IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERALD N. 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 AIRCONDITIONING CO., INC.,

Petitioners,

v.

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 AMICUS CURIAE OF NATIONAL CONFERENCE OF BLACK MAYORS, INC.

BERNARD PARKS
LENWOOD A. JACKSON
GEORGE L. HOWELL

PARKS JACKSON & HOWELL, P.C.
Suite 1150
100 Peachtree St., N.E.
Atlanta, Ga. 30303
(404) 577-5900

TABLE OF CONTENTS

AUTHORITIES CITED

AUTHORITIES CITED (Continued)

I. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Amendment XIV, Section 1 of the United States Constitution provides:

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. STATUTES INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) provides:

> "2. Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project 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. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, et al.,
Appellants,

v.

JUANITA KREPS, Secretary of Commerce of the United States of America, et al.,
Respondents.

AMICUS CURIAE BRIEF

The National Conference of Black Mayors, Inc., with the consent of all parties, respectfully submits this brief as *Amicus Curiae.*

III. THE CONSTITUTIONAL AND LEGAL ISSUES PRESENTED

This Court is called upon to decide herein two issues:

A. Whether the requirement contained in Section 103(f)(2) of the Local Public Works Capital Development and Investment Act of 1976 (42 U.S.C. §6701, et seq.) (the "Public Works Act") that 10% of the grants made thereunder be allocated to "minority business enterprises" is permissible under the Due Process or Equal Protection provisions of the Constitution of the United States?

B. Whether Section 103(f)(2) of the Public Works Act (the "set-aside amendment") is violative of Title VI of the Civil Rights Act of 1964?

In the present case, Appellants, as associations of (non-minority) contractors, contend that the set-aside amendment to the Public Works Act is a preference enacted by Congress to benefit minorities, which has an effect upon them so burdensome as to be illegal. They claim, therefore, that the set-aside amendment violates the modern equal protection standards of the Constitution and Title VI of the Civil Rights Act of 1964. In short, the contractors are attacking the constitutionality and legality of the set-aside amendment as a device for remedying the present effects of past racial discrimination against, in this case, minority business enterprises.

The case represents yet another attempt to undermine the already eroding public policy of the United States to take meaningful actions to remedy obvious manifestations of a prior policy of race discrimination as expressed by its laws, and as interpreted by its courts. The approach of Appellants is to question the competence of the courts to determine the obvious, but not expressly stated purpose of the set-aside provision, and their authority to take judicial cognizance of past discrimination where specific formal findings thereof were not made by the Congress. Appellants contend that this governmental device to eliminate the existing discrepancies between the races in the building industry, in the absence of a formal finding by the Congress of past discrimination, must fail constitutionally since it would, by favoring minorities, have an adverse impact upon non-minorities. The classic "reverse discrimination" issue, which considers it immaterial that non-minorities were favored in the past, is here presented to the Court, in the context of a federal grant program for local public works construction.

The *Amicus Curiae* respectfully urges the Court to

deny Appellants any relief; to uphold the unquestionably legitimate and obvious congressional purpose of the subject Act, and respectfully submits that the court below correctly framed and decided the issues presented.

IV. INTEREST OF THE AMICUS CURIAE

The *Amicus Curiae*, National Conference of Black Mayors, Inc. ("NCBM"), is a non-partisan, non-profit, service organization, formed to assist its membership, consisting of approximately 175 black mayors, in addressing the problems confronting them and the communities which they serve. The overwhelming majority of the mayors are recently elected with little or no previous experience in relating to the problems of municipalities. Most serve small, rural municipalities, with severely limited resources.

NCBM gears its programs and activities to, *inter alia*, develop the executive management capacity of the mayors, and to enhance and improve the efficiency and magnitude of the delivery of municipal services in their respective communities. Ultimately, it is hoped that NCBM will be instrumental in improving the social and economic well-being, and hence, enhancing the quality of life of the 22 million people, in the aggregate, which its members serve.

Most of the municipalities from which NCBM's members are elected are comprised of populations which are predominantly black, and many of the nation's black-owned businesses operate in and comprise a significant portion of the tax base of such municipalities. Hence, these communities stand to benefit doubly: indirectly from the set-aside provision of the Public Works Act, and directly as grantees. The overall well-being of a com-

munity is dependent upon the vitality of its business community. Thus, it is in NCBM's interest that the decision of the court below be upheld by this Court.

V. ARGUMENT

A. The Set-Aside is a Legally Appropriate Mechanism to Attain Legitimate Governmental Goals.

The principle that race may be utilized by government as a valid classification in formulating remedies to overcome the effects of past racial discrimination against that same race is now finally and firmly entrenched in the law.[1] Such classifications may have legitimate governmental objectives, and are not, therefore, per se violations of the Due Process or Equal Protection Clauses.[2]

The constitutional validity of the set-aside as a device for eliminating obvious discrepancies existing between small business concerns comprised of socially or economically disadvantaged persons mostly from ethnic minorities, and the business community at-large, is now well established.[3]

Obviously, as the court below concluded after careful examination of the circumstances surrounding the adoption of the set-aside amendment in question, its purpose was to remedy the continuing effects of past discrimination against racial and ethnic minorities.[4]

---

[1] *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978). See also, *Kahn v. Shevin*, 416 U.S. 351 (1974).

[2] See the concise discussion in *Contractors Assn. of W. Pa. v. Kreps*, 573 F.2d 811, 85 (1978).

[3] *Eastern Canvas Products, Inc. v. Brown*, 580 F.2d 675 (D.C. Cir., 1978), *Ray Ballie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696 (5th Cir. 1973), *cert. denied*, 411 U.S. 914 (1974); *Valley Forge Flag Co. Inc. v. Kleppe*, 506 F.2d 243 (1974); *Fortec Constructors v. Kleppe*, 350 F.Supp. 171 (D.D.C. 1972).

[4] *Fullilove v. Kreps*, 584 F.2d 600, 604-05 (2d Cir. 1978).

Appellants' constitutional attack on the set-aside amendment is based upon the absence of formal specific findings of the present effects of past discrimination in the construction industry. The issue becomes, therefore, whether the constitutionality of the set-aside amendment is impaired as a result thereof.

B. Easily Discernible Conditions Exist which the Congress Obviously Sought to Remedy by the Set-Aside Amendment.

It has, for some time now, been widely recognized that minority businesses are not an integral part of America's free enterprise system.[5] While the specific hard statistical data regarding minority businesses may not be at the fingertips of most reasonably aware members of the general public, the general state of affairs as to how minority business enterprises fare in the larger economy should be a matter of common knowledge. Members of Congress are required, by the nature of their duties, to be even more informed as to such matters.

For example, a cursory look at the state of the largest ethnic group represented among minority business enterprises, blacks, presents a telling picture.[6] In 1978, e.g., Campbells Soup Company produced more revenue from its soup sales than was produced by the aggregate of the sales of all 100 of the largest black-owned businesses taken together![7] The construction industry is no exception.

---

[5] See, e.g., Summary of Activities of the Committee on Small Business, 94th Cong., 2d Sess., 182-83 (1976).

[6] Approximately 51% of all minority business enterprises in the United States are owned by blacks. 1972 Survey of Minority-Owned Business Enterprises, Bureau of the Census Special Report (May 1975).

[7] *Compare Fortune*, May 7, 1979, at 274, *with Black Enterprise*, June 1979, at 140.

In 1972, the latest year for which census data are available, minority business enterprises accounted for slightly more than one percent of the total gross revenues produced in the construction industry.[8] That such conditions, in fact, exist cannot be ignored by the Court.

C. The Absence of Formal Congressional Findings Regarding the Specific State of the Minority Business Enterprise in the Construction Industry Does Not Render the Set-Aside Amendment Constitutionally Invalid.

The absence of specific congressional findings of present manifestations of past discrimination based upon race does not, of course, result in the conclusion that such manifestations do not exist. If it appears to the Court that the legislative act under scrutiny has a rational basis in fact, its validity should be upheld and the will of the Congress respected.[9] Strict scrutiny does not require a different result.[10]

The effect of the Court adopting the Appellants' view that the absence of formal legislative findings aborts the attempt of Congress to remedy a perceived condition, would be a substantial and unwarranted encroachment by the Judiciary upon the Legislative branch of government. It would establish the principle that Congress may not enact by floor amendment, measures calculated to

[8] *Compare* 1972 Survey of Minority-Owned Business Enterprises, supra note 6, *with* 1972 Census of Construction Industries, Bureau of the Census (June 1976). The figures were $152.7 billion in receipts for all construction firms as compared with $1.7 billion for all minority firms.

[9] See, e.g., *Weiner v. Cuyahoga Community College District*, 19 Ohio St. 2d 35, *cert. denied*, 396 U.S. 1004 (1970).

[10] *Regents of the Univ. of Calif. v. Bakke*, supra note 1, at 365-66 (opinion of Brennan, J.).

remedy the effects of a historically documented, unconstitutional denial of equal protection based upon race or national origin. Moreover, such a result would undermine the inherent respect which one branch of government must have for another under our separation of powers scheme of government.

The court below, it is submitted, utilized the appropriate standard of judicial review of the actions of Congress.[11] It reviewed, rationally and analytically, the events surrounding the passage of the set-aside amendment giving its co-equal branch of government the benefit of any doubt; concurred in the relevance of information generally available on the subject of the lack of opportunities for minority business enterprises generally and that information specifically available to the Congress, and concluded that:

> [the trial] judge's finding that Congress acted upon sufficient evidence of past discrimination is more than amply supported by the record and establishes a "perceived" basis for congressional action.[12]

Laws are not enacted in a vacuum but against the backdrop of history, subject to the influence of the personal experiences of the legislators who are guided by the dictates of common sense and act on the basis of available information.

D. No Violation of Title VI Exists because the Requisite Harm Resultant from the Suspect Classification Has Not Been Established.

The benefits of Title VI of the Civil Rights Act of 1964, of which Appellants seek to avail themselves, may only be invoked upon a showing of harm resultant from govern-

[11] Id. at 365-66 (opinion of Brennan, J.).
[12] *Fullilove v. Kreps*, supra note 4, at 606.

mental action predicted upon a racial or other prohibited classification. That is to say, the issue of "reverse discrimination" resultant from a preferential classification is without merit unless the person or class seeking the protection of Title VI can establish the imposition of a substantial burden directly resultant from the preference.[13]

The burden which was imposed upon Mr. Bakke, for example, as a result of the preferential treatment afforded minorities by the University of California Medical School was direct, personal and substantial: the denial of his admission to medical school for two consecutive years. The governmental burden which Appellants are asked to bear is mild by comparison. Here, the obvious compelling interest of the federal government, consistent with its long established policy, is to remedy the effects of past discrimination against minorities and easily outweighs the potential harm which non-minority contractors *might* suffer (only in the event of the occurrence of several contingencies, if at all) by the enforcement of the set-aside amendment by the Secretary of Commerce.[14]

Even assuming that all 10% of the total of $6 billion appropriated by the Congress through May 1977 was expended for minority business enterprises which were wholly minority,[15] it could not be reasonably concluded that such an expenditure would have any meaningful adverse impact upon non-minority business enterprises

[13] *Regents of the Univ. of Calif. v. Bakke*, supra note 1, at 299-300 (opinion of Powell, J.).

[14] See *Fullilove v. Kreps*, supra note 4 at 602.

[15] By virtue of the definition of "minority business enterprise" in Section 103(f)(2) of the Public Works Employment Act of 1977, as "a business at least 50 per centum of which is owned by minority group members", it is possible that as many as one-half of the individual beneficiaries of the set-aside amendment may be non-minority.

or any discernible segment thereof. No such showing has been made by Appellants in the case at hand.

Accordingly, under the circumstances, there is no substantial burden of the effect of ameliorating the vestiges of discrimination against minorities in the area of business opportunity, to be borne by non-minority members represented by the Appellants in the case *sub judice.*[16]

---

[16] See discussion in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773-78 (1976) where the Court recognized that:

> a sharing of the burden of the past discrimination is presumptively necessary—is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that "attainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies." (Citing *Phelps Dodge v. NLRB*, 313 U.S. at 188)

VI. CONCLUSION

For the foregoing reasons, we respectfully request that this Court uphold and support not only the legality, but the appropriateness of the set-aside device as a legitimate governmental exercise to remedy the lingering effects of past discrimination. That this Court, in effect, declare it the public policy of this nation to encourage and obligate the powers of government to affirmatively foster equality of opportunity in all aspects of the life of its citizens, and to provide remedial measures as long as the obvious need exists, especially in situations such as the one here presented, where the adverse effect upon another classification of citizens is minimal at best.

PARKS JACKSON & HOWELL, P.C.

By: /s/ BERNARD PARKS
BERNARD PARKS

By: /s/ LENWOOD A. JACKSON
LENWOOD A. JACKSON

By: /s/ GEORGE L. HOWELL
GEORGE L. HOWELL

Attorneys for Amicus Curiae

VII. CERTIFICATE OF SERVICE

I, BERNARD PARKS, one of the attorneys for the *Amicus Curiae*, National Conference of Black Mayors, Inc., and a member of the Bar of the Supreme Court of the United States hereby certify that, on the 6th day of October, 1979, I served copies of the foregoing *Amicus Curiae* Brief upon the parties as follows:

1. By mailing copies in duly addressed envelopes, with sufficient postage prepaid to their respective attorneys of record as follows:

TO: Robert G. Benisch, Esquire
Colleran, O'Hara & Kennedy, P.C.
Attorneys for Petitioners
1461 Franklin Avenue
Garden City, N. Y. 11530

TO: Honorable Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D. C. 20530

TO: Brian K. Landsberg, Esquire
Department of Justice
Attorney for Juanita Kreps
Secretary of Commerce
Washington, D. C. 20530

TO: Honorable Robert Abrams
Attorney General of the State of New York
2 World Trade Center
New York, New York 10047

BERNARD PARKS
PARKS JACKSON & HOWELL, P.C.
Suite 1150
100 Peachtree Street, N.W.
Atlanta, Georgia 30303
Attorney for the Amicus Curiae
National Conference of Black
Mayors, Inc.