No. 84-1656

IN THE

Supreme Court of the United States

October Term, 1984

LOCAL 638 . . . , 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.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

Petitioners are before this Court having been found guilty of a long and ignominious history of intentional racial discrimination and of repeated defiance of judicially supervised efforts to effect compliance with local, state and federal fair employment laws. For over twenty years, in more than twenty-five orders or opinions, the state and federal courts have sought to force these petitioners into

compliance with established law.* *See, e.g.*, Pet. 2, n.2; A-i-ii.** The Second Circuit now has rejected, for the third time, petitioners' efforts to evade compliance with federal court orders entered to redress their discriminatory practices, and has affirmed the lower court's judgments holding defendants in contempt of these remedial orders. Under the guise of appealing the contempt judgments, petitioners come to this Court principally to obtain review of the underlying remedial court orders, for which the time to seek review has long since expired. Because this petition is untimely as to virtually all of the rulings being challenged and because the rulings below are plainly correct, the petition should be denied.

A. Litigation History Prior to the Contempt Proceedings

In 1971, the United States Department of Justice, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, filed suit against petitioners to enjoin a pattern and practice of discrimination against black and Spanish surnamed individuals ("non-whites") who sought

* Petitioners were first found to have intentionally discriminated against minorities in 1964, in a proceeding brought under the New York Human Rights Law. *State Comm'n For Human Rights* v. *Farrell*, 43 Misc. 2d 958 (Sup. Ct. N.Y. Co. 1964). A-411. Thereafter, the trial judge repeatedly castigated Local 28 for foot-dragging in its integration efforts and found it necessary to issue several orders enforcing the original judgment. *State Comm'n For Human Rights* v. *Farrell*, 47 Misc. 2d 244 (Sup. Ct. N.Y. Co. 1965); *State Comm'n For Human Rights* v. *Farrell*, 47 Misc. 2d 799 (Sup. Ct. N.Y. Co. 1965), *State Comm'n For Human Rights* v. *Farrell*, 52 Misc. 2d 936 (Sup. Ct. N.Y. Co.), *aff'd*, 27 A.D.2d 327 (1st Dept.), *aff'd*, 19 N.Y.2d 974 (1967). Local 28 continued to resist court orders following commencement in 1971 of the federal action. *See, e.g.*, A-220.

** References to the Petition for Writ of Certiorari are cited as "Pet. ——". References to the Appendix to the Petition are cited as "A- ——". References to the Respondents' Brief in Opposition to the Petition for Writ of Certiorari are cited as "Opp. ——".

membership in Local 28 and training and job opportunities in the sheet metal trade in New York City. Following a trial in 1975, the district court found that petitioners had intentionally discriminated against non-whites 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 non-white; consistently discriminating in favor of white applicants seeking to transfer into Local 28 from sister locals; refusing to administer journeyman examinations out of a fear that minority candidates would do well, and instead issuing work permits to non-members on a discriminatory basis; and failing to organize non-union sheet metal shops owned by or employing non-whites. A-330-50.*

Based upon these findings, the court entered an Order and Judgment ("O&J") that enjoined petitioners from all future violations of Title VII and ordered petitioners to achieve, by July 1, 1981, a remedial end-goal of 29% non-white membership in Local 28. A-305, 354. This goal was based on the relevant non-white 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

* The court further noted that, during the pendency of both the state and federal proceedings, Local 28 and the JAC had repeatedly flouted the state court's mandate to "create 'a truly non-discriminatory union,'" and had obeyed the federal court's interim orders only under threat of contempt citations. A-352.

basis. A-354-56, 308-10, 303. 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 for these tests and transfers, A-355, 312, and 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 the court's decree. A-355, 305-07.

On appeal, the Second Circuit affirmed, noting that there was ample evidence that petitioners "consistently and egregiously violated Title VII." A-212. Indeed, petitioners "[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, 222. 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 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 earlier New York court orders and the district court's rulings in this case. A-220.

Petitioners did not seek review in this Court from the Second Circuit's judgment, which finally determined all issues in the action.

On January 19, 1977, following the Second Circuit's affirmance, the district court issued a revised affirmative action program and order ("RAAPO"). A-182. Among other things, RAAPO granted petitioners an additional year in which to meet the 29% membership goal. The court ordered petitioners to insure that regular and substantial progress was made every year in admitting non-whites. Additional modifications were made to insure that, during a time of widespread unemployment in the industry, apprentices shared equitably in available employment opportunities in the industry. A-183-84. The court therefore 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.

Petitioners appealed six provisions of RAAPO, including the apprenticeship indenture requirement and the 29% goal, but the Second Circuit affirmed. A-160, 165-66. Once again neither Local 28 nor the JAC sought certiorari from this Court.

B. The Contempt Proceedings

In 1982, it became clear to the respondents that Local 28 would not achieve the 29% goal by the July 1, 1982 date required under the O&J. Because this result was a consequence of Local 28's failure to comply with several sub-

stantive provisions of the O&J and RAAPO, respondents moved for an order holding petitioners in contempt. Petitioners cross-moved for an order terminating the O&J and RAAPO.

Following a hearing, the district court found that petitioners had "impeded the entry of non-whites into Local 28 in contravention of the prior orders of this court." A-149, 150.* Judge Werker held petitioners in contempt for violating the O&J and RAAPO by a) underutilizing the apprentice program to the detriment of non-whites; 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 non-white members by protecting members aged fifty-two or over during periods of unemployment (the "older workers' provision"). The cumulative effect of these contemptuous acts, the district court ruled, was that petitioners failed even to approach the 29% goal.** A-155-56.

* Petitioners' assertion, at Pet. 7, that they had achieved a non-white membership in Local 28 of 14.9% by April 1977, was rejected by both the district court and the Second Circuit. A-9. Petitioners' own April 1982 census showed its non-white membership to be only 10.8%. Similarly, petitioners' statement that 45% of their apprentice classes are made up of non-whites, Pet. 7, is misleading in that only since January 1981 have petitioners indentured apprenticeship classes consisting of 45% non-whites. A-37.

** Although Local 28's total non-white journeymen 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.

The primary basis for the contempt holding was the district court's finding that petitioners had deliberately underutilized the apprenticeship program in order to limit nonwhite membership and employment opportunities. This finding rested on evidence that petitioners trained substantially fewer apprentices after entry of the O&J than prior to its issuance. The court found that the underutilization of the apprenticeship program was not the result of a downturn in the economy. To the contrary, the average number of hours and weeks worked per year by its 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 its predominantly white, incumbent journeymen.* The extent of that shift was demonstrated by the increase in the ratio of journeymen to apprentices from 7:1 before the O&J was entered to 18:1 by 1981, well above the industry standard of 4:1. A-16.

The court's finding that petitioners were also in contempt for issuing permits without the Administrator's approval was based upon evidence that Local 28 issued thirteen unauthorized permits between March and June 1981. Of the thirteen unauthorized permit men, only one was nonwhite. These contemptuous acts were particularly signifi-

* Petitioners erroneously assert, at Pet. 7, that the Administrator approved the size of each of more than 60 classes of apprentices. 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.

cant 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 non-whites access to employment opportunities in the sheet metal industry. A-345-46.

Petitioners were also held in contempt for violating the provisions of the O&J and RAAPO requiring Local 28 and the JAC to devise and implement a written plan for an effective general publicity campaign designed to dispel their reputation for discrimination in non-white communities. A-152-53. It was undisputed that the general publicity plan required by the O&J and RAAPO was never formulated, much less implemented. Finally, petitioners were held in contempt for failing, since 1976, to comply with the 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 its purposes had not been achieved and that it had not caused petitioners unexpected or undue hardship. A-157.

On April 11, 1983, the City brought a proceeding against Local 28 and the JAC for additional violations of the O&J and RAAPO. After a hearing, the Administrator found that Local 28 and the JAC 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 Local 28 and the JAC in contempt. A-125.

C. The Fund Order

To remedy petitioners' past noncompliance, the district court 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 were 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, provide incentive or matching funds to attract additional funding from governmental or private job training programs, establish a tutorial program for non-white first year apprentices, and create summer or part-time sheet metal jobs for minority youths who have had vocational training. A-116-18. The Fund will "remain in existence until the [new non-white 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.

D. AAAPO

Because the remedial purposes of RAAPO had not been achieved, the district court, on November 4, 1983, entered AAAPO to replace RAAPO. A-53, 111. AAAPO modified RAAPO in a number of respects. It modified the non-white membership goal from 29% to 29.23% to reflect Local 28's expanded jurisdiction (due to 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 non-white applicant be indentured into the apprenticeship program for each white applicant indentured and that, unless waived by plaintiffs, the JACs assign each Local 28 contractor one apprentice for every four journeymen. A-57.

E. The Appeal to the Second Circuit

Local 28 and the JAC appealed to the Second Circuit from the district court's contempt orders, its Fund order and its order adopting AAAPO. They did not appeal from the denial of their cross motion to terminate the O&J and RAAPO.

The Second Circuit affirmed all of the district court's findings of contempt against Local 28 and the JAC, except the finding based on the older workers' provision. It also affirmed the contempt remedies and establishment of the Fund.

With respect to the first contempt proceeding, the Second Circuit 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 concluded that the establishment of the Fund was an appropriate 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. A-26.

The court affirmed AAAPO with two modifications: it set aside the requirement that one non-white 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.

Finally, the court reaffirmed the 29.23% membership goal, finding that it met the circuit's two-pronged test for the validity of a temporary, race-conscious affirmative action remedy. First, as the court had twice before recognized, 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.

It is from this judgment of the Second Circuit that petitioners seek review.

ARGUMENT

I.

The Petition Is Untimely As To Virtually All Of The Questions Presented.

Petitioners' application for certiorari is untimely as to almost all of the rulings for which review is sought. First, petitioners seek to challenge the district court's original findings of intentional race discrimination, which were made in 1975 and affirmed on appeal in 1976. A-211-15. Petitioners declined to seek certiorari after the Second Circuit's affirmance. This Court's rules, 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. Petitioners' challenge to these findings of intentional race discrimination thus comes more than eight years too late. *See Parker* v. *Illinois*, 333 U.S. 571, 576 (1948).*

* Petitioners claim no new facts or changed circumstances that might make appropriate a belated review of the findings of liability. Their argument that *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977), requires a redetermination was made and rightfully rejected by the Second Circuit in 1977 in an opinion from which the petitioners also did not seek review. Moreover, the findings of discrimination were consistent with *Hazelwood*. Petitioners' liability was based not on statistics alone but primarily on a series of intentionally discriminatory practices against minorities. Opp. 2. *See also* A-333 n.12.

Furthermore, certiorari is inappropriate because petitioners seek to relitigate factual findings concurred in by both the district and appellate courts. This Court has often stated that it is reluctant to disturb findings of fact concurred in by two lower courts. *E.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *see Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, —— U.S. ——, 104 S. Ct. 2948, 2959 n.15 (1984).

Petitioners' challenges to the powers of the Administrator and to the 29% goal are likewise untimely.* The 1975 O&J created the office of Administrator, giving it supervisory powers over petitioners' implementation of the court's order. The O&J also established the 29% goal. In 1976, the Second Circuit affirmed both the appointment of the Administrator and the 29% goal. A-220. As noted above, petitioners did not seek certiorari from the Second Circuit's judgment.

Following entry of RAAPO in 1977, petitioners appealed a provision granting certain oversight powers to the Administrator, A-165, and again challenged the goal, claiming that it constituted a quota forbidden by Title VII and the Constitution, and that it was improperly calculated under *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). The Second Circuit upheld the Administrator's powers, A-165-66, and reaffirmed the goal. A-167-68. Again, petitioners did not seek certiorari. Because petitioners' challenge to the Administrator's powers and to the 29% goal seeks review of the Second Circuit's 1976 and 1977 judgments, their challenge is untimely under 28 U.S.C. 2101 and Sup. Ct. R. 20. *See Parker* v. *Illinois*, 333 U.S. at 576.

Petitioners renewed their twice failed challenges to the powers of the Administrator and the 29% goal in 1982 when they sought to terminate the O&J and RAAPO. A-150-57. The district court denied this motion, stating that "[t]he

* The adjustment made to the goal in August 1983 by the district court, A-119, and affirmed by the Second Circuit, A-33, was so minor that a challenge to the 29.23% goal is in reality a challenge to the underlying 29% goal itself. As the district court noted, "[t]he new goal of 29.23% essentially is the same as the goal set in 1975." A-123.

purposes of RAAPO have not been achieved and it has not caused the defendants any unexpected or undue hardship." A-157. Petitioners did not, simply by moving to terminate the goal, revive their right to seek review of the court's earlier judgments. Moreover, because no appeal was taken from the district court's order denying their motion, A-12, the issues raised therein, such as the alleged impracticality of the goal, cannot be brought before this Court. 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 City Board of Education* v. *Spangler*, 427 U.S. 424, 432 (1976) (refusing to consider, on certiorari from denial of a motion to modify or terminate certain provisions of a 1970 decree, the validity of the district court's original judgment since it had not been appealed).*

* Petitioners' argument that the appointment of an administrator interferes with Local 28's right of self-government must likewise fail for the simple reason that 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 Ass'n*, 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 Co.*, 544 F.2d 837, 858 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977) (collectively bargained agreements may be overridden if they violate Title VII). In any event, 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 the Administrator monitors admission to union membership or employment, such monitoring is fully justified by Local 28's intransigence in refusing to obey previous court orders. Courts have often upheld the appointments of administrators or special masters to oversee the implementation of judgments in complex cases where the defendants have failed to comply with court orders requiring changes in existing practices and conditions. *See New York State Ass'n for Retarded Children* v. *Carey*, 706 F.2d 956, 962-63 (2d Cir. 1982), *cert. denied*, 104 S. Ct. 277 (1983); *Ruiz* v. *Estelle*, 679 F.2d 1115,

(footnote continued on next page)

Contrary to petitioners' argument, at Pet. 12 n.7, "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 Oriel* v. *Russell*, 278 U.S. 358 (1929); *Halderman* v. *Pennhurst State School & Hospital*, 673 F.2d 628, 637 (3d Cir. 1982) (*en banc*), *cert. denied*, 104 S. Ct. 1315 (1984); *Florida Steel Corp.* v. *N.L.R.B.*, 648 F.2d 233, 238 n.10 (5th Cir. 1981).* As the Third Circuit stated,

> There are strong policy reasons for limiting review, even in post-final judgment contempt proceedings, to matters which do not invalidate the underlying order. 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 at 637.

1160-63 (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). Here, Local 28's record of foot-dragging and non-compliance dates back almost twenty years, *see ante* at 1-2. The powers granted the Administrator here do not exceed those granted administrators appointed in other complex civil rights cases. *See, e.g., Ruiz* v. *Estelle*, 679 F.2d at 1160-63. The Administrator's term has been extended simply because of Local 28's refusal to comply with the lower courts' orders in this case.

* The cases cited by petitioners at Pet. 12 n.7 are inapposite, as each of those cases dealt with contempt orders imposed for violation of a temporary restraining order, a preliminary injunction or a discovery order, and not for contempt stemming from a violation of a final judgment imposed several years earlier.

In the present case, petitioners' arguments were long ago rejected by two judgments of the Second Circuit. Petitioners should not be allowed to relitigate these same claims before this Court at this late date under the guise of appealing the contempt judgment.

II.

The Contempt Remedy Affirmed Below Is Firmly Rooted In Well-Settled Principles Of Contempt Law.

Petitioners urge that certiorari be granted "to restate the principles of civil contempt." Pet. 17. They fail, however, to ground their petition on any of the traditional criteria that govern review on certiorari. *See* Sup. Ct. R. 17.1. Petitioners' claim is simply that in this case the lower courts misapplied established law. Yet, as the record demonstrates, the decisions of the courts below were plainly correct. A-25-26.

This Court has long held that a finding of civil contempt allows the imposition of remedial sanctions "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 of America,* 330 U.S. 258, 303-4 (1947); *see Hutto* v. *Finney,* 437 U.S. 678, 691 (1978); *McComb* v. *Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949); *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 443-44 (1911).

The compensatory nexus between the injury inflicted by the defendants' contumacious conduct and the remedies imposed is manifest. The district court concluded, and the

Court of Appeals agreed, that petitioners' contumacious conduct "impeded the entry of non-whites into Local 28 in contravention of the [district court's] prior orders" and "that the collective effect of these violations has been to thwart the achievement of the 29% goal of non-white membership in Local 28 established by the court in 1975." A-26, 150, 155. Undeniably, this obstruction of the remedial relief previously ordered by the district court—particularly the deliberate underutilization of the apprentice program by Local 28 and the JAC—injured the class of non-whites interested in becoming Local 28 sheet metal workers who are the intended beneficiaries of the O&J and RAAPO. By deliberately shifting employment opportunies to journeymen, virtually all of whom were white, rather than training new apprentices on a non-discriminatory basis, petitioners ensured that they would achieve only minimal progress in increasing the proportion of minorities in their membership. Although those thus denied the intended remedial benefit of the district court's orders may not all have been individually identifiable, the injury inflicted is real and substantial: but for petitioners' contemptuous conduct, there would have been more non-white apprentices and further progress toward attainment of the 29% remedial goal.

The Fund order directs that the compensatory contempt fines assessed against petitioners be used to attract additional qualified non-whites into the apprentice program and to assist them in completing the program by establishing counseling and tutorial services, by providing financial assistance to any non-white apprentice unemployed or experiencing financial hardship during the first apprentice term, and by funding part-time and summer jobs for non-

white youths in vocational programs in the sheet metal or allied trades. Further, to expand the training and employment opportunities for apprentices, especially minority apprentices, part of the fines are to be used as incentive or matching funds to attract governmental or private job training programs, and to provide financial assistance to employers who otherwise cannot afford to hire an additional apprentice to meet the 4:1 ratio required by AAAPO. A-113-18. Thus, as the Court of Appeals correctly held, the Fund is "specifically intended to compensate those who had suffered most from [petitioners'] contemptuous conduct," and it does so "by improving the route [non-whites] most frequently travel in seeking union membership." A-26.

Moreover, because the Fund order requires petitioners to make additional periodic payments into the Fund until they have fully complied with the O&J and AAAPO by eradicating the effects of their persistent and intentional exclusion of non-whites, the Fund order serves a coercive function as well. Under the terms of RAAPO, full compliance should have been achieved by July 1, 1982. Yet, in April 1982, after 7 years under remedial court orders, only 10.8% of petitioners' members were non-white. In a classic exercise of coercive contempt powers, the Fund order gives the petitioners an opportunity to purge themselves of contempt and to recover excess monies from the Fund upon achieving, however belatedly, full compliance with the O&J and AAAPO. *See Penfield Co.* v. *Securities & Exchange Commission*, 330 U.S. 585, 590 (1947).

Petitioners insist that this Court conduct a highly individualized factual analysis to determine whether, as they

assert, there is an imperfect match between petitioners' contumacious acts and the Fund designed to compensate for those acts. Such fact-specific assertions, addressed to a voluminous factual record that was carefully considered by the Court of Appeals, do not warrant this Court's review. *See National Collegiate Athletic Association* v. *Board of Regents*, —— U.S. ——, 104 S. Ct. 2948, 2959 n.15 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982). In any event, this Court recognized long ago that a perfect match between the injury inflicted and the compensatory contempt remedy fashioned is not always possible, and thus is not an essential ingredient of such a remedy. *See Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (noting that a compensatory civil contempt fine must be "measured in some degree" by the injury caused by the disobedient act). By assisting non-whites' entry into and completion of the apprentice program and by expanding training and employment opportunities for non-white apprentices, the Fund order will accelerate the integration of Local 28, remedying to a large degree the injuries inflicted by petitioners' obstruction of the prior remedial orders.

Petitioners' argument, that even narrowly fashioned remedial contempt sanctions are unavailable to redress clear injury solely because the injured victims are not individually identifiable, would, if accepted, as this Court has remarked in a different but related context, "operate to prevent accountability for persistent contumacy." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). Such an inflexible bar would enable a union or employer to violate with impunity a judgment enjoining discriminatory practices, provided that in continuing to pursue discriminatory practices, the defendant ensured that individual

victims could not be identified (*i.e.*, by continuing a discriminatory reputation, thereby deterring minority applications, or by failing to retain applications). Surely, as the Court of Appeals implicitly recognized, "the force and vitality of judicial decrees derive from more robust sanctions." *Id.* at 191.

III.

The Petition Should Be Denied Because The Court Below Correctly Concluded That This Court's Holding In *Firefighters* v. *Stotts* Was Not Controlling And Because This Case Provides An Inappropriate Vehicle For Evaluating Race-Conscious Remedies Under Title VII.

Petitioners argue that certiorari should be granted because the court below, and other lower courts, have failed to follow what petitioners characterize as this Court's holding in *Firefighters Local Union No. 1784* v. *Stotts*, —— U.S. ——, 104 S. Ct. 2576 (1984). In the alternative, petitioners argue that, if *Stotts* does not preclude race-conscious remedies under the facts presented, the Court should grant certiorari to determine whether race-conscious remedies that benefit unidentifiable victims can ever be awarded in a Title VII case. Not only do petitioners mischaracterize *Stotts*, they ignore this Court's previous holdings and the unanimous conclusion of the courts of appeals that affirmative race-conscious remedies can be appropriate and necessary means of eliminating employment discrimination. Moreover, petitioners overlook the unique facts of this case, their untimeliness in challenging the 29% hiring goal, and the complicating factor of the district court's contempt powers pursuant to which the Fund was established.

Petitioners contend that *Stotts* held that section 706(g) of Title VII prohibits all race-conscious remedies except those designed to compensate identifiable victims of discrimination. To the contrary, *Stotts* held only that "the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." 104 S. Ct. at 2585 (footnotes omitted). The Court concluded that section 703(h) of Title VII bars a court from overriding a *bona fide* seniority plan by granting retroactive seniority to individuals never identified as victims of discrimination. *Id.* at 2589.

This Court did not hold in *Stotts* that affirmative, prospective race-conscious remedies, imposed after a finding of past intentional race discrimination, are prohibited.* The discussion in *Stotts* was limited to the range of permissible make-whole remedies and did not address the propriety of prospective remedies which are not "make-whole" in nature. Thus, in noting that its holding under section 703(h) was supported by section 706(g), the Court stated that the policy behind section 706(g) "is to provide *make-whole* relief only to those who have been actual victims of illegal discrimination." *Id.* at 2589 (emphasis supplied). In its description of the Congressional debates regarding section 706(g), the Court again repeatedly refers to the issue of "make-whole" relief. *Id.* at 2589-90 and n.15. At no point did the Court hold that a district court was barred by that section from fashioning prospective, race-conscious relief,

* This Court did not even suggest that the interim hiring and promotion goals in *Stotts*, which benefitted individuals not identified as victims of discrimination, were unlawful. *See Deveraux* v. *Geary*, 596 F. Supp. 1481, 1486 (D. Mass. 1984), *aff'd*, —— F.2d —— (1st Cir. 1985) (No. 84-2004).

which does not override a seniority system, in order to remedy the effects of proven, past discrimination.

The Second Circuit therefore correctly distinguished the instant case from *Stotts* on three grounds. First, the relief awarded by the district court does not conflict with a seniority plan.* A-30. Second, the 29% goal and the Fund order are prospective remedies designed to overcome past discrimination, unlike an award of retroactive seniority, which by its nature is a "make-whole" remedy. A-30. Third, the district court's remedies were based upon findings of past intentional discrimination. A-31.

The Second Circuit's conclusion that *Stotts* does not bar prospective, race-conscious relief that does not override a *bona fide* seniority system comports with that of every other circuit court considering the appropriateness of race-conscious remedies subsequent to the *Stotts* decision.**

* As the Court of Appeals noted nearly eight years ago in this litigation, seniority-based work allocation has never been a practice in the sheet metal industry. A-166.

** *Turner* v. *Orr*, 759 F.2d 817 (11th Cir. 1985) (affirming order that enforced consent decree provisions requiring good faith efforts toward attainment of minority hiring and promotion goals); *Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d 479 (6th Cir. 1985) (consent decree entered after a finding of race discrimination, providing that promotions in the city fire department be made from a list of qualified candidates on a one minority to one non-minority basis for a limited amount of time, is appropriate where existing seniority system was preserved); *Diaz* v. *American Telephone & Telegraph*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985) (*Stotts* does not undermine the group-rights goals of Title VII); *Van Aken* v. *Young*, 750 F.2d 43 (6th Cir. 1984) (upholding voluntary affirmative hiring plan for Detroit fire department); *Johnson* v. *Transp. Agency*, 748 F.2d 1308 (9th Cir. 1984) (upholding a voluntary affirmative action plan containing goals for women, minorities and handicapped persons); *Palmer* v. *Dist. Bd. of Trustees*, 748 F.2d 595 (11th Cir. 1984) (rejecting reverse discrimination claim challenging hiring made pursuant to an affirmative action plan adopted after a finding of past

(footnote continued on next page)

Moreover, Justice White's opinion in *Stotts* does not indicate disapproval of the unanimous view of the Courts of Appeals that, in appropriate circumstances, interim goals, such as the 29% goal at issue here, may be ordered as an essential means to dismantle segregation in employment caused by past discrimination.*

Petitioners' alternative argument, that if the validity of race-conscious remedies in cases not involving seniority plans was not decided in *Stotts*, certiorari should be granted to resolve that issue, is likewise flawed. Even if that issue were an unresolved one, we submit that this case is an inappropriate vehicle for deciding it. First, as discussed in Point I, *ante*, petitioners' challenge to the 29% minority hiring goal is simply untimely. Second, the Fund was developed as a sanction for petitioners' contumacious

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discrimination); *Wygant* v. *Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985) (No. 1340, 1984 Term) (upholding collective bargaining agreement requiring that, in event of layoffs, percentage of minority teachers laid off would not be greater than current percentage of minority personnel employed); *Kromnick* v. *School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985) (upholding teacher reassignment system that required each school to employ between 75% and 125% of the existing proportion of black teachers employed city-wide).

* *See, e.g., Thompson* v. *Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Ass'n Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *United States* v. *Int'l Union of Elevator Constructors, Local 5*, 538 F.2d 1012 (3d Cir. 1976); *Chisolm* v. *United States Postal Serv.*, 665 F.2d 482 (4th Cir. 1981); *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *United States* v. *Int'l Bhd. of Electrical Workers, Local 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States* v. *City of Chicago*, 663 F.2d 1354 (7th Cir. 1981); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979).

conduct, and not as part of the relief granted pursuant to the judgment in the underlying Title VII case. Whatever questions remain open after *Stotts* should not be decided in the context of a trial court's exercise of its contempt powers, as a district court's power to impose contempt sanctions rests not on the underlying statute but upon the court's equitable power to enforce its own decrees. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949) ("the measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief"). Relief that may not be available in an underlying action may thus be proper as a remedy for contempt of a judgment in that action. *Hutto* v. *Finney*, 437 U.S. at 690-92. Third, certiorari is inappropriate because, as is reflected by the absence of any split in the circuits, *ante* at 23, the Second Circuit was correct in holding that prospective race-conscious remedies, designed to overcome the effects of past discrimination, are permissible under section 706(g).

Section 706(g) recognizes the dual goals of Title VII by providing for both make-whole relief and affirmative relief. The last sentence of section 706(g) forbids courts from ordering the "hiring, reinstatement, or promotion of an *individual* as an employee . . . if such *individual* was . . . refused employment or advancement . . . for any reason other than discrimination." 42 U.S.C. § 2000e-5(g) (emphasis added). It has no bearing on affirmative race-conscious remedies, which are governed by the first sentence of section 706(g), authorizing a court to "order such affirmative action as may be appropriate . . . ." *Id.* Rather, it merely precludes a court from ordering that a particular individual be hired, promoted or reinstated if an employer pre-

viously refused to do so for non-discriminatory reasons. Affirmative remedies, in contrast, do not require the hiring, promotion or reinstatement of any particular individual, and do not create a right to a particular job on behalf of a particular individual. Rather, they are designed to overcome and eradicate systemic discrimination.*

Title VII remedies cannot be "colorblind," *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 353 (1978) (Brennan, White, Marshall and Blackmun, J.J.), if they are "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800 (1973). Where, as here, a persistent pattern and practice of unlawful discrimination is proven, race-conscious relief must be available not only to make whole the identified victims of discrimination, but also to eradicate the continuing effects of past discrimination. *See International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 364-65 (1977); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 764, 771 (1976); *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 421 (1975).

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* This Court has recognized that such relief will often benefit unidentified victims of an employer's pattern and practice of discrimination. *Int'l Bhd. of Teamsters* v. *United States,* 431 U.S. 324, 330 n.4, 361 n.47 (1977) (partial consent decree required that vacancies be filled temporarily on a one-to-one minority/white ratio).

IV.

The Remedial Orders At Issue, Narrowly Tailored To Further The Compelling Interest In Eradicating Proven Systemic Discrimination, Fully Comport With The Governing Principles Of Equal Protection.

Echoing the same arguments offered in support of their erroneous Title VII analysis, petitioners assert that race-conscious elements of AAAPO and the Fund order deny equal protection of the law to whites because "the non-whites benefitting from the program are not identifiable victims of past discrimination, and the whites discriminated against by the program are not persons who practiced discrimination." Pet. 14. Yet this Court long ago recognized that judicial remedies must often be race-conscious to redress meaningfully proven systemic discrimination, and that such remedies, even if non-victim specific, pass constitutional muster. *See, e.g., Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 28 (1971).

Where, as here, long-standing and pervasive discrimination has been established, race-conscious governmental action, if remedial and properly tailored, is constitutionally permissible even though it benefits unidentified members of the group suffering the discrimination. *Fullilove* v. *Klutznick,* 448 U.S. 448, 482-83 (1980) (Burger, C.J., White and Powell, J.J.); *id.* at 517-19 (Brennan, Marshall and Blackmun, J.J., concurring in the judgment); *Regents of the University of California* v. *Bakke,* 438 U.S. at 307 (Powell, J.); *id.* at 355-79 (Brennan, White, Marshall and Blackmun, J.J.); *United Jewish Organizations* v. *Carey,* 430 U.S. 144, 159-62 (1977) (White, Brennan, Stevens and

Blackmun, J.J.); *id.* at 179-80 (Stewart and Powell, J.J., concurring); *McDaniel* v. *Barresi,* 402 U.S. 39, 41 (1971); *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. at 18-21; *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969); *South Carolina* v. *Katzenbach,* 383 U.S. 301, 308 (1966). Moreover, a narrowly tailored, race-conscious remedy is permissible even if it results in a "sharing of the burden by innocent parties." *Fullilove* v. *Klutznick,* 448 U.S. at 484 (Burger, C.J., White and Powell, J.J.); *id.* at 518 (Brennan, Marshall and Blackmun, J.J., concurring in the judgment).

As modified by the Second Circuit, AAAPO does not require indenture of any specific ratio of non-white apprentices. Accordingly, the burden to be shared by whites is the minimum required to redress the historic exclusion of minorities from Local 28's ranks. No incumbent union member or readily identifiable applicant will be displaced by AAAPO. Similarly, the Fund order is properly fashioned to provide compensatory services to the class of non-whites injured by petitioners' contemptuous conduct and does not impose any burden on white union members or applicants. Moreover, some provisions of the Fund order, particularly those which provide for financial assistance to employers that cannot otherwise meet the 1:4 apprentice to journeymen requirement of AAAPO, and for incentive or matching funds to attract additional funding from governmental or private job training programs, are race-neutral and operate to the benefit of whites and non-white apprentices alike.

The Second Circuit's rejection of petitioners' constitutional challenge to AAAPO and the Fund is thus consistent

with the governing principles formulated by this Court. There is no conflict among the circuits. No review on these bases is warranted.

Conclusion

For the foregoing reasons, respondents respectfully pray that the petition for certiorari be denied.

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Respectfully submitted,

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