No. 84-1656

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

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

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

JOHNNY J. BUTLER
General Counsel (Acting)
Equal Employment Opportunity Commission
Washington, D.C. 20507

BRIAN K. LANDSBERG
DENNIS J. DIMSEY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether as a remedy in an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., or as a civil contempt remedy for violation of a Title VII judgment, a court may award preferences based solely on race or ethnic background, rather than on the beneficiary's status as a actual victim of discrimination.

2. Whether such remedies are unconstitutional.

3. Whether the contempt remedies awarded in this case were procedurally defective penalties for criminal contempt.

4. Whether the proof in this case supported the 1982 contempt finding and findings of intentional discrimination made in 1975 and sustained on appeal in 1976 and 1977.

5. Whether the district court abused its discretion in appointing an administrator in 1975 to supervise compliance with its orders in this case and in continuing his term of office in 1983.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 84-1656

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

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

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A52) is reported at 753 F.2d 1172. The district court's order of August 16, 1982 (Pet. App. A149-A159) holding petitioners in contempt is reported at 29 Fair Empl. Prac. Cas. (BNA) 1143. The district Court's other orders relating to contempt (Pet. App. A125-A148), its order establishing an employment, training, education, and recruitment fund (Pet. App. A113-A118), and its Amended Affirmative Action Plan (Pet. App. A53-A107) and order (Pet App. A111-A112) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1985. The petition for a writ of certiorari was filed on April 16, 1985, and was granted on October 7, 1985. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1971, the United States initiated this action in the United States District Court for the Southern District of New York against petitioners (Local 28 of the Sheet Workers' International Association and the Local 28 Joint Apprenticeship Committee (JAC)) and three other locals and their apprenticeship committees. The action was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., for the purpose of enjoining a pattern and practice of discrimination against nonwhites in union membership.[1/]

After a trial in 1975, the district court found that petitioners had purposefully denied nonwhites membership in the union in violation of Title VII (see Pet. App. A317-A363). The district court entered an order and judgment (O&J) (id. at A301-A316) and Affirmative Action Program and Order (AAPO) (id. at A230-A299) as remedies for the violation. Among other things, petitioners were ordered to achieve a nonwhite membership goal of 29% by July 1, 1981 (id. at A232, A305). Interim percentage goals were also set (ibid.), and an administrator was appointed to supervise compliance with the court's orders (id. A305-A307).

1/ The Equal Employment Opportunity Commission was substituted as plaintiff before trial, and the City of New York intervened as a plaintiff. The New York State Division of Human Rights was named by the union as a third party defendant but realigned itself with the plaintiffs. The Sheet Metal and Air Conditioning Contractors' Association of New York City was added as a defendant (Pet. App. A210 n.3).

On appeal, the court of appeals in 1976 affirmed the district court's finding that the defendants had "consistently and egregiously" violated Title VII but reversed part of the relief ordered in the O&J and AAPO (Pet. App. A207-A229). On remand, the district court entered a revised Affirmative Action Plan and Order (RAAPO) containing an ultimate goal of 29% nonminority membership by July 1, 1982, as well as revised interim goals and other provisions aimed at increasing nonwhite membership (id. at A182-A206). A divided panel of the court of appeals subsequently affirmed the RAAPO (id. at A160-A181).2/

2. In April 1982, the City and State of New York moved that petitioners be held in contempt for failure to comply with the O&J, the RAAPO, and two orders of the administrator (Pet. App. A8). After a hearing, the court entered orders of contempt based on five "separate actions or omissions" that had "impeded the entry of non-whites * * * in contravention of the prior orders of [the] court" (id. at A9; see id. at A149-157).3/ The court imposed a fine of $150,000 to be placed in a

---

2/ Judge Meskill dissented on the ground that the initial finding of liability was based on improper statistical proof (Pet. App. A169-A181).

3/ These were "(1) adoption of a policy of underutilizing the apprenticeship program to the detriment of nonwhites; (2) refusal to conduct the general publicity campaign ordered in RAAPO; (3) adoption of a job protection provision in their collective bargaining agreement that favored older workers and discriminated against nonwhites; (4) issuance of unauthorized work permits to white workers from sister locals; and (5) failure to maintain and submit the records and reports required by RAAPO, the O&J [order and judgment], and the administrator" (Pet. App. A9).

training fund to increase nonwhite membership in the union's apprenticeship program (id. at A156).

A year later, the City of New York again instituted contempt proceedings, this time before the administrator. The administrator concluded that petitioners were in contempt of outstanding court orders requiring them to provide records, to furnish accurate data, and to serve copies of the O&J and RAAPO on contractors who hired their members. As a remedy, the administrator suggested that petitioners pay for computerized record keeping and make further payments to the training fund (Pet. App. A127-A148). The district judge adopted the administrator's recommendations (id. at A125-A126).

3. In September 1983, the district court entered two more orders. One adopted the administrator's proposal for the establishment of a fund exclusively for the benefit of nonwhites (Pet. App. A113-A118). This fund is financed by the fines previously imposed upon petitioners, as well as an assessment of $.02 per hour to be paid by petitioner Local 28 for every hour of work done by a journeyman or apprentice (id. at A115). All expenses of the fund must be paid by petitioner JAC (ibid.). Among other things, the fund is used to train and counsel nonwhite apprentices and to provide stipends and low-interest loans to needy nonwhite apprentices (id. at A116-A118). The order did not require that the beneficiaries be the actual victims of the union's past discrimination.

The other order adopted an Amended Affirmative Action Plan and Order (AAAPO) (Pet. App. A111-A112), which made six significant changes in the RAAPO: (1) it required computerized record keeping; (2) it extended the affirmative action provisions to locals and their JAC's that had merged with Local 28; (3) it required that one nonwhite apprentice be indentured (i.e., enrolled in the apprenticeship program) for every white indentured; (4) it ordered that contractors employ one apprentice for every four journeymen; (5) it eliminated the apprentice aptitude exam and replaced it with a three-person selection board; and (6) it established a nonwhite membership goal of 29.23% that must be met by August 31, 1987 (id. at A53-A107; see id. at A12). As the court of appeals later explained, the AAAPO was adopted in response to three developments in this case (id. at A28): "first, Local 28's failure to meet the 29% nonwhite membership goal by July 1, 1982; second, Local 28's contemptuous refusal to comply with many provisions of RAAPO; and third, the merger of several largely white locals outside New York City with Local 28."

4. A divided panel of the court of appeals held that petitioners had properly been adjudged in contempt and upheld all of the contempt penalties assessed against them. The court also sustained the AAAPO with a few modifications (Pet. App. A1-A52).

a. The court of appeals upheld four of the five findings on which the district court's first holding of contempt was based

and concluded that these findings provided a sufficient basis for contempt (Pet. App. A13-A20). The court rejected petitioners' argument that certain of the alleged violations were moot or time barred (id. at A14-A15). While acknowledging that the important finding of underutilization of the apprenticeship program was based in part on a misunderstanding of the statistics, the court concluded that the finding was supported by sufficient additional evidence (id. at A15-A17). The court reversed the finding that the adoption by petitioners and the Contractors' Association of a provision favoring the employment of older workers constituted contumacious conduct, since that provision was never implemented (id. at A18).4/

b. The court of appeals similarly affirmed the district court's second holding of contempt (Pet. App. A20-A24), finding that it 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" (id. at A22). The court of appeals rejected petitioners' contention that one of the violations found by the district court was based on inadmissible hearsay, that some of the violations were de minimis, and that others were barred by laches (id. at A20-A22).

4/ Since this was the only contemptuous conduct found to have been committed by the Contractors' Association, the court of appeals vacated all relief against the Association (Pet. App. A19-A20).

c. The court of appeals also rejected petitioners' argument that the contempt remedies were punitive and therefore could be imposed only after a criminal proceeding (Pet App. A25-A27). The court found that the fund order was compensatory because its "purpose was to compensate nonwhites, not with a money award, but by improving the route they most frequently travel in seeking union membership" (id. at A26). The court also observed that the fund order was coercive because it was to remain in effect until the 29.23% goal was achieved (id. at A27).5/

d. The court of appeals likewise rejected most of petitioners' challenges to the AAAPO, and the court held that the AAAPO did not violate Title VII of the Constitution (Pet. App. A27-A37). The court concluded that Firefighters Local Union No. 1784 v. Stotts, No. 82-206 (June 12, 1984), did not require reversal of the AAAPO because: (1) unlike the order in Stotts, the AAAPO does not conflict with a bona fide seniority plan; (2) the discussion in Stotts of Section 706(g) of Title VII applied only to "make whole" relief and did not address the kind of prospective relief contained in the AAAPO and the fund order; and (3) this case, unlike Stotts, involves intentional discrimination (Pet. App. A30-A31).

5/ The court of appeals rejected the argument that reversal of the contempt finding based on the older workers' provision made it necessary to vacate the fund order; the court found that "the remedies ordered are amply warranted by the other findings of contempt" (Pet. App. A27).

After rejecting a claim that the AAAPO interfered with union self-government, [6] the court of appeals considered the six changes made by the AAAPO. The court ruled that the 29.23% nonwhite membership objective was not a permanent quota but a temporary "permissible goal" (Pet. App. A31-A33). This goal, the court stated, was a remedy for Local 28's "long-continued and egregious racial discrimination," and added that the goal "will not unnecessarily trammel the rights of any readily ascertainable group of nonminority individuals" (id. at A31-A32).[7] The court of appeals upheld a hiring ratio of one apprentice to every four journeymen as necessary to prevent underutilization of the apprenticeship program, the focal point of the AAAPO's integration efforts (id. at A33-A34). The court of appeals also approved the creation of a three-person apprentice selection board to replace the apprentice selection exams ordered by RAAPO (id. at A34-A35). The AAAPO had abandoned these tests because they had an adverse impact on minorities, because of persistent disagreement about their validity, and because they were too costly to administer (id. at A35-A36).

Finally, the court of appeals held that the district court had abused its discretion by requiring the selection of one nonwhite for every white who enters the apprenticeship program

---

[6] The court noted it had rejected this contention in previous appeals in this case (Pet. App. A31).

[7] The court of appeals rejected New York City's claim that the 29.23% goal was too low, finding that this figure was not a clearly erroneous measure of the minority labor pool (Pet. App. A33).

(Pet. App. A36-A37). Stressing that it would approve the use of racial quotas only when no other form of relief is available (ibid.), the court noted that the defendants had indentured 45% nonwhites in apprenticeship classes since January 1981 and that "there is no indication that defendants will in the future deviate from this established, voluntary practice" (id. at A37). Furthermore, the court reasoned that the new selection board will oversee the apprentice selection process and insure that nonwhites are selected (ibid.).

Judge Winter dissented (Pet. App. A38-A52), largely on the ground that the majority failed "to address the fact that Local 28 had the approval of the administrator for every act it took that affected the number of minority workers entering the sheet metal industry" (id. at A38). Judge Winter argued that statistics in the record refuted the district court's central finding that the apprenticeship program had been underutilized (id. at A42-A48). Noting the depressed economics of the sheet metal industry, he stated (id. at A48) that "reactive finger pointing at Local 28 is a faintly camouflaged holding that journeymen should have been replaced by minority apprentices on a strictly racial basis" and that such a requirement "is at odds with [Stotts], which rejected such a use of racial preference as a remedy under Title VII." Judge Winter also disagreed with the required establishment of the training and education fund (id. at A48-A52).

SUMMARY OF ARGUMENT

Petitioners challenge orders, entered after contempt findings against them, which require them to meet a 29.23% nonwhite union membership goal by August 31, 1987, and to establish and contribute to a training and education fund exclusively for the benefit of nonwhites. They also challenge the contempt findings and the appointment of an administrator with broad powers over their day-to-day operations.

We agree with petitioners that the 29.23% membership "goal," which is actually a rigid quota, was improperly entered. It is unclear whether this quota was imposed as a Title VII remedy or civil contempt sanction. If the quota is a Title VII remedy it is improper because, as the Court held in Firefighters Local Union No. 1784 v. Stotts, No. 82-206 (June 12, 1984), Section 706(g) of Title VII prohibits the award of racially preferential affirmative relief to persons who are not actual victims of discrimination. There has been no showing here that the beneficiaries of the 29.23% membership quota are victims of petitioners' past discrimination. Moreover, if imposed as a civil contempt sanction, the membership quota is equally improper. Where, as here, a particular form of relief is proscribed by statute, there is no justification for imposing such relief as a contempt sanction.

For essentially the same reasons, we also agree with petitioners that the race-conscious fund order was improperly entered. The fund is to "be used solely for the benefit of

nonwhites" (Pet. App. A114) and, like the membership quota, its beneficiaries have not been shown to be victims of petitioners' discrimination. The finding that petitioners "underulitized" the apprenticeship program may have justified establishment of a fund to benefit that program generally, but it does not warrant creation of a fund to benefit nonwhite appprentices only.

We disagree with petitioners, however, on the question whether they were properly held in contempt. Regardless of their validity, the sanctions imposed were in essence coercive civil contempt remedies, not punitive criminal contempt remedies. The procedural requirements for criminal contempt proceedings set out in Rule 42(b), Fed. R. Crim. P., therefore do not apply. The contempt citations, moreover, are adequately supported by concurrent findings of the courts below that are not challenged as clearly erroneous.

Finally, petitioners' challenge to the office of administrator is not properly before the Court and, in any event, finds no support in the record.[8/]

ARGUMENT

I

THE 29.23% MEMBERSHIP QUOTA AND THE FUND ORDER ARE INVALID

The orders at issue in this case contain several provisions that extend benefits to individuals solely on the basis of race and not because they are the actual victims of discrimination.

8/ We are filing this brief at the time petitioners' brief is due to enable respondents to reply to our arguments that the membership quota and fund order are impermissible.

Petitioners have been ordered to achieve a finely calibrated nonwhite membership "goal" -- 29.23% by August 31, 1987. This goal is in reality a quota since if it is not met severe sanctions -- "fines that will threaten [petitioners'] very existence" (Pet. App. A123) -- have been threatened.9/ Disregarding the impact on white members and applicants for membership, the order in effect requires that racially preferential treatment be employed if it is a necessary means of achieving the quota. Nondiscrimination is neither the end nor the means of this order. Instead, the order seeks a racial ratio through racially discriminatory means. This technique is carried over into the order requiring petitioners to make large payments into a training and education fund reserved exclusively for nonwhites. The principal focus of the petition in this case (Pet. 11-16) is on the legality of such relief.

A. The Membership "Goal"

It is entirely unclear to what degree the critical 29.23% nonwhite membership "goal" rests upon the remedial authority of Title VII and to what degree it is supported by the district court's power to impose sanctions for civil contempt. According to the court of appeals (Pet. App. A28), the AAAPO, which contains this "goal," was a response both to "Local 28's failure

---

9/ In addition, the court of appeals relied upon the failure to meet RAAPO's 29% "goal" as proof of contempt (Pet. App. A24) and acknowledged that the rights of whites would be affected by AAAPO's 29.23% goal (id. at A32). Thus, whatever the nature of the 29% "goal" originally ordered in 1975, it is clear that the 29.23% "goal" imposed in 1983 is actually a quota.

to meet the 29% nonwhite membership goal by July 1, 1982" and "Local 28's contemptuous refusal to comply with many provisions of RAAPO."[10] This certainly suggests that the 29.23% goal was imposed in part as an exercise of the district court's contempt power.

On the other hand, as petitioners point out (Pet. 13), the court of appeals tested this provision solely against Title VII and Fourteenth Amendment standards (Pet. App. A27-A33). And although the court of appeals addressed the issue of contempt remedies in another portion of its opinion (id. at A25-A27), it did not apply this analysis to the AAAPO or its 29.23% "goal." Furthermore, this goal appears to represent nothing more than the reimposition, with a slight statistical adjustment (see note ___, supra), of the 29% goal embodied in the O&J and RAAPO, neither of which rested on the district court's power of contempt.[11]

If the goal was imposed as a Title VII remedy, it exceeded the scope of the district court's remedial authority. As we show in our brief as amicus curiae in Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleve-

---

[10] In addition, the statistical adjustment from a goal of 29% to a goal of 29.23% responded to the merger of several other locals and their JAC's with petitioners in this case. See Pet. App. A9.

[11] Since the 29.23% figure is either a modification of the original goal or a contempt sanction, petitioners' failure to seek certiorari from this Court to review the court of appeals' affirmance of the original 29% goal does not bar the Court from considering the propriety of the 29.23% quota at this time.

land, No. 84-1999 (cert. granted, Oct. 7, 1985), pages __ - __, Section 706(g) of Title VII, as interpreted by this Court in Firefighters Local Union No. 1784 v. Stotts, No. 82-206 (June 12, 1984), prohibits racially preferential make-whole relief to non-victims of discrimination.12/ The court of appeals, having accepted that the 29.23% membership quota in this case undeniably benefits, on account of race, persons who are not victims of petitioners' discrimination at the expense of innocent third parties, should have held that it is not a permissible Title VII remedy.

The court of appeals rejected petitioners' contention that "Stotts eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination" (Pet. App. A29). The three bases for distinguishing Stotts advanced by the court of appeals (see page ___, supra), however, do not withstand scrutiny.

Contrary to the court of appeals' belief (Pet. App. A30), Stotts' holding that Section 706(g) prohibits the award of affirmative equitable relief on a racial basis to non-victims of discrimination is not limited to cases in which the remedial orders infringe upon seniority rights. Our brief in Local No. 93 addresses this question (pages __ - __), and we rely upon that discussion here.

12/ We are serving copies of our brief in Local No. 93 upon the parties in this case.

The court of appeals also erred in holding that Stotts applies only to cases involving retrospective relief, and not those involving "prospective relief." This Court correctly observed in Stotts that the challenged order in effect awarded its beneficiaries competitive seniority, a traditional form of "make-whole" relief (slip op. 16). However, union membership itself may be an appropriate form of "make-whole" relief for identified victims in cases involving discriminatory union membership practices. Indeed, the Court's explanation of the limits on make-whole relief repeatedly relies on legislative history which explicitly refers to "admission to membership" as subject to Section 706(g)'s limiting language, slip op. p. 17 (quoting remarks of Sen. Humphrey at 110 Cong. Rec. 6549); p. 18 (quoting the Clark-Case interpretive memorandum, 110 Cong. Rec. 7214, and a bi-partisan newsletter, id. at 14465), and on Congress' intent to withhold authority to order "racial quotas in * * * unions * * *," slip op. p. 18, quoting 110 Cong. Rec. 6566 and adding the emphasis. Because union membership, like competitive seniority, is a type of make-whole relief, it may be ordered, under Stotts, only to identified victims of discrimination. The 29.23% membership quota may be considered "prospective," but no more so than the layoff quota at issue in Stotts.

The third ground the court of appeals advanced for distinguishing Stotts -- that there was no finding of any intent to discriminate in Stotts (Pet. App. A30-A31) -- is beside the point. Section 706(g) broadly governs all relief entered in

Title VII cases; nothing in Stotts, or any other decision of this Court, even remotely suggests that a court may order racial quotas in Title VII cases if the discrimination was intentional. Upon finding a violation of Title VII, a district court has the authority and duty to "make whole" the victims of the discrimination. A finding that the discrimination was intentional, however, does not rationally support imposition of quota relief to persons who were not victims of that discrimination.

The membership quota is equally improper as a contempt sanction. Where, as here, a statute explicitly prohibits a particular form of relief, imposing the prohibited relief as a contempt sanction frustrates the congressional command. The traditional contempt sanctions -- i.e., fines and imprisonment -- are sufficient to coerce recalcitrant defendants into compliance with valid Title VII remedial decrees. Both criminal and civil contempt sanctions are available in cases arising under Title VII. See 42 U.S.C. 2000h. Nothing in the language or legislative history of this provision suggests that Congress intended to authorize federal courts to order racial quotas as contempt remedies in Title VII cases. Even if viewed as a question of district court discretion, an order which frustrates that statutory scheme would constitute an abuse of discretion.

In any event, even if racial quotas are permissible contempt remedies in Title VII cases (and they are not), the facts of this case do not justify imposition of such sanctions. In setting aside the 1:1 indenture ratio, the court of appeals

observed that petitioners "have voluntarily indentured 45% nonwhites in the apprenticeship classes since January 1981, and there is no indication that [they] will in the future deviate from this established, voluntary practice" (Pet. App. A37). Moreover, the selection board appointed by the district court will be able to review the selection process to ensure that nondiscriminatory practices are followed (ibid.; id. at A57-A58). In these circumstances, imposition of a 29.23% membership quota as a contempt sanction is entirely without justification.13/

B. The Fund Order

For similar reasons, the racially exclusionary feature of the fund order is also invalid. The fund, which consists primarily of the contempt fines levied against petitioners, is intended to "compensate nonwhites, not with a money award, but by improving the route they most frequently travel in seeking union membership" (Pet. App. A26). It is to be used exclusively for

---

13/ As Judge Winter correctly observed in dissent below (Pet. App. A48), the 29.23% membership quota is also of questionable constitutional validity. For the reasons set out in our brief as amicus curiae in Wygant v. Jackson Board of Education, cert. granted, No. 84-1340 (Apr. 15, 1985) (pages 9-30), and in our petition for a writ of certiorari in Turner v. Orr, 759 F.2d 817 (11th Cir. 1985), petition for cert. pending, No. 85-177 (pages 21-25), the membership quota at issue here contravenes the equal protection component of the Due Process Clause of the Fifth Amendment. (We are serving copies of our Wygant brief and Turner petition on the parties in this case.) The constitutional question, however, should be addressed only if the Court should determine that Congress intended to authorize the courts to award such relief. There should therefore be no occasion to consider the constitutional question in this case.

the benefit of nonwhites (id. at A114). There is no requirement that the fund's beneficiaries be actual victims of petitioners' past discrimination.

As the court of appeals correctly recognized, "the fund order was aimed primarily at the finding that the apprenticeship program was underutilized" (Pet. App. A27). But petitioners' refusal to expand that program prevented both whites and nonwhites from entering it. In this circumstance, establishment of an employment and training fund to benefit the apprenticeship program generally would have been an appropriate civil contempt sanction. The presence of the apprenticeship selection board, (Pet. App. A57-A50), together with the enhanced recruitment ordered by the district court (id. at A68-A70), should ensure that the additional programs financed by the fund order would be operated in a nondiscriminatory manner and that nonwhites would be able to participate in these programs in substantial numbers.

The district court, however, directed the establishment of a fund to be used exclusively for the benefit of nonwhites. The finding that the apprenticeship program was underutilized, to the detriment of both whites and nonwhites desiring to enter the program, simply does not justify creating an apprenticeship fund for the exclusive use of nonwhites.

Among other things, the fund is to be used for establishing tutorial program of up to 20 weeks duration for nonwhite first-year apprentices; creating part-time and summer sheet metal jobs for nonwhite youths between the ages 16 through 19 who have

completed or are enrolled in specified types of training programs; paying the expenses of nonwhite members and apprentices who act as "liaisons" to vocational and technical schools having sheet metal programs; appointing counselors to help ensure that nonwhite apprentices complete the program; providing stipends to unemployed nonwhite apprentices while they attend their regular apprenticeship class and any additional classes offered to nonwhites pursuant to the AAAPO; and establishing a low-interest loan fund for nonwhite first-term apprentices (Pet. App. A116-117). White apprentices are ineligible for all of these programs.

Insofar as the order creates part-time and summer jobs for nonwhite youths only, it is inconsistent with the Court's ruling in Stotts that Section 706(g) prohibits "make-whole" relief to non-victims, since hiring is clearly a form of "make-whole" relief. See p. ___, supra. It is unclear, however, to what extent the other types of racially-exclusive remedies ordered by the court (i.e., the tutorial, liaison, counseling, stipend, and loan programs) may be considered "make-whole relief" under Stotts, and thus impermissible under Section 706(g).[14/]

Regardless of the applicability of Section 706(g), however, such programs are plainly unlawful under Section 703(d) of Title

---

14/ By its terms, Section 706(g) relates only to "the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as employee, or the payment to him of any back pay * * *."

VII, which prohibits racial discrimination in apprenticeship programs. The district court has in effect ordered a 100% racial quota for these programs. Since whites are totally excluded from the programs, the fund order in this regard fails to satisfy even the standards for voluntary affirmative action plans of private employers established by the Court's decision in United Steelworkers v. Weber, 443 U.S. 193, 208 (1979), which requires that such plans must not "unnecessarily trammel the interests of white employees." Because, as we have shown, an employment and training fund solely for the benefit of minorities is not a proper Title VII remedy, neither is it a proper contempt sanction in a Title VII case.15/

The fund order is invalid for an additional reason. Under the district court's order, the fund is to remain in existence until the 29.23% goal is met (Pet. App. A114), and until that time petitioners must make periodic payments to finance its operations (id. at A115). Thus, as the court of appeals recognized (id. at A26), the fund is in part a measure designed to coerce compliance with the 29.23% goal. Since, as we have shown, this goal is invalid, the fund order designed to enforce the goal must be set aside as well.

15/ A judicial order creating such a race-conscious fund also raises serious equal protection questions. See note ___, supra.

II

PETITIONERS WERE PROPERLY ADJUDGED IN CIVIL CONTEMPT

Petitioners challenge the propriety of their contempt citations on two grounds. They contend, first, that the district court imposed criminal contempt sanctions without affording them the procedural protections made applicable to criminal contempt proceedings by Rule 42(b), Fed. R. Crim. P., 16/ and, second, that the contempt findings resulted from the district court's misuse of statistical evidence. These contentions are without merit.

A. The Sanctions Imposed Are Civil in Nature

Petitioners contend (Pet. 16-17) that the sanctions ostensibly imposed in this case for civil contempt are in fact punitive and were imposed in violation of criminal contempt procedures. These sanctions include: (1) a $150,000 fine to be

---

16/ Rule 42(b), Fed. R. Crim. P., which governs criminal contempt proceedings, provides in pertinent part as follows:

> Criminal contempt * * * shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. * * * Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

It is undisputed that these procedures were not followed in this case (Pet. 16; Pet. App. A25).

paid into the fund (Pet. App. A115, A156); (2) additional assessments to finance the fund (id. at A115); (3) a requirement of computerized record keeping (id. at A126); and (4) attorney's fees and expenses (id. at A126, A156-A157).[17/]

Criminal contempt sanctions are punitive in nature and are imposed to vindicate the authority of the court. Civil contempt sanctions, on the other hand, may be used for either or both of two purposes: to coerce the defendant to comply with the court's order and to compensate the complainant for losses suffered. Shillitani v. United States, 384 U.S. 364, 368-370 (1966); United States v. Mine Workers, 330 U.S. 258, 302-304 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441, 448-449 (1911).

Although it is not always easy to determine whether a particular order constitutes a civil or criminal contempt sanction, McCrone v. United States, 307 U.S. 61, 64 (1939), no such difficulty is presented here. The contempt sanctions imposed in this case were clearly coercive in nature, not punitive. As the court of appeals correctly recognized (Pet. App. A26), the contempt orders were designed to coerce petitioners to comply with AAAPO. The orders coerce compliance in three ways. First, they establish a program which should ensure that apprentice training occurs as previously ordered. Second, the orders are conditional: the fund is to last only until the

---

17/ In addition, as previously noted, the AAAPO, to an unknown degree, may also represent a sanction for contempt. See pages _____, supra.

goal set forth in the AAAPO is met and the court determines that the fund is no longer needed (Pet. App. A114).[18/] Moreover, upon termination of the fund, petitioners are entitled to recover any remaining contributions they have made, with the court's approval (id. at A116). Third, the requirement of computerized record keeping coerces compliance with prior more general record keeping orders.

Indeed, the type of relief entered by the district court as a contempt sanction is essentially no different from the supplemental relief to compel compliance with prior orders sanctioned by the Court in Hutto v. Finney, 437 U.S. 678, 687 (1978). In both cases noncompliance with initial orders led to entry, as a last resort, of secondary relief orders aimed at underlying causes of the violations. The court had authority to order the union to provide tutoring, recruitment, summer jobs and the like, without following criminal contempt procedures. Surely the characterization of the order as a "fine" for "contempt" does not change its nature. Thus, there can be no doubt that these orders are coercive, not punitive, measures.[19/] The

---

[18/] As we have argued elsewhere, the goal is invalid. Accordingly, if the district court on remand continues the fund and requires that it be used to benefit all apprentices (see page ___ supra), the duration of the fund will have to be determined on a different basis.

[19/] As indicated (p. ___, supra), the court's contempt orders also require petitioners to reimburse the City for its attorney's fees and expenses. Such reimbursement is ancillary to the coercive orders. Hutto v. Finney, 437 U.S. at 691.

procedural requirements of Rule 42(b), Fed. R. Crim. P., therefore do not apply.[20/]

B. The Evidence Supports the Contempt Findings

Petitioners also contest the evidentiary basis for their contempt citations. Specifically, they contend that the district court "misused" statistical evidence in its 1975 finding that they had violated Title VII -- the finding which supports the remedial orders which they were subsequently found to have violated. They also contend that the district court's improper use of statistical evidence concerning their alleged "underutilization" of the apprenticeship program requires that the 1982 contempt finding be set aside (Pet. 18-19). These contentions, however, are not a proper basis for setting aside the contempt findings.

1. The 1975 Liability Finding

Petitioners' challenge to the district court's 1975 finding that they had discriminated against minorities in violation of Title VII is not properly before the Court. This finding was made a decade ago and was twice affirmed by the court of appeals -- in 1976 (Pet. App. A211-A215) and again in 1977 (id. at A169 n.8). On the latter occasion, Judge Meskill registered a

---

20/ The non-punitive nature of the sanctions imposed is consistent with the character and purpose of the proceedings in the district court. The proceedings were initiated to secure compliance with the court's orders, were denominated civil contempt proceedings, and were considered such by all concerned (e.g., Pet. App. A126, A150, A444-A445). The relief requested was civil in nature (id. at A142, A444-A445, A476). Petitioners were on notice that fines were being sought (id. at A444, A476) and made no effort to seek a Rule 42(b) type hearing.

strenuous dissent containing the same contentions now advanced by petitioners (id. at A169-A181). Petitioners, however, did not seek certiorari from this Court to review either of these judgments of the court of appeals. Those judgments are therefore final and are not subject to review by the Court at this late date. Boeing Co. v. Van Gemert, 444 U.S. 472, 480 n.5 (1980); Brownell v. Chase National Bank, 352 U.S. 36, 39 (1956); Angel v. Bullington, 330 U.S. 183 (1947).

Petitioners' contention (Pet. 12 n.7) that "[a] contempt proceeding requires consideration of the legality of the underlying order" is patently incorrect. Their argument is inconsistent with the settled rule that outstanding federal court injunctions must be obeyed until modified or reversed by a court having authority to do so. Pasadena City Bd. of Ed. v. Spangler, 472 U.S. 424, 439 (1976); Walker v. City of Birmingham, 388 U.S. 307, 313-314 (1967); United States v. Mine Workers, 330 U.S. at 293-294; Howat v. Kansas, 258 U.S. 181, 189-190 (1922). As the Court observed in Maggio v. Zeitz, 333 U.S. 56, 69 (1948), "[i]t would be a disservice to the law if we were to depart from the long-standing rule that 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." See also United States v. Rylander, 460 U.S. 752, 756-757 (1983); Halderman v. Pennhurst State School & Hospital,

673 F.2d 628, 637 (3d Cir. 1982) (en banc), cert. denied, 465 U.S. 1038 (1984).[21/]

Even if the question were properly before the Court, there is no basis on this record for setting aside the concurrent findings of the courts below that petitioners violated Title VII. Cf. Rogers v. Lodge, 458 U.S. 613, 623 (1982). Petitioners contend that the 1975 liability finding is inconsistent with this Court's subsequent decision in Hazelwood v. School District v. United States, 433 U.S. 299 (1977), because it is based upon events which predated the 1964 Civil Rights Act and because the proof of a pattern or practice of discrimination by statistical evidence was not "logically consistent [and] drawn from relevant geographical locations" (Pet. 18).

As the court of appeals correctly stated in its 1977 decision in this case, however, the finding of liability under Title VII "did not rely on inferences from racial ratios of population and employment in the area to establish a prima facie case of discrimination," but rather "was based on direct and overwhelming evidence of purposeful racial discrimination over a

---

21/ Moreover, petitioners failed to raise the validity of the 1975 liability finding in the court below as a basis for overturning the contempt citations, and the court of appeals accordingly did not address the question. The Court will address issues not raised below only in exceptional circumstances, Lawn v. United States, 355 U.S. 339, 362-363 n.16 (1958), and no such circumstances are present here.

period of many years" (Pet. App. A169 n.8).[22/] Indeed, in its original opinion in the case, the court of appeals commented that petitioners' brief "does not even make a serious effort to contest the finding of Title VII violations" (id. at A215). On this record, then, there is no basis for disturbing the decade-old finding of Title VII liability.

2. The 1982 Contempt Citation

Nor is there any ground for setting aside the 1982 contempt citation.[23/] It is true, as petitioners point out (Pet. 18), that the district court misapprehended certain statistical evidence relating to their underutilization of the apprenticeship

---

22/ The court of appeals noted in that opinion, for example, that petitioners, after the effective date of Title VII, had administered discriminatory entrance examinations for the apprenticeship program; paid for cram courses for sons and nephews of members that were unavailable to minority applicants; refused to accept blowpipe workers for membership because they were predominantly minorities; consistently discriminated in favor of white applicants for transfer from sister construction unions while denying transfer to blacks with equivalent qualifications; and issued temporary work permits to white members of distant, allied construction unions, while denying them to minority group sheet metal workers residing in the New York City area (ibid.; see also Pet. App. A211-A215; A330-A350).

23/ The petition does not challenge the evidentiary basis of the 1983 contempt finding. Thus the validity of that determination is not properly before the Court. See this Court's Rule 21.1(a); Berkemer v. McCarty, No. 83-710 (July 2, 1984), slip op. 22 n.38. In any event, the concurrent findings of the courts below amply support the ruling that petitioners violated the RAAPO by failing to provide required records in a timely fashion, provide accurate data, and serve the O&J and RAAPO on contractors. See Pet. App. A20-A22; A126; A128-A138.

program.[24] But, as the court of appeals correctly observed (Pet. App. A15-A16), these statistics were "only a small part of the overall evidence showing underutilization of the apprenticeship program" (Pet. App. A16). The underutilization finding was amply supported by other evidence establishing that the ratio of journeymen to apprentices employed by contractors increased from 7:1 in 1975 to 18:1 in 1981; the average number of hours worked annually by journeymen increased from 1,066 in 1975 to 1,666 in 1981; the percentage of unemployed apprentices dropped from 6.7% in 1977 to 0% by 1981 [25]; the union issued more than 200 temporary work permits, predominantly to white journeymen, between July 1981 and March 1982; and petitioners refused to conduct the general publicity campaign designed to attract minorities to the apprenticeship program (Pet. App. A16; see also id. at A151-A154; A156). Thus, the district court's statistical error does not afford any basis for setting aside

---

24/ In seeking to compare the number of apprentices indentured between 1971 and 1975 with the number indentured between 1976 and 1981, the district court mistakenly compared the total number of apprentices enrolled in all four years of the program between 1971 and 1975 (2174) with the number indentured (i.e., new enrollees) during the period 1976 to 1981 (334) (Pet. App. A16, A151). The record indicates that 750 apprentices were enrolled in the program between 1976 and 1981; however, petitioners had failed to provide figures for five months during this period (id. at A484-A485). Although these statistics are incomplete, they support the district court's underutilization finding.

25/ Petitioners erroneously contend that the low unemployment rate for apprentices is proof that the program was not underutilized (Pet. 18 n.13). Their reasoning confuses underutilization of the program with underutilization of the small number of persons who were in the program. It was petitioners' failure to properly expand the program that was found contemptuous.

its underutilization finding and resulting contempt citation.[26]

III

THE QUESTIONS WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN ESTABLISHING THE OFFICE OF ADMINISTRATOR IN 1975 AND CONTINUING THAT OFFICE IN 1983 ARE NOT PROPERLY BEFORE THE COURT

Petitioners contest (Pet. 19-20) the district court's appointment in 1975 of an administrator with broad powers over their activities and those provisions of the 1983 AAAPO continuing his term of office. They claim that the office of administrator unjustifiably interferes with their right to self-government.

Petitioners, however, have waited a decade since the administrator was appointed and nine years since his appointment was sustained by the court of appeals to take this claim to this Court. At this late date, the question of the propriety of the appointment of the administrator in the first instance is not properly before the Court. If petitioners were dissatisfied with the court of appeals' 1976 affirmance of the district court's appointment of the administrator, the proper remedy was by certiorari to this Court at that time. Brownell v. Chase National Bank, 352 U.S. at 39; Angel v. Bullington, 330 U.S. at 189-190. In any event, because of the complexity of the case,

---

26/ Petitioners also assert (Pet. 18) that since the administrator "approved each new class of apprentices," a contempt finding based on underutilization cannot stand. The record, however, does not support their assertion that the administrator approved the size of each of these classes. In any event, under the RAAPO it was petitioners' obligation -- not the administrator's -- to operate the program in a nondiscriminatory fashion (Pet. App. A191-A197).

the possibility of hearings for back pay awards (Pet. App. A307), and petitioners' established record of resistance to prior state and federal court orders designed to ensure nondiscriminatory membership procedures, [27] appointment of an administrator was within the district court's discretion. Rule 53, Fed. R. Civ. P.; New York Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956 (2d Cir. 1983), cert. denied, 464 U.S. 915 (1983); Ruiz v. Estelle, 679 F.2d 1115, 1160-1163 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983); Gary W. v. State of Louisiana, 601 F.2d 240, 244-245 (5th Cir. 1979).

The question whether the district court abused its discretion in 1983 in continuing the office of administrator is also not properly before the Court. Although petitioners appealed from this order, they did not contend in the court of appeals that the office of administrator should be discontinued. Rather, they argued only that the provisions of the AAAPO relating to

---

[27] Prior to the commencement of this action in federal court, petitioners had been found in state court proceedings to have violated New York law by maintaining discriminatory hiring practices (Pet. App. A211). In its 1975 opinion and order appointing the administrator in the present case, the district court noted that "Local 28 flouted the [state] 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 JAC battery," and that the JAC had improperly obtained an exemption from state affirmative action regulations in violation of the state court's remedial decree (id. at A352). The court also observed in its opinion that petitioners had "unilaterally suspended court-ordered time tables for admission of forty non-whites to the apprenticeship program pending trial of this action, only completing the admission process under threat of contempt citations" (ibid.). The court of appeals concurred in these findings (id. at A214, A220).

the administrator "should be modified to limit his authority to adjudicating disputes under AAAPO and for no other purpose."[28/] Petitioners thus did not argue below that the administrator's office should be discontinued, and the court of appeals did not address the point. This Court should therefore decline to consider it. Brandon v. Holt, No. 83-1622 (Jan. 21, 1985), slip op. 9 n.25; Monsanto v. Spray-Rite Service Corp., No 82-914 (Mar. 20, 1984), slip op. 5-6 n.6. At any event, petitioners' repeated violations of RAAPO, which resulted in contempt findings, make it clear that the district court did not abuse its discretion in entering its 1983 order continuing the office of administrator to ensure compliance with its decrees.

Although the court of appeals' initial hope that the administrator's appointment would prove to be temporary (Pet. App. A220) has unfortunately not been realized, his extended term of office is due solely to petitioners' failure to comply with the district court's remedial decrees.[29/] The courts below properly recognized the general rule that appointment of a special master is "an extraordinary remedy," United States v. City of Parma, 661 F.2d 562, 578-579 (6th Cir. 1981), cert. denied, 456 U.S. 726 (1982), to be used only where less intrusive means appear inadequate to ensure compliance with the court's decree (see Pet. App. A220, A352, A354-A356). Assuming arguendo

---

28/ See petitioners' brief as appellant in the court of appeals, page 92.

29/ As indicated (supra, page _____), injunctive orders must be complied with until vacated or reversed.

that the issue is properly before the Court, no basis exists on this record for terminating the administrator or limiting his powers at this time.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part and the case remanded for the entry of appropriate relief.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

JOHNNY J. BUTLER
General Counsel (Acting)
Equal Employment
Opportunity Commission

BRIAN K. LANDSBERG
DENNIS J. DIMSEY
Attorneys

DECEMBER 1985