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.

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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REPLY BRIEF OF PETITIONERS

Petitioners, Local 28 of the Sheet Metal Workers' International Association and its Joint Apprenticeship Committee, respectfully submit this Reply Brief in support of their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.[1]

[1] References to the Petition for Writ of Certicrari are cited as "Pet. ____." References to the Appendix to the Petition are cited as "A-____." References to the Brief for Respondent Equal Employment Opportunity Commission ("EEOC") are cited as "EEOC ____". References to the joint brief of Respondents City of New York and the New York State Division of Human Rights In Opposition To The Petition For Writ of Certiorari are cited as "Opp. ____."

I

THE ISSUES RAISED IN THIS PETITION MERIT PLENARY REVIEW BY THE COURT

The Solicitor General, in his brief on behalf of the EEOC, agrees that issues raised in the present case "warrant review and clarification by this Court" (EEOC 10). He suggests, however, that the primary issue is more clearly raised in *Local No. 93, International Association of Firefighters* v. *City of Cleveland (Vanguards)*, 753 F.2d 479 (6th Cir. 1985), *petition for cert. pending*, No. 84-1999 and *Wygant* v. *Jackson, Board of Education*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, No. 84-1340 (Apr. 15, 1985). He thus urges that this petition be held pending resolution of those cases.

The Solicitor describes the issues in the present case which warrant review as follows:

> "issues relating to the failure to abide by racial quotas contained in past decrees as a proper basis for a finding of contempt, as well as the imposition of such quotas as part of the remedial scheme of the present contempt judgment affirmed below." [EEOC 8].

These issues cannot be resolved by any determination of *Vanguards* or *Wygant*.

The primary issue in the present case is the breadth of *Firefighters Local Union No. 1784* v. *Stotts*, 104 S. Ct. 2576 (1984) and the legality of court imposed race-conscious remedies under Title VII of the Civil Rights Act.

Wygant is purely an Equal Protection Clause case. It does not involve the Civil Rights Act or *Stotts*.

Both *Vanguards* and *Wygant* involve voluntarily-adopted affirmative action plans incorporated in consent decrees — not court imposed plans. Voluntary affirmative action was considered in *United Steelworkers of America* v. *Weber*, 443 U.S.

193, 208 (1979); it is not involved in the present case.[2] Moreover, *Vanguards* involves various threshold complications before the core civil rights issue can be addressed. First is the matter of a party to the action which objected to the consent decree, and whose standing was challenged on review. A reversal of the Court of Appeals' ruling with respect to these issues would probably end the case without consideration of the central question.

Even if this Court were to affirm on these issues in *Vanguards*, it would be required to determine if the limitations upon the district court's powers to fashion remedies under Title VII apply to consent decrees to the same extent as they do to judicially-imposed decrees. Only if this issue were decided in the affirmative would the Court reach the issue of national concern — the extent of permissible court-imposed, race-conscious remedies. The present case raises that issue directly and unavoidably.[3]

The fact that this case presently arises in the context of a contempt does not detract from or complicate the issues; it enhances them. The Court of Appeals justified the blatantly race-conscious Fund order as a civil contempt remedy because it "has coercive components" (A-26). The permissible breadth of contempt orders entered under the Civil Rights Act is an important issue which this Court has yet to address. It is important

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[2] *Turner v. Orr*, 759 F.2d 817, 826 (11th Cir. 1985), in which the Solicitor General intends to file a petition for a writ of certiorari and to ask this Court to hold the case pending a resolution of *Vanguards* and *Wygant* (EEOC 9 at n.8), also involves a consent decree. There, the Court of Appeals distinguished between consent decrees and court imposed decrees as follows:

> "As *Weber* made clear, Section 706(g) does not bar voluntary affirmative action agreements, such as the consent judgment in this case; it is merely a limit on what a court may 'require' in a coercive action under Title VII."

[3] The Solicitor General agrees that certain remedies in this case, most notably the quota, are clearly imposed as Title VII remedies. (EEOC 10-11)

because contempt is the primary means of enforcement of the Civil Rights Act of 1964 (See 42 U.S.C. §2000(h)). The Solicitor General identifies this issue as being worthy of the court's attention (EEOC 8), but then suggests that the court hold this case pending review of others which do not raise the same issues. Plenary review of this case should be granted.

II

THE JUDICIALLY-IMPOSED INTERFERENCE WITH THE UNION'S RIGHT OF SELF-GOVERNMENT WARRANTS REVIEW

The Solicitor General questions whether the issue of the appointment of an Administrator with broad supervisory powers over union activities as part of Title VII relief warrants this Court's attention. He states that Petitioners have not cited similar measures in other cases (EEOC 12).

However, petitioners cited three cases where this Court questioned the appointment of special masters with far-reaching managerial powers over the objections of the affected parties (Pet. 20 and n. 14). It is a simple matter to string-cite some of the numerous cases in which similar appointments have been ordered without consent of the parties. *See, e.g., Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Amos* v. *Board of School Directors of City of Milwaukee*, 408 F. Supp. 765, 822-25 (E.D. Wis. 1976); *Gautreaux* v. *Chicago Housing Authority*, 384 F. Supp. 37 (N.D. Ill. 1974); *Hart* v. *Community School Board of Brooklyn, New York School District #21*, 383 F. Supp. 699, 758-67 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). The appointment of Administrators to compel compliance with court-ordered Title VII relief has been particularly utilized against labor organizations following a finding of intentional racial discrimination. *See, e.g., Equal Employment Opportunity Commission* v. *Local 14, International Union of Operating Engineers*, 553 F.2d 251, 257-58 (2d Cir. 1977); *Rios* v. *Enterprise Association of Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974); *Commonwealth of Pennsylvania* v. *Local Union 542, International Union of Operating Engineers*, 507 F. Supp. 1146, 1151 n. 6 (E.D. Pa. 1980), *aff'd* 648 F.2d 923 (3rd Cir. 1981), *reversed on other grounds*, 458 U.S. 375 (1982); *Patterson* v. *Newspaper and Mail Deliverers' Union of New York and Vicinity*, 384 F. Supp. 585, 594 (S.D.N.Y. 1974); *aff'd on other grounds*, 514 F.2d 767 (2d Cir. 1975), *cert. denied* 427 U.S. 911 (1976); *United States* v. *United States Steel*

Corp., 371 F. Supp. 1045, 1057 (N.D. Ala. 1973); *United States* v. *Bethlehem Steel Corp.*, 6 Fair Empl. Prac. Cas. (BNA) 1073 (W.D.N.Y. 1973); *United States* v. *Wood, Wire and Metal Lathers International Union, Local Union 46*, 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973); *United States* v. *Local No. 86, International Association of Bridge, Structural, Ornamental & Reinforcing Ironworkers*, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971). *See also*, Harris, *The Title VII Administrator: A Case Study In Judicial Flexibility*, 60 CORNELL L. REV. 53 (1974).

In the present case, the Court of Appeals has twice recognized that the appointment of the Administrator was in conflict with the national goal of union self-government, (A-31, 220), but it still approved the continuation of the office over the union's protests. Dissenting Judge Winter stated that the appointment of the Administrator was tantamount to a judicially-imposed receivership. (A-38, 45).

The appointment of an administrator in this case to oversee union compliance with Title VII remedial programs is not an isolated event. Such intrusions into union autonomy are commonplace and certain to recur. This Court's consideration of the issue is clearly warranted.

II

ALL OF THE QUESTIONS PRESENTED ARE RAISED IN A TIMELY MANNER

Respondents City of New York and the New York State Division of Human Rights oppose certiorari on the erroneous contention that the petition is directed more to the underlying remedial orders than the contempt (Opp. 2), and that this Court is foreclosed from considering (1) the original order finding intentional discrimination and establishing the affirmative action program, (2) the legality of the quota, and (3) the continuation of the Office of the Administrator.

However, the Court of Appeals decision to which this petition is addressed (A-1-52) considered not only the contempt findings, but also direct and timely appeals from (1) AAAPO itself which perpetuated and enhanced the affirmative action program and the Office of the Administrator, (2) the order fixing the quota, and (3) the Fund Order. In the Court of Appeals, respondents never questioned the appealability of any of these issues. The entire court below considered all issues, including the constitutionality of the quota, the impact of the *Stotts* decision, and the challenge to the Office of the Administator, to be properly and timely raised. These matters are clearly before this Court in a timely fashion.

In addition to these questions, petitioners have now raised issues as to the 1975 Order and Judgment ("O&J") which enjoined Petitioners from further discrimination, and which also established the racial quota and the Office of the Administrator which are both continued by orders directly reviewed below. Respondents urge that review of the underlying finding is untimely because Petitioners did not seek certiorari from two prior Court of Appeals decisions upholding the O&J and the statistical

evidence for the district court's finding of intentional discrimination.[4]

The unappealed decisions of the Court of Appeals are the law of the case, but they do not preclude further review by this Court. *United States* v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186 (1950); *United States* v. *A.S. Kreider*, 313 U.S. 443 (1941); *Burnrite Coal Briquette Co.* v. *Riggs*, 274 U.S. 208 (1927); *Diaz* v. *Patterson*, 263 U.S. 399 (1923); *Messenger* v. *Anderson*, 225 U.S. 436 (1912). Indeed, in the second appeal below, Judge Meskill in his dissent expressly noted that the Supreme Court would not be bound by the "law of the case" and could review its prior rulings on the original finding of intentional discrimination and the statistical predicate for such finding when the case ultimately reached this Court on certiorari. (A-170 and A-170 n.1). It should do so now.

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[4] Contrary to the arguments of all respondents, Petitioners have not requested this Court to review the statistical evidence which purportedly established the findings of intentional discrimination. Rather, Petitioners have questioned whether the district court's findings were in accordance with the Court's guidelines for the use of such statistical evidence in employment discrimination cases (Pet. 18-19). No *de novo* review of the statistics themselves is required or requested.

CONCLUSION

Petitioners respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

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August 7, 1985

Respectfully submitted,

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