No. 84-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

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

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

The National Association of Manufacturers ("NAM") respectfully submits this brief *amicus curiae* pursuant to the written consents of the parties.[1]

INTEREST OF THE AMICUS CURIAE

NAM is a non-profit voluntary business association of approximately 13,000 manufacturing and related business

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[1] These consents have been filed with the Clerk of the Court.

concerns. Its members employ approximately 85 percent of all workers in the nation's manufacturing sector and produce more than 80 percent of the nation's manufactured goods. As employers, NAM's members support affirmative action in the workplace as an effective method of achieving civil rights progress by enhancing employment opportunities for minorities and women. Affirmative action has proved to be a good business policy which has allowed industry to benefit from new ideas, opinions and perspectives generated by greater workforce diversity. Affirmative action has also strengthened the fabric of society by creating an environment of cooperation and understanding among persons of diverse backgrounds.

NAM believes that effective affirmative action plans include outreach, recruitment, counseling and training activities designed to ensure that qualified minorities and women are considered for employment opportunities. Goals for minority workforce participation are merely an effective measurement of program success.

This case raises the issue of whether race-conscious goals are an appropriate judicial remedy where intentional discrimination is found, and presents an indirect challenge to the use of race-conscious goals in voluntary affirmative action programs. NAM believes goals are both an effective tool in voluntary affirmative action programs and an appropriate remedy in a case where there is a finding of discrimination.

SUMMARY OF THE CASE

After making a general finding in 1975 that the petitioner union and joint apprenticeship committee had discriminated on the basis of race in denying admission to nonwhites, the trial court ordered relief, which included a 29 percent nonwhite membership goal to be achieved by July 1981. The trial court also ordered petitioners to take specific steps designed to achieve this goal, including revision of union admission procedures, restrictions on the

issuance of temporary work permits, and adoption of a publicity campaign to increase awareness among nonwhites of employment opportunities with the union. In 1982, the trial court held petitioners in contempt for failure to comply with its 1975 order. The court stated that it was *not* holding petitioners in contempt for failure to attain the 29 percent goal, but for failure to comply with other aspects of its remedial order. 29 Fair Empl. Prac. Cas. at 1146. The trial court imposed contempt sanctions and ordered petitioners to take additional remedial measures, which included a revised nonwhite membership goal of 29.23 percent to be attained by July 31, 1987 and the creation of a training fund to assist nonwhite apprentices.

On appeal, a divided panel of the court of appeals affirmed the finding of contempt and largely affirmed the remedial measures ordered by the trial court, including the revised 29.23 percent goal and the minority apprentice training fund. In affirming, the majority was careful to note that the trial judge "did not rest his contempt finding on failure to meet the 29% membership goal by the date ordered. . . ." 753 F.2d at 1176-77. In his dissent, Judge Winter disagreed, contending that petitioner union had the approval of the court-appointed administrator for every action it took and concluding therefrom that "[t]he majority's tacit premise . . . is that full compliance with the specific terms of [the trial court's order] is legally insufficient to avoid sanctions for contempt if the 29% goal is not met." *Id.* at 1189. Judge Winter, however, appeared to suggest that a race-conscious "goal guiding the administrator's decisions" would be permissible under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1982 ed.) ("Title VII") and the Constitution. *Id.*

Despite this apparent agreement among the members of the panel of the Court of Appeals, petitioners in this Court argue that any type of race-conscious relief not

limited to identified victims of discrimination is impermissible under Title VII and the Constitution, including even flexible goals which are merely guidelines. The position of the EEOC with respect to flexible goals is less clear. The EEOC argues, on the one hand, that relief under Title VII is properly limited to identified victims of discrimination, but stresses, on the other hand, the broad authority of courts to order nondiscriminatory affirmative action. *See* Brief for the EEOC at 30-32. The EEOC also argues that the court-ordered training fund approved by the Court of Appeals violates Section 703(d) of Title VII, 42 U.S.C. § 2000e-2(d), because the fund benefits minority apprentices exclusively. Under the EEOC's reasoning, such a fund is unlawful whether ordered by a court or adopted by an employer or union voluntarily.

SUMMARY OF ARGUMENT

It is the position of *amicus curiae* that a court-ordered race-conscious goal imposed after a general finding of discrimination, which only serves as a flexible guideline for directing an employer's or union's good faith efforts to increase minority participation in the workforce, does not contravene either Title VII or the Constitution.

With respect to the training fund issue, *amicus curiae* submits that the EEOC reads the decision of this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), too narrowly. In *Weber*, the Court held that an affirmative action program voluntarily adopted by an employer and union for a remedial purpose does not violate Title VII, provided it is temporary in duration and does not unnecessarily trammel the interests of white employees. The Court in this case should be careful not to limit or impair its holding in *Weber*, because voluntary affirmative action programs remain a necessary management tool for effecting voluntary compliance with Title

VII and because such programs have resulted in substantial employment gains for minorities and women.[2]

ARGUMENT

I. FLEXIBLE RACE-CONSCIOUS GOALS ARE A LAWFUL GUIDELINE FOR DIRECTING AN EMPLOYER'S OR UNION'S GOOD FAITH EFFORTS TO EXPAND CONSIDERATION OF THE AVAILABLE POOL OF QUALIFIED MINORITIES.

A. Federal Agency Distinctions Between Goals And Quotas.

Every agency of the federal government responsible for enforcing equal employment opportunity laws and regulations has recognized a principled distinction between goals and quotas.[3]

Beginning in 1969, the Attorney General of the United States issued an opinion on the legality of a plan which proposed to use race-conscious goals to implement Execu-

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[2] Affirmative action issues are also raised in two other cases before the Court, *Wygant v. Jackson Board of Education, cert. granted,* 105 S.Ct. 2015 (1985), and *Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, cert. granted,* 106 S.Ct. 59 (1985). *Wygant* deals exclusively with the limits the Constitution places on affirmative action by public employers. *Local No. 93* deals with the restrictions, if any, which § 706(g) of Title VII places on consent decrees. Neither of these cases requires reexamination of the lawfulness of a voluntary affirmative action program of a private employer which is not embodied in a consent decree.

[3] The distinction recognized by these agencies differs from the goals/quotas distinction adopted by the court below. The court there distinguished between goals and quotas on the basis of permanence, holding that a goal is a requirement for a specified racial percentage which must be met by a specified date, but need not be maintained thereafter, while a quota is a fixed percentage requirement which must be permanently maintained. 753 F.2d at 1186. *See also Rios v. Enterprise Association of Steamfitters Local 638,* 501 F.2d 622, 628 n.3 (2d Cir. 1974).

tive Order 11246. 42 Op. Att'y Gen. 405 (1969). In finding the plan lawful, the Attorney General relied on the two essential elements which distinguish goals from quotas. First, the plan provided that the commitment to specific goals " 'is not intended and shall not be used to discriminate against any qualified applicant or employee.' (sec. 6(b)(2))." *Id.* at 408. Second, the obligation to meet the goals was not absolute. The employer was only required to make good faith efforts to meet its commitment. *Id.*

On March 23, 1973, the Departments of Justice and Labor, the Equal Employment Opportunity Commission, and the Civil Service Commission issued a joint memorandum which further developed the distinction between goals and quotas. 2 Empl. Prac. Guide (CCH) ¶ 3775 (March 23, 1973). The memorandum defined a quota system as one that "would impose a fixed number or percentage which must be attained, or which cannot be exceeded; . . . regardless of the number of potential applicants who meet necessary qualifications." *Id.* at 2096. Under a quota system, an employer who fails to meet the fixed number or percentage is subject to sanction. *Id.*

In comparison, a goal was defined in the memorandum as a "numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market." *Id.* If the employer fails to meet the goal because he has fewer vacancies than expected or despite good faith efforts, "he is not subject to sanction, because he is not expected to displace existing employees or to hire unneeded employees to meet his goal." *Id.*[4]

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[4] This interpretation of affirmative action goals was reaffirmed by the Equal Employment Opportunity Coordinating Council in a 1976 policy statement. *See* 41 Fed. Reg. 38,815 (1976). The distinction has most recently been reaffirmed by Secretary of Labor Raymond J. Donovan sitting in his capacity as the administrative appeal officer of last resort in cases prosecuted by the U.S. Department of

Thus, every federal agency responsible for enforcing equal employment opportunity has recognized and currently recognizes a distinction between goals and quotas. As so defined, NAM supports the use of flexible goals after a finding of discrimination as an appropriate remedy which contravenes neither the remedial limits of Title VII nor the Constitution. NAM has no position on whether quotas may be used as a remedy in cases such as this where a union or employer has been held in contempt for violation of a court's order.[5]

B. Court-Ordered Race-Conscious Goals Are An Appropriate Remedy Authorized by Title VII.[6]

Petitioners contend that section 706(g) of Title VII prohibits a court from ordering the hiring, promotion, reinstatement or payment of back pay to individuals who are not identified victims of discrimination.

Even if petitioners were to prevail on this point, goals do not transgress this limitation. Goals are established in

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Labor pursuant to its authority under Executive Order 11246. *See Office of Federal Contract Compliance Programs ("OFCCP") v. Priester Construction Co.*, No. 78-OFCCP-11 (Feb. 22, 1983), *summarized in* 2 Aff. Action Compl. Man. (BNA) D: 9121 (goals, unlike quotas, merely require good faith efforts and do not require that one person be preferred over another because of his or her race or sex); *OFCCP v. National Bank of Commerce of San Antonio*, No. 77-OFCCP-2 (Dec. 11, 1984), *summarized in* OFCCP Fed. Contract Compl. Man. (CCH) ¶ 21,223 (same).

[5] The court of appeals divided on whether petitioners were sanctioned solely because they failed to meet the 29 percent "goal" or because they failed to make good faith efforts to meet the goal by complying with other aspects of the trial court's 1975 order. Given the apparent ambiguity of the record on this point, *amicus curiae* takes no position on whether the 29 percent "goal" in this case is actually a goal or a quota.

[6] While this case presents issues related to race-conscious relief, similar principles will apply to all types of relief under Title VII, including, for example, gender-conscious remedies.

conjunction with other types of prospective remedies designed to expand the available pool of qualified minority (and female) applicants. Such prospective remedies might include use of "outreach" efforts known as "linkage programs" to connect employers with available pools of minorities trained or experienced for available positions. Other available prospective remedies may involve recruitment or advertisement efforts to increase the applicant flow of qualified minorities. Such outreach and recruitment efforts are inclusionary and not exclusionary and assist employers by expanding the pool of identifiable qualified candidates for hire and promotion. If an employer or union makes good faith efforts to achieve a goal by making these sorts of outreach and recruitment efforts, it is not subject to sanctions if, despite such efforts, a goal is not met. In this context, goals are used only as a guideline to measure progress achieved through other remedial measures and to determine when such efforts may no longer be useful or necessary.

With this limitation, race-conscious goals do not run afoul of any possible interpretation of Section 706(g), because they do not require employers to hire, promote or reinstate nonvictims of discrimination. They require only equal consideration of qualified candidates, minority and otherwise, within the available pool. Thus, goals measure progress achieved through other remedial measures, such as affirmative advertising and recruitment efforts, which are consistent with any limits imposed by Section 706(g) and which this Court has expressly approved in the past. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 n.47, 366 n.51 (1977); Brief for the EEOC at 30-32.[7]

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[7] Of course, *any* relief ordered by a federal court may only be predicated on a finding of a violation of Title VII and must be carefully tailored to fit the nature and extent of the violation found. *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976).

C. Under The Constitution, Race-Conscious Goals Are A Permissible Remedy After A Finding of Discrimination.

Members of the Court have proposed a number of different standards for determining the constitutionality of government sponsored race-conscious remedial action. *Fullilove v. Klutznick*, 448 U.S. 448, 472-73 (1980) (opinion of Burger, C.J.) (analysis of race-conscious remedial classification requires close examination of objectives of the classification and the means for achieving these objectives); *id.* at 496 (Powell, J., concurring) (racial classification must be necessary means of advancing a compelling governmental interest); *id.* at 519 (Marshall, J. concurring in the judgment) (racial classifications designed to further a remedial purpose must serve important governmental objectives and be substantially related to achievement of those objectives).

Each of these tests emphasizes a number of common points with respect to race-conscious remedies. First, race-conscious remedies must be flexible. Thus, the Court in *Fullilove* upheld a race-conscious minority business set-aside program because "[t]he MBE program does not mandate the allocation of federal funds according to inflexible percentages solely based on race or ethnicity." *Id.* at 473 (opinion of Burger, C.J.). Instead, a provision for waiver of the program's ten percent set-aside requirement in cases where this goal was impossible to attain through good faith efforts provided the necessary flexibility to pass constitutional muster. *Id.* at 488 (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring). *See also Regents of the University of California v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.) (race may flexibly be considered as a plus in seeking diverse student body, but a fixed number of slots in a class may not be reserved for minority students).

Second, remedial racial classifications also may not unduly or unnecessarily interfere with the rights or expec-

tations of innocent third parties. *Fullilove v. Klutznick*, 448 U.S. at 514 (Powell, J., concurring). However, in remedying the effects of past discrimination, some "sharing of the burden" by innocent parties is permissible. *Id.* at 484 (opinion of Burger, C.J.). Finally, remedial racial classifications are constitutionally defective where they have the effect of stigmatizing a particular class of persons. *Regents of the University of California v. Bakke*, 438 U.S. at 360 (opinion of Brennan, J., joined by White, Marshall and Blackmun, JJ.); *id.* at 298 (opinion of Powell, J.).

Reliance on properly limited goals is a narrowly tailored means to remedy discrimination which comports fully with constitutional limitations. Goals are flexible; they do not automatically require sanction of an employer or union which, despite good faith efforts, fails to attain the goal. Goals also permit employers or unions to consider applicants on an individual basis and do not require that one person be preferred over another because of his or her race. This both reduces interference with the settled expectations of innocent third parties and minimizes any stigma arising out of the use of goals. Thus considered in light of established constitutional principles, race-conscious goals are a permissible, narrowly tailored means of achieving the legitimate objective of remedying past discrimination.

II. THE COURT NEED NOT AND SHOULD NOT LIMIT OR IMPAIR ITS HOLDING IN *WEBER* THAT GIVES EMPLOYERS SUBSTANTIAL LATITUDE IN ADOPTING REMEDIAL, VOLUNTARY AFFIRMATIVE ACTION PROGRAMS.

In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), this Court held that voluntary affirmative action programs do not violate Title VII, provided they are temporary in duration and do not unnecessarily trammel the interests of white employees. Unlike *Weber*,

this case concerns the limits which § 706(g) and the Constitution place on a court's authority to order relief after a finding of discrimination. Voluntary affirmative action programs adopted by private employers are subject neither to the restrictions of § 706(g) nor to the constitutional limitations of the equal protection and due process clauses. This case, therefore, would appear to offer no occasion to reexamine this Court's holding in *Weber*.

The EEOC, however, attacks the trial court's creation of a fund to assist minority apprentices with their training as being inconsistent not only with the remedial limits of § 706(g), but also as violative of § 703(d), which prohibits racial discrimination in apprenticeship programs. Brief for the EEOC at 37. The argument of the EEOC based on § 703(d) thereby suggests that it would be unlawful for an employer to create a training fund to aid minority employees, either at the direction of a court or as a purely voluntary aspect of its affirmative action program.

The position of the EEOC appears contrary to this Court's decision in *Weber*. The EEOC claims that *Weber* is distinguishable because the training program at issue there provided that whites and nonwhites would be admitted on a one-to-one basis. By contrast, the training fund in this case was established exclusively for the benfit of nonwhites. Thus, the EEOC contends that this is a 100 percent quota which far exceeds the 50 percent admission ratio approved in *Weber*.

The EEOC, however, defines the program at issue here too narrowly by focusing exclusively on the training fund. The fund is only one component of an overall apprenticeship program which admits both whites and nonwhites in approximately equal numbers, as was true of the apprenticeship training program this Court ap-

proved in *Weber*.[8] The fund merely provides limited financial assistance to nonwhites who might otherwise experience difficulty in remaining in the apprenticeship program, "the route they most frequently travel in seeking union membership" (A-26). Thus, the fund considered as part of the training program as a whole does not "unnecessarily trammel the interests of white employees," who retain a full opportunity to be selected for and to participate in the apprenticeship program.[9]

This Court should be careful not to limit or impair its holding in *Weber*. In reliance on *Weber*, a substantial number of private employers have adopted or decided to retain various types of voluntary affirmative action programs. Such programs are a reasonable response to situations where an employer finds that minorities or women are significantly underrepresented in their workforce. Given such underrepresentation, employers face a real threat of being sued based either on allegations that the employer has engaged in a pattern or practice of discrimination or that its selection procedures have had an impermissible disparate impact on minorities or women. The defense of such lawsuits is complex, and given the difficulties of rebutting a *prima facie* case or of validating selection procedures as job-related, even an employer who has acted with utmost good faith may face a serious threat of potential liability.

Voluntary affirmative action programs adopted pursuant to *Weber* offer employers a reasonable way to reduce the threat of being sued based on statistical dis-

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[8] In the instant case, recent apprenticeship classes have been 55 percent white. 753 F.2d at 1189.

[9] Indeed, the court of appeals struck down as an abuse of discretion a one-to-one admission ratio ordered by the trial court in connection with the apprenticeship program, which would have been far more restrictive of the interests of white employees, but which would clearly have been permissible in a voluntary context under *Weber*.

parities in their workforce. As Justice Blackmun observed, if such programs were unlawful, employers would find themselves on a:

> 'high tightrope without a net beneath them.' . . . If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

United Steelworkers of America v. Weber, 443 U.S. at 209-10 (Blackmun, J., concurring) (quoting Wisdom, J., dissenting, 563 F.2d at 230). Permitting voluntary affirmative action programs allows employers to avoid the "high tightrope," and is fully consistent with the well-established principle under Title VII (and Executive Order 11246) that voluntary compliance is the preferred means of eliminating employment discrimination. *See, e.g., W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *see also United Steelworkers of America v. Weber*, 443 U.S. at 204 (Title VII intended as a catalyst to cause employers and unions to self-examine and self-evaluate their employment practices to eliminate vestiges of past discrimination).

In addition to providing employers with a flexible means of affecting voluntary compliance with Title VII, the use of employment goals has been a valuable tool to promote equal employment opportunities for minorities and women. Studies have indicated that affirmative action goals do affect employment patterns. One report submitted to the Department of Labor was an empirical study of the impact of the federal affirmative action regulations and antidiscrimination law on employment.[10]

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[10] *See* Jonathan S. Leonard, "The Impact of Affirmative Action," National Bureau of Economic Research, Cambridge, Massachusetts, and Institute of Industrial Relations and School of Business Admin-

The study concluded that affirmative action goals "have a measurable and significant impact in improving the employment of minorities and females." Impact Report at 377. Similarly, a study conducted by the Office of Federal Contract Compliance Programs within the United States Department of Labor found that employment opportunities for minorities and women were greater with federal government contractors that used employment goals pursuant to their federal affirmative action obligations under Executive Order 11246 than those available with noncontractor companies subject only to Title VII and not the Executive Order.[11]

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istration, University of California at Berkeley (July 1983) (hereinafter referred to as "Impact Report"). (A copy of the Impact Report has been lodged with the Clerk of the Court for the convenience of the Court.)

[11] *See* "Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980: A Report of the Office of Federal Contract Compliance Programs," Employment Standards Administration, U.S. Department of Labor at 37 (June 1984) (hereinafter referred to as "OFCCP Report"). (A copy of the OFCCP Report has been lodged with the Clerk of the Court for the convenience of the Court.) This study found that minority participation rates in contractors' workforces grew by 20.1 percent from 1974 to 1980, while minority employment in noncontractors' workforces grew only by 12.3 percent. OFCCP Report at 39. Women's participation rates in contractors' workforces increased by 15.2 percent, as opposed to 2.2 percent in noncontractors' workforces. *Id.*

CONCLUSION

This Court should uphold the use of race-conscious goals as a proper remedy after a finding of discrimination. This Court should also take care not to limit or impair its holding in *Weber* which preserves the flexibility needed by employers to comply voluntarily with Title VII, while promoting employment opportunities for minorities and women.

Respectfully submitted,

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