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

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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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 an 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 findings of intentional discrimination made in 1975 and sustained on appeal in 1976 and 1977.

5. Whether the district court's appointment in 1975 of an administrator to supervise compliance with its orders in this case violated the union's right to self-governance.

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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, and the petition for a writ of certiorari was filed on April 16, 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 Council (JAC)) and three other locals and their apprenticeship councils. 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 non-whites 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.* at A305-A307).

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,

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[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.

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."[3] *Id.* at A9; see *id.* at A149-A157. The court imposed a fine of $150,000 to be placed in a 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).

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[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).

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 July 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' contentions 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).

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[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 or 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 "retrospective" 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).

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.

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[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).

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

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. 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

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[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).

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).

DISCUSSION

This petition for certiorari raises three classes of interrelated issues: first, issues relating to petitioner's course of conduct, before and after the institution of this litigation, as manifesting multiple instances of illegal discrimination; second, issues relating to the correctness of the court of appeals' affirmance of the district court's finding that petitioner had acted in contempt of earlier decrees in this litigation and that this contempt has been so continuous and widespread as to warrant severe sanctions to remedy some of the consequences of that contempt and to compel compliance in the future; and third, issues relating to the failure to abide by racial quotas contained in past decrees as a proper basis for a finding of contempt, as well as the imposition of such quotas as part of the remedial scheme of the present contempt judgment affirmed below. It is the view of the EEOC and the United States that only the third set of issues, those relating to the use of goals or quotas, merits further review. This issue, however, is presented in a way that is inextricably interwoven with the other issues, which are highly fact-bound and have been reviewed and affirmed several times in the courts below, and thus are not appropriate for review in this Court at this time. Moreover, the

issue in this case which does merit further attention is presented in far clearer form, without the accretion of the massive factual record produced in numerous prior stages of this litigation, in *Local No. 93, International Association of Firefighters* v. *City of Cleveland* (*Vanguards*), petition for cert. pending, No. 84-1999, in which the United States, as amicus curiae, has urged this Court to grant certiorari. In addition, in *Wygant* v. *Jackson Board of Education*, cert. granted, No. 84-1340 (Apr. 15, 1985), in which the United States has also filed a brief as amicus curiae, the Court will consider the validity under the Fourteenth Amendment of schemes designed to produce a predetermined racial representation in a particular workforce. The decisions in those cases are likely to provide substantial clarification of the principles bearing on the resolution of the third issue in this case. Accordingly, we respectfully request this Court to hold the present case pending disposition of *Vanguards* and *Wygant*.[8]

1. 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 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. Petitioners have also been required to make large payments into a training and education fund reserved

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[8]In *Turner* v. *Orr*, 759 F.2d 817 (11th Cir. 1985), which involves a consent decree entered into by the Air Force, the United States will soon file a petition for a writ of certiorari raising analogous questions regarding remedies for Title VII violations. The United States will suggest that the Court hold that case as well pending disposition of *Vanguards* and *Wygant*. If certiorari is not granted in *Vanguards*, the United States will request that review be granted in *Turner*.

exclusively for nonwhites. The principal focus of the petition in this case (Pet. 11-16) is on the legality of such relief.

These provisions raise questions regarding the proper scope of remedial relief in actions under Title VII, particularly after this Court's decision in *Stotts*. These questions are discussed in the government's brief in *Vanguards*. They warrant review and clarification by this Court.

We do not recommend plenary review in the present case, however, because here the remedial issue is imbedded in layers of factual and procedural details and complications. For example, 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 to meet the 29% nonwhite membership goal by July 1, 1982" and "Local 28's contemptuous refusal to comply with many provisions of RAAPO."[9] This certainly suggests that the 29.23% goal was imposed in part as an exercise of the district court's contempt power. However, 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 9, *supra*), of the 29% goal embodied in the O

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[9]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.

& J and RAAPO, neither of which rested on the district court's power of contempt. Until the basis for the 29.23% goal is clarified by the lower courts, we think that review by this Court is unwarranted and premature. If that goal was imposed as a Title VII remedy, this case presents a question very similar to that in *Vanguards* and may be controlled by the decision in that case, if review is granted. If, however, the 29.23% goal rests substantially on the district court's power of contempt, a different question would be presented. This Court should not be asked to decide that question until the lower courts have clarified whether it is indeed presented in this case.

The race-conscious fund order has similarly uncertain foundations because it is closely tied to the 29.23% goal. 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. If the fund lacked this coercive component, the court of appeals' conclusion (*id.* at A25-A26) that the fund was a proper remedy for civil contempt, rather than a procedurally defective criminal contempt penalty, would be substantially weakened. Because the fund and companion measures are designed to enforce the 29.23% goal, a decision striking down that goal would call into question the continued validity of these measures as well.

In sum, both the 29.23% goal and the fund order may rest to a substantial but undetermined extent upon Title VII and upon a fundamental misunderstanding of Title VII remedies. It is our hope that the proper scope of Title VII remedies will be clarified in *Vanguards* or, indirectly, in *Wygant*. The petition in this case should be held pending such elucidation.

2. Petitioners also 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 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). In addition, as previously noted, the AAAPO, to an unknown degree, may also represent a sanction for contempt. See pages 10-11, *supra*. It seems evident that most of these sanctions are closely linked to the fund and the AAAPO, both of which, as shown above, may rest on an incorrect interpretation of Title VII. Therefore, the legality of these sanctions merits reconsideration by the court of appeals in light of *Vanguards* and *Wygant*.

3. Petitioners challenge (Pet. 18-19) findings of discrimination made a decade ago and 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 strenuous dissent containing the same contention now advanced by petitioners (*id.* at A169-A181). At this late date, we do not urge review of this issue by this Court.

4. Finally, petitioners contest (Pet. 19-20) the district court's authority to appoint an administrator with broad powers over their activities. However, petitioners have not demonstrated that this issue is sufficiently important to warrant review at this time. Petitioners have not pointed to any similar measures imposed in other cases, and in the present case, petitioners 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 (Pet. App. A220-A221).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending disposition of *Vanguards* and *Wygant*.

Respectfully submitted.

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