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

CAROLYN B. KUHL
Deputy Solicitor General

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

MICHAEL CARVIN

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 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 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.

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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. 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 Metal 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. _/

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).

On appeal, the court of aqppeals 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

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_/ 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).

largely through the use of the union's apprenticeship program

membership (id. at A182-A206). A divided panel of the court of appeals subsequently affirmed the RAAPO (id. at A160-A181). _/

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). _/ 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 payfments 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

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

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_/ 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).

(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., admitted to 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 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 petitioner's 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). __/

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 administrative or" (id. at A22). The court of appeals rejected petitioner's 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).

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

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__/ 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).

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). __/

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, 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).

After rejecting a claim that the AAAPO interfered with union self-government, __/ 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). __/ 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 integra-

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__/ 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).

__/ The court noted it had rejected this contention in previous appeals in this case (Pet. App. A31).

__/ 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).

tion 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 nonwhite are selected (ibid.).

Judge Winter dissented (Pet. App. A38-A52), observing that ~~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

SUMMARY OF ARGUMENT

Petitioners in this case are a union and a union apprenticeship committee that were found to have violated Title VII of the Civil Rights Act of 1964 by discriminating against blacks in admission to the union. Petitioners were required, among other things, to achieve a 29% nonwhite union membership goal. Some years later, after finding that petitioners had not met this goal and had violated other remedial orders, the district court held them in contempt and levied heavy fines. The court also ordered the union, on pain of fines that would threaten its very existence, to achieve a 29.23% nonwhite membership "goal" by August 31, 1987, and to establish, finance, and operate a training fund exclusively for the benefit of nonwhite apprentices. The principal questions raised in this case concern the legality of the race-conscious relief ordered by the district court. Petitioners also challenge their contempt citations 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 improper. It is not clear whether the quota was entered exclusively as a Title VII remedy or whether it was also based to some degree on the district court's authority to impose sanctions for civil contempt. If the quota is a Title VII remedy, it is unlawful because, as this 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 relief such as union membership to persons who are not the actual victims of illegal discrimination. There has been no showing here that the beneficiaries of the 29.23% membership quota are victims of petitioners' past discrimination.

The remedial principle recognized in Stotts is not limited to cases involving seniority rights, as the court of appeals believed. On the contrary, Section 706(g) governs all Title VII relief, not just relief affecting seniority rights. The court of appeals was also wrong in holding that Stotts's interpretaion of Section 706(g) does not apply to "prospective" relief. By its express terms, Section 706(g) applies to forms of prospective relief such as hiring and promotion. Indeed, Section 706(g) expressly applies to the very form of relief at issue here--admission to union membership. Finally, there is no support for the court of appeals' bald assertion that Stotts's interpretation of Section 706(g) does not apply to cases of intentional discrimination.

Even if the 29.23% quota rests to some degree on the district court's civil contempt power, it is still invalid. We do not condone contempt; we applaud the use of firm measures to bring about compliance with court orders, especially in cases involving discrimination. We would have no objection to the imposition of stern sanctions here. But it stands to reason that a court, in seeking to enforce a statute, should not impose a contempt remedy that is contrary to statutory policy. Thus, contempt sanctions imposed to enforce Title VII must not themselves violate the statute's policy of providing relief only

to the actual victims of discrimination. The basis for this rule is not softness toward contemnors or discriminators but the recognition that those disadvantaged by quotas are often innocent persons who are not guilty of either discrimination or contempt. In this case for example, the 29.23% nonwhite membership quota disadvantages whites seeking to join the union. Since these individuals are not union members, they obviously cannot be blamed for the union's conduct.

For essentially the same reasons, we belioeve that the race-conscious fund order is improper. 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. Far from satisfying the standards for judicial relief contained in Section 706(g), the fund order, which in effect imposes a 100% nonwhite quota, does not even appear to satisfy the standards for a purely voluntary affirmative action program set out in United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

We disagree with petitioners regarding all of the remaining questions in the case. The contempt sanctions imposed by the district court were coercive and compensatory, not punitive, and thus the procedures for criminal contempt (Fed. R. Cr. P. 42(b)) need not have been followed. The contempt citations, moreover, are adequately supported findings that should not be disturbed.

Finally, petitioners' challenge to the appointment and continued service of an administrator charged with supervising their compliance with the court's orders is not properly before

the Court and, in any event, finds no support in the record.__/

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

required establishment of the training and education fund (id. at A48-A52).

INSERT SUMMARY OF ARGUMENT (attached)

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. 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. 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"

As we stated in our response to the petition (at 10), it is not clear whether the critical 29.23% nonwhite membership "goal" rests exclusively upon the district court's Title VII remedial authority or whether the district court also intended to invoke its 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." __/ This seems to suggest 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. Indeed, respondents the City and State of New York have taken the position (Br. in Opp. 13 n.) that the 29.23% "goal" is "in reality" the same as the prior 29% goal -- from which it must follow that the 29.23% goal rests exclusively on Title VII. Although we remain uncertain about the intended basis for the forced 29.23% goal, if [illegible] to speculate about the district court's intent (and that is the best that can be done without a remand), we would ~~tend to~~ agree with the City and State that the 29.23%

__/ 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.

"goal" rests exclusively upon Title VII. __/ But whichever ground the district court chose, the 29.23% goal cannot be sustained.

a. If the goal was imposed as a Title VII remedy, it exceeded the scope of the district court's remedial authority under Section 706(g). As we show in our brief (at ___) as amicus curiae in Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, No. 84-1999 (cert. granted, Oct. 7, 1985), 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. The court opf appeals in the present case rejected petitioners' contention that "Stotts eliminates all race-conscious relief except that benefiting specifically identified victims of past discrimination" (Pet. App. A29) However, the court of appeals three bases for distinguishing Stotts (see page ___, supra) cannot withstand scrutiny.

__/ Although we agree with the state and city that the 29.23% "goal" represents the reimposition of the previous 29% goal with a slight statistical modification, we disagree with their contention (Br. Opp. 12-16) that petitioners are barred from contesting the new "goal." Because the prior decisions concerning the 29% goal were rendered during earlier stages of this same case, they are [redacted] the law of the case, not res judicata. See Arizona v. California, No. 8, Orig. (March 30, 1983), slip op. 12; 1B J. Moore & T. Currier, Federal Practice ¶ 0.404 (1983). "Law of the case directs a court's discretion, it does not limit the tribunal's power." Arizona v. California, slip op. 12. Here, this doctrine does not preclude petitioners' challenge to the 29.23% "goal." First, this Court's subsequent decision in Stotts, which greatly clarified the permissible scope of Title VII remedies, represents an intervening legal development sufficient to justify reexamination of the propriety of the prior relief. See 1B J. Moore & T. Currier, supra, ¶ 0.404[1] at 123-124. Moreover, subsequent orders in the case have drastically increased the penalty for failure to achieve the nonwhite membership "goal" and have accordingly made it abundantly clear that this figure is not a hortatory goal to be achieved by nondiscriminatory means but a rigid, minutely calibrated quota to be met on pain of fines that will threaten [petitioners'] "very existence" (Pet. App. A123).

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

(i) First, the court of appeals was clearly wrong in concluding (Pet. App. A30) that Stotts' holding is 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.

(ii) The court of appeals also erred in holding that Stotts does not apply to "prospective" as opposed to "make-whole" relief. The court of appeals did not explain what it meant by prospective relief; nor did the court explain why it discerned this distinction in Stotts. In our view, this distinction is not rational and cannot be reconciled with the language of Section 706(g), the legislative history of Title VII, or the decision in Stotts.

The final sentence of Section 706(g), which enforces the remedial principle of victim-specificity, expressly refers, not only to forms of retrospective relief such as back-pay, but to what must be regarded as forms of "prospective" relief, namely, "admission * * * as a member of a union," "hiring," and "promotion." Indeed, one of these forms of relief--admission to union membership--is precisely the objective of the 29.23% membership quota at issue in this case. Further, as this Court's discussion of the legislative history in Stotts makes clear, members of Congress who explained the meaning of Section 706(g) repeatedly referred to admission to union membership as a form of relief governed by that provision. __/ Thus, we do not understand how it can be argued that Section 706(g) does not govern prospective relief in general or union membership quotas in particular.

__/ See Stotts, slip op. 17 (quoting remarks of Sen. Humphrey at 110 Cong. Rec. 6549); slip op. 18 (quoting the Clark-Case interpretive memorandum at 110 Cong. Rec. 7214, the bi-partisan newsletter at 110 Cong. Rec. 14465, and Republican memorandum at 6566).

The decision in Stott likewise leaves no room for a distinction between prospective and retrospective relief. The remedy at issue in Stotts was an injunction prohibiting the city from following its seniority system in making layoffs insofar as that system would decrease the percentage of black employees. This injunction operated prospectively, just like the membership "goal" and fund order in this case.

Finally, it would be irrational to apply fundamentally different remedial principles to prospective and retrospective relief. Whether a particular case calls for prospective or retrospective relief usually depends upon whether the discriminatory practice is challenged in court before or after it has caused harm. It would not make sense to apply a different remedial ~~principle based upon this happenstance.~~ advanced by

(iii) The third ground the court of appeals ~~used~~ for distinguishing Stotts -- that there was no finding of any intent to discriminate in Stotts (Pet. App. A30-A31) -- is plainly beside the point. Section 706(g) broadly governs all relief entered in Title VII cases. Nothing in Title VII or in Stotts or in any other decision of this Court even remotely suggests that the remedial power of a Title VII court differs depending upon whether the discrimination is intentional.

b. Even if the district court imposed the membership quota in the exercise of its contempt power, the quota still cannot be sustained because it is contrary to the strong remedial policy of Title VII. In Stotts (slip op. 16-17), this Court noted that the remedial policy of Title VII "is to provide make-whole relief only to those who have been actual victims of illegal discrimination." As we have argued in our brief in Local No. 93 (at ___), a quota necessarily violates this policy because it awards benefits and inflicts disadvantages that are not linked to any past discrimination but are based instead solely on factors such as race and ethnicity.

Federal courts, in our view, must respect this strong statutory policy in framing sanctions for civil contempt. To be sure, Congress has made clear that the federal courts may use the full power of civil contempt, "including the power of detention," to secure compliance with Title VII decrees (42 U.S.C. 2000h). We do not wish to derogate these powers in the slightest or ~~to~~ suggest that they should not be vigorously exercised. But it seems obvious that a court in seeking to bring about compliance with a Title VII decree must not lose sight of the underlying policies of the statute that it is trying to enforce. It would be ironic indeed if a court, for the purpose of enforcing a statute, imposed a contempt sanction that contravened statutory policy. It follows that contempt sanctions imposed to enforce Title VII must not them themselves violate the statute's policy of providing make-whole relief only to actual victims.

The basis for this rule of law is not softness toward contemnors or discriminators but concern for the innocent individuals who are inevitably disadvantaged by quotas. In present case, for example, the persons who will suffer the most as the result of the 29.23% membership quota are those white persons who may wish to enter the union and the sheet metal trade but will be kept our solely because of their race. Because these persons are not members of the union, they they plainly are not responsbile for the union's past conduct. On the other hand, those who are responsible -- most notably the union leaders -- will not be comparably affected. We agree with the lower courts in this case that disobedience of Title VII judgments should not be countenanced and that strong and effective measures should be employed to bring about prompt and complete compliance. But the force of those contempt sanctions should be felt by ~~those~~ the individuals responsible for disobeying the court's order, not by third parties who bear no part of the culpability. See Gompers v.

Bucks Stove & Range Co., 221 U.S. 418, 441-442 (1911). Contempt sanctions should be strong but not indiscriminate.

The imposition of racial or ethnic quotas as contempt sanctions would also trangress constitutional principles. See Pet. App. A48 (Winter, J., dissenting). 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 Orr v. Turner, 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 Orr petition on the parties in this case.) The constitutional question, however, need not be addressed unless the Court determines 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.

Finally, even if racial quotas were permissible contempt remedies in Title VII cases, 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 was unnecessary and entirely without justification.

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 the benefit of nonwhite (id. at A114), and there is no requirement that the fund's beneficiaries be actual victims of petitioners' past discrimination. Among other things, the fund is to be used for establishing a 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 of 16 and 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 apprentice 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 totally barred from for all of these programs.

Insofar as the fund order creates part-time and summer jobs for nonwhite youths only, it is inconsistent with the express terms of Section 706(g), which prohibits a court from ordering "the hiring * * * of an individual as an employee" unless that individual was discriminatorily refused employment by the employer. Section 706(g) does not expressly address the other racially-exclusive benefits conferred by the fund order (i.e., the tutorial, liaison, counseling, stipend, and loan programs), but those aspects of the order are equally offensive to the

remedial policy of Title VII. In any event, these programs are plainly unlawful under Section 703(d) of Title 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 contrary to the remedial policy of Title VII, neither is it a proper contempt sanction in a Title VII case.

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

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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.

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

to coerce compliance with the 29.23% goal. Since this goal is invalid, the fund order designed to enforce the goal must be set aside as well.

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 of Fed. R. Cr. P. 42(b) __/ and, second, that the contempt findings resulted from the district court's misuse of statistical evidence. These contentions provide no basis for vacating petitioners' contempt citations.

A. The Sanctions Imposed Are Civil in Nature

Petitioners contend (Pet. 16-17) that the sanctions in this case, although ostensibly imposed 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

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__/ Rule 42(b), Feb. 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).

computerized record keeping (id. at A126); and (4) attorney's fees and expenses (id. at A126 , A156-A157). __/

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. at 441.

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 or compensatory in nature, not punitive.

As the court of appeals recognized (Pet. App. A26), the sanctions relating to the fund -- the initial $150,000 assessment and the continuing levies against petitioners -- were clearly designed to coerce compliance with the 29.23% nonwhite membership "goal." The fund is to continue until this "goal" is met, and at that time petitioners are entitled, with the court's consent, to recover what is left (id. at A114-A116). Thus these sanctions are similar to the classic civil contempt sanction of a periodic fine to be assessed against the contemnor until the underlying court order is obeyed. That the monetary sanctions in this case seek to coerce compliance with an invalid "goal" (see pages ___, supra) does not change their coercive nature.

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__/ As previously noted, the AAAPO, which contains the 29.23% nonwhite membership "goals," may also rest to some degree upon the district court's civil contempt power, as well as its Title VII authority. It, however, that the AAAPO was not entered purely as a contempt sanction, and thus we do not consider whether its provisions could be sustained on that basis alone.

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Indeed, the type of relief entered by the district court as a contempt sanction here 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. __/ The procedural requirements of Fed. R. Crim. P. 42(b) therefore do not apply. __/

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 that supports the remedial orders that 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 lack merit.

__/ As indicated (p. ___, supra), the court's contempt orders also require petitioners to reimbursement 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.

__/ 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 to be such by all concerned (e.g., Pet. App. A126, A150, A444-A445). The relief requested was civil in nature (id. at A142, A444-A4445, A476). Petitioners were on notice that fines were being sought (id. at A444, A476) and made no effort to seek a Rule 42(b) hearing.

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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 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 decisions, as petitioners acknowledge (Reply Memorandum at 708), are therefore the law of the case (see page ___, note ___ supra), and petitioners have not provided any reason why the findings affirmed in those decisions should be reviewed by this Court.

Petitioners' contention (Pet. 12 n.7) that "[a] contempt proceeding requires consideration of the legality of the underlying order" 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. Mineworkers, 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 form 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

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

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 School District v. United States, 433 U.S. 299 (1977), because it is based upon events that 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 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 discrimina-

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__/ Petitioners' attack on these findings, unlike their challenge to the nonwhite membership quota (see page ___ note ___. supra), is not based on any interviewing change in the law. Their attack on these findings (see Pet. 18) is based upon Hazelwood School District v. United States, 433 U.S. 299 (1977), which antedated and was discussed in the Second Circuit's 1977 decision (see Pet. App. A168; id. at A169-A180 (Meskill, J., dissenting)).

__/ 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. This Court will address issues not raised below only in exceptional circumstance. Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); Lawn v. United States, 355 U.S. 339, 362-363 n. 16 (1958). No such circumstances are present here.

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

2. The 1982 Contempt Citation.

__/ The court of appeals noted in that opinion, for example, the 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 (Pet. App. A169 n.8; see also id. at A211-A215; A330-A350).

Nor is there any cause for this Court to set aside the 1982 contempt citation. As affirmed by the court of appeals, this citation was based on four findings: 1) that petitioners adopted a "policy of underutilizing the apprenticeship program to the detriment of nonwhites;" 2) that petitioners "refus[ed] to conduct the general publicity campaign ordered in RAAPO;" 3) that petitioners issued "unauthorized work permits to white workers from sister locals:" and 4) that petitioners failed "to maintain and submit the records and report required by" prior court orders (Pet. App. A9). The only sanction imposed for this contempt was a $150,000 fine to be placed in the apprenticeship fund. (Pet. App. A156)

Petitioners now challenge only the first of these findings -- underutilization of the apprenticeship program. (Pet. App. A16) The court of appeals recognized that Judge Werker's finding of underutilization was based on a statistical misunderstanding. __/ However, the panel majority on the court of appeals found other statistical support in the record to support Judge Werker's conclusion. The panel majority relied on the increase in the ratio of journeymen to apprentices employed between 1975 and 1981, the average number of hours worked annually by journeymen during this same period, and the change in apprentice unemployment between 1977 and 1981 (Pet. App. A16). __/ In dissent, Judge Winter concluded that the statistics in the record did not slow underutilization of the apprenticeship program. He relied on enrollment in the

admitted to the apprenticeship program

__/ In seeking to compare the number of apprentices indentured (i.e.,) between 1971 and 1975 with the number indentured between 1976 and 1981, the district court mistakenly compared the total number of apprentices enrolled between 1971 and 1975 (2174) with the number indentured during the period 1976 to 1981 (334) (Pet. App. A16, A151). The record indicates that at least 750 apprentices were enrolled in the program during this latter period (id. at A484-A485).

__/ In addition to these statistics, the panel majority relied on petitioners' failure to conduct the publicity campaign and the issuance of temporary work permits to predominantly white journeymen (Pet. App. A16).

A fifth finding, concerning the older workers program, was overturned (Pet. App. A18; see page ——, supra).

apprenticeship program between 1977 and 1981 (Pet. App. A44 & n.5), the decrease in the number of journeymen between 1975 and 1981 (id. at A46), the average number of 40-hour weeks worked by a journeyman between 1970 and 1980 (id. at A46), and the percentage of total hours worked by journeyman and apprentices between 1977 and 1981 (id. at A47). __/

We see no need or reason for resolving this murky statistical dispute in this Court. Since petitioners do not challenge three of the findings on which the 1982 contempt citations was based, we see no reason why this citation cannot stand independant of the finding of underutilization. However, the sanction imposed for this comtempt -- the $150,000 fine -- will in any event have to be reexamined on remand because it is closely tied up with the racially exclusionary fund, which must be substanially modified for reasons already explained. It is problematic whether the district court on remand will find it appropriate to reimpose or vacate this fine in view of this modification. Moreover, it is unclear whether the fine is supported solely by the 1982 contempt citation or whether it also rests on the 1983 citation, which petitioners have not challenged here. __/ Certainly, the $150,000 fine figured prominently in the sanctions imposed following the 1983 citation. __/ Accordingly, we believe that the $150,000 fine should be vacated

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__/ Judge Winter also relied on the administrator's close supervision of the apprenticeship program and the "excruciating reduction in the demand" for Local 28's services (Pet. App. A47).

__/ 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 Sup. G. R. 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.

__/ As previously noted (see page ___, supra), these included the establishment, financing, and operation of the fund. The $150,000 fine provided the essential initial financing for the fund.

and that the lower courts on remand should be instructed to reexamine whether this sanction is justified or appropriate.

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, as well as 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. If petitioners were dissatisfied with the court of appeals' 1976 affirmance of the district court's appointment of the administrator, they should have sought review by this Court at that time. The court of appeals's decision is the law of case and, as with the prior findings of discrimination, petitioners have provided no reason why that law should not be followed. In any event, because of the complexity of the case, the possiblity 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 (see Pet. App. A211, A214, A220, A352), appointment of an administrator was within the district court's discretion. Fed. R. Civ. P. 53; 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 Louisana, 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 the administrator "should be modified to limit his authority to adjudicating disputes under AAAPO and for no other purpose." __/ 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. In 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 attributable to petitioners' failure to comply with the district court's remedial decrees. __/ The courts below properly recognized the general rule that appointment of a special master is "an extraordinary remedy" (United States v City of Parma, 662 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 that

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__/ See petitioners' brief as appellant in the court of appeals at 92.

__/ As indicated (supra, page ___), injunctive orders, whether or not correct, must be complied with until vacated or reversed.

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

CAROLYN B. KUHL
Deputy Solicitor General

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

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

MICHAEL CARVIN
BRIAN K. LANDSBERG
DENNIS J. DIMSEY
Attorneys

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