegal under Title VII, because it was issued pursuant to Executive authority and not pursuant to the Civil Rights Act. *Id.* 442 F.2d at 171-173. Furthermore, the Court held that the Plan did not impose a quota,

(Footnote Continued)

Representative Dent explained that his proposed amendment was directed at Philadelphia-type plans issued under Executive Order 11246 and that such preferential treatment was already prohibited by Title VII:

> My . . . amendment would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program. This responsibility, which is now vested in the Office of Federal Contract Compliance of the Department of Labor, would be transferred by H.R. 1746 to the Commission. Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program. Legislative History of the Equal Employment

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but merely set forth a range of goals for minority hiring in various trades, 442 F.2d at 164, which contractors were required to make "a good faith effort to achieve," 442 F.2d at 172, as a precondition for the right to bid on federal contracts. The Philadelphia Plan is thus in accord with the definition of a goal jointly established by the EEOC, the Department of Justice, the Civil Rights Commission and the Office of Federal Contract Compliance. 2 Empl. Prac. Guide (CCH) ¶3776. *See also*, Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84, 107 n. 115 (1970).

Similarly, Executive Order 11246 does not provide any independent basis for the quotas ordered against petitioners; respondents have not suggested otherwise. The Order merely requires that federal contractors not discriminate in employment and "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." The remedies for a violation of the Order, set forth in §209, include publishing the names of noncomplying contractors or unions, recommending that proceedings be instituted under Title VII, suspension of the contract and/or requiring that the contractor refrain from future contracts until the Secretary of Labor is satisfied that the employment practices are in compliance with the Order. The Order does not require quotas or preferential hiring as a remedy for past discriminatory practices. Note, *Executive Order 11246: Anti-Discrimination Obligations In Government Contracts*, 44 N.Y.U.L. REV. 590, 591, 599 (1969).

> Opportunity Act of 1972, prepared by Subcomm. on Labor, Sen. Comm. on Labor and Public Welfare 190 (1972) (hereinafter 1972 Leg. Hist.)

An exchange between Representatives Erlenborn and Hawkins further clarifies this point:

> Mr. Hawkins. Under the current law, a quota of preferential treatment is denied. That is a part already of Title VII of the Civil Rights Act.
>
> * * *
>
> You just said that the law prohibits the establishment of quotas. You are referring to Title VII of the Civil Rights Act of 1964?
>
> Mr. Hawkins. Yes.
>
> Mr. Erlenborn. You are not referring to the Executive order of the President from which the authority for the OFCC was derived?
>
> Mr. Hawkins. I have read the Attorney General's opinion and I assume you did also. As you no doubt saw, the Attorney General says that, in his opinion, the provisions of the Philadelphia plan do not contravene the law of the prohibitions in Title VII.
>
> So as I read the amendment, the amendment does not prohibit anything that the law does not already prohibit. It was never the intent, as the present Attorney General states in his opinion, that an Executive order should contravene what the law prohibits. So squaring this, it seems to me when we talk about prohibiting quotas and talk of preferential treatment, we are merely reflecting what is in the present law. While this amendment clarifies things, it does not do anything that is not already prohibited. 1972 Leg. Hist. 209.

See also Remarks of Representatives Dent and Pucinski, 1972 Leg. Hist. 234-235 and Remarks of Rep. Hawkins, 1972 Leg. Hist. 204, 206.

Representative Green, while of the view that Executive Order 11246 operated to establish a quota system, similarly concluded that such preferential relief was barred by Title VII:

> Title VII of the Civil Rights Act has always prohibited the establishment of quotas. During the legislative history of the Civil Rights Act, it was clearly the congressional intent not to bring about civil rights for some by denying civil rights to others. We had seen that for decades. We were trying to end it. The legislative history of the Civil Rights Act—the debate in the Senate and the House shows that it was not the congressional intent to establish quotas of any kind in our struggles to bring about equality of opportunity. 1972 Leg. Hist. 209-210.

Following Representative Green's remarks, Representative Ford stated: "The Philadelphia plan, which is what we are talking about, does not have anything to do with quotas," 1972 Leg. Hist. 261, and Representative Erlenborn further explained: "I hope that the contribution of the gentlewoman from Oregon has not confused the committee, because the language she read from Title VII of the Civil Rights Act is undisturbed by the Committee bill, and undisturbed by the Erlenborn substitute. Neither one is going to repeal the prohibition against quotas that is in Title VII of the Civil Rights Act." *Id.* Finally, it should be noted that the foregoing debate arose over consideration of whether the EEOC should be afforded cease and desist powers, see Remarks of Representative Chisholm, *id.*, an unlikely forum for overturning the ban on preferential remedies contained in the 1964 legislation. *See also,* Amicus Curiae Brief of Local 542, International Union of Operating Engineers and Local 36, International Association of Firefighters, AFL-CIO, at 10-13. [14]

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[14] The brief debate in the Senate which rejected the Ervin Amendment to abolish quotas and preferential remedies followed similar lines as the House discussion. Again, the proposed legislation was rejected as an attack on "Philadelphia-type plans." Remarks of Sen. Javits, 118 Cong. Rec. 1664-1665.

As the section-by-section analysis of the 1972 Amendments demonstrates, 118 Cong. Rec. 7168, Congress did not intend to make any sweeping change to §706(g) by the inclusion of the term "other equitable relief". The original intent to limit relief under §706(g) to injunctive and make-whole relief to actual victims of discrimination remained undisturbed. Both houses of Congress in 1972 adhered to the view that Title VII did not authorize court-ordered quotas.

In the absence of action by a subsequent Congress amending a statute, the intent of the Congress that originally enacted it is the basis for interpreting its meaning. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977).

D. *This Court Has Uniformly Limited Title VII Relief To Identified Victims Of Discrimination*

Relying exclusively on general language as to the overall purpose of Title VII, which is to eliminate the vestiges of past discrimination, the State seeks to transform these statements into a separate remedy authorizing race-conscious relief to unidentified victims of discrimination. State Br. 29-32. The Court, however, in each of its extended interpretations of the remedial section of Title VII, has expressly limited remedies to make-whole relief to actual victims of past discrimination.

In both *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Court considered remedies imposed under Title VII, §706(g), following judicial findings that the defendants had engaged in a pattern or practice of racial discrimination. In *Franks*, after reviewing the primacy of make-whole or "rightful place" relief under §706(g), as amended, 424 U.S. at 763-764, the Court expressly limited the award of retroactive seniority relief to "actual victims of racial discrimination." *Id.* 424 U.S. at 772-773. Class-wide relief to individuals who could not prove racial discrimination was clearly not contemplated.

Similarly, in *Teamsters*, the United States successfully prosecuted a pattern or practice suit against an employer and a union. The Court exhaustively analyzed the procedure for determining whether individual claimants for relief were actual victims of discrimination and thus eligible for relief. 431 U.S. at 356-377. This lengthy discussion would not have been necessary if courts, as the State and various amici argue, are permitted under Title VII to grant class-wide relief to unidentified nonvictims.

In *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), the Court followed its earlier decisions in *Franks* and *Teamsters* and reversed an order which would have benefited unidentified victims of racial discrimination at the expense of the vested seniority rights of other workers. After reviewing the legislative history of §706(g), Justice White concluded that the "Court of Appeals holding that the District Court's order was permissible as a Title VII remedial order ignores not only our ruling in *Teamsters* but the policy behind §706(g) as well." 104 S. Ct. at 2590. Moreover, the Court specifically rejected any expansive reading of the 1972 Amendments, which respondents and certain amici here, as well as in *Stotts*, argued had effected a change in policy by adding the term "other equitable relief." *Id.* 104 S. Ct. at 2590 n. 15. Similarly, the *Stotts* Court also rejected the argument renewed by the State here that the 1972 Congress codified intervening lower court Title VII decisions upholding class-wide racial remedies. (State Br. 38-39). In rejecting this contention, the Court relied on the 1972 section-by-section analysis relative to §706(g) which indicated that the Amendment would have no effect on that provision, and which reconfirmed that "make whole" relief to actual victims of discrimination was the proper remedy under the subsection. *Id.*

In sum, this Court has not only never approved racial quotas as Title VII relief but has consistently ruled that such remedies must be carefully tailored so as to benefit only identified victims of discrimination in which the victims are able to prove their entitlement to relief through competent evidence.[15]

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[15] Alternatively, the State contends that even if Title VII prohibits the remedies ordered by the district court, the relief may be sustained under a local ordinance,

(Footnote Continued)

The State and various amici finally argue that the quota was necessary and must be continued because of petitioners' history of recalcitrance and egregious discrimination. As the statement of the case indicates, this case does not provide the factual basis for such an argument. In any event, the argument ignores the limitation on the federal courts' power to fashion relief. Such relief is limited to that available under the particular statutory scheme under which jurisdiction is conferred. *See TVA v. Hill*, 437 U.S. 153, 195 (1978) ("[i]n our constitutional system, the commitment to the separation of powers is too fundamental for [the courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' ").

N.Y.C. Administrative Code §B1-7.0. The federal complaint was based exclusively on Title VII and Executive Order 11246 (JA-372), and there is little indication in the extensive record of this case that the district court ever exercised pendent jurisdiction over this ordinance. Moreover, during the debates on the Civil Rights Act, Congress stated that Title VII would preempt contrary provisions of state and local law. "Existing State laws will remain in effect except as they conflict directly with Federal laws." Remarks of Representative Celler, 110 Cong. Rec. 1521, Remarks of Representative Dent, 110 Cong. Rec. 2602. Congress' intent to eschew conflicting remedial interpretations of Title VII under local authority was written into the Civil Rights Act as §708, 42 U.S.C. §2000e-7, which provides:

> **Effect on State Laws:**
> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

An omnibus provision applying to all of the titles of the Civil Rights Act and validating State laws unless "inconsistent with any of the purposes of this Act" was written into Title XI §1104, 42 U.S.C. §2000h-4.

Under the express terms of §708, the State's belated reliance on an obscure ordinance, never actively litigated in fifteen years of judicial proceedings, cannot justify preferential remedies, which constitute unlawful employment practices under §§703(c)(1) and (2), (d), and (j), 42 U.S.C. §§2000e-2(c)(1), (2), (d), and (j) and are contrary to the remedies available under section 706(g), 42 U.S.C. §2000e-5(g).

II

ALL OF THE QUESTIONS PRESENTED ARE RAISED IN A TIMELY MANNER

A. *Neither Res Judicata Nor Law Of The Case Limits This Court's Review Of Issues Raised In The Petition*

Relying on cases in which the Court applied *res judicata* principles where the petitioners sought review of orders they had never appealed to the circuit courts,[16] respondents contend that the Court is foreclosed from reviewing many of the issues which have been raised. They contend that the O&J, which established the affirmative action program and the quota, the question of whether the quota was calculated in conformity with *Hazelwood School District v. United States*, 433 U.S. 299 (1977), and the propriety of the creation and continuation of the office of the Administrator are all beyond the power of this Court to review.

Respondents ignore the fact that, in 1975, petitioners timely appealed the O&J, the findings of liability for the violation of the Civil Rights Act, the Affirmative Action Program and Order (AAPO), the propriety of the quota under Title VII, and the appointment of the Administrator. (A-207-229). In 1977, petitioners timely appealed RAAPO and the quota calculation. (A-160-181). Finally, on the appeal from which certiorari was granted, petitioners timely appealed the Amended Affirmative Action Program and Order (AAAPO), the constitutionality and propriety under Title VII of the amended racial quota, the continuation of the Administrator, the orders adjudicating petitioners in contempt, and the orders effectuating the contempt remedies, including the Fund order. (A-1-52).

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[16] *See, e.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-399 (1981); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 n. 5 (1980); *Pasadena Board of Education v. Spangler*, 427 U.S. 424, 432 (1976).

This Court has never imposed a requirement that a party must seek separate writs of certiorari addressed to successive rulings of a Court of Appeals in a continuing controversy to avoid preclusion. The consequence of such a rule on litigants and the Court is readily apparent.[17] Rather, in these circumstances the Court has applied the more flexible, and discretionary, law of the case doctrine, which does not bind the Court in reaching the merits of earlier determinations.

In *Messenger v. Anderson*, 225 U.S. 436, 444 (1912), a case which went to the Circuit Court of Appeals three times before certiorari was sought, Justice Holmes explained the rule as follows:

> The judgment of the lower court was pleaded, but it was held by the Circuit Court of Appeals after the affirmance by the Supreme Court that its own previous decision was the law of the case and that it was not at liberty to reverse the judgment even if the matter was res judicata on the principle laid down in *New Orleans v. Citizens' Bank*, 167 U.S. 371, 396. See *Parrish v. Ferris*, 2 Black 606. In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *King v. West Virginia*, 216 U.S. 92, 100. *Remington v. Central Pacific R.R. Co.*, 198 U.S. 95, 99, 100. *Great Western Telegraph Co. v. Burnham*, 162 U.S. 339, 343. Of course this court, at least, is free when the case comes here. *Panama R.R.R. Co. v. Napier Shipping Co.*, 166 U.S. 280. *United States v. Denver & Rio Grande R.R. Co.*, 191 U.S. 84.

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[17] Because the denial of certiorari has no preclusive effect, petitioners are in the identical posture had they sought certiorari from the earilier Court of Appeals' decisions, and the Court had denied their petition. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n. 1 (1973); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950).

Similarly, in cases that were before the Courts of Appeals on two occasions before certiorari was sought, the Court has rejected claims that its review was limited by *res judicata* or the law of the case established in the first appeal. In *United States v. A.S. Kreider Co.*, 313 U.S. 443, 445-446 (1941), the Court reversed a judgment entered nine years earlier following two appeals. As here, the Circuit Court of Appeals concluded that it was bound by the law of the case as established by its earlier decision.[18] This Court, however, ruled it was not precluded from reviewing the original determination. *See also, Burnrite Coal Briquette Co. v. Riggs*, 274 U.S. 208, 215 (1927); *Diaz v. Patterson*, 263 U.S. 399, 402 (1923) ("The opinion of the Circuit Court of Appeals was not *res judicata* or conclusive here, as the defendant seems to suppose."); *Southern Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922).[19] In the foregoing cases, petitioners did not seek certiorari to the Court from the first, or, in *Messenger*, from the first or second appeals. Nevertheless, the Court reached the underlying merits of the original judgments and orders. *See also, United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950) ("it requires a final judgment to sustain the application of the rule of the law of the case," which "is only a discretionary rule of practice . . . not controlling here.") *Zeckendorf*

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[18] Judge Meskill, dissenting from the decision on the second appeal below, specifically stated that this Court would not be "bound by our law of the case. . . . [in] our prior decisions," (A-170), clearly indicating that this Court could reach issues raised in all appeals when the case ultimately reached it on certiorari.

[19] Even if the more stringent doctrine of *res judicata* applied, it would not foreclose this Court's consideration of orders that were beyond the remedial scope of Title VII. *See, e.g., New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953); *Hansberry v. Lee*, 311 U.S. 32 (1940). In 1876, Mr. Justice Field, writing for a unanimous Court in *Windsor v. McVeigh*, 93 U.S. 274, 282 (1876), explained the limitation of the *res judicata* doctrine when applied to remedial orders. *Res judicata*, the Court ruled, does not preclude Supreme Court review of such orders if their provisions exceeded the powers conferred by statute.

v. Steinfeld, 225 U.S. 445, 454 (1912); *Remington v. Central Pac. R.R. Co.*, 198 U.S. 95, 100 (1905).[20]

B. *The Validity of Earlier Orders Is Before The Court On Review Of Civil Contempt*

If, as the respondents and the Solicitor agree, petitioners were held in civil, as opposed to criminal, contempt,[21] the validity of

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[20] *Arizona v. California*, 460 U.S. 605 (1983), is fully in accord. *Arizona* involved a decree settling water rights of Indian tribes, which the Court had entered in 1964. The Court declined to apply law of the case "into the situation of our original jurisdiction." *Arizona* is thus entirely distinguishable because in the present case the Court has not previously determined any of the issues with respect to these parties.

[21] Respondents and the Solicitor have not contested petitioners' authorities that civil contempt fines, which are in the nature of damages awarded to a party injured by contumacious conduct, must be based on evidence of actual losses. (Pet. Br. 38-39). *See also, Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455-456 (1932); *United States v. Aberbach*, 165 F.2d 713, 715 (2d Cir. 1948) (dismissing civil contempt fines where the evidence did not support a "reasonable relationship between the fine and damages"); Note, *Recent Applications Of The Civil-Criminal Contempt Distinction*, 15 U. CHI. L. REV. 202, 208 (1947) (In civil contempt "the courts have always followed the accompanying principle that the amount of such a compensatory fine must be based on clear evidence of the complainant's losses, particularly of profits lost and the expenses of litigation").

The fines imposed against petitioners were not directed toward compensating respondents, but toward creating an Employment, Training, Education and Recruitment Fund ("Fund") to enhance the educational levels and recruitment opportunities of the New York minority population. Such fines, imposed for the public benefit, may only be ordered in criminal contempt proceedings. *Leman v. Krentler-Arnold Hinge Last Co., supra*, 284 U.S. at 455-456 ("a proceeding for civil contempt is for the purpose of compensating the injured party, and not, as in criminal contempt, to redress the public wrong. . . . ").

Hutto v. Finney, 437 U.S. 678 (1978), and *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), are not to the contrary. In *Hutto*, the Court was considering a punitive award of attorneys' fees for the bad faith of recalcitrant

(Footnote Continued)

the O&J and RAAPO which imposed the quota and the ministerial obligations upon which the contempt was purportedly premised are before the Court on appeal of the contempt orders, and the contempts must fall if these obligations were, in whole or in part, beyond the remedial scope of Title VII.

Reviewability of the underlying order on appeal of contempt is one of the fundamental distinctions between civil and criminal contempts. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, 294-295 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911) ("it becomes necessary carefully to consider whether this was a case at law for criminal contempt where the evidence could not be examined for a want of a bill of exceptions; or a case in equity for civil contempt, where the whole record may be examined on appeal and a proper decree entered."); *Worden v. Searls*, 121 U.S. 14, 25 (1887); *Ex parte Fisk*, 113 U.S. 713, 718 (1885) ("When, however, a court of the United States, undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court

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litigants. Although the Court drew an analogy to civil contempt remedies, contempt was not before the Court and nothing in that opinion demonstrates a departure from the Court's rulings on the proper measure of compensatory civil contempt fines. In *McComb*, a suit for unpaid wages and overtime under the Fair Labor Standards Act, the contempt fines were carefully structured to "compute the weekly and monthly amount that is due each employee. . . ." *Id.* 336 U.S. at 194. Although the Court tacitly acknowledged that it was departing from precedent by making the award payable to the Adminstrator, the Court observed that the Administrator was statutorily empowered to bring such actions, and the formula for computing back wages was more expeditious than awaiting individual suits by employees. *Id.* 336 U.S. at 194-195. The fine in *McComb* ultimately providing restitution of lost wages to individual employees bears no resemblance to the Fund order which grants class-wide relief to unidentified nonvictims of petitioners' discrimination.

While the identical conduct may result in both civil and criminal contempt sanctions in the same proceeding, *United States v. United Mine Workers*, 330 U.S. 258 (1947), criminal contempt penalties may not be imposed absent the due process safeguards required in criminal proceedings (Pet. Br. 40-41), which were indisputably denied to petitioners.

had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void"); *Ex parte Rowland*, 104 U.S. 604, 612 (1882) ("But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements."). *Accord: Ex parte Young*, 209 U.S. 123, 143 (1908). *See also*, Rodgers, *The Elusive Search For The Void Injunction: Res Judicata Principles In Criminal Contempt Proceedings*, 49 BOSTON U. L. REV. 251, 251 n. 1 (1969); Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 782 n. 13 (1943); Note, *Contempt Liability For Disobedience Of Defective Court Order*, 15 BROOKLYN L. REV. 166 (1947).

The basis for inquiring into the validity of the underlying orders in civil contempt has been explained in Wright, et al., *Civil and Criminal Contempt In Federal Courts*, 17 F.R.D. 167, 177 as follows:

> Since civil contempt proceedings are part of the original cause and are designed to insure to the plaintiff compliance with the court's judgment in the main case, the proceedings in the civil contempt action stand or fall with those in the original cause. Gompers v. Buck's Stove & Range Co., supra; Anargyros v. Anargyros & Co. C.C.N.D. Cal. 1911, 191 F. 208. This is so whether the court in the main action is reversed on non-jurisdictional or on jurisdictional grounds and whether, in the latter case, the parties did or did not contest its jurisdiction.

Similarly, the Court of Appeals for the Second Circuit in its *per curiam* decision in *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 86 F.2d 727 (2d Cir. 1936), elaborated:

> A conviction for criminal contempt may indeed survive the reversal of the decree disobeyed; the punishment is to vindicate the court's authority which has been equally flouted whether or not the command was

> right. But the same cannot be true of civil contempts, which are only remedial. It is true that the reversal of the decree does not retroactively obliterate the past existence of the violation; yet on the other hand it does more than destroy the future sanction of the decree. It adjudges that it never should have passed; that the right which it affected to create was no right at all. To let the liability stand for past contumacy would be to give the plaintiff a remedy not for a right but for a wrong, which the law should not do.

The foregoing analysis is undisturbed by the authorities raised by respondents and the Solicitor. In *Walker v. City of Birmingham*, 388 U.S. 307, 313-314 (1967), and *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922) (Sol. Br. 17), the Court's discussion was limited to criminal contempts. Petitioners do not contend that review of the underlying order is permissible in the context of criminal contempt. Both criminal and civil contempt orders were involved in *United States v. United Mine Workers*, 330 U.S. 258 (1947), but the Solicitor has only cited that portion of the opinion dealing with criminal contempt, *id.* at 293-294, despite the fact that the Court clearly stated that the validity of the underlying orders was reviewable when the contempt was civil in nature. *Id.* at 294-295. There was no actual contempt order before the Court in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 439 (1976), and the Court limited its discussion to possible criminal contempt sanctions for violating the injunction, relying exclusively on *Howat*, *Walker* and *United Mine Workers*.

Maggio v. Zeitz, 333 U.S. 56 (1948), and *United States v. Rylander*, 460 U.S. 752 (1983), are also inapposite. In those cases, the only issue before the Court reviewing the contempts was the strictly factual question of whether the contemnors had goods or documents actually in their possession at the time they were ordered to turn them over pursuant to orders of the bankruptcy and district court judges. No question was raised as to whether the district court or the bankruptcy judge had the authority to issue the turnover orders under the statutes they were enforcing.

As *Ex parte Fisk, Ex parte Rowland* and the commentators referred to at p. 28, *supra*, agree, a different analysis is required when questions are raised as to the validity of the order itself as being beyond the statutory scheme before the court. *Cf. Windsor v. McVeigh*, 93 U.S. 274, 282 (1876). Moreover, in *Maggio*, the Court reviewed the validity of the underlying order to prevent a manifest injustice, and refused to enforce it.

Finally the state contends that *NLRB v. Local 28, International Brotherhood of Teamsters*, 428 F.2d 994, 999 (2d Cir. 1970), establishes a rule that the validity of the underlying order is not in question when a permanent injunction has been violated. However, unlike the present case where petitioners appealed the injunction (A-207-229), that case involved an unappealed permanent injunction to which, as previously stated, *res judicata* applies as opposed to the less stringent law of the case doctrine. Moreover, the court's discussion indicates that it was not stating an ironclad rule, but rather a discretionary application: "the doctrine of res judicata . . . *militates in favor* of barring collateral attacks upon permanent injunctions." (Emphasis added). As the State specifically acknowledges, the civil contempt proceeding in this case was not collateral; it was brought as a motion in the same litigation which has been a continuing matter since 1971. (State Br. 25-26 n. 26).

CONCLUSION

Petitioners respectfully pray that the judgment of the United States Court of Appeals for the Second Circuit be reversed; that all outstanding orders and judgments be vacated, and that the underlying proceedings be dismissed.

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Respectfully submitted,

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