IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND, ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Petitioners,

vs.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

Brief of The National Bar Association, Inc. and The American Business Council, Inc. Amici Curiae

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Respondents.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 584 F.2d 600 (2d Cir., 1978). It affirmed the decision of the United States Dis-

trict Court for the Southern District of New York (Werker, J.), reported at 443 F. Supp. 253 (S.D.N.Y. 1977), which upheld the constitutionality of Section 103 (f) (2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705 (f) (2).

JURISDICTION

The petition for a Writ of Certiorari was filed on December 21, 1978 and granted on May 21, 1979. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSENT TO FILING

This Amici Curiae is being filed with the consent of all parties to the proceeding.

INTEREST OF THE AMICI CURIAE

The National Bar Association, 1900 L Street, N.W., Washington, D.C. 20036, is a professional membership organization which represents the more than 7,000 black attorneys, judges and law students in the United States. The officers of the Association are as follows:

Robert L. Harris, President
William A. Borders, Jr., President-Elect
George R. Burrell, Jr., Vice-President
Warren H. Dawson, Vice-President
Stuart J. Dunnings, Jr., Vice-President
Renee Jones Weeks, Vice-President
Arnette R. Hubbard, Secretary
Arthenia L. Joyner, Treasurer
John Crump, Executive Director

The National Bar Association was incorporated under the laws of the State of Iowa in 1925, over two decades before black attorneys were allowed membership in the American Bar Association, and at the time when very few law schools in the United States admitted black students.

The Articles of Incorporation of the National Bar Associarion state the objectives of the Association, in part, as being:

> ". . . to advance the science of jurisprudence, uphold the honor of the legal profession, . . . and protect the civil and political rights of all citizens of the several states of the United States."

One of the primary reasons for the birth of the Association in 1925, was to achieve equalization of opportunities for minorities in the legal profession in order to further the goal of equal justice for all. In its fifty-four years, the Association has seen the number of black attorneys in the United States grow from a fraction of a percentage of the total, to almost two percent today. However, Blacks, as well as other minorities and women, are still grossly under-represented in the legal profession and also the medical and other professions.

Thus far, the most effective methods proven to ameliorate that condition and certainly the most critical factors in doubling the number of black attorneys in America in the past decade, has been the affirmative action programs initiated in a number of law schools since around 1968. This was also the year that the National Bar Association, in partnership with the American Bar Association, the American Association of Law Schools and the Law School Admissions Council, founded the Council on Legal Education Opportunity whose stated goal was to increase the enrollment of minority students in American law schools.

The legal profession has perhaps been more significant than any other in shaping the fortunes and destinies of the American people, majority and minority alike. It is common knowledge that until a few years ago, all but a miniscule number of Blacks were excluded from the profession. In fact, as recently as 1950, Blacks were forced to invoke the powers of the United States Supreme Court in order to gain admission to tax-supported law schools in parts of this country. Although the situation has improved somewhat today, it would not be inaccurate to state that at our present rate of progress, we are still many years away from true equality in our justice system and proportionate representation of Blacks in the legal profession. Consequently, this country cannot achieve true equality of opportunity without affirmative action to correct past societal discrimination.

Blacks and other minorities, as well as women, stand to lose tremendous grounds which have been accomplished under the rubric of affirmative action. By affirmative action, we mean those series of programmatic efforts designed to fully integrate minorities and women in this country into equal employment opportunity, entrepreneurship and equal educational opportunity.

The American Business Council (ABC) is a non-profit, independent organization, incorporated in the District of Columbia on April 17, 1979. The purpose of ABC is to promote the business interests of its members and others similarly situated in public and private forums. Furthermore, it is the purpose of ABC to monitor, evaluate and disseminate information concerning contemplated, proposed and existing legislation and policy which affects or could affect the business interests of its members.

ABC believes that the continued growth and development of the American economic system is closely linked

to the inclusion of all business persons, regardless of race, in the mainstream of this country's economy. Consequently, the members of ABC have a direct interest in the arguments presented for the Court's consideration in this case, which is the question of the legality of the set-aside provisions in the Public Works Employment Act of 1977. The Act requires that 10% of all Federal funds appropriated for public works projects be expended on bids tendered by minority business enterprises.

Because ABC feels that the development of a sound minority business community is essential for the continued positive growth of the overall economy, it urges the Court to resolve this issue in favor of the respondents. Such a decision would be in the best interests of the country.

STATEMENT OF THE CASE

On July 22, 1976, Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999. In May 1977, Congress amended the 1976 Act by authorizing an additional four billion dollars for similar projects.

The new statute, entitled the Public Works Employment Act of 1977 (hereinafter "PWEA"), Pub. L. No. 95-28, 91 Stat. 116, made various changes in the 1976 Act, including the addition of Section 103(f)(2), 42 U.S.C. 6705(f)(2), the "minority business enterprise" provision (hereinafter "MBE" set-aside provision). Section 103(f)(2) provided that "[e]xcept to the extent that the Secretary determines otherwise, no grant shall be made under the Act * * * unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." The circumstances under which the Secretary will waive the 10 percent minority set-aside requirement are detailed in regulations promulgated under the Act (13 C.F.R. 317.19(b)(2)). Congress ensured that funds appropriated under the Act would reach the private sector by requiring state and local grantees to contract with private contractors for the construction of the projects. Section 103(e)(1), 91 Stat. 116, 42 U.S.C. §6705(e)(1).

As authorized by the Act, the Secretary of Commerce issued regulations (13 C.F.R. 317.19(b), 42 Fed. Reg. 27434 (1977)) which required that at least 10 percent of each grant made under the Act must be expended for contracts with and/or supplies from minority business enterprises.

All grants authorized by the Act were awarded by September 30, 1977. The State of New York and New York City were among the grantees awarded funds.

On November 30, 1977, petitioners filed this action in the United States District Court for the Southern District of New York, seeking injunctive and declaratory relief. Petitioners contended that Section 103(f)(2) establishes an impermissible racial classification and violates the Fifth and Fourteenth Amendments, the Reconstruction civil rights statutes (42 U.S.C. 1981, 1983, 1985), and Titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. 2000d, 2000e). Petitioners sought to enjoin the Secretary of Commerce and the state and local entities that had received funds distributed under the Act from enforcing the minority business enterprise provision in Section 103(f)(2). Petitioners also sought a declaratory judgment that Section 103(f)(2) was unconstitutional.

The district court, after denying Petitioner's request for a temporary restraining order and consolidating their request for preliminary injunction with a trial on the merits, held that the minority business enterprise provision of the Act was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry.

The court of appeals affirmed (Pa23-Pa41). In upholding the minority business enterprise provision, the court stated that it was unnecessary for it to determine "[w]hether rigid scrutiny is mandated whenever an act of Congress conditions the allocation of federal funds in a manner which differentiates among persons according to their race * * * for we are of the opinion that even under the most exacting standard of review the MBE provision passes constitutional muster" (Pa28). The court of appeals agreed with the district court that the minority business

enterprise provision in the 1977 Act was intended to remedy past discrimination against minority construction businesses (Pa32). The court also agreed with the district court that there was an ample basis to support Congress' conclusion that the severe shortage of potential minority entrepreneurs with general business skills is a result of their historical exclusion from the mainstream economy and that "the history of discrimination was specific to the construction industry" (Pa35-Pa36).

The court of appeals then analyzed the adverse effect of the minority business enterprise provision on non-minority contractors. The effect, the court concluded, was quite limited and did not fall upon a " 'small, ascertainable group of non-minority persons' " (Pet. App. 38a, quoting from *EEOC v. Local 638, Sheet Metal Workers*, 532 F.2d 821, 828 (2d Cir. 1976).

ARGUMENT

The minority business enterprise set-aside provision as contained in Section 103(f)(2) of the Public Works Employment Act, 1977, 42 U.S.C. §6705(f)(2), is constitutionally permissible as a remedy for the effects of past discrimination.

A. *The Need for the MBE set-aside provision*

The matter currently before the Court is the third major confrontation on the issue of affirmative action within the past two years. In the first case, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), 98 S. Ct. 2733 (1978), the Court was asked to review an admissions program of a University designed to seek the admission of a certain specified percentage of minority students. In *Bakke, supra,* the Court struck down the special admissions program of the University but held that race may be taken into account when it acts to remedy the past effects of racial discrimination. In the second case, *United Steelworkers v. Weber*, — U.S. — (1979), 99 S. Ct. 2727 (1979), this Court was asked to review the legality of private voluntary affirmative action plans which were designed to eliminate racial imbalance in certain job categories. In *Weber, supra,* the Court held that the use of private voluntary affirmative action plans does not violate the provisions of Title VII. In the matter *sub judice,* the Court is being asked to declare unconstitutional a provision (Sec. 103(f)(2) on the PWEA) of an act of Congress which requires that a certain percentage (in this case 10%) of funds (authorized for capital development and improvement) be set aside for minority business enterprises. Of the three cases, this case may be the most important one because of its long range implications to the minority community. The present case then presents issues that will have a profound impact on our society. Affirmative

action, as a concept and a method of eradicating the effects of past discrimination, has been traditionally limited to the area of employment and academic admissions. Congress, in enacting the MBE set-aside provision, has for the first time expanded the concept and utility of affirmative action to the marketplace. Congress has decided to use its considerable economic clout as a major consumer and purchaser of goods and services and major funding source to hasten the development of minority business enterprises in the marketplace of the construction industry. Minority businesses, like their individual counterparts in the employment and academic admissions context, have faced tremendous obstacles to their entry, as legitimate competitors, in the marketplace in general for their goods and services and in the market place of the construction industry in particular.

There are literally thousands of minority businesses in this country which are not in the mainstream of our economy because of the past and present effects of societal discrimination. If minority businesses are to develop and compete on an equal footing with non-minority business enterprises they must have unrestrained access to the marketplace, and must be freed from the past and present effects of racism and societal discrimination.

The concept of societal discrimination is useful to describe the phenomenon whereby discrimination in one economic sector[1] affects outcomes in another sector.[2] It also encompasses the fact that present discrimination and the effects of past discrimination in employment, education, housing, and other areas of private and public life interact with one another. *See, e.g.*, U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974). Its emphasis is on systems of discrimination and their resulting

1 In this case, employment in the construction industry.

2 In this case, entry of minority business enterprises into the marketplace of the construction industry.

conditions, not on any need to identify individual entities which may legally be held responsible for causing those conditions.

When used in this sense, societal discrimination describes that kind of institutional discrimination which has prevented minority business enterprises from entering our free market economy to compete with their non-minority counterparts. If this Court requires that some evidence of a legal violation be acknowledged to exist as a pre-condition for this type of affirmative action, it would limit affirmative action to employment and academic admission matters. The result would be to freeze societal discrimination into the social and economic order The MBE set-aside provision is a prototype provision for future set-aside arrangements on the local, State, and Federal levels in other industries that have traditionally excluded minorities and erected artificial barriers against their entry into the marketplace. We view the MBE set-aside provision in the context of this case to be a legitimate exercise of Congress' power and authority to eradicate the vestages of past discrimination.

The marketplace would not, in the absence of a requirement to do so, freely select minority business enterprises to supply it with goods and services. This is especially true in the context of the construction industry which is no stranger to racism and the studied exclusion of minorities in an employment context in that industry. Certainly, we cannot expect that same industry to freely select minority business enterprises to supply it with goods and services.

Minorities, especially Blacks, have been far too long excluded from being owners and developers of their own endeavors or enterprises because of numerous artificial barriers placed in their development. The development of minority enterprises inevitably has a positive impact on our economy. Given the high rate of unemployment in the

minority community, minority business enterprises afford more of a real opportunity for numerous members of the minority community to be employed and thus alleviate the serious unemployment problem in this country. Minority enterprises are valuable resources that have been allowed to remain idle for too long. Economic efficiency requires, first, that available resources be actually utilized in the production of goods and services rather than allowed to be idle. Unutilized resources—both human and property—obviously mean waste and inefficiency.

B. *The MBE set-aside provision is a necessary remedy for past discrimination in the marketplace of the construction industry*

The legislative debate that proceeded the Congressional approval of the MBE set-aside provision clearly discloses the connection between the past discrimination and the set-aside provision. The court of appeals noted the history of discrimination was specific to the construction industry. In fact, the court stated that:

> "a report prepared by the House Sub-Committee on Small Business Administration Oversight and Minority Business Enterprise contains the following statement:
>
> 'The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its fact, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, *or in the construction industry, in particular.* However, inroads are now being made and

> minority contractors are attempting to 'break-into' a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them.'" 584 F.2d at p. 606.

The petitioners argue that the legislative history is silent with respect to delineating the purpose for the MBE set-aside provision. As the court of appeals noted:

> "There is no need to rely solely on a bare presumption to determine the purpose of Congress. The classification established by the amendment is self-evident. The amendment makes no sense unless it is construed as a set-aside to benefit minority subcontractors. * * * It is beyond dispute that the set-aside was intended to remedy past discrimination." 584 F.2d at p. 605.

This was obviously the intent of Congress when it enacted the MBE set-aside program to alleviate unemployment and to utilize minority business enterprises in its effort to combat unemployment. There can be little doubt of that intention.

The Civil Rights Commission found in its examination of the statistics in the 1974 EEO-3 reports of 15 major building trades unions that, at most, minorities constituted 6.2% of journeymen working in the construction industry in 1972, and more likely only 5.5%.[3] It is safe to state, as did the Civil Rights Commission in 1976, that:

> [T]he percentages of minorities . . . among journeymen in the construction industry are extremely low, whether compared with population or relevant labor force statistics. Report at 52.

The Civil Rights Commission concluded that the "extremely low" percentages of minorities within the con-

3. The difference in percentages reflects irregularities in data provided by the unions on the EEO-3 forms, including: failure to report; overestimation of minority membership; categorical combining of non-construction and semi-skilled workers with construction journeymen; combining apprentices with journeymen; and failure to report actual referral opportunities. Report at 38.

struction industry resulted from two sources: (1) overt discrimination and (2) institutional discrimination. Such overt discriminatory practices included, among other things, "white only" clauses in many union constitutions until the mid-1960's and exclusion of minorities from participation in apprenticeship examinations. The Report recognized that while overt discrimination is not as "widespread as it once was, it is far from uncommon" (Report at 92) and that although a few "progressive locals" have made the entry of racial minorities a "relatively routine matter" *id.*, the most common form of discrimination which accounts for the continued exclusion of racial minorities is the use of seemingly neutral practices that disproportionately exclude them.

As for institutional discrimination, the Report states:

> Institutional discrimination occurs when policies and practices used in selecting apprentices and applicants for membership and employment have an adverse impact on minorities and women, even when these policies and practices are not intentionally applied in a discriminatory manner. The adverse effect these policies and practices have on minority groups may have been caused by the past intentional discriminatory policies of a union or by economic, educational, and social disparities in the society. Whatever the cause, the effect is exclusion from employment. Report at 64.

The Report identified, and discussed at length, four common institutional practices within building trade unions which have caused the virtual exclusion of significant numbers of racial minorities: (1) membership selection practices; (2) restrictions on the size of membership; (3) methods of recruitment; and, (4) examinations. Report at 65-92.

In summary, the Civil Rights Commission concluded:

> The effect of intentional and direct employment discrimination in the building trades continues to be severe. The proportion of unions that neither discriminate directly nor intentionally or that do not continue to use widely practiced institutional mechanisms that adversely affect the employment opportunities of minorities and women is unfortunately quite small. Report at 94.

The practice of racial discrimination in America has shown itself to be remarkably durable. It has persisted in the face of sustained opposition for over three centuries. It has survived the destruction of the plantation economy which provided it with its most explicit justification. Incursions made during the Reconstruction period were quickly beat back. The prohibitions of Constitutional amendment and statutory enactment have debilitated it little. It has shown great resilience to the contemporary attacks generated by what may be viewed as America's second attempt at "Reconstruction."

This evil, racial discrimination, may never be mitigated without some form of preferential treatment. Justices Brennan, White, Marshall, and Blackmun noted that:

> "* * * in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefitted suffered from racial discrimination. These decisions compel the conclusion that States also may adopt race-conscious programs

> designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination. (*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), 98 S. Ct. 2733, 2787. See Justice Powell's response at page 2658, fn. 44).

The history of this past discrimination in an employment context was the impetus for the enactment of Title VII of the Civil Rights Act of 1964. It demonstrates that Congress realized that the present effects of past racial discrimination could not be remedied by being neutral on the question of race, in the area of employment. Congress has now chosen by its enactment of the MBE set-aside provision not to remain neutral on the question of minorities participating in our economy and sharing in the development of public projects, not necessarily as employees but as entrepreneurs. What is needed and what Congress intended, was preferential treatment.

Blacks have suffered the dehumanizing effects of racism since the inception of this nation. Fear and racial hatred have assumed many disguises throughout our history. For though the chains and whips have been discarded, more sophisticated methods and institutional practices are used today to perpetuate the effects of racism.

In both the North and the South, the black slave was barred from almost every avenue leading to a productive, dignified existence. And his experience in the labor market, over the last two centuries, is one of the best illustrations of the lasting effects of institutionalized slavery.

In the South, after the Civil War, the black man seeking a job found that the years of enslavement had predetermined that he was to be admitted to the lowest forms of employment, even though, quite frequently, he

was a skilled craftsman. It is commonly known that during slavery, Blacks were used as domestics and unskilled laborers. A less commonly known fact is that the slaves, ". . . were also, to a large extent, the craftsmen and mechanics. They were carpenters, bricklayers, painters, blacksmiths, harness workers and shoemakers. For even skilled labor was degraded and whites had often been denied the opportunity of acquiring training since masters had preferred to work with slaves." Myrdal, Gunther, *An American Dilemma* (New York, 1944). White artisans strongly protested against the use of slaves for skilled craft labor, but the skilled slave was protected by his more politically powerful master. However, after the Emancipation, the black artisan was on his own. His former master no longer had an interest in protecting him against his white competitor. See Myrdal, *supra.*

The history of organized labor tells a similarly sad tale of exclusion of the black worker.[4] "From its inception as a national movement, organized labor found it necessary to deal with the prevailing attitudes of American society toward the black population. In 1866, the National Labor Union held its first convention, and was immediately confronted with the need to formulate a policy on racial practices. At its second convention in 1869, it requested black delegates to form their own "all-Negro labor organizations." Ross and Hill, *Employment, Race and Poverty* (New York, 1967), p. 365. The National Labor Union's policy of exclusion of Blacks was adopted by many major unions. "The history of the American

4. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied* 404 U.S. 854 (1971); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); and *Equal Employment Opportunity Commission v. Local 638, Sheet Metal Workers*, 532 F.2d 821 (2d Cir. 1976).

Federation of Labor (AFL), the most successful national labor organization, demonstrates that labor unions not only accepted racial discriminations but significantly contributed to the pattern of discrimination and segregation." *Ross & Hill, Id.*, at 366. AFL unions used a variety of tactics to eliminate or limit Blacks as a group from competition in the labor market. They excluded Blacks from membership by racial provisions in their constitutions or ritual by-laws or by tacit agreement in the absence of written provisions. Segregated locals and "auxiliary" locals are established by the larger unions. The black worker was extended the privilege of joining and paying dues but, generally, he was barred from participating in union affairs and contract negotiations. *Northrop, Organized Labor and the Negro* (New York, 1971), p. 2. AFL unions also controlled licensing boards that excluded black workers from craft occupations and apprenticeship training programs. *Ross & Hill, supra.* Blacks were also denied access to union hiring halls where such halls were the exclusive source of labor supply.

The consequences of these institutional practices of discrimination against the black worker remain manifest. By the turn of the century, this color-caste system had become firmly entrenched. By 1900, Blacks had become almost completely segregated from the mainstream of labor by law and by custom.

> "In the last years of the nineteenth century and in the first decades of the twentieth, the harsh discriminatory racial practices of AFL-affiliated unions and the railroad brotherhoods were decisive factors in developing the pattern of Negro job limitations that was to continue for many generations. Because of the AFL's craft orientation and discriminatory practices, most unions refused to organize Negro workers in the 1900's,

> thus denying them trade union protection during a period of intense labor exploitation. The consequences of the pattern of discriminatory racial practices by organized labor was an important and in some instances decisive factor in the barring of Negroes from full and equal protection in the economic life of the nation." *Ross, supra.*

And:

> "During the period 1860-1910, craft unions contended that they were not acting with any malice towards Negroes; they did rearticulate, in a new form (into our industrial structure), which has pervaded the social structure and social consciousness of society in the United States. Since "socially," Negro inferiority is sanctioned, unions have used exclusion as an economic weapon to maintain and raise the economic social status of their members. The acceptance of Negro subjugation is linked partially, with economic preservation in an unstable society: the latter fits well with the doctrine of job scarcity. Thus, artificial restriction serves at least a two-fold purpose: (1) it enhances the bargaining power of the union; (2) it increases the union's economic control over its membership." Black, *Labor and the Negro*, 1866-1910, 50 Journal Negro History 163 (1965).

The Blacks who migrated to the North entered the unskilled, manual jobs in steel mills, auto plants, road maintenance, laundries, feed industries and some branches of the needle trades. As a rule, these were the jobs that Whites and immigrants did not want or had vacated to take better positions.

The entry of Blacks into the Northern labor market was further hampered by the prevailing racial attitudes of that period. The white workers strongly resented the immigration of blacks to the North, especially when the

black workers were brought to the North by employers to be used as strikebreakers, cheap labor, or as a means to overt unionization. See, *Marshall, The Negro and Organized Labor* (N.Y. 1965), p. 21.

The hostility and aggression of the white workers took on many forms. Blacks were victimized and terrorized by riots and other acts of violence. In 1917 and 1919 tensions between the white workers and the Blacks from the South erupted into some of the most bitter and bloody race riots in this country's history. St. Louis and Chicago became the battle-grounds of fierce, racial conflicts.

It is submitted that these open and covert practices of exclusion of black workers had the net effect of securing for the white worker and non-minority businesses the advantages of job security and economic development.

Petitioners would like this Court to overlook the history of black workers detailed above; and ignore the moral distinction between a racial classification designed to discriminate against those who have suffered the effect of slavery, and a racial classification that serves to eliminate the plight of these very people who have traditionally suffered from that discrimination.

Appropriately tailored numerical remedies have long been upheld as a viable means of restoring equality of opportunity to persons historically denied equal employment opportunities. Such remedies insure representation of qualified minorities in a workforce and, "promptly [operate] to change the outward and visable signs of yesterday's racial discrimination and thus, . . . provide an impetus to the process of dismantling the barriers, psychological or otherwise, enacted by past practices." *NAACP*

v. Allen, 493 F.2d 614, 621 (5th Cir. 1974). It has been held that absent such numerical remedies, "[a]dequate relief may well be denied." *Id.* at 765.

This Court stated that, "ordinarily such relief will be necessary to achieve the 'make whole' purposes of the Act." *Franks v. Bowman Transportation Co., supra* at 766.

In *NAACP v. Allen, supra*, where the district court found that because of a history of racial discrimination, there was an absence of Blacks on the state police force, a quota system very similar to the one here at issue, was upheld on the basis that it was, "essential to make meaningful progress toward eliminating the unconstitutional practices and to overcome the patrol's 37-year reputation as an all-white organization . . ."

In *Allen*, the Court ordered the hiring of one qualified black for each white hired as a state trooper until 25% of the force was black. It further ordered that Blacks be admitted to each training position until Blacks comprised 25% of the training positions.[5]

It is submitted that plans designed to provide relief as remedy for past discrimination have been uniformly upheld by the courts. *See, e.g., Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (*en banc*), *cert. denied*, 416 U.S. 950 (1972); *United States v. I.B.E.W.*, Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).

5. The 1970 Census revealed that 26.2% of the Alabama population was Black.

Thus, until the evil effects of past discrimination are eradicated, the courts must continue to sanction race-conscious numerical remedies even in a non-employment context. And this type of preferential treatment merely fosters the ideal of equality, a concept articulated in the Constitution.

In this historically significant case, which may have an adverse impact on millions of minorities and women, the issues go beyond the mechanical interpretations of the MBE set-aside provision. This provision was not promulgated in a vacuum. It was born out of Congress' deep understanding of the plight of minority businessmen in general and minority businessmen in the construction industry in particular in entering the marketplace to sell their goods and services.

CONCLUSION

Amici Curiae respectfully submit that the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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