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

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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There is much in the briefs submitted by our fellow respondents, the City and the State, with which we fully agree, and accordingly there is no need for us to reply to many of their arguments. Most fundamentally, we agree that petitioners are guilty of pronounced and protracted discrimination. After all, we initiated this suit, have litigated it for more than a decade, and have not abated in our efforts to bring about complete and long overdue compliance with Title VII. We also agree that petitioners were properly adjudged in civil contempt, and we support the imposition of effective sanctions to end petitioners' contumacy.

We part company with our fellow respondents only with respect to the appropriate remedy. We favor the enforcement of nondiscrimination through the use of

strong measures, including fines and imprisonment, directed against those responsible for petitioners' discrimination and contempt. We favor innovative, affirmative measures to recruit and encourage nonminority membership in the union. But we do not favor discrimination against innocent members of some racial and ethnic groups for the purpose of ending discrimination against others. We therefore do not support quotas or other forms of racially restricted relief.

In *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), this Court recognized that under Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), "not even a Court * * * could order * * * admission to [union] membership * * * for anyone who was not discriminated against in violation of this title."[1] In this case, however, the State of New York has nevertheless argued that Title VII authorized the district court to order preferential admission to union membership for persons who were not discriminated against in violation of Title VII. The City of New York opposes the 29.23% membership "goal" and declines to offer a legal defense for this provision of the court's order (City Br. 29). However, the City does support the provision of the district court's order totally barring all whites from the programs financed by the apprenticeship fund. In supporting such racially restricted measures, the State and City are wrong.

1. The State first attempts to defend the 29.23% membership "goal"[2] and the racially restricted features of the

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[1] Slip op. 18, quoting 110 Cong. Rec. 14465 (1964) (bipartisan newsletter of Senate sponsors) (elipses added).

[2] There is no merit in the State's argument that res judicata bars petitioners from challenging the order modifying and reimposing this "goal" (State Br. 27-28). We rely on our opening brief in response to this contention (at 25-26 n.24), and add only that the cases cited by the State for its res judicata argument involve orders that finally settled specific claims rather than a situation where a court retains jurisdiction to enforce an injunction or, as

apprenticeship fund on the ground that they are within the scope of the district court's inherent contempt power (State Br. 28-39) and are accordingly valid irrespective of whether they are barred by Title VII (*id.* at 37-39). The City joins this argument with respect to the fund (City Br. 29-30).

At the outset, we reiterate our skepticism that the district court relied on its contempt power in entering these measures. As the State argues, the district court acknowledged that " 'the new goal of 29.23% essentially is the same as the goal set in 1975,' " which was entered pursuant to Title VII (State Br. 27, quoting Pet. App. A23). The City, moreover, acknowledges (City Br. 26) that the district court adjusted the quota to 29.23% solely in order "to reflect the increase in membership due to the merger [with other unions] and an increase in the non-white population." Furthermore, the court of appeals analyzed the quota exclusively with respect to whether it violates Title VII or equal protection (Pet. App. A27-A31). Nevertheless, as we stated in our opening brief (at 24-25), it does not matter for present purposes whether the district court relied solely on Title VII or whether it also relied upon its civil contempt power, for the contempt power does not justify the imposition of relief expressly prohibited by the law that the court is seeking to enforce.

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here, actually reimposes and alters provisions of that injunction (see State Br. 27-28, citing *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981); *Nevada* v. *United States*, 463 U.S. 110 (1983); *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948)). Where a continuing injunction remains in effect, a party may move to modify the decree and the court retains inherent power to order such modification. See *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961). Here, of course, the court not only continued but reordered and altered the injunction based upon its perception of changed facts. A party cannot be barred from opposing such an order merely because the court had imposed a similar obligation in the past, particularly where, as here and in *System Federation*, there has been a change in the law supporting such an injunction.

The argument of the City and State based on the district court's contempt power is contrary to the plain language of Section 706(g). Section 706(g) does not provide that "some orders of a court" may not require the admission of nonvictims to unions. It does not provide that "no order of the court except those characterized as contempt orders" may require the admission of nonvictims. It provides simply and unequivocally that "no order of the court" may require such relief.

Moreover, the City and State have cited no case law supporting their position. The cases on which opposing respondents rely (see State Br. 38) do not suggest that a court may flout a specific statutory prohibition such as Section 706(g) when imposing civil contempt sanctions. To the contrary, *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946), states that a court's inherent equitable powers are available "[u]nless otherwise provided by statute." In the present case, Congress "has otherwise provided" by enacting Section 706(g).[3] In addition, the constitutional guarantee of equal protection also restricts the permissible scope of contempt sanctions that may be ordered by a federal court; this principle prohibits government from awarding racial preferences that are not necessary to make whole actual victims of specific discriminatory acts.[4] See U.S. Brief, *Wygant* v. *Jackson Board of Education*, cert. granted, No. 84-1340 (Apr. 15,

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[3] The conclusion that Congress meant what it said when it used the phrase "no order of the court" is not a "questionable inference from[] or doubtful construction[] of statutory provisions" (State Br. 39, citing *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Brown* v. *Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)).

[4] The serious constitutional questions that would result from a holding that Section 706(g) permits court-ordered racial preferences for nonvictims militate strongly in favor of our interpretation of Title VII. See *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available").

1985), and our petition for a writ of certiorari in *Orr* v. *Turner*, No. 85-177, served with our opening brief.[5]

Not only is the civil contempt argument devoid of support in the language of Title VII and the case law, but it defies common sense. The purpose of coercive civil contempt sanctions is to secure compliance with the underlying statute. It is self-contradictory to impose a contempt sanction that violates a statutory directive regarding permissible remedies supposedly in order to secure compliance with the statute.

The purpose of Section 706(g) is not abstract, and this purpose applies with equal force whether a court is entering a remedial order in a Title VII case or a civil contempt sanction. The purpose is to ensure that a court-ordered remedy for discrimination does not itself discriminate against innocent persons. To such individuals, the harm inflicted by a race-restricted order is just as palpable and just as wrong no matter what rubric is attached to the court order.

The principle that a contempt sanction may not inflict harm on innocent persons was recognized by this Court in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441-442 (1911), where the Court indicated that a contempt order may burden only those who have disobeyed an order of the court. Explaining that this limitation applies irrespective of whether the contempt order is characterized as civil or criminal, the Court emphasized that a contempt order can be directed only at an individual who has been accused of violating and found to have violated the order (*ibid.*):

> [I]n either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the

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[5] The State admits that the scope of a district court's contempt power is limited by the Constitution (State Br. 39, citing *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 406 (1971) (Harlan, J., concurring)).

order, and a prayer that he be attached and punished therefore.

Judge Learned Hand's opinion for the Second Circuit in the leading case of *Alemite Manufacturing Corp.* v. *Staff*, 42 F.2d 832 (1930), contains a persuasive application of the principle that the contempt power of the courts should be felt only by those who have disobeyed an order. Reversing a contempt judgment against a defendant who had previously been dismissed from the case, the court recognized that a court's "equitable" jurisdiction does not permit the imposition of contempt sanctions even against nonparties who act in a manner that the court views as inconsistent with the decree (42 F.2d at 832-833). Emphasizing the necessity of limiting the court's equitable powers so as to avoid penalizing those who were not enjoined and had not, because they were not parties, had their day in court, the court commented (*id.* at 833 (emphasis added)):

> It is by ignoring such procedural limitations that the injunction of a court of equity may by slow steps be made to realize the worst fears of those who are jealous of its prerogative. The District Court had no more power in the case at bar to punish the respondent *than a third party who had never heard of the suit.*

In the present case, the quota and the racial restrictions in the fund order violate this precept. They punish innocent third parties, *i.e.*, innocent nonminority members who may wish to enter the sheetmetal trade. As we said in our opening brief (at 35), we support the imposition of "the strongest possible measures to bring about complete, and long overdue, compliance with Title VII." But those sanctions should be directed at those responsible for the union's contumacy, not innocent nonunion members.

2. Since a civil contempt sanction in a Title VII case cannot contravene Title VII, we turn again to the crux of

this case: the permissible scope of remedial relief under Title VII.[6]

a. We begin with the statutory language. As frequently reiterated in the briefs, the critical final sentence of Section 706(g) provides:

> No order of the court shall require * * * 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 employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.

The plain meaning of this provision, as we contended in our brief in *Vanguards* (at 8), is that a court, upon finding that an employer has engaged in unlawful employment discrimination, may order such affirmative relief as is necessary to make victims whole but may not award relief to individuals whose rights under Title VII were not violated.

In an effort to escape this interpretation the City and State and their supporting amici, relying expressly on the analysis adopted by the dissenting opinion in *Stotts*, contend that Section 706(g) applies only to individual, make-whole relief and does not govern prospective relief to a class. See State Br. 47-61; City Br. 32-39. This argument, however, has multiple flaws.

First, as we explained in our opening brief (at 27-29), *Stotts* itself outlawed precisely the type of prospective, class-based remedy—there, a layoff quota—that the City and State maintain was somehow untouched by that opinion's discussion of Section 706(g), in a discussion that focuses almost exclusively on the impermissibility of race-conscious quota remedies (see slip op. 13-20). The district

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[6] While we do not elaborate here on the unconstitutionality of a court order requiring racial preferences for nonvictims, the Court will face that question only if it decides that Title VII or the contempt power authorizes the instant order. We refer the Court to our brief in *Wygant* for our position on this issue.

court order invalidated in *Stotts* required that the City, in the future, "not apply the seniority policy insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed" (see *id.* at 4). Accordingly, the quota order in *Stotts*, like the quota and fund order here, operated prospectively and did not provide a benefit to any "particular individual." Thus, *Stotts* cannot be distinguished on the basis that the relief granted here is somehow different.

Moreover even if *Stotts* were not binding precedent on this point, the distinction between prospective and retrospective relief is inconsistent not only with the language of Section 706(g), but also with common sense because it would provide greater remedial benefits to nondiscriminatees than to discriminatees (see opening brief at 27-29). The same is true of any purported distinction between individual and class relief.

A class or group is made up of individuals. Thus, whatever forms of relief may not be awarded under Section 706(g) to an individual likewise may not be awarded to the individuals that make up a class or group.[7] The invalidity of the individual/class distinction is demonstrated by applying it to the Due Process and Equal Protection Clauses, which by their terms apply only to "person[s]," not classes or groups. Under the reasoning advanced by the City and State, due process and equal protection would be protected for any person who sued to protect his rights but could be freely denied to the members of classes or groups. Similarly, if Title VII requirements concerning individuals do not obtain with respect to groups of individuals, then no class-based liability is possible under that statute because Title VII substan-

[7] The State's reading of Section 706(g) as permitting greater relief for groups than for individuals would turn the principle underlying Title VII antidiscrimination provisions on its head. See, *e.g.*, *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708 (1978) (Title VII's "focus on the individual is unambiguous"); *Ford Motor Co.* v. *EEOC*, 458 U.S. 219 (1982); *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983).

tive provisions speak exclusively in terms of "individuals." See Section 703(a)-(e), 42 U.S.C. 2000e-2(a)-(e).

The distinction between individual and class relief also makes no sense whatsoever as a matter of policy, and thus no one has suggested any plausible explanation why Congress would have drawn such a line. In view of the fact that Section 706(g) concededly restricts the relief that may be awarded to an individual who brings suit and succeeds in establishing that he is the actual victim of discrimination, what conceivable justification can there be for allowing greater relief for individual class members who have not suffered any discrimination? Certainly it is not the purpose of Section 706(g) to penalize victims and reward non-victims nor to discourage individual suits.

Contrary to assertions by the City and State, neither *Teamsters* nor any other pre-*Stotts* opinion by this Court supports the notion that class-based prospective relief to non-victims is permissible under Title VII. To be sure, this Court has frequently stated that the purpose of Title VII judicial relief is not simply to compensate victims of discrimination, but also to prospectively " 'bar like discrimination in the future.' " *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977), quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). See also *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770-771 (1976); *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 250 (1982) (Blackmun, J., dissenting). Such *preventive* relief obviously inures to the benefit of all future and incumbent employees, including nondiscriminatees. But such relief is fully consistent with the remedial limitations of Section 706(g) because it does not fall within the category of relief—"make-whole" preferences—covered by the last sentence of that Section. By contrast, judicial injunctions which grant tangible employment benefits to non-discriminatees in preference to third parties are expressly governed by Section 706(g) and therefore are invalid, regardless of whether these benefits are labeled prospective or retrospective and whether they purportedly serve a "preventive" or compensatory function.

Accordingly, this Court's recognition of the dual remedial purposes of Title VII and its authorization of prospective relief to prevent future violations hardly supports the prospective use of quota relief or other preferential devices. Rather, all the cases relied upon by opposing respondents simply state the obvious proposition that injunctive relief which, unlike quotas or other preferential measures, is designed to eradicate future discrimination is an essential element of a Title VII relief package. The "prospective relief" referred to in *Teamsters*, for example, was solely nonpreferential preventive measures such as "an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any order 'necessary to ensure the full enjoyment of the rights' protected by Title VII" (431 U.S. at 361 (citation and footnote omitted)). As examples of the latter category of prospective relief, this Court cited orders designed to "prevent the deterrence of future applicants," "such as posting of job vacancies and job qualification requirements," "dissemination of information," and "public recruitment and advertis[ement]" (*id.* at 365-366 n.51). Thus, the *Teamsters* opinion's acknowledgement that nondiscriminatory, preventive relief is authorized does not in any way suggest that any order expressly barred by the last sentence of Section 706(g) could nevertheless have "prospective" effect. To the contrary, *Teamsters*, as well as *Franks*, make clear that such preferential, make-whole measures may be granted only to victims of discrimination (see opening brief, page 28 n.28; U.S. Br. 6-30 in *Local No. 93, International Association of Firefighters* v. *City of Cleveland*, cert. granted, No. 84-1979 (Oct. 7, 1985)). Indeed, if the *Teamsters* Court intended that such affirmative preferential relief could be granted to nondiscriminatees, it surely would not have required that the district court on remand go through the exercise of identifying those class members who were "actual victims of the company's discriminatory practices" (431 U.S. at 371-372).

Finally, there is no merit to the argument, advanced by the State (Br. 48) and amici NAACP Legal Defense and Education Funds, Inc., et al. (NAACP Am. Br. 34), that the final sentence of Section 706(g) does not apply when a court awards benefits such as hiring or advancement to individuals *who were never denied those benefits.* Whatever support this interpretation may find in a woodenly literal reading of the statutory language, this interpretation draws an irrational line that Congress could not have intended. For example, under this interpretation of Section 706(g), if Mr. Jones was denied promotion for a nondiscriminatory reason (*e.g.*, lack of seniority under a bona fide system), a court could not order his promotion for the purpose of achieving a prescribed racial balance. But if Mr. Smith did not even bother to seek promotion because he had even less seniority, Section 706(g) would not bar a court from ordering that he be promoted to satisfy a quota. Clearly such inconsistent results make no sense. Rather, the only intelligible interpretation of the sentence is that " 'not even a Court * * * could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay *for anyone who is not discriminated against in violation of this title.*' " *Stotts*, slip op. 18 (emphasis added), quoting 110 Cong. Rec. 14465 (1964).

b. Opposing respondents and their supporting amici have also failed to explain away the legislative history of the 1964 Civil Rights Act, which unmistakably reveals Congress's opposition to court-ordered quota relief. Indeed, the City of New York states (Br. 29 (emphasis added)) that it "is opposed, as a matter of public policy, to the use of racial employment *quotas, or goals, which if coupled with sanctions and timetables, are the functional equivalent of quotas.*" Accordingly, the City refuses to defend the 29.23% membership "goal," leaving the State as the only respondent willing to support this remedial provision. But even the State concedes that the 1964

Congress intended that Title VII not be interpreted (Br. 50-51 (emphasis in original; footnotes omitted))

> to impose liability for a failure to adopt a quota or for racial imbalance without more, to require employers to hire particular individuals who had not been subject to discrimination, to authorize the EEOC or the courts to require employers to attain racial balance irrespective of past discrimination, or to impose *permanent* quotas to remedy proven discrimination.

Two principal points must be noted about the State's analysis. First, it is not an accurate description of the relevant legislative history, which we have recounted in our brief in *Vanguards* (at 9-11) and thus do not reiterate here. Second, since Congress was concedely opposed to the concept of racial preferences in all of the contexts noted by the State, at least a presumptive case is built that Congress was opposed to *the general principle* of racial preferences. Accordingly, the State's concessions logically place upon it the burden of showing that, notwithstanding the general congressional antipathy toward quotas, Congress wished to allow the sort of measures at issue in this case—*i.e.*, the 29.23% membership requirement and the apprenticeship fund programs that are restricted exclusively to minority members. This the State cannot even begin to do.

In the first place, although the State and supporting amici describe the measures at issue here as goals, those measures are quotas if ever there were quotas.[8] A quota,

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[8] In the opinion below, the only hint of a reason for calling the 29.23% membership requirement a goal is the distinction made by the court of appeals in *Rios* v. *Enterprise Association Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974). In that case, the court applied the "quota" label to requirements that specified levels of minority requirements be permanently maintained rather than achieved by a particular time. *Id.* at 628 n.3. But, as we have seen, this was not a distinction that motivated the expressions of approval of some congressmen for nonmandatory and nondiscriminatory "goals."

we are told in the amicus brief (at 6-8) endorsed by the NAACP Legal Defense and Education Fund and other groups, is "a rigid prescribed distribution of benefits and opportunities," whereas a "goal" is "flexible, can be adjusted if unrealistic and require[s] only a good faith effort * * * to obtain appropriate representation." But there can be no doubt that the 29.23% membership goal and the 100% minority requirement associated with the fund programs are quotas when tested by these standards. It must be remembered that this is not a requirement that 29.23% of new *admittees* be nonwhites. It is a more sweeping and onerous requirement that the union alter its total membership so as to become 29.23% nonwhite no later than August 31, 1987. Pet. App. A46.[9] The union in this case was told that it "*must*" achieve the 29.23% "goal" on the pain of fines that would threaten its very existence (Pet. App. A123).[10] That command can hardly be characterized as "flexible" and it calls for something much more specific than "a good faith effort."

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[9] Therefore, compliance with the 29.23% "goal," depending on economic conditions, might well require a *100%* nonwhite quota on admissions and even the expulsion of innocent nonwhites from the union. While data in the record is not recent, it illustrates the problem. As of the end of 1980, Local 28 had 1720 members, 152 of whom were nonwhite (J.A. 48). Between 1977 and 1980, the average yearly number of people included in the apprenticeship program was approximately 221 (see J.A. 96). Assuming that Local 28's current membership and racial breakdown approximate the figures for the beginning of 1981, and yearly admissions to its apprentice program average 221 per year until August 31, 1987, not even a 100% nonwhite apprenticeship admissions quota would ensure achievement of the 29.23% "goal," barring retirement or expulsion of significant numbers of nonwhites from the Union. Although we are unaware of more recent figures in the record, no matter what such figures reflect, the point remains that the 29.23% "goal" is a quota for alteration of the union's racial composition and requires that much more than 29.23% of new admissions be nonwhite.

[10] See also Pet. App. A54, A55, A220, A232, A305.

The apprenticeship fund devoted exclusively for the benefit of nonwhites is no more flexible. How can this requirement that not one single white person be admitted to the fund's program be termed "flexible"? What does "a good faith effort" mean in this context? That the union will not be held in contempt if despite its best efforts a white person somehow manages to benefit from the program?

In any event, whether these measures are termed "quotas" or "goals," they are plainly not the kind of voluntary, flexible "affirmative action" program that some congressmen regarded as permissible in the legislative history cited by the State (*e.g.*, State Br. 58-61). In fact, much of this legislative history on which the State relies is of no relevance to Section 706(g) at all; it merely refers to the practices of contractors under the "Philadelphia Plan," not the scope of judicial remedies under Title VII. In any case, to the extent that some members may have expressed approval of programs such as the Philadelphia Plan, their support was premised on their understanding that "the plan does not require, nor does it allow discriminatory hiring practices * * *. Instead, the plan establishes a range of desirable hiring within which the contractor must set his goal" (115 Cong. Rec. 40905 (1969) (remarks of Rep. Bow), quoted at State Br. 60 n.46). In a portion of Representative Bow's statement that the State omits, he went on to emphasize that "there is no magic in these numbers or percentages" and that the plan only requires "a good faith, but lawful effort to meet" goals the contractor has chosen for himself (*ibid.*). Other congressmen similarly emphasized that the plan created no enforceable obligation that employers discriminate nor any firm requirement that they reach their goals. See, *e.g.*, 115 Cong. Rec. 40915 (1969) (remarks of Rep. MacGregor) (the plan "shall not be used to discriminate against any qualified applicant or employee" and "the goals set forth pursuant to the Philadelphia plan are not absolute"); *id.* at 40743 (Sen.

Percy) ("the plan is not coercive"). None of the congressmen supporting the plan suggested that it contained an enforceable requirement for any level of minority hiring or percentage of minorities on the job. See, *e.g.*, *id.* at 40916 (Rep. Rhodes); *id.* at 40917 (Rep. Hawkins); *id.* at 40919 (Rep. Ryan). On the contrary, those representatives who viewed the Philadelphia Plan as permissible in 1969 did so precisely because they understood the plan to lack the enforceable numerical requirements characteristic of the 29.23% requirement imposed by the court in this case.[11]

c. We come next to the 1972 amendments of Section 706(g), which loom large in the arguments of opposing respondents and their amici. We addressed the 1972 amendment at some length in our brief in *Vanguards* (at 11-14), and nothing said by the State or its supporting amici undermines our argument. Although in 1972 Congress added language to Section 706(g) generally allowing a Title VII court to award "any * * * equitable relief as the court deems appropriate," this amendment has no bearing on the present case. Opposing respondents concede, as they must, that the final sentence of Section 706(g), which was left unchanged in 1972, imposes *some limits* on the equitable powers of a Title VII court. In other words, they concede that the language added in 1972 is qualified by whatever limitations are imposed by the final sentence of Section 706(g). Thus, the 1972 amendment is not relevant for present purposes, and the only relevant question is whether the measures at issue here are or are not consistent with the final sentence of Section 706(g).

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[11] We do not argue that these congressmen were correct in their assumption that the Philadelphia Plan was permissible. Nor do we attach any degree of significance to post hoc legislative interpretations of the legality of the plan made by a handful of members of Congress. Our point is that even the congressional "evidence" the State cites in support of the plan was premised on the absence of the mandatory characteristics of the absolute, finely calibrated 29.23% quota involved in this case.

Beyond its reliance on the 1972 amendment, the State rests on a section-by-section analysis of the 1972 amendments which stated that "in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII" (118 Cong. Rec. 7166 (1972)). The City and State conclude that the 1972 amendment of Section 706(g), together with Congress's failure legislatively to overrule case law permitting class-based relief, evinces an intent to permit class-based prospective relief under Section 706(g).

This precise argument was considered and expressly rejected by the majority in *Stotts*. By the time *Stotts* was decided, the Court had, moreover, "already rejected * * * the contention that Congress intended to codify all existing Title VII decisions when it made [the] brief statement" on which the City and State rely so heavily (slip op. 18-19 n.15 (citing *Teamsters* v. *United States*, 431 U.S. at 354 n.39)). The *Stotts* Court added that the statement, which referred only to unamended sections of Title VII, "cannot serve as a basis for discerning the effect of the changes that were made by the amendment" (*ibid.*). Most important in this Court's view and in ours, the sponsors' explanation of the purposes of the 1972 amendments reaffirmed that the "scope of relief under * * * section [706(g)] of the Act is intended to make unlawful victims of discrimination whole" (118 Cong. Rec. 7168 (1972)). Thus, in rejecting the argument offered by respondents in *Stotts* and repeated by respondents in this case, the Court concluded (slip op. 18-19 n.15 (emphasis in original)):

> As we noted in *Franks* [v. *Bowman Transportation Co.*, 424 U.S. 747, 764 (1976)], the 1972 amendments evidence "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible *the victims of racial discrimination.*

The State also relies on Congress's failure in 1972 to adopt certain anti-quota amendments. As we explained in our brief in *Vanguards* (at 12-13), we do not understand how the *failure* to amend a statute can change its meaning. Moreover, as we demonstrated in that brief, despite contrary statements by one or two *opponents* of these proposed amendments, the amendments were irrelevant to Section 706(g)'s victim-specific limitations on the remedial authority of the courts (Br. 13-14 n.10).[12] And to the extent that there was "spirited debate" regarding the meaning of Section 706(g) (City Br. 39), as we have seen, that debate was resolved so as to maintain the intention that the "scope of relief under that section of the Act is * * * to make unlawful victims of discrimination whole" (118 Cong. Rec. 7168 (1972) (explanation of sponsors)).

Furthermore, the statements in the 1972 legislative history to which the State refers reinforce the conclusion that the 29.23% requirement would have been regarded by the cited members of Congress as a prohibited, mandatory quota. For example, in the statement by Representative Hawkins cited in the State's brief (Br. 59), he did discuss quotas but he was of the view that Title VII already prohibited mandatory quotas. Thus he concluded (117 Cong. Rec. 31965 (1971)) that "when we talk of prohibiting quotas and talk of preferential treatment, we are merely reflecting what is in present law"). Again, there is no suggestion in any of the legislative his-

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[12] For that reason, this Court's reasoning in rejecting a far stronger claim of congressional approval of pre-1972 judicial interpretations of Section 703(h) applies with greater force here (*Teamsters*, 431 U.S. at 354 n.39):

> [T]he section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, * * * are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls.

tory cited by the State that a quota may be saved merely by calling it a "goal." Congress fully understood that Title VII prohibited mandatory levels of minority representation and preferential treatment. A remedial provision with such characteristics cannot be saved by labeling it a "goal."

e. Finally, the State suggests that quotas are necessary to prevent future discrimination and redress the effects of discrimination. While such arguments are more properly directed at the branch of government that is responsible for amending, rather than interpreting, Title VII, we note that this argument fails even on its own terms.

First, quotas are neither designed nor necessary to prevent future discrimination. Rather, quotas require that a particular percentage of a certain racial group be afforded the relevant employment benefit without regard to whether such persons would receive that benefit under a wholly nondiscriminatory employment system. Indeed, far from preventing future racial discrimination, quota remedies ensure it by retaining race as a permissible selection criterion.

In any event, such discriminatory devices are surely not necessary to preclude continued discrimination. A whole arsenal of other remedies is available to end discrimination; the appointment of the administrator in the present case is just one example of the innovative approaches that may be employed. Unlike quotas, this kind of relief is truly directed at fulfilling Title VII's purpose of "achiev[ing] equal employment opportunity and * * * remov[ing] the barriers that have operated to favor white male employees over other employees." *Teamsters*, 431 U.S. at 364-365. Furthermore, here, when a party such as petitioners contemptuously flouts the Title VII orders of a court, we support the imposition of the strongest possible coercive measures directed against those responsible for the disobedience of the court's orders. Traditional contempt sanctions are effective in all other areas of the law, and we can perceive no reason why they cannot be made to work here as well.

Nor do quotas in any way enable courts to redress more fully the effects of past discrimination. The restoration of all identifiable discriminatees to their rightful places in the employer's work force, in combination with the prophylactic enforcement measures described above, will remedy to the fullest extent possible all of the effects of the employer's unlawful discrimination. The State, however, points out that the effort to identify and make whole all victims of the employer's discriminatory practices will rarely be 100% successful. While the inherent limitations of the judicial process may well have this unfortunate result, a quota remedy in no way addresses—let alone solves—this problem. The injury suffered by a discriminatee who cannot be located is in no way ameliorated—much less remedied—by conferring preferential treatment on other, randomly selected members of his race who are strangers to the employer's past discrimination. A person suffering from appendicitis is not relieved of his pain by an appendectomy performed on a patient in the next room.

Accordingly, there is simply nothing *remedial* about preferring an individual whose *personal* statutory right to nondiscriminatory treatment has in no way been infringed solely because that individual is a member of the same racial group as others who were so victimized. And, of course, according such preferential treatment to persons who have no claim to a "rightful place" in the employer's workforce necessarily deprives innocent third parties of *their* "rightful place."

In sum, since quotas serve neither a preventive nor compensatory function, and since Title VII does not grant any substantive right to a particular racial balance in an employer's workforce (see Section 703(j)), such racially preferential devices do not further any purpose of Title VII. Accordingly, even had Congress not expressly prohibited quotas as a remedial tool, they would in any event be impermissibly at odds with basic remedial and equitable principles.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the decision 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.

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