IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, *et al.*,

Plaintiffs,

v.

JUANITA KREPS, *et al.*

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

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE NATIONAL URBAN LEAGUE, INC., THE NATIONAL BANKERS ASSOCIATION, INC., AND THE NATIONAL BAR ASSOCIATION, AS *AMICI CURIAE*

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INTEREST OF AMICI

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to

black persons suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of race discrimination issues regarding employment. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 747 (1976). The Legal Defense Fund believes that its experience in such litigation and the research it has done will assist the Court in this case. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

The National Urban League, Inc., is a charitable and educational organization established as a not-for-profit corporation under the laws of the State of New York. For more than 69 years, the League and its predecessors have addressed themselves to the problems of disadvantaged minorities in the United States by improving the working conditions of blacks and other minorities, and by fostering better race relations and increasing understanding among all persons.

The National Bankers Association, a non-profit organization incorporated in 1972 under the laws of the District of Columbia, was founded

in 1927 as the National Negro Bankers Association. The National Bankers Association is a national trade organization for minority-owned and controlled banks. The purposes of the Association include strengthening minority financial institutions so that they can, in turn, promote economic progress in minority communities and by minority businesses. The Association has a particular interest in this case because of its possible impact on ongoing federal efforts to increase government deposits in minority banks.

The National Bar Association founded in 1925, is a professional membership organization which represents more than 10,000 black attorneys, judges and law students in the United States. Its purposes include achieving equal opportunities for minorities in the legal profession, and protecting the civil and political rights of all citizens. The Association has a particular interest in this case because of its belief in the importance of affirmative action as a means of solving America's racial problems. The Association's officers are Robert L. Harris (President), William A. Borders, Jr. (President-Elect), George R. Burrell, Jr., Warren H. Dawson, Stuart J. Dunnings, Jr., Renee Jones Weeks (Vice Presidents), Arnette R. Hubbard (Secretary) and Arthenia L. Joyner (Treasurer).

SUMMARY OF ARGUMENT

The use of racial classifications for benign purposes is constitutionally permissible where it serves important purposes and does not represent a slur or stigma on any group. That construction of the Fourteenth Amendment, advanced by four members of the Court in Regents of University of California v. Bakke, 438 U.S. 265, 361 (1978), was supported by two additional Justices in United Jewish Organizations v. Carey, 430 U.S 144, 164 (1977). This standard is consistent with the legislative history of the Amendment, which was framed and approved by the same Congress that adopted a number of race-conscious laws designed to ameliorate the condition of blacks.

The fact that the MBE provision was not considered during the hearings on the 1977 Public Works Act is not fatal to its validity. The exigencies of the then-existing economic circumstances compelled Congress to act with extraordinary speed to enact the 1977 Act, and precluded as a practical matter inquiry into the experience of minorities under the 1976 Public Works Act. Minority set-asides were by 1977 a remedial device already in use by and familiar to the federal and state governments.

The debates on the MBE clause reveal that it was intended to overcome both present discrimination and the continuing effects of past dis-

crimination against minority businesses and minority employees. Each of these problems had been the subject of repeated and exhaustive past congressional hearings and reports, which supported the decision of Congress. Proponents of the clause also maintained that it alone would suffice to resolve the problems with which it was concerned. While this conclusion was not essential to the clause's validity, it too was fully supported by past congressional hearings and reports.

ARGUMENT

I. THE APPLICABLE CONSTITUTIONAL STANDARD

Resolution of the instant case requires a determination of the standard by which to measure the constitutionality of a racial classification established for a benign reason. This issue was considered but not finally decided in Regents of University of California v. Bakke, 438 U.S. 265 (1978). In Bakke only five members of the Court reached this question; four expressly rejected the traditional strict scrutiny test, holding instead that such a classification need only meet three less stringent requirements: (1) there must be "an important and articulated purpose for its use," (2) it must not "stigmatize any group," (3) it must not "singl[e] out those

least well represented in the political process to bear the brunt of a benign program." 438 U.S. at 361 (opinion of Justices Brennan, White, Marshall and Blackmun). The usual strict scrutiny test was also rejected by two additional members of the Court in United Jewish Organizations v. Carey, 430 U.S. 144 (1977). Part IV of Justice White's opinion in that case, which was joined in by Justices Stevens and Rehnquist, upheld as consistent with the Fourteenth Amendment the race-conscious drawing of district lines so long as such a plan represented no "racial slur or stigma with respect to whites or any other race." 430 U.S. at 165. This seems identical to the second requirement listed by the plurality opinion in Bakke. Thus a benign racial classification which satisfied the three requirements of the Bakke plurality would appear to command the support of a six-member majority of the Court.[1/]

This constitutional standard is strongly supported by the legislative history of the Fourteenth Amendment, which we set out at length

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1/ The standards in Bakke and United Jewish Organizations are not literally the same, although as a practical matter a classification failing the first or third Bakke requirement would probably fail as well the UJO test. The distinction between these standards does not affect the disposition of the instant case, and would not affect the validity of the racial classifications with which we are familiar. Accordingly we take no position on these alternative articulations of the underlying rule.

in our brief amicus curiae in Bakke.[2] See 438 U.S. at 396-98 (Marshall, J.) That history reveals that the Congress which framed the Fourteenth Amendment contemporaneously debated and overwhelmingly approved a variety of programs limited to blacks, and regarded the Amendment as providing a constitutional basis for such programs.

In the years immediately preceding and following the framing of the Fourteenth Amendment, the Congress which authored that provision also enacted a series of race-conscious social programs. The combined impact of these programs was far greater than the affirmative action measures which have come before this Court. The racial classifications in those nineteenth century programs were far more exclusive than the measures common today; they were either limited to blacks alone, or included within their ambit only blacks and a nominal number of white loyalists who had fled the South.[3] The 1865 Freedmen's Bureau Act[4] established the Bureau to provide provisions, clothing and fuel for freedmen, to lease and

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2/ Brief of NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae, No. 76-811, pp. 10-53 (hereinafter cited as "Amicus Brief").

3/ Amicus Brief pp. 19-42.

4/ 13 Stat. 507-508 (1865).

ultimately sell to them up to 40 acres of land, and to "control ... all subjects" relating to freedmen. Although the Bureau's authority also extended to white refugees, neither Congress[5/] nor historians[6/] regarded this provision as important, and the Bureau's programs, as Congress was aware, were in operation usually limited to freedmen.[7/] The 1866 Freedmen's Bureau Act, enacted over President Johnson's veto, authorized educational programs which were expressly limited to "freedmen."[8/] In 1867 Congress appropriated funds "for the relief of freedmen or destitute colored people in the District of Columbia,"[9/] with no provision for aid to destitute whites. In the same year Congress enacted the Colored Servicemen's Claim Act, providing for black veterans, and for them alone, special assistance in obtaining funds owed them by the government.[10/] The Freedmen's Bureau's programs for blacks were ultimately phased out by

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5/ Cong. Globe, 38th Cong., 1st Sess. 693 (1864); see Amicus Brief, pp. 21-23.

6/ G. Bentley, A History of the Freedmen's Bureau 47-49 (1955); P. Pierce, The Freedmen's Bureau 42-45 (1904).

7/ H.R. Exec. Doc. No. 11, 39th Cong, 1st Sess. (1865).

8/ 14 Stat. c. 200, 174-176 (1866).

9/ 15 Stat. Res. 4, 20 (1867).

Congress on the assumption that its work would be continued by the states, an expectation that went unfulfilled for a century.

The racial classifications in this early legislation did not go unnoticed, but were the source of repeated but ineffective opposition in the Congress and on the part of President Johnson, who twice vetoed the 1866 Freedmen's Bureau bill on that basis.[11/] The arguments voiced in vain against this legislation closely resemble the contentions raised against affirmative action programs in our own time. Characterizing these measures as "class legislation",[12/] opponents objected that no comparable aid was being provided to equally needy whites.[13/]

> A proposition to establish a bureau of Irishmen's affairs, a bureau of Dutchmen's affairs, or one for the affairs of those of

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11/ VIII Messages and Papers of the Presidents, 3610-11 (1914).

12/ See e.g., Cong. Globe, 39th Cong. 1st Sess. 37 (1866) (remarks of Congressman LeBlond); VIII Messages and Papers of the Presidents, 3623 (1914); Cong. Globe, 40th Cong., 1st Sess. 79 (1867) (remarks of Sen. Grimes).

13/ See e.g., Cong. Glove 39th Cong., 1st Sess. 297 (remarks of Sen. Stewart), 319 (remarks of Sen. Hendricks), 372 (remarks of Sen. Johnson), 372 (remarks of Sen. Davis), 401 (remarks of Sen. McDougall), 629 (remarks of Rep. Marshall); App. 71 (remarks of Rep. Chanler) (1866).

> Caucasian descent generally, who are incapable of properly managing or taking care of their own interests by reason of a neglected or deficient education, would, in [our] opinion ..., be looked upon as the vagary of a diseased mind. Why the freedmen of African descent should become the marked objects of special legislation, to the detriment of the unfortunate whites, [we] fail to comprehend. 14/

It was urged that such programs would ultimately prove harmful to blacks, either by increasing their dependence 15/ or by provoking white resentment. 16/ Taxing whites to support programs aiding only blacks was criticized as unfair, 17/ and as giving blacks an unfair competitive advantage over whites. 18/

Proponents of such race-conscious legislation, however, successfully argued that such race-conscious legislation was justified by the

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14/ H. R. Rep. No. 2, 38th Cong., 1st Sess. 2, 4 (1864).

15/ Cong. Globe, 39th Cong., 1st Sess. 401 (remarks of Sen. McDougall) (1866).

16/ Id. at App. 69-70 (remarks of Rep. Rousseau).

17/ Id. at 362 (remarks of Sen. Saulsbury), 634, 635 (remarks of Rep. Ritter); App. 83 (remarks of Rep. Chanler).

18/ "Mr. Speaker, when I was a boy, and in common with all other Kentucky boys was brought in company with negroes, we used to talk, as to any project, about having 'a white man's chance.' It seems to me now that a man may be very happy if he can get 'a negro's chance.'" Id.

special needs of blacks[19] and in the long term interest of all citizens.[20] They emphasized that those special needs were the result of a long history of discrimination, and that the aid would help blacks to become self-supporting.[22] A distinction was drawn between such benign race-conscious measures and invidious discrimination.

> One object of this bill is to ameliorate the condition of the colored men .... [Its opponents assert] the bill provides one law for one class of men, and another for another class. The very object of the bill is to break down the discrimination between whites and blacks. Therefore I repeat that the true object of this bill is the amelioration of the condition of the colored people. [23]

19/ See, e.g., id. at 365 (remarks of Sen. Fessenden), 568 (remarks of Rep. Donnelly); App. 75 (remarks of Rep. Phelps).

20/ See e.g., Cong. Globe, 40th Cong., 1st Sess. 444 (remarks of Rep. Scofield) (1867).

21/ See e.g., Cong. Globe, 39th Cong., 1st Sess. 322 (remarks of Sen. Fessenden and Sen. Trumbull) ("We shall not long have to support any of these blacks out of the public Treasury if we educate and furnish them with land upon which they can make a living for themselves.") (1866).

22/ See, e.g., id. at 589 (remarks of Sen. Donnelly), 630 (remarks of Rep. Hubbard).

23/ Id. at 631-32 (remarks of Rep. Moulton).

This distinction was apparently accepted by the majority of Congress, which consistently voted to adopt such race-conscious legislation.

The Fourteenth Amendment was fashioned and approved by the same Congress which had consistently adopted legislation with such "ameliorative" racial classifications. The Amendment was adopted in part to remove doubts as to the constitutionality of the Freedmen's Bureau bills,[24/] which President Johnson had argued exceeded the authority of Congress.[25/] The Freedmen's Bureau Act of 1866, the Reconstruction measure which probably contained the most important race-specific provisions, was considered and approved by Congress simultaneously with the Fourteenth Amendment.[26/] The same legislators

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24/ J. tenBroek, Equal Under Law 201, 203 (1965); Cong. Globe, 39th Cong., 1st Sess. 1088 (remarks of Rep. Woodbridge), 1092 (remarks of Rep. Bingham) (1866).

25/ VIII Messages and Papers of the Presidents 3599 (1914).

26/ The House passed the Amendment on May 10, 1866, the Senate voted a modified version on June 8, 1866, and the House acquiesced in the Senate changes on June 13, 1866. Cong. Globe, 39th Cong., 1st Sess. 2545, 3042, 3149 (1866). The House approved the Freedmen's Bureau Act on May 29, 1866, the Senate voted a modified version on June 26, 1866, and the Conference Report was accepted on July 2 and 3, 1866. Id., at 2773,

who comprised the two-thirds majority necessary to override President Johnson's second veto of the Freedmen's Bureau bill also comprised the two-thirds majority that approved the Fourteenth Amendment. Of the 33 Senators and 104 Representatives who voted to override that veto, every one who was present for the vote also supported the Fourteenth Amendment.[27/] Congressman Stevens, introducing the Fourteenth Amendment to the House, described its basic purpose as providing for "the amelioration of the condition of the freedmen."[28/] These were the exact words used only three months earlier to describe the Freedmen's Bureau bill.[29/] This identity of phrasing underlines the perceived compatibility of the two measures. The supporters of the Act and Amendment regarded them as both consistent and complimentary, while opponents viewed the two, together with the Civil Rights Act of 1866, as part of a

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26/ cont'd.

3413, 3524, 3562. On several occasions the Act was being debated in one house at the same time the Amendment was being debated in the other. See, e.g, id. at 2799, 2807, 2869, 2977.

27/ Id. at 3042, 3149, 3842, 3850.

28/ Id. at 2459.

29/ See p. 11, supra.

single coherent, though in their view undesireable, policy.[30/]

The Thirty-Ninth Congress, which was well aware of the race-conscious remedies and limitations contained in the Freedmen's Bureau bills it passed in February and July of 1866, cannot conceivably have intended by its approval of the Fourteenth Amendment on June 12, 1866, to invalidate or forbid such remedies. The debates in that Congress have an uncannily modern tone; the opposition to race-specific remedies was expressed in much the same terms as the contemporary arguments against measures such as the minority set-aside program. But the framers of the Fourteenth Amendment clearly regarded it as not merely permitting, but affirmatively authorizing such programs. Many of the race-conscious provisions adopted dealt with the problems of black farmers, the most important group of minority businessmen in nineteenth century America. In assessing that ameliorative legislation, the Thirty-Ninth Congress applied no special stringent standard, but inquired only whether it was reasonably calculated to serve an ameliorative purpose. That is the standard which this Court should apply

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30/ Cong. Globe, 39th Cong., 1st Sess. 2501 (remarks of Rep. Shanklin), 2537-8 (remarks of Rep. Rogers), 2941 (remarks of Sen. Hendricks); App. 239-40 (remarks of Sen. Davis).

in assessing the constitutionality of such measures.

II. THE ORIGIN OF THE MBE PROVISION

The petitioners focus their constitutional attack on the MBE provision on the congressional processes leading to its adoption, claiming that the lack of hearings on this provision is unjustifiable and virtually fatal to its validity. They regard the adoption of that measure in 1977 on the floors of the House and Senate as inexplicable and hasty, representing merely a seizure of federal funds for the black community to which the majority of Congress incomprehensibly, and erroneously, agreed. We suggest that the actual origin of the MBE provision is somewhat different. .In adopting the 1977 Act, Congress was required to act with extraordinary speed to deal with the critical economic situation. Hearings concerning the experience of minorities under the 1976 Act were not possible because implementation of that statute was only just beginning. Congress acted reasonably in choosing a set-aside provision, an established federal and state device, to deal with the well-known general problems of minority contractors.

The Public Works Acts of 1976 and 1977 were adopted to address problems created by the reces-

sion which began in 1974, the worst economic downturn which the country had suffered in the past 40 years. Following the lifting of wage-price controls, and spurred by the dramatic increase in oil prices in early 1974, the annual inflation rate of the consumer price index rose from 3.4% in 1972 to 8.8% in 1973 and 12.2% in 1974.[31/] The Federal Reserve Board, with the support of the administration, raised the discount rate from 4.5% in 1972 to 7.8% in 1974, in the hope of cooling off the economy.[32/] This in turn caused the prime rate to rise in the same period from 5.25% to the then unheard of level of 10.81%.[33/] This greatly increased the cost of borrowing, slowing down capital investment, which fell 12% in real terms in 1974.[34/] Higher interest rates, together with the reduction in bank deposits due to the higher rates of return available elsewhere, reduced housing starts by 34% in that year.[35/] These events combined to produce in 1974 a reduction in the gross national product,

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31/ Economic Report of the President, 1979, p. 244. The same data can be found in editions from 1975 through 1978.

32/ Id. p. 258.

33/ Id.

34/ Id. p. 235.

35/ Id. p. 224.

and an increase in the unemployment rate from 4.9% to 5.6%.[36/]

By January of 1976, these economic and fiscal policies had reduced the inflation rate from 12.2% to 7.0%,[37/] but the unemployment rate for 1975 had risen to 8.5% and 7.8 million people were out of work,[38/] almost twice as many as in 1973. Unemployment benefits in 1975 had totaled $16.8 billion, and were on the verge of bankrupting several state unemployment agencies. In these difficult circumstances a debate began as to whether federal policies should continue to focus on the problem of inflation, at the risk of continuing the recession, or should emphasize instead stimulating the economy and reducing unemployment. The President urged the former approach, while a majority of Congress supported the latter. To implement its preferred policy Congress began work on a public works program, which would inject additional funds into the economy and which permitted the focusing of those funds on the construction industry, particularly hard hit by the recession. Congress adopted in July 1976, over the President's veto, the Local

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36/ Id. p. 217.

37/ Id. p. 244.

38/ Id. pp. 216, 221.

Public Works Capital Development and Investment Act of 1976. 90 Stat. 889. The 1976 Act mandated the granting of $2 billion in aid to state and local governments. The effectiveness of this program required that the funds be spent immediately, while the economy was still struggling to pull out of the recession, and that they be spent over a short period of time so as not to dissipate their stimulative effect. Congress therefore required the Economic Development Administration ("EDA") to publish implementing regulations within 30 days, 42 U.S.C. § 6706, and to act on any application within 60 days, 42 U.S.C. § 6706, and provided that any project for which funds were awarded must begin within 90 days of EDA approval, 42 U.S.C. §6705(d).[39/]

The economic situation confronting the incoming administration in January, 1977, was even more complex. The unemployment rate in December, 1976 was 7.8%, the same level as January, 1976, and higher than the 7.3% rate reached in May of that year.[40/] The gross national product, which had

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39/ Funding was also available for projects funded in part by other federal laws if those other funds were available "immediately." 42 U.S.C. § 6703. The funding of projects jointly with state or local contributions was permitted only if the needed contributions were available "immediately." 42 U.S.C. § 6704.

40/ Economic Report of the President, 1977, p. 221.

increased at a healthy 9.2% annual rate during the first quarter of 1976, had risen only 3.0% during the last quarter.[41/] The Council of Economic Advisors concluded that the decline of the GNP growth rate was the result in part of sluggish spending by federal, state and local governments; government purchases in constant dollars had fallen 4.9% during the first quarter, and had risen only 0.4% over the entire year.[42/] The inflation rate had fallen considerably, from 7.0% in December, 1975 to 4.8% in December, 1976.[43/]

Under these circumstances the new administration, which had been elected on a platform placing unemployment ahead of inflation as its first priority, decided that strong measures were necessary to stimulate the economy. It was also aware, however, as was Congress, that time was of the essence; if additional federal spending were to have the desired effect, it had to occur while the economy was still in its then sluggish condition. If the funds were not actually expended until after a healthy growth rate had

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41/ Id. p. 59.

42/ Economic Report of the President, 1979, p. 244. The 1977 Act had found that reduced state and local government spending tended "to undermine the Federal Government's efforts to stimulate the economy." 42 U.S.C. § 6721.

43/ Id.

begun, those funds, far from helping the economy, would tend to overheat it and cause increased inflation.

Accordingly, both the incoming administration and the Congress acted with unprecedented but essential speed. On January 4, 1977, Congressman Roe, chairman of the Economic Development Subcommittee of the House Public Works Committee, introduced H 78, calling for an additional $4 billion in public works expenditures.[44/] On January 7, 1977, the President-elect met with congressional leaders and agreed upon an economic stimulus package that included that $4 billion for emergency public works.[45/] A similar bill was introduced in the Senate on January 25 by Senator Randolph.[46/] The details of the administration's proposals became known the next day.[47/] On January 27, the Secretary of the Treasury testified in support of the stimulus package, urging that the funds should be spent "as quickly as good management allows" and that "speed is clearly

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44/ 123 Cong. Rec. H 78 (daily ed. January 4, 1977).

45/ New York Times, January 8, 1977, 1:5, 6:3.

46/ 123 Cong. Rec. S 1349 (daily ed. January 25, 1977).

47/ New York Times, January 26, 1977, 1:6.

of the essence."[48/] The President's Message on the Economic Recovery Act stressed "the need for an immediate stimulus to government purchasing power" and urged "prompt" action.[49/] House[50/] and Senate[51/] hearings on the proposals were completed on February 4, 1977, barely a month after the proposal was introduced in the House, and only 10 days after its introduction in the Senate. The House report was issued on February 16,1977, and the bill reached the floor and was passed on February 24, 1977.[52/] The Senate Report was released on March 4, 1977, and the Senate approved the bill 6 days later.[53/]

48/ Hearings on the Conduct of Monetary Policy Before the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. 3, 12 (1977).

49/ H. Doc. 95-68 95th Cong., 1st Sess. 123; Cong. Rec. H 653 (daily ed. Feb. 1, 1977).

50/ H. Rep. 95-20, p. 2 (1977).

51/ S. Rep. 95-38. (1977). The report stated that the Funds were "urgently needed." Id. p. 3.

52/ 123 Cong. Rec. H 1401-H 1462 (daily ed., Feb. 24,1977).

53/ 123 Cong. Rec. S3851-S3928 (daily ed. March 10, 1977).

In urging quick passage of the bill Senator Randolph explained:

> The timing of public works projects, of course, is very important. There are economic peaks and valleys in America, which we call recession or depression ... Today ... we have unemployment of perhaps 8 million people. We now understand that these types of public works projects do much to offset the fluctuation of business cycles. We need this legislation now, because in most of our country, at least a considerable portion, the spring is the time when these projects can get underway. We do not want to wait until the middle of the summer and let the fall and the colder months of the year approach again. We want the beginning of these projects in what I call the construction season. 54/

Congressman Roe called for

> [p]rompt enactment [to] enable the EDA to immediately release the additional funds for those applications already on file, and put our people back to work .... [T]he Committee ... very carefully designed this program so that it could be implemented as efficiently and expeditiously as possible, avoiding the long lag time sometimes associated with public works construction. We designed this program to have an immediate anti-recessionary impact on the economy. 55/

54/ 123 Cong. Rec. S3858 (daily ed. March 10, 1977).

55/ 123 Cong. Rec. H 1401 (daily ed. Feb. 24, 1977).

In signing the 1977 Public Works Act the President emphasized that it would provide "immediate funding" for construction projects.[56/]

It was in the context of this widely recognized need for extraordinarily prompt action, resulting in the enactment of a major piece of legislation with virtually unprecedented but clearly essential speed, that the MBE provision was added to the bill. Under the 1976 Public Works Act the first grants were only announced on December 26, 1976.[57/] The House and Senate hearings held barely a month later dealt almost exclusively with the formulas and criteria used to pick the projects chosen on December 26, 1976. To a significant degree these formulas and criteria, which were widely criticized as directing funds to areas with very little unemployment, were known from regulations issued by EDA well prior to December. On the other hand, because the first grants to state and local governments were only announced in late December, the process of letting of contracts by those governments could only commence after that date, and those contracts generally required a time-consuming competitive bidding process; thus the actual awarding of contracts was only just beginning on February 4, 1977, when the congressional hearings ended. The

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56/ Public Papers of the President, Jimmy Carter, 1977, p. 870.

57/ S. Rep. 95-38, p. 2 (1977).

hiring of the workers who ultimately received employment under the 1976 Act was only to occur later yet. And although EDA kept detailed statistics on which cities and states won grants, it does not appear to have had similar data available regarding the race of contrators or their employees.[58/]

Thus the detailed hearings and reports which petitioners urge should have preceeded adoption of the MBE provision were utterly inconsistent with the economic exigencies with which Congress was concerned. Such a congressional inquiry regarding minority contractors and employees under the 1976 Act would have required months, and Congress did not have months to spare. Because of the dispatch with which it was enacted, funds for the 1977 Public Works Act became available in the late spring and early summer of 1977, when the unemployment rate averaged over 7% and the inflation rate was falling to under 5%. But had the Act been delayed six months, it probably would have been counter productive. By January 1978, the unemployment rate had fallen to 6.3%,[59/] total unemployment had fallen by 800,000,[60/] and

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58/ See Comptroller General, Minority Firms on Local Public Works Projects -- Mixed Results, p. 8 (1979). Experience Under the 1977 Act indicated minority participation under the earlier Act was low. Id.

59/ Economic Report of the President, 1979, p. 217.

inflation was up to 9.6%.[61] In 1978 the administration shifted its economic policies away from stimulation of the economy, reducing federal spending and tightening fiscal and monetary policies.[62] Thus the delay required for an inquiry into the administration of the 1976 Public Works Act would have defeated the entire purpose of the 1977 Act.

The limited information which was available at the time of the February, 1977 hearings, indicated that EDA's allocation policies had had a pronounced discriminatory impact against predominantly black communities. A study by the Michigan Advisory Committee to the United States Commission on Civil Rights revealed that the average per capita grant in towns over 90% white was almost three times as high as the average grant in towns under 90% white.[63] Minorities made up 22.5% of the population in the funded districts, but received only 12.3% of the funding.[64] This occurred despite the fact that unemployment was far higher in predominantly black communities

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61/ Id. p. 244.

62/ Id. pp. 25, 28.

63/ The average per capita grant was $47.32 in towns over 90% white and $16.48 in towns under 90% white. Hearings before the Subcommittee on Economic Development of the House Committee on Public Works and Transportation, 95th Cong., 1st Sess. p. 814 (1977).

64/ Id. p. 825.

than in predominantly white communities. Congressman Conyers of Michigan, who testified about this allocation problem, also expressed concern about minority contractors and employees.

> I have been contacted by individuals who believe that minorities and women have been deprived of employment and contracting opportunities on LPW-funded projects. I have not had time to investigate their allegations, but the historical pattern of discrimination within the construction industry lends credence to their charges. For the next few days, my staff will study this matter. If it appears that minorities and women do suffer discrimination under this program, I will propose an amendment to strengthen the nondiscrimination provision contained in the current Act. (Emphasis in original). 65/

But the hearings ended on the day Representative Conyers testified, and the House committee issued its report shortly thereafter. Thus the only route open for protecting minority contractors and employees was to offer an amendment on the floor of the House.

Conyers reported to the House that:

> EDA's Office of Civil Rights apparently made little effort to closely review affirmative action and civil rights compliance data within individual applications. 66/

He also noted his office was "replete with examples" of minority contractors unable to

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65/ Id. p. 939. The 1976 Act contained a general prohibition against discrimination. 42 U.S.C. § 6709.

win contracts because of the "intricacies" of the bidding process.[67/]

21.

The solution supported by Conyers was the MBE provision which is the subject of the instant action. The amendment was offered by Congressman Mitchell, rather than by Congressman Conyers, apparently because Mitchell was the leading House proponent of minority business enterprises, and had less than a month before he offered a bill to require that virtually all federal procurement and construction contracts be subject to a minority set-aside requirement.[68/] Giving minority business enterprises preferential treatment in bidding for federally-funded contracts was not a novel proposal. Since 1968 the Small Business Administration, acting under section 8(a) of the Small Business Act of 1953, 15 U.S.C. § 637(a), had arranged for procurement contracts to be let to minority firms without any requirement of competitive bidding. The contracts let in this manner involved thousands of minority firms and hundreds of millions of dollars.[69/] Other federal agencies maintained various programs setting

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67/ Id. H 1440.

68/ 123 Cong. Rec. H 611-H 613 (daily ed. Jan. 31, 1977).

69/ See Joint Hearing on Minority Contracting Before the Senate Select Committee on Small Business and the Subcomittee on Minority Enterprise and General Oversight of the House Small Business Committee, 95th Cong., 2d Sess. 5 (1978).

minimum levels of minority contractor participation.[70] The committee draft of the 1977 Public Works Act already contained a set-aside provision, reserving 2 1/2% of the funds for public works projects for "Indian tribes and Alaska Native Villages."[71] In proposing utilization of this approach, Congressman Mitchell and Senator Brooke emphasized that it had long been used by the federal government,[72] and that specifying the portion of government contracts to be so set aside was already a common practice among state governments.[73] Thus, when Congress adopted the MBE provision to achieve its purposes, it invoked not a radical and unprecedented solution, but a well-established device with which both the federal and state governments had substantial experience.

Under the then-existing economic circumstances, the procedures leading to the adoption of

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70/ Comptroller General, Minority Firms on Local Public Works Projects -- Mixed Results, p. 5 (1979).

71/ See 42 U.S.C. § 6707(a)(1).

72/ 123 Cong. Rec. H 1437 (daily ed. Feb. 24, 1977); 123 Cong. Rec. S 3910 (daily ed. March 10, 1977).

73/ Id. H 1437-38, H 1440. Set-aside programs in Illinois and Colorado were described in United States Commission on Civil Rights, Minorities and Women as Government Contractors, pp. 102-104 (1975).

the MBE provision were not merely understandable, but the only manner in which Congress could have addressed the underlying problems. If, as petitioners suggest, Congress can only adopt race-conscious remedies after exhaustive committee hearings and detailed committee reports, then Congress would be powerless to address such racial issues during an economic or other crisis. It is inconceivable that the Fourteenth Amendment compels such a conclusion. When that Amendment was adopted, congressional hearings were infrequent and committee reports were often perfunctory. Constitutional constraints on congressional procedures are spelled out expressly in Article I, which requires neither hearings nor reports, but only a majority vote of both houses to adopt legislation.[74/] It would be inconsistent with the separation of powers for this Court to impose on Congress other more detailed rules for the fashioning of legislation. Congress regularly adds and deletes billions of dollars from the federal budget on the floor of the House or Senate based on debates compared to which the instant legislative history is fulsome. Momentous legislation often comes into being as a floor

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74/ Jefferson's Manual of Parliamentary Practice, used by both houses in the early years of the Republic, regarded resort to committees as optional. Section XXVI (1977).

amendment; the 1968 fair housing legislation, for example, was adopted by the Senate as an amendment to a bill dealing primarily with riots, Indian rights, and violent interference with federally protected activities. Congressional committees have been both roundly condemned as inefficient and praised as essential[75/] and cogent arguments could doubtless be made for increasing or decreasing their role, but that is a matter confided to the discretion of the Congress. The Fourteenth Amendment no more enacted General Henry Robert's Rules of Order that it enacted Mr. Herbert Spencer's Social Statics.[76/]

III. THE PURPOSES OF THE MBE PROVISION

The purposes which prompted Congress to adopt the MBE provison were clearly articulated on the floors of both the House and the Senate. Because of the time constraints noted above, little information was available about the administration

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75/ See, e.g., R. Nader, Ruling Congress (1975); T. Murphy, Politics of Congressional Committees (1978); N. Ornstein, Changing Congress: The Committee System (1974).

76/ Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); Ferguson v. Skrupa, 372 U.S. 726, 728-733 (1963).

of the 1976 Public Works Act in particular, and Congress relied primarily on its knowledge of the general practices of contracting officials and federal contractors. The dismal record that had been compiled by those past practices had been the subject of repeated reports by or to the Congress, and was a record with which the Congress was quite familiar. No reason appeared then or since to believe that the administration of the 1976 Public Works Act had been significantly better than that general record, and the petitioners do not assert that Congress was not justified in relying on the broader record.

(1) Overcoming Discrimination-Based Problems of Minority Business Enterprises

Both the House and Senate proponents of the MBE provision based it in part on the need to assure minority businessmen a "fair share" of federal public works funds.[77/] Congressman Biaggi urged,

> Fiscal year 1976 figures indicate that less than 1 percent of all Federal procurement contracts went to minority business enterprises. This is a situation which must be remedied. ...[W]ithout adoption of this amendment, this legislation may be potentially inequitable to minority business and workers. 78/

77/ 123 Cong. Rec. H 1436 (remarks of Rep. Mitchell) (daily ed. Feb. 24, 1977).

78/ Id. H 1440.

Senator Brooke also noted with alarm the small number of minority businesses among federal contractors.[79/]

These statements reflect not the uninformed whim of legislators seeking favors for their constituents, but the culmination of almost a decade of congressional inquiry and action concerning minority businesses. The problems of minority business first became a major federal priority in 1969 when President Nixon signed Executive Order 11458, providing for the development of a national program to assist "the establishment, preservation and strengthening of miniority business enterprise." Section 1(a)(i). In 1971 and 1972 the subcommittee on Minority Small Business Enterprise of the House Small Business Committee conducted extensive hearings on the obstacles facing minority businessmen. It concluded that the obstacles had their roots in past racial discrimination. "These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group." H. Rep. 92-1615, p. 3. The "long history of racial bias" to which minorities had been subjected invariably led, it found, to the lack of capital and experience which seriously handicapped the efforts of minority entrepreneurs. Id. at 3-4.

79/ 123 Cong. Rec. S 3910 (daily ed. March 19, 1977).

In 1975 that House subcommittee again conducted several days of hearings on this subject, and found the continuing problems of minority businesses to have the same origin.

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> The effect of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
>
> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in the present economic inequities. 80/

The subcommittee reiterated that conclusion on January 3, 1977, two years later:

> The very basic problem disclosed by the testimony 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

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80/ H. Rep. 94-468, pp. 1-2.

> a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. 81/

This latter report was issued less than two months before the adoption of the MBE provision by the House.

To eliminate the continuing effects on minority businesses of past discrimination, the federal government had adopted over 100 programs to aid minority businesses. These programs included financial, marketing and business management assistance.82/ But despite the substantial federal efforts to create and sustain minority businesses, those firms received less than one percent of all federal contracts. Congressman Mitchell argued that such contracting practices were frustrating federal policy:

81/ H. Rep. 94-1791, p. 182; see also S. Rep. 91-1343, p. 45 (1970). A federal task force reached the same conclusion. Report of the Task Force on Education and Training for Minority Business Enterprise, p. 17 (1974) ("Decades of prejudice, poor educational opportunity, limited access to real management positions within American business and industry have conspired to restrict the entry of minorities into the mainstream of the nation's free enterprise system.")

82/ U.S. Department of Commerce, Office of Minority Business Enterprise. Federal Assistance Programs for Minority Business Enterprises (1977).

> We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to giving those minority businesses a piece of the action, the Federal Government is absolutely remiss. All it does is say that, "We will create you on the one hand and, on the other hand, we will deny you." That denial is made absolutely clear when one looks at the amount of contracts let in any given fiscal year and then one looks at the percentage of minority contracts. 83/ . . . . [W]e approve a budget for OMBE [Office of Minority Business Enterprise], we approve a budget for the SBA, and we approve other budgets to run those minority enterprises, to make them become viable entities in our system, but then on the other hand we say no, they are cut off from contracts.

Mitchell urged that legislation mandating that contracts be awarded to minorities were needed because "every agency of the Government has tried to figure out a way to avoid doing this very thing."84/ The United States Commission on Civil Rights had reported to Congress less than two years before that minority-owned firms faced a serious problem of intentional discrimination because "[g]overnment contracting officers expressed biases against minority firms...."85/

83/ 123 Cong. Rec. H 1436-7 (daily ed. Feb. 24, 1977).

84/ 123 Cong. Rec. H 1438 (daily ed. Feb. 24, 1977).

85/ Minorities and Women as Government Contractors, p. 112 (1975); see also pp. i, 20-22.

Thus the MBE provision was adopted and needed to overcome both ongoing discrimination and the continuing effects of past discrimination.

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(2) Reducing Black Unemployment

The central focus of the hearings and debate regarding the 1977 Public Works Act was the need to assure better targeting of the construction funds to areas of high unemployment. The hearings indicated that funds had too often gone to affluent white areas with little, if any, unemployment. This was not only unfair, but economically unsound, since increased demand for labor in areas of low unemployment was likely to be inflationary.

Senator Brooke urged that the MBE provision was an important way to insure "moneys are properly targeted."86/

> It is an appropriate concept because minority business' work forces are principally drawn from residents of communities with severe and chronic unemployment. With more business, these firms can hire even more minority citizens. Only with a healthy, vital minority business sector can we hope to make dramatic strides in our fight against the massive and chronic unemployment which plagues throughout this country. 87/

86/ 123 Cong. Rec. 3910 (daily ed. March 10, 1977).

87/ Id.

Congressman Biaggi, arguing in a similar vein, noted that unemployment among minority groups was running "as high as 35 percent", and that the amendment was needed to avoid "potential inequities to ... workers" and would provide "great benefit to the entire minority community."[88/]

Congress' concern about minority unemployment was well founded. In January, 1977, unemployment was 12.7% among non-whites, compared to 6.8% among whites.[89/] By March of that year white unemployment was falling while non-white unemployment was actually rising.[90/] Teenage unemployment exceeded 36% among non-whites, over twice the rate among white teenagers.[91/] The history and magnitude of discrimination against minorities in the construction industries was well-documented and well-known.[92/] Congress was justifiably concerned that a federal spending program involving construction was especially likely to afford a disproportionately small number of jobs to minor-

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88/ 123 Cong. Rec. H 1440 (daily ed. Feb. 24, 1977).

89/ Economic Report of the President, 1979, p. 218.

90/ Id. By November white unemployment had fallen to 5.9%, while the non-white rate had risen to 13.5%.

91/ Id.

92/ See, e.g., United States Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions (1976).

ities among whom unemployment was the highest. The proportion of minority employees in minority-owned firms is substantially higher than in white-owned firms.[93] Under these circumstances Congress properly resorted to "targeting" minority businesses as a method of targeting unemployed minorities.

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(3) The Lack of Available Alternatives

The petitioners urge that the MBE provision must be struck down because it was not the "least onerous" method of achieving Congress' purposes.[94] No such requirement, in our view, is imposed by the Constitution on benign racial classifications. Moreover, no reason appears to characterize the MBE provision as less "onerous" than the alternatives pressed by petitioners, such as cash advances to minority contractors.[95] If such alternatives were successful, they would still result in recipient minority businessmen winning contracts, and white businessmen losing them, because of the race of each. The effect

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93/ See, e.g., Hearings on SBA's 8(a) Subcontracting Program Before the Subcommittee on Government Procurement of the Senate Small Business Committee, 92nd Cong., 1st Sess. 83 (1971). The MBE provision in fact "provided employment for minorities that otherwise would not have been available." Comptroller General, Minority Firms on Local Public Works Project -- Mixed Results, p. 14 (1979).

94/ Brief for Petitioners, pp. 21-28.

95/ Id. p. 22.

on the losing bidder would be no less substantial, but only less overt.

In any event, Congress clearly believed that only the MBE clause would suffice to achieve its purposes. Representative Mitchell argued that set-asides were "the only way we are going to get minority enterprises into our system".[96/] Senator Brooke urged the provision was

> necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive Orders, and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool. [97/]

The failure of the alternative approaches urged by petitioners, and attempted in the past, was documented in detail by a series of congressional reports[98/] and hearings[99/] and a report of the

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96/ 123 Cong. Rec. H 1437 (daily ed. Feb. 24, 1977).

97/ 123 Cong. Rec. S 3910 (daily ed. March 10, 1977).

98/ S. Rep. 94-636, pp. 221-227 (1976); S. Rep. 91-1343, pp. 45-50 (1970); H. Rep. 94-1791, pp. 124-149 (1977); H. Rep. 94-468 (1975); H. Rep. 92-1615 (1972).

99/ Hearing on the Small Business Administration § 8(a) Contract Procurement Program before the Senate Committee on Small Business, 94th Cong., 2d Sess. (1976); Hearings on SBIC and SBLC Programs

United States Commission on Civil Rights.[100/] The need for immediate expenditure of the $4 billion in grants during the spring and summer of 1977

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99/ cont'd.

and Selected SBA Actitities Before the Subcommittee on SBA Oversight and Minority Enterprises of the House Committee on Small Business, 94th Cong., 1st Sess. (1976); Oversight Hearings on Small Business Administration Programs and Activities Before the Subcommittee on SBA Oversight and Minority Enterprises of the House Committee on Small Business, 94th Cong., 1st Sess. (1976); Hearings on Procurement Assistance Programs of the Small Business Administration Before the Senate Committee on Small Business, 94th Cong., 1st Sess. (1975); Hearings on Minority Enterprise and Allied Problems of Small Businesses Before the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business, 94th Cong. 1st Sess. (1975); Hearings on Government Minority Enterprise Programs -- Fiscal Year 1974, before the Subcommittee on Minority Small Business Enterprises and Franchising of the House Committee on Small Business, 93rd Cong., 2d Sess. (1974); Hearings on SBA's 8(a) Subcontracting Program -- Minority Enterprise before the Subcommittee on Government Procurement of the Senate Committee on Small Business, 92nd Cong., 1st Sess. (1971); Hearings Before the Subcommittee on Minority Small Business Enterprises of the House Committee on Small Business, 92nd Cong., 1st Sess. (1971).

100/ Minorities and Women as Government Contractors (1975); see also Comptroller General, A Look at How the Small Business Administration's Investment Company Program for Assisting Disadvantaged Businessmen Is Working, p. i, ii (1975).

precluded further experimentation with remedial devices. It was too late for new training or aid for minority enterprises to have any imapct, and there was no time to set up or operate any complex administrative machinery. The 10% set-aside program was indeed far more effective than the earlier programs, channeling more contrac- dollars to minority businesses in a few months than they had received in 10 years under the section 8(a) program of the Small Business Administration.[101/]

Under these circumstances, Congress had only two alternatives -- to adopt the minoity set-aside clause, as an effective but short term expedient, or to increase spending under the Public Works Act without that clause, knowing that to so so would both undermine past congressional efforts to aid minority businesses and defeat the present con-

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101/ Comptroller General, Minority Firms on Local Public Works Project -- Mixed Results, p. 9 (1979).

gressional purpose to reduce minority unemployment. Neither the Constitution nor considerations of public policy compelled the latter course.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be affirmed.

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