No. 84-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28, SHEET METAL WORKERS, ETC., *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*

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

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL URBAN LEAGUE, INC., PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC., THE NEW JEWISH AGENDA, AND THE COMMISSION ON SOCIAL ACTION OF THE UNION OF AMERICAN HEBREW CONGREGATIONS AND THE CENTRAL CONFERENCE OF AMERICAN RABBIS

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QUESTIONS PRESENTED

(1) Does Title VII forbid the use of race conscious numerical remedies in a case where they are necessary to redress, prevent or deter racial discrimination?

(2) Was the race conscious numerical remedy in this case reasonably framed to prevent a continuation of proven intentional discrimination?

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTEREST OF AMICI*

The framing of this brief has required amici, as the resolution of this case will require this Court, to consider with care the circumstances in which numerical remedies are necessary to prevent, redress or deter violations of Title VII, and to distinguish such situations from numerical remedies which serve no such purposes and which a number of amici regard as objectionable for that and other reasons. All of the amici support vigorous enforcement of Title VII, and believe that Title VII should not be construed in a way that would leave employment discrimination on the basis of race, sex, religion or national origin

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* Letters from the parties consenting to the filing of this brief have been filed with the Clerk.

unremedied, undeterred, or unpreventable. We recognize that the enforcement of Title VII has involved a variety of practical problems, and believe that here, as in other areas of the law, the views of trial courts regarding the necessary remedial measures are entitled to substantial weight.

Several of the amici have long opposed, and continue to reject, inflexible numerical devices whose purpose is to allocate jobs or other benefits on the assumption that minorities or women are inherently entitled to a particular share. But these amici object, as well, to the attempt of the Solicitor General to label as "quotas" any and all affirmative numerical remedies, regardless of whether those remedies may be essential to eliminate and correct discrimination on the basis of race, sex, religion or

national origin. The government's approach would pervert legitimate concerns about the use of unneeded numerical remedies into a major rigid rule that would at times permit continued discrimination against minorities and women.

The amici who join in this brief adhere to distinct approaches to the use of race or sex conscious numerical measures. We share, however, a common position, set out below, with regard to the specific case now before the Court. We express no joint view with regard to legal and factual issues which are not necessary for the disposition of this case.

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist Blacks to secure their constitutional and civil rights by means of litigation. Since 1965 the Fund's attorneys have represented

plaintiffs in several hundred employment discrimination actions under Title VII and the Fourteenth Amendment, including many of the employment discrimination cases decided by this Court. In attempting to frame remedies to redress, prevent and deter discrimination, we have repeatedly found, as have the courts hearing those cases, that race conscious numerical remedies are for a variety of pragmatic reasons a practical necessity. In some instances, as in Sheet Metal Workers v. EEOC, numerical remedies are essential to ending ongoing intentional discrimination. In other circumstances, such as Fire-fighters v. Cleveland, such remedies are a practical necessity in resolving by settlement disputes as to the identities of direct or indirect victims of discrimination. We believe that effective enforcement of Title VII would at times be

impossible unless numerical orders remain among the arsenal of remedial devices available to the federal courts.

The American Jewish Committee is a national organization of approximately 50,000 members. AJC was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It is AJC's conviction that the security and the constitutional rights of Jewish Americans can best be protected by helping to preserve the security and the constitutional rights of all Americans, irrespective of race, creed or national origin, including, specifically, elimination of discrimination in employment and educational opportunities for all Americans. Experience has demonstrated that the legal requirement of non-discrimination is by itself not sufficient to erase, within the foreseeable future, the accumulated

burdens imposed on the disadvantaged in America who have historically suffered from systematic discrimination. AJC believes that affirmative action programs -- voluntary and, in certain instances, compelled programs to recruit, train and upgrade those who have been historically disadvantaged or the victims of discrimination -- are in accord with the American tradition of giving special assistance to categories of people on whom society has imposed hardship and injustice or who have special needs that could not otherwise be met.

Accordingly, AJC is committed to specific numerical goals and timetables, even while maintaining that quotas are not an appropriate remedy and, in fact, are in violation of constitutional and statutory provisions. AJC believes that quotas, as a rigid prescribed distribution of benefits

and opportunities, are qualitatively different from other forms of race-conscious relief because they sacrifice fundamental principles of equality, fairness and individual rights. Quotas, in AJC's view, downgrade individual merit, set one group against another, and cannot be reconciled with genuine equal opportunity for all. As opposed to a quota, however, a specific numerical goal is a realistic objective arrived at not only by reference to the proportional representation of a minority group in the general population, but also by reference to the number of vacancies expected and the number of qualified or qualifiable applicants available in the relevant job market. Moreover, goals are flexible, can be adjusted if unrealistic and require only a good faith effort by employers to obtain an appropriate representation of

qualified or qualifiable members of minority groups. AJC believes that the court of appeals correctly rejected petitioners' "attempt to characterize the membership goals as a permanent quota, because the provision at issue is clearly not a quota but a permissible goal." 753 F.2d at 1186. The remedy imposed below embodies the flexibility that is characteristic of reasonable goals and timetables, in contrast to rigid quotas. All that is needed here is the vital element which was absent heretofore, i.e., a good faith effort to meet goals and timetables. If that good faith effort were convincingly demonstrated, and were petitioners still not able to meet the 29% goal, although coming reasonably close to it, this amicus maintains that the

order of the court below, properly understood, should be considered satisfied.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs which would increase opportunities for disadvantaged minorities to speed the day when all Americans may enjoy full equality without regard to race.

The National Association for the Advancement of Colored People ("NAACP") is a New York non-profit membership corpo-

ration. Its principal aims and objectives may best be understood by reference to its Articles of Incorporation:

> ... voluntarily to prompt equality of rights and eradicate caste or race prejudice among the citizens of the United States; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.
>
> To ascertain and publish all facts bearing upon these subjects and to take any lawful action thereon; together with any and all things which may lawfully be done by a membership corporation....

The NAACP has a long-standing history of participating in the Untied States Supreme Court, both as a party and as amicus curiae, in cases presenting constitutional and statutory claims of racial discrimination. The NAACP is vitally concerned with the issues raised in this appeal.

The Mexican American Legal Defense and Educational Fund, Inc. ("MALDEF") is a national civil rights organization established in 1967. Its principal objective is to secure the civil rights of Hispanics living in the United States, through litigation and education. MALDEF believes that Title VII should and must apply with equal force to members of all racial and ethnic groups. MALDEF also believes, however, that public and private employers are permitted under Title VII to take reasonable voluntary measures, such as goals and timetables, to correct historical underrepresentation of racial and ethnic minorities in the workforce. In support of these principles and goals, MALDEF has participated as amicus curiae and as counsel of record in numerous cases before the Court. Wygant v. Jackson Board of Education, No. 84-1340 (MALDEF Amicus

Curiae); Firefighters Local Union NO. 1784 v. Stotts, ___ U.S. ___, 104 S.Ct. 2576 (1984).

The National Urban League, Incorporated, is a charitable and educational organization organized as a not-for-profit corporation under the laws of the State of New York. For more than 75 years, the League and its predecessors have addressed themselves to the problems of disadvantaged minorities in the United States by improving the working conditions of blacks and other minorities, and by fostering better race relations and increasing understanding among all persons.

Puerto Rican Legal defense and Education Fund, Inc. ("PRLDEF") is a New York not-for-profit corporation, authorized to practice law by the State of New York. The PRLDEF's primary purpose is to protect and advance the constitutional and

civil rights of Puerto Ricans and other Hispanics. In furtherance of this purpose, the PRLDEF represents both individuals and classes of persons who challenge employment discrimination against Puerto Ricans and other Hispanics. The PRLDEF has also filed numerous briefs as amicus curiae in employment discrimination litigation. During its thirteen year history, much of the PRLDEF's litigation, in federal and state courts, has centered on Title VII litigation.

The Asian American legal Defense and Education Fund ("AALDEF") is a non-profit civil rights organization that employs legal and educational methods to address critical issues affecting Asian Americans. AALDEF's legal and educational work against racial discrimination in the job market resulted from the historic exclusion of Asians from the mainstream of

American business life and the legacy of overt economic discrimination sanctioned by law.

New Jewish Agenda is a national non-profit, membership organization that seeks to promote traditional, progressive Jewish religious and secular values of peace and social and economic justice and the Talmudic principle of "Tikkun Olam," the just reordering of the universe. Consistent with these beliefs, NJA supports minimum quotas as a necessary mechanism for achieving true equality of opportunity and for overcoming a history of discriminatory practices in certain circumstances including, but not limited to, the factual situation in this case.

The Commission on Social Action of the Union of American Hebrew Congregations and the Central Conference of American Rabbis represents over 1 million Jews in

the United States and Canada. The Commission has long been committed to the furtherance of civil rights and civil liberties for all Americans.

SUMMARY OF ARGUMENT

I. Title VII permits a court to order numerical remedies when such remedies are needed to redress, prevent or deter discrimination. In authorizing courts to direct "affirmative relief", Congress "armed the courts with full equitable powers". Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

The legislative history of Title VII does not reveal any congressional intent to bar numerical remedies in every case, regardless of whether it might be impossible without such remedies to redress, prevent or deter discrimination in some instances. Although Title VII supporters on several occasions stated the act did

not impose "quotas", it is clear that what both supporters and opponents were concerned about was whether Title VII itself created a duty to maintain a "racially balanced" work force. United Steelworkers v. Weber, 443 U.S.193,205 (majority opinion), 235-47 (Rehnquist, J., dissenting)(1979). The specific congressional statements relied on by the Solicitor General were expressly intended as denials that Title VII required "quotas for racial balance", not as a discussion of the availability of numerical remedies to redress, prevent or deter unlawful discrimination. Section 703(j), which forbids imposition of preferential treatment for "racial balance", spells out precisely the meaning of congressional statements that Title VII did not require "quotas".

II. The petitioners in this case has a 20 year history of intransigent and successful violation of state and federal injunctions against discrimination. When specific discriminatory practices were forbidden, petitioners repeatedly devised new discriminatory schemes. The district court properly concluded that it was not feasible to foresee and forbid every conceivable device which petitioner might in the future utilize to violate the law, and that the ordering of a numerical remedy was essential to bring an end to continued discrimination.

ARGUMENT

I. TITLE VII DOES NOT FORBID THE USE OF NUMERICAL REMEDIES NECESSARY TO REDRESS, PREVENT OR DETER DISCRIMINATION

For almost twenty years federal district judges responsible for framing decrees to enforce Title VII have con-

cluded that the use of numerical remedies was necessary to redress, prevent or deter discrimination under the circumstances of the specific cases before them.[1] As occurs in all areas of the law, the fashioning of these remedies has been an essentially practical task, reflecting the particular types of violations that had occurred or seemed likely to recur. Numerical orders have generally been regarded as the remedy of last resort, often used only when milder remedies had failed, at times accompanied by candid expressions of reluctance by the courts. The pragmatic foundation of this practice is underscored by the fact that no

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[1] A description of the types of cases in which such remedies have been found necessary is set forth in part IA of the Brief Amicus Curiae of the NAACP Legal Defense Fund, et al., in Local 93, Firefighters v. Cleveland, No. 84-1999.

appellate court has ever imposed a numerical remedy where the district court concluded such remedies were unneeded.

The interpretation which petitioners and the Solicitor ask the Court to read into Title VII is thus one of enormous practical importance. For two decades judges across the nation have found in a variety of circumstances that numerical remedies were "the only possible means to provide relief for [unlawful] discrimination."[2] To hold, as petitioners urge, that Title VII absolutely forbids such remedies, would raise serious questions about the enforceability of Title VII itself.

Petitioners insist that this critical issue was summarily resolved by two paragraphs in Firefighters v. Stotts, dis-

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[2] Crockett v. Green, 388 F. Supp. 912, 921 (E.D. Wis. 1975).

cussing "the policy behind § 706(g) of Title VII." 81 L.Ed.2d 483, 499 (1984). The decision in Stotts did not, however, suggest that any provision in Title VII forbade the use of any category of judicial decree that might in fact be necessary in some instances to promptly redress, prevent or deter violations of Title VII itself. Nor did Stotts attempt to delineate what types of orders were being referred to by members of Congress who expressed objections to what they called "quotas." For these reasons we believe Stotts is not dispositive of this appeal. If, as petitioners urge, courts are forbidden to use any numerical remedy in any Title VII case, regardless of whether that remedy may be essential to redress, prevent or deter discrimination,

that limitation must be found in the language or legislative history of Title VII itself.

A. Judicial Authority to Direct "Affirmative Action"

When Congress adopted Title VII it mandated that enforcement of that law be given the "highest priority." Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). Where a violation of the law has been established, section 706(g) authorizes a court, not merely to forbid future illegality, but also to "order such affirmative action as may be appropriate ... or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), correctly characterized section 706(g) as "arm[ing] the courts with full equitable powers." 422 U.S. at 418. In exercising those powers,

Albemarle recognized, the courts are to be required to do whatever may be necessary to promptly redress, prevent and deter discrimination; there may be practical obstacles to such thorough enforcement, but Title VII itself contains no such encumbrances:

> [I]t is the historic purpose of equity to "secur[e] complete justice" ... "Where federally protected rights have been invaded, the ... courts will be alert to adjust their remedies so as to grant the necessary relief" ... Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as is possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

422 U.S. at 418. (Emphasis added) "Congress' purpose in vesting a variety of 'discretionary' powers in the courts was ... to make possible the fashion[ing] [of] the most complete relief possible." 420 U.S. at 421 (Emphasis added).

This congressional intent to provide federal courts with a full arsenal of enforcement techniques led this Court in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), to reject an argument that Title VII stripped the courts of any authority to order rightful place seniority. Although there was some dispute regarding when such relief was appropriate, every member of the Court agreed that Title VII did not contain "a bar, in every case, to the award of retroactive seniority relief." 424 U.S. at 781-82 (Powell, J., concurring and dissenting). Franks emphasized that the "broad equitable discretion" established by Title VII, 424 U.S. at 763, was to be exercised in a pragmatic manner.

> In equity, as nowhere else, courts ... look to the practical realities and necessities...." [A]ttainment of a great national policy ... must not

> be confined within narrow canons ... suitable ... in ordinary private controversies."

424 U.S. at 777-78 and n.39.

Congress' decision to confer on federal courts such broad enforcement authority, unrestricted by any per se limitations, is readily understandable. When Congress framed Title VII in 1964, it was all too aware of the failure of earlier prohibitions against discrimination. The House Report expressly noted that discrimination had not been ended by state antidiscrimination legislation.[3] Proponents of the legislation noted continuing discriminatory practices by

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[3] H.R. Rep. 914, 88th Cong., 1st Sess., reprinted in Legislative History of Titles VII and XI of Civil Rights Act of 1964, 1018, 2149-50 ("Legislative History"); H.R. Rep. 1370, 87th Cong., 2d Sess., Legislative History 2159; 110 Cong. Rec. 7217 (remarks of Sen. Clark).

unions,[4] despite decisions of this Court that such discrimination violated a union's duty of fair representation.[5] Executive Order 11246, earlier versions of which dated from 1941, had had little visible impact, although applicable to large portions of American industry.

In light of the failure of other remedies, Congress understandably refused to place any restrictions on the enforcement authority of federal judges. That decision was doubtless reinforced by the extraordinary and well publicized difficulties then being encountered by federal judges in enforcing other civil rights of racial minorities. In 1957 and 1960 Congress had adopted legislation

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[4] Legislative History, p. 2158.

[5] Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944).

intended to eliminate racial discrimination in voting; in 1964, however, Congress recognized that discriminatory election officials remained intransigent, and that "present procedures do not provide adequate remedies".[6] Cf. South Carolina v. Katzenbach, 383 U.S. 301, 311-13 (1966). The debates on the 1964 Civil Rights Act were also replete with references to the obstinate refusal of school officials, some 10 years after Brown v. Board of Education, 347 U.S.483 (1954), to even begin to comply with their constitutional

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[6] 110 Cong. Rec. 6529-30 (Sen. Humphrey); see also id. at 1593 (Rep. Farbstein) (remedies in 1957 and 1960 civil rights acts inadequate), 1535 (Rep. Celler) (same), 144690 (Bipartisan Newsletter) (same); H.R. Rep. No. 914, 88th Cong., 1st Sess., Legislative History, pp. 2019, 2123-25.

obligation to end de jure segregation.[7] Cf. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 13 (1971). In framing Title VII, Congress had good reason to fear that this legislation would be met by the same intransigence and evasion that for a century had frustrated enforcement of the Fourteenth and Fifteenth Amendments. Against that background the sweeping authority granted to the courts by section 706(g) is entirely understandable.

Section 706(g) was modeled after, although somewhat broader than, section 10(c) of the National Labor Relations Act. Franks v. Bowman Transportation Co., 424 U.S. at 768-770 and n.29. An order of the NLRB, this Court has repeatedly held, is

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[7] 110 Cong. Rec. 1518 (Rep. Celler), 1600 (Rep. Daniels), 6539-42 (Sen. Humphrey); H.R. Rep. No. 914, pt. 2, Legislative History, pp. 2138-42.

to be upheld "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 357 (1952); Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540 (1943). In fashioning remedial orders the Board is to be guided, not by any per se rules in the NLRA, but by "enlightenment gained from experience." NLRB v. Seven-Up Bottling Co., 344 U.S. at 347. The Court emphasized that the Board's authority to provide affirmative relief was a mandate to develop whatever remedies experience might demonstrate were needed:

> [I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these diffi-

> culties by leaving the adaptation of means to [that] end to the empiric process of administration.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). In fashioning specific remedies the Board was not required to act with surgical precision, but was permitted to paint with a broad brush "to attain just results in . . . complicated situations . . . through flexible procedural devices." Id. at 198-99. Enforcement orders under the NLRA were never limited to "make whole" redress, but included as well orders intended to prevent or deter future violations.[8]

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[8] See, e.g., Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941)(order to "neutralize" the effects of past violations); Virginia Power & Electric Co. v. NLRB, 319 U.S. 533, 543 (1943)(order to "deprive an employer of advantages accruing from" a violation); NLRB v. United Mine Workers, 355 U.S. 453, 456 (1958)(order to dissipate discriminatory "atmosphere" created by past violation); International Association of Machinists v. NLRB, 311 U.S. 72, 82 (1940)(order to expunge the effects

In modeling section 706(g) after the NLRA, Congress thus chose to reject precisely the sort of constricted view of remedies which petitioners now advance. The NLRB enjoyed, and Congress elected to give to the courts in Title VII cases, broad authority to take whatever steps experience might show were necessary to promptly redress, prevent or deter violations of the law. Enacted as it was in light of the established interpretation of the NLRA, section 706(g) must be understood as a mandate to the courts to develop whatever remedial devices might prove necessary and efficacious. Section 706(g), like the NLRA, does not require that remedies be framed with the precision appropriate for ordinary tort or contract litigation, particularly where such a

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of past discrimination).

requirement would have the effect of impeding or delaying redress for or prevention or deterrence of violations of the vital national policies that Title VII, as well as the National Labor Relations Act, embodies.

B. The Language of Sections 703(j) and 706(g)

Local 28 argues that the asserted limitation on Title VII remedies is found in section 703(j). That provision states:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in,

> any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area.

In United Steelworkers v. Weber, 443 U.S. 193 (1979), this Court rejected petitioner's interpretation of section 703(j), holding that "[s]ection 703(j) speaks to substantive liability under Title VII, but ... not .. [r]emedies for substantive violations." 443 U.S. at 205 n.5.

The carefully drafted language of section 703(j) does not support the sweeping limitation on Title VII remedies urged by petitioners. Local 28 argues that section 703(j) precludes the use of race conscious measures for any purpose, even for redressing, preventing or deterring violations of Title VII. But

section 703(j) disavows mandatory race conscious measures only under one specific circumstance, where those measures are imposed to redress a mere racial imbalance in an employer's workforce. The language of section 703(j) thus reflects a deliberate congressional decision to disapprove race conscious measures only in that one specific circumstance, a legislative decision inconsistent with petitioners' view that Congress intended to ban such measures in all circumstances.

Petitioners also rely on the last sentence of section 706(g), which states:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin....

Petitioners urge that section 706(g) provides that a court may only order the hiring or promotion of individuals who were refused employment or advancement for a discriminatory reason. But section 706(g) simply does not say that. In the case of hiring, for example, section 706(g) literally excludes from a hiring order only previous applicants who were rejected for a legitimate reason. Individuals who had not yet sought and thus were never denied employment do not fall within the literal language of the section 706(g) prohibition. That does not mean, of course, that a remedial decree must treat future applicants in the same way it treats past victims, but indicates only that distinctions between such groups must be based on general remedial considerations, not on any per se limitation on

remedies established by Title VII itself. Here, as with section 703(j), the carefully phrased and narrow limitation in section 706(g) is simply inconsistent with a general congressional intent to exclude future applicants from the scope of a remedial decree.

Neither section 703(j) nor section 706(g), moreover, purports to limit the use of numerical orders as such. The Solicitor General asserts that race conscious remedies, remedies for non-victims, and quotas are, as a practical matter, all the same thing. But the actual experience of the lower courts, and of the Justice Department itself, demonstrates precisely the contrary.

C. The Legislative History of Title VII

Both petitioners and the Solicitor General argue that the legislative history of Title VII demonstrates that Congress intended to forbid any use of numerical remedies. The legislative history on which they rely does contain a number of statements that Title VII would not require or lead to the use of "quotas." If there were some universal consensus that all numerical orders are by definition "quotas," the references to "quotas" in the 1964 debates might support petitioners' view.

But what various individuals and groups mean by the term "quota" varies widely, and what Congress had in mind in 1964 is thus not self-evident. The Solicitor's brief appears to suggest that any numerical order is a quota; but the

Solicitor describes as devoid of quotas some 33 Justice Department consent decrees that are replete with numerical orders. For most of 1985 the Secretary of Labor and the Attorney General have waged a cabinet level battle over the difference between a "goal" and a "quota"; in late January 1986, as this brief was being written, the President still had not decided what types of numerical devices constitute "quotas" and should therefore be excluded from the scope of Executive Order 11246. Several of the amici who join in this brief have long opposed practices they regard as quotas. These amici, however, have never defined "quotas" in the sweeping manner proposed by petitioners and the Solicitor; rather, these amici have maintained that some numerical devices, which they denote as

"goals", are entirely appropriate methods of correcting discrimination on the basis of race, sex and national origin.

The significance of the legislative debates regarding "quotas" must turn on the nature of the practice that members of Congress had in mind in 1964 when they used that term. Although opponents of Title VII repeatedly expressed objections that the legislation required, or would lead to, "quotas", their arguments were not directed at the types of remedies which might prove necessary to redress, prevent or deter actual discrimination. Rather, as both the majority and Justice Rehnquist correctly observed in Weber, 443 U.S. at 205, 231-247, these critics were concerned that the term "discrimination" in Title VII would be interpreted to mean or include "racial imbalance." Thus construed Title VII might have imposed on

employers an absolute and permanent duty to maintain in each job a specific proportion of minorities or women. When critics objected to "quotas," they were arguing that Title VII should not establish, and courts should not enforce, such an obligation. The House Minority Report, for example, asserted that the administration intended to define "discrimination" to include "the lack of racial balance," a definition that would force an employer "to hire according to race, to 'racially balance' those who work for him ... or be in violation of federal law." H.R. Rep. 914, pt. 1, pp. 67-69.[9]

It was to this specific contention that supporters of Title VII were responding when they made the statements regard-

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[9] See also 110 Cong. Rec. 1620 (Rep. Abernathy), 7418 (Sen. Robertson), 8500 (Sen. Smathers), 9034-35 (Sens. Stennis and Tower), 10513 (Sen. Robertson).

ing quotas on which petitioners and the Solicitor General rely. Most of these assurances were intended to make clear that "employers would not be required to institute preferential quotas to avoid Title VII liability." United Steelworkers v. Weber, 443 U.S. at 205 n. 5.[10] (Emphasis added). Thus when Senator Robertson asserted Title VII would require an employer to replace whites with blacks "to overcome racial balance," Senator Humphrey replied, "The bill does not require that at all ... There is no percentage quota". 110 Cong. Rec. 5092. As Justice Rehnquist noted in Weber, what Senator Humphrey and other supporters "'maintained all along' ... was that it neither required nor

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[10] Justice Rehnquist characterized those same statements as assuring Congress that Title VII "did not authorize the imposition of quotas to correct racial imbalance." 443 U.S. at 243 n. 22. (Dissenting opinion).

permitted imposition of preferential quotas to eliminate racial imbalances." 444 U.S. at 248 n.28. (Emphasis omitted and added).

The legislative statements relied on by the Solicitor General were generally preceded or followed by an express reference to the "racial balance" argument to which Title VII supporters were responding. Representative Celler's speech was intended to rebut charges that employers would be required "to rectify existing 'racial or religious imbalance.'" 110 Cong. Rec. 1518. The statement of Representative Lindsay, quoted at note 6 of the Solicitor's brief, is immediately followed by this explanation of why Title VII imposed no quotas: "There is nothing whatever in this bill about racial balance as appears so frequently in the minority

report." 110 Cong. Rec. 1540. Representative Minish gave the same explanation of his interpretation of Title VII.

> There is nothing here ... that would require racial balancing ... There is no quota involved. 110 Cong. Rec. 2558.

Senator Humphrey's statement regarding quotas was expressly offered as a reply to charges Title VII would "authorize the Federal government to prescribe 'racial balance' of job classifications or office staffs." 110 Cong. Rec. 5423. Senator Kuchel disputed claims that federal "inspectors would dictate ... racial balance in job classifications, racial balance in membership", 110 Cong. Rec. 6563;it was in response to this particular charge that Senator Kuchel made the statement quoted in note 7 of the Solicitor's brief, and placed in the record the House Republican memorandum cited in note

6 of the Solicitor's brief. 110 Cong. Rec. 6563, 6566. The statement of Senator Humphrey at 110 Cong. Rec. 6549, referred to but not quoted by the Solicitor, reads

> There is nothing in [Title VII] that will give any power to ... any Court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent. (Emphasis added).

The singular form of the demonstrative pronoun "that" and the pronoun "it" made clear that Senator Humphrey regarded the quota and racial balance arguments as one and the same objection. The assurance offered by Humphrey and others was not intended to limit the authority of courts to redress, prevent or deter discrimination; supporters of Title VII were simply stating, in the words of Senator Carlson, that the legislation contained "no

authority to require quota hiring to achieve racial balance." 110 Cong. Rec. 10520.

That Congress had in mind this very specific problem, not numerical remedies generally, when it discussed quotas, is clear from the final legislative resolution of this issue. Concerns about quotas continued unabated despite the language discussed earlier in section 706(g), a clear indication that Congress read section 706(g) literally, and thus believed it had no bearing on quotas in any sense. On May 26, 1964, however, the Dirksen-Mansfield substitute was introduced. That substitute for the first time contained the language now found in section 703(j). Although section 703(j) does not restrict the use of numerical remedies for Title VII violations, section 703(j) did preclude the specific require-

ment Congress had in mind in the discussions regarding "quotas." When the language ultimately incorporated in section 703(j) was first proposed by Senator Allott, he explained that it "makes clear that no quota system will be imposed if Title VII becomes law", 110 Cong. Rec. 9881. That assurance would have made no sense unless Congress understood "quota" to refer only to "quotas for racial balance", for only that specific type of order is precluded by section 703(j).[11] As Justice Rehnquist

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[11] Senator Allott commented:

> "I have heard over and over again in the last few weeks the charge that Title VII ... would impose a quota system on employers and labor unions.... I do not believe Title VII would result in the imposition of a quota system.... But the argument has been made, and I know that employers are also concerned about the argument. I have, therefore, prepared an amendment which I believe makes clear that no quota system will be imposed if Title VII becomes law. Very briefly, it provides that no finding of unlawful

observed in Weber,

> [T]he language of §703(j) is precisely tailored to the objection voiced time and again by Title VII's opponents. Section 703(j) apparently calmed the fears of most of the opponents; after its introduction, complaints concerning racial balance and preferential treatment died down considerably.

443 U.S. at 244-47.[12] The majority in Weber recognized that section 703(j) was intended as a full response to the frequently expressed concern about "quotas." 443 U.S. at 205.

Section 703(j) is thus of decisive importance in interpreting the Title VII debates regarding "quotas." Section

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[12] Elsewhere Justice Rehnquist observed that section 703(j) was "carefully worded to meet, and put to rest, the opposition's charge." 443 U.S. at 246.

703(j) delineates with precision the specific type of requirement which both proponents and opponents of Title VII had in mind when they used the term "quota." Section 703(j) is not, of course, a general prohibition against numerical remedies. Rather, section 703(j) spells out exactly what Title VII proponents meant when they disavowed quotas -- that Title VII did not create, and that courts therefore would not enforce, a general obligation to maintain a racially balanced work force.

This does not mean that Congress intended to express any preference for numerical or race conscious remedies. The language and legislative history of Title VII simply establish no per se rules regarding such orders. General remedial principles, which are thus controlling in a Title VII case, dictate that race con-

scious and numerical remedies not be used either casually or automatically. The federal courts must fashion decrees which will effectively and promptly redress, prevent and deter unlawful discrimination, but race conscious and numerical remedies need not be used where other milder devices would clearly suffice. Where, however, race conscious or numerical remedies are in fact a practical necessity, Title VII, imposes no per se bar to their utilization.

II. THE RACE CONSCIOUS REMEDY IN THIS CASE IS APPROPRIATELY FRAMED TO PREVENT FURTHER DISCRIMINATION

The petitioners in this action are no typical Title VII defendants, and the remedial problems presented by this appeal are far more severe than those which arise in an ordinary civil case. Local 28 of the Sheet Metal Workers has over the

course of two decades of litigation established a record of intransigent resistance to both the law and judicial decrees which is without parallel in the annals of equal employment litigation. Almost 22 years have passed since the issuance of the first court order forbidding Local 28 to engage in racial discrimination against blacks. In the face of that decree Local 28 chose, not to obey the law, but to embark upon 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. While the history of Local 28's scheme of illegality and contempt is complex, one thing is clear: that effort to avoid obedience to federal law has been enormously successful. In 1964, when the first injunction against discrimination

was issued, Local 28 had over 3300 journeyman members, every one of them white. (J.A. 301); today, after two decades of litigation and more than a dozen subsequent court orders, the union still has only 122 non-white journeymen, in a city almost half of whose population is black or Hispanic. (J.A. 50).

More is thus at stake in this appeal than whether Local 28 will be permitted to continue to flout federal and state law and judicial decrees. We recognize that, because Local 28's history of unlawful conduct is exceptional, the remedies necessary here would not necessarily be required to deal with less intransigent defendants. But Local 28 asks this Court, by overturning or eviscerating the outstanding federal court orders, to place a seal of approval on the arsenal of evasive tactics which the union has devised. A

number of opposing amici, well aware of Local 28's extraordinary success in excluding blacks and Hispanics, urge the Court to approve the union's conduct. As the federal courts learned a generation ago in dealing with resistance to the commands of Brown v. Board of Education, 347 U.S. 483 (1954), exceptional intransigence is all too likely to become commonplace if it is not dealt with firmly. Affirmance is required here, as it was required in Cooper v. Aaron, 358 U.S. 1 (1958) and Louisiana v. United States, 380 U.S. 145 (1965), to assure that the deplorable record compiled by Local 28 does not become a judicially authorized model for future defendants.

The first unsuccessful injunction prohibiting Local 28 from engaging in racial discrimination was issued on August 24, 1964 in State Commission for Human

Rights v. Farrell, 252 N.Y.S.2d 649, 43 Misc. 2d 958 (Sup. Ct. N.Y. Co. 1964). Rather than obey that injunction,

> Local 28 flouted the court's mandate by expending union funds to subsidize special training sessions designed to give union members' friends and relatives a competitive edge in taking the [Joint Apprenticeship Committee] battery. JAC obtained an exemption from state affirmative action regulations directed towards the administration of apprenticeship programs on the ground that its program was operating pursuant to court order; yet Justice Markowitz had specifically provided that all such subsequent regulations, to the extent not inconsistent with his order, were to be incorporated therein and applied to JAC's program.

EEOC v. Local 638 (Pet. App. A-352). The state judge repeatedly castigated Local 28 for these tactics, and issued a series of additional orders.[13] The success of these tactics is testified to by a single

[13] See cases cited, Respondents Brief in Opposition, p. 2 n.*.

statistic; as of July 1, 1968, four years after the issuance of the state court injunction, Local 28 still had no black journeyman members. (J.A. 334).

On June 29, 1971, respondent EEOC commenced this action alleging that Local 28, despite the issuance of a series of state court injunctions, was still engaged in systematic racial discrimination. (J.A. 372). On July 2, 1974, the district court issued an interim order directing Local 28 to admit 20 non-whites to its next apprenticeship class. (J.A. 363). On October 4, 1974, the United States Attorney was compelled to seek a contempt citation against Local 28, since the union still had not indentured and assigned to employment any of those new non-white apprentices. (J.A. 345). The district court subsequently found that the union had "unilaterally suspended court-ordered

timetables for admission of non-whites to the apprenticeship program pending trial of this action, only completing the admission process under threat of contempt citations." (Pet. App. A-352).

The EEOC action against Local 28 was tried in early 1975. Despite the fact that Local 28 had by then been for 9 years under a state court injunction against discrimination, the district court found that the union had continued to engage in a wide variety of discriminatory practices. (Pet. App. A-330-50). The second circuit properly characterized local 28 as "recalcitrant", and recognized that its discriminatory practices were "contrary to the spirit and letter of the New York court's order". (Pet. App. A-214-15).

The district court realized that a general injunction against racial discrimination by Local 28 would have been

meaningless, since the Local had for 10 years intentionally and systematically violated just such an injunction. Accordingly, the district court attempted to frame an order intended to preclude, not only the types of discrimination to which Local 28 had already resorted, but other possible techniques as well. In July, 1975, the district judge entered a detailed order and injunction prohibiting a variety of forms of discrimination. This was followed in 1975 by a detailed Affirmative Action Plan and Order (AAPO), and in 1976 by Revised Affirmative Action Plan and Order (RAAPO). (Pet. App. A 8). The injunction provided for the selection of a plan administer who was authorized to administer the affirmative action plans and issue additional orders.

These orders were met with the familiar pattern of resistance. Local 28 consistently delayed implementation of the administrator's orders by insisting they be reviewed by the judge. (J.A. 217). Although the RAAPO required Local 28 to seek government funds to provide additional training opportunities, the Local refused to do so. (J.A. 143). In 1980 every one of the 16 journeymen who joined the union by direct admission was white. (JA 99). In 1979 Local 28 amended its agreement with contractors to require, in a period of unemployment, that 20% of all vacancies be reserved for members over the age of 52. The district judge found that this provision discriminated against minority members of Local 28, since over 98% of all members over 52 were white. (Pet. App. A-155; J.A. 48).[14]

[14] The court of appeals found that this

The most important manner in which Local 28 evaded the letter and spirit of the 1975 injunction, AAPO, RAAPO, and the orders of the administrator was by drastically reducing the size of its apprenticeship program, traditionally the primary means of admission to the union. The 1975 injunction and subsequent orders succeeded in regulating in such detail the process of selecting apprentices that discrimination in that phase of Local 28's activities finally become impossible. Between 1977 and 1980 approximately 45% of all indentured apprentices were non-white. (J.A. 96). Local 28 responded to this development by largely shutting down the program. In the four years prior to the 1975 injunction, when non-whites were a comparatively small portion of appren-

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provision had not been put in operation. Pet. App. A-17-18.

tices, Local 28 indentured an average of 543 apprentices a year. In the four years between 1977 and 1981, Local 28 indentured an average of 83 apprentices a year. This drastic reduction in apprenticeships occurred even though apprentice unemployment was far higher in 1971-75 than in 1977-81. (Pet. App. A-151).

Although some of the details of Local 28's evasive tactics may be in controversy, the Local's continued success in minimizing the admission of non-whites is indisputable. In 1974, prior to the issuance of any of the remedial orders at issue, there were 117 non-white journeyman members of Local 28.[15] (J.A. 323). In 1982, some seven years after the district court's injunction and AAPO went into

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[15] The figures at J.A. 323 do not include apprentices as union members. Compare J.A. 312 (number of non-white apprentices) with J.A. 323.

effect, there were 122 non-white journeyman members. (J.A. 50). Even this trivial progress is illusory, for the 1982 journeymen include 11 non-whites who were transferred into Local 28 in 1978 at the direction of the International, and who actually work in the blowpipe industry rather than the sheet metal industry. (J.A. 102). On this record the administrator,[16] the district court[17] and court of appeals[18] all understandably found Local 28 in contempt.

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[16] Pet. App. A-139 ("a pattern of delay, obstructionism and blatant disregard for court orders that goes back as far as 1965"),A-142 ("passive if not overt, resistance").

[17] Pet. App. A-123 (petitioners "consistently have violated numerous court orders"), A-112 (past violations of court's orders "egregious").

[18] Pet. App. A-13-25.

It is against this background that the challenged portions of the decree must be judged. The purpose of the 29% goal, we believe, is both self-evident and reasonable. By 1975 it was all too clear that Local 28 was determined to use any evasive technique it could devise to minimize the number of minorities admitted to the union. Over a ten year period that union had demonstrated its ability to fashion new discriminatory schemes to replace older methods struck down by a series of state court orders. The federal district court understood full well that, no matter how many discriminatory devices that court might forbid, Local 28 would still be able to devise yet more. To bring to an end this cycle of repeated but ineffective injunctions, the district court included in its order the one type of provision that would clearly be

violated by any effective discriminatory scheme -- a goal of 29% non-white members by 1981. In view of the district judge's particular familiarity with the years of federal litigation which preceeded the order at issue, this Court should give considerable deference to the trial judge's view that the 1982 injunction was necessary to enforce both Title VII and earlier federal decrees.

The 29% goal represented the degree of integration that it was reasonable to expect would naturally occur if Local 28 ended at once all forms of discrimination, and avoided such discrimination in the future. Had Local 28 continued after 1975 to indenture apprentices at the pre-1975 rate, the 29% goal would have been reached long ago. The 1975 injunction did not require Local 28 to give preference to apprentice applicants of any race, and the

1983 injunction, as modified on appeal, does not do so either. To comply with the present goal Local 28 may need to do no more than return the size of its apprentice classes to the pre-1975 level, and assure that construction work is shared equitably between those apprentices and the virtually all-white journeymen. In 1977, when circumstances beyond the union's control made compliance with the 1981 deadline more difficult, the district judge extended that deadline for a year on the motion of the plaintiffs. (J.A. 163). There is no reason to doubt that the judge would be equally willing to modify the requirements of his present order if future developments warrant.

In its original contempt decision the district court indicated its intention to impose a fine on Local 28. (Pet. App. A-126). The district court subsequently

ordered, "in lieu of" fines for the various acts of contempt, that Local 28 and other petitioners make certain payments into a Fund to be utilized to provide sheet metal training for non-whites. The Fund's training activities can include operation of a training program, stipends or loans to blacks and Hispanics in existing programs, and part-time or summer sheet metal jobs for youths between 16 and 19. (Pet. App. A-113-118). This order, like the goal, was reasonably framed as a method to prevent future discrimination. In light of Local 28's record of discrimination, the district court could reasonably anticipate that black applicants will still face significant obstacles in winning membership in the union, despite the hoped for effect of the new injunctive relief. The training and experience that the Fund can

provide will increase the ability of blacks to overcome those obstacles, and will do so in a manner less severe in its impact on whites than an order establishing a race conscious membership rule.

CONCLUSION

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

Respectfully submitted,

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