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# Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, *et al.*,

*Petitioners,*

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

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

## BRIEF FOR THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICUS CURIAE*

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## Interest of Amicus

The Asian American Legal Defense and Education Fund is a non-profit corporation established under the laws of the States of California and New York in 1974 in order to assist Asian Americans throughout the nation in the protection of their civil rights through the prosecution of lawsuits and the dissemination of public information. Amicus has found that much of its work concerns discrimination on the basis of race and national origin in the job market and economic opportunity generally as a result of the historic exclusion of Asians from the mainstream of American business life and the legacy of overt economic discrimination sanctioned by law. It is the experience of amicus that affirmative action programs such as the Congressional minority business enterprise set-aside program upheld by the court below are necessary to overcome burdens on equal opportunity for Asian Americans.*

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*The parties have consented to the filing of this brief amicus curiae, and letters of consent have been filed with the Clerk.

## SUMMARY OF ARGUMENT

The minority set-aside provision of the Public Works Employment Act of 1977 was enacted as a means of bringing minority businesses, including Asian American enterprises, into full and equal participation in the economic life of the nation. The legislation is one of a set of recent Congressional programs specifically designed to redress documented discriminatory exclusion of minority firms from dominant business activity. This exclusion of Asian Americans, as is true of other racial minority groups, is a vestige of prior legal restraints which limited and relegated Asians to marginal areas of economic endeavor. It was therefore appropriate for Congress to take steps to overcome the continuing effects of prior discrimination in an area of great national concern pursuant to the enforcement powers conferred by the Thirteenth and Fourteenth Amendments.

## ARGUMENT

### I. THE PURPOSE OF THE SET-ASIDE PROVISION IS TO REDRESS THE EXCLUSION OF MINORITY BUSINESSES, INCLUDING ASIAN AMERICAN ENTERPRISES, FROM THE MAINSTREAM OF AMERICAN ECONOMIC LIFE.

The Public Works Employment Act of 1977, 42 U.S.C. §§ 6701 et seq., was passed by Congress as

an antirecession measure targeted for areas of high unemployment. Section 103(f)(2) of the Act, 42 U.S.C. § 6705(f)(2), provides, in pertinent part, that "no grant shall be made under this chapter 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," i.e., enterprises owned in substantial part by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." The set-aside provision was proposed "to strengthen the nondiscrimination provision contained in the ...Act", section 110 of the Public Works Act of 1976, 42 U.S.C. § 6709, [1] in order (a) to provide minority businesses "a fair share" of construction contracts and related business to be generated by the Act[2] and (b) to fight unemployment in minority areas.[3]

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1. Hearings Before the Subcomm. on Economic Development of the House Comm. on Public Works and Transportation, 95th Cong., 1st Sess., 939 (1977) (Rep. Conyers).

2. 123 Cong. Rec. H 1436 (daily ed. Feb. 24, 1977) (Rep. Mitchell).

3. 123 Cong. Rec. S 3910 (daily ed. Mar. 10, 1977) (Sen. Brooke); 123 Cong. Rec. H 1440 (daily ed. Feb. 24, 1977) (Rep. Biaggi).

The proponents of the legislation made clear that the set-aside provision was part and parcel of a decade of substantial federal efforts to encourage minority business through direct grants, loans, loan guarantees, and procurement of goods and services.[4/] On March 5, 1969, President Nixon issued Executive Order 11458 which established the Office of Minority Business Enterprise under the Department of Commerce to develop and coordinate expanded federal efforts. The agency with the greatest implementation responsibility was the Small Business Administration ("SBA"), which in 1972 spent over one-half of federal funds allocated for minority business assistance. Among the programs administered by the SBA is a set-aside program for minority federal procurement contracts pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), which was specifically cited as precedent for the public works act set-aside provision.[5/] Other federal agencies with programs to assist minority businesses, including, in some instances, set-aside programs, were the Commerce

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4. See, e.g., 123 Cong. Rec. H 1437 (daily ed. Feb. 24, 1977) (Rep. Mitchell); 123 Cong. Rec. S 3910 (daily ed. Mar. 10, 1977) (Sen. Brooke).

5. Id.

Department's Economic Development Administration, the Department of Housing & Urban Development, the Department of Health, Education & Welfare, the Department of the Interior, the Department of Transportation, and the Federal Aviation Administration, as well as state and local agencies.[6/]

Indeed, the public works set-aside provision was expressly intended to supplement and strengthen existing federal minority business programs.[7/] Representative Mitchell, the author of the provision, pointed out that only 1 percent of all government contracts went to minority businesses and that existing federal programs had not yet been able to increase the amount.[8/] Congress was well aware of

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6. See, U.S. Dept. of Commerce, Office of Minority Business Enterprise, Report of the Task Force on Education and Training for Minority Business Enterprise 47-75 (1974) (hereinafter "OMBE Task Force Report"); U.S. Comm'n on Civil Rights, Minorities and Women as Government Contractors 102-104 (1975); see also, S. Doctors & A. Huff, Minority Enterprise and the President's Council 17-30 (1973).

7. 123 Cong. Rec. H 1436-37 (Rep. Mitchell), H 1440 (Rep. Biaggi) (daily ed. Feb. 24, 1977); 123 Cong. Rec. S 3910 (daily ed. Mar. 10, 1977) (Sen. Brooke).

8. Id.

the need for the legislation because the problem of "a business system which has traditionally excluded measurable minority participation" was fully documented in reports of federal agencies with responsibilities for promoting minority business.[9/] Thus, while minority persons were 17 per-

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9. See, e.g., House Subcomm. on Small Business Admin. Oversight and Minority Business Enterprise, Summary of Activities of the Comm. on Small Business, 94th Cong., 182-183 (1976):

> "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 face, 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."

Cited by the court below, 584 F.2d 600, 606 (2d Cir. 1979).

cent of the nation's population, they control only 4 percent of the total number of business enterprises. Gross receipts of all minority-owned businesses in 1969 were less than 1 percent of the total receipts for all American businesses and roughly equal to the 1972 sales of the General Electric Company alone, and the combined assets of minority-owned businesses equalled 0.3 percent of all business assets in 1971.[10/]

The situation of Asian American business enterprises is comparable to that of other minority firms. Asian American businesses comprise 0.5 percent of total businesses, and the typical Asian American business is a sole proprietorship without paid employees engaged in retail trade or personal service with annual gross receipts of under $25,000.[11/] One-third of all Asian American firms

10. OMBE Task Force Report at 17-19; see generally, U.S. Dept. of Commerce, Bureau of the Census, Minority-Owned Business: 1969 1-2 (1971); U.S. Dept. of Commerce, Bureau of the Census, 1972 Survey of Minority-Owned Business Enterprises, Minority-Owned Business, MB 72-4 (1975).

11. U.S. Department of Commerce, Office of Minority Business Enterprise, Amsun Associates, Socio-Economic Analysis of Asian American Business Patterns 5-26 (1977) (hereinafter "OMBE Study"); see generally, U.S. Department of Commerce, Bureau of the Census, 1972 Survey of Minority-Owned Business Enterprises, Minority-Owned Businesses: Asian Americans, American Indians, and Others (1975).

had less than $5,000 in gross receipts in 1972, and a little over two-thirds had gross receipts of under $25,000. 63 percent of all Asian American firms are engaged in retail trade and personal service (which includes laundry, cleaning and garment services, barber shops, beauty shops, etc.) business. The nearly 90 percent of Asian American businesses that are sole proprietorships account for only about one-half of the receipts of all Asian American businesses. More than three-fourths of Asian American businesses operate without paid employees. In 1972, 61 percent of all Asian American employer firms had less than five employees and 99 percent had less than fifty employees; the 0.5 percent of Asian American employer firms which had more than 100 employees are still considered small businesses by the SBA.

In particular, Asian American construction contractors are typical of minority contractors. Specific problems of minority construction contractors were cited in the debate on the public works set-aside provision: Minority firms could not compete successfully against the older, larger, and more established non-minority firms, and minorities were unfamiliar with bidding procedures and often needed assistance in handling the administrative work required under federal

contracts.[12] Only 4 percent of Asian American businessas are engaged in construction work in contrast to 10 percent of all American businesses. Average receipts per Asian American firm were half of total American firms, and three-quarters of the Asain American construction businesses were sole proprietorships with no paid employees. Employer firms are small, averaging eight employees per firm.[13]

The degree of discrimination encountered by minorities in the construction industry is so great that it had "(j)udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice". United Steelworkers of America v. Weber, __ U.S.__, 99 S. Ct. 2721, 2725 n.1 (1979). Asians, like other minorities, have been unable to enter skilled trades in the construction

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12. 123 Cong. Rec. H 1437 (Rep. Mitchell), H 1439 (Rep. Harsha), H 1440 (Rep. Conyers) (daily ed. Feb. 24, 1977); see generally, U.S. Comm'n on Civil Rights, Minorities and Women as Government Contractors (1975); U.S. Dept. of Labor, Manpower Admin., R. Glover, Minority Enterprise in Construction (1977); U.S. Gen'l Accounting Office, Minority Firms on Local Public Works Projects—Mixed Results (1979).

13. OMBE Study at 39, 52-53.

industry in any appreciable numbers in areas of substantial Asian population because of racially exclusionary policies of construction unions; indeed, they are practically invisible, see, e.g., United States v. Operating Engineers, 4 F.E.P. Cases 1088 (N.D. Cal. 1972). One study found that Asian participants in the Federal Highway Administration highway construction-related trades and apprenticeship training, who successfully completed their training, nevertheless were unable to enter apprenticeship programs because of racial discrimination against Asians within the construction industry in California.[14/] Another striking example is the recent protracted efforts of Asian American groups and government agencies to convince builders and contractors to employ Asians in trainee construction jobs at Confucius Plaza, a federally-supported residential and commercial complex in the heart of New York City's Chinatown.[15/]

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14. U.S. Department of Transportation, Federal Highway Admin., F. Wu, P. Chen, Y. Okano, P. Woo, Involvement of Asian Americans in Federal-Aid Highway Construction (1978).

15. See, New York State Advisory Comm. to the U.S. Comm'n on Civil Rights, The Forgotten Minority: Asian Americans in New York City 28-29 (1977).

## II. ASIAN AMERICANS ARE STILL SUBJECT TO THE VESTIGES OF PRIOR ECONOMIC DISCRIMINATION IMPOSED BY LAW.

Asian Americans have been subjected to state-imposed discrimination since their earliest arrival in the mid-1800's. The early history of Asian American wage earners and businessmen reflects their participation in diverse occupations and industries. However, in each area in which Asian Americans became competitive in the pursuit of their livelihood with the white population, prohibitive statutes and ordinances were enacted or discriminatorily applied against Asians: indeed, the history of Asian Americans in the western states, to which they first immigrated, is largely the history of legally-imposed exclusion from the mainstream of business life and restriction to separate and lesser economic pursuits.[16/] Yick Wo v. Hopkins, 118 U.S. 356 (1886), in which this Court struck down an ordinance regulating laundry buildings which San Francisco authorities administered "with an evil eye and an unequal hand" to exclude Chinese from an entire occupation, and for

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16. The history of legally-enforced discrimination and exclusion of Asians is set forth in M. Coolidge, Chinese Immigration (1909) (hereinafter "Coolidge"); E. Sandmeyer, The Anti-Chinese Movement in California (1939) (hereinafter "Sandmeyer"); F. Chuman, The Bamboo People: The Law and Japanese Americans (1976) (hereinafter "Chuman"). See generally P. Murray, States' Laws on Race and Color (1951).

which "no reason for it exists except hostility to the race and nationality to which petitioners belong," id. at 374, was but one, and by no means the most invidious, part of the structure of racial discrimination and exclusion sanctioned by law.

The earliest Asian immigrants were the Chinese who began arriving in substantial numbers in 1847. The Chinese arrived as contract laborers to work in the mines and later on the railroads. In the 1870's, following the completion of the railroads, Chinese entered a broad range of agricultural and manufacturing industries. They were also self-employed as laundrymen, domestics, and peddlers.[17] However, Chinese miners were subject to a foreign miner's tax enforced only on them,[18] and San Francisco imposed a vehicle tax on Chinese laundrymen.[19]

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17. The history of the Chinese in the West is set forth in Coolidge, supra note 16; Sandmeyer, supra note 16; S. Lyman, The Asian in the West 9-26 (1970); S. Lyman, Chinese Americans (1974); see also P. Chiu, Chinese Labor in California, 1850-1880 (1967); I. Light, Ethnic Enterprise in America: Business and Welfare Among Chinese, Japanese and Blacks (1972).

18. Foreign Miners' License Tax, Act of Apr. 13, 1850, ch. 97, § 1 et seq., 1850 Cal. Stat. 221. See Coolidge at 36.

19. Municipal Reports, 1871-72, 550; see Sandmeyer at 52.

Chinese peddlers were prohibited from using poles and baskets, a traditional method of transporting goods and food.[20] The California State Constitution of 1879 expressly forbade the employment of any Chinese, directly or indirectly, by any California corporation or governmental entity.[21] While that provision did not survive constitutional challenge, other prohibitive statutes and ordinances were widely enacted throughout the western states.[22] What discriminatory laws and court rulings failed to achieve, physical violence and anti-Chinese sentiment completed. Finally in 1882 the first Chinese Exclusion Act was passed prohibiting further immigration and setting off a policy of curtailment which continued into the middle of this century.[23]

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20. S. Lyman, The Asian in the West 23 (1970).

21. California Constitution of 1879, art. XIX, §§ 2-3. See Sandmeyer at 71-74.

22. See, e.g., Idaho Constitution of 1890, art. 13, § 5 (public works); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (San Francisco laundry building ordinance); In re Hong Yen Chang, 84 Cal. 163 (1890) (attorneys).

23. Chinese Exclusion Act, 22 Stat. 58 (1882). See The Chinese Exclusion Case, 130 U.S. 581 (1889).

Japanese immigration began in the 1860's but did not reach significant numbers until 1891. Like the Chinese who came before them and in partial response to the labor shortage brought about by the prohibitions against further Chinese immigration, the Japanese also entered the agricultural, mining and railroad industries. In Colorado and Utah they branched out into the smelting and refining industries and in the Northwest, into the lumbering industries. The Japanese also engaged in the fishing and canning industries.[24/] However, numerous "alien land laws" were passed to prohibit the Japanese from owning any legal interest in real property,[25/] and laws were passed prohibiting Japanese from engaging in commercial fishing by

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24. The history of the Japanese in California is set forth in Y. Ichihashi, Japanese in the United States (1932); R. Daniels, The Politics of Prejudice (1962); H. Kitano, Japanese Americans: The Evolution of a Subculture (1969).

25. See, e.g., Terrace v. Thompson, 263 U.S. 197 (1923) (Washington statute); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923); Cockrill v. California, 268 U.S. 258 (1924); Oyama v. State of California, 332 U.S. 633 (1948). See generally M. Konvitz, The Alien and the Asiatic in American Law 157-70 (1946); McGovney, The Anti-Japanese Land Laws of California and Ten Other States, 35 Cal. L. Rev. 7 (1947); Ferguson, The California Alien Land Law and the Fourteenth Amendment, 35 Cal. L. Rev. 61 (1947).

forbidding the issuance of fishing licenses or the sale of fish by Japanese.[26] From 1923 to 1933 bills aimed at the Japanese were proposed in virtually every session of the California legislature to prohibit the employment of aliens in government and by contractors for public work projects.[27] The uprooting of Japanese American families under Executive Order 9066 wiped out their agricultural, fishing and small business enterprises. Although the economic and personal losses can never be fully recompensed, bills proposing economic redress for Japanese American internees are being considered by Congress.[28] Koreans, Pilipinos, and later Asian immigrants arriving after the Chinese and Japanese were subject to similar official treatment.

While the express legal structure and sanction that "put the weight of government behind racial

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26. Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); T. Abe v. Fish and Game Comm'n, 9 Cal. App. 2d 300, 49 P.2d 608 (1935).

27. See Chuman at 111 n.10 (and bills cited therein).

28. See, e.g., S. 1647, 96th Cong., 1st Sess. (1979).

hatred and separatism"[29] has faded in the modern postwar era, its effects have not been eliminated root and branch. Asian American business activity remains concentrated in the marginal areas to which they were relegated by state-imposed discrimination, small retail trade and personal service enterprises, see supra. Many of these enterprises operate in Chinatowns and Little Tokyos throughout the nation.[30]

## III. THE SET-ASIDE PROVISION OF THE PUBLIC WORK EMPLOYMENT ACT OF 1977 IS A NECESSARY AND PROPER MEANS OF PROMOTING THE DEVELOPMENT OF MINORITY BUSINESSES.

Senator Brooke, the Senate sponsor, explained why the set-aside provision is "entirely proper, appropriate and necessary."

> It is 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.

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29. University of California Regents v. Bakke, 438 U.S. 265, 357-58 (1978) (Brennan, J.)

30. See generally U.S. Dept. of Health, Education & Welfare, Urban Associates, Inc., A Study of Selected Socio-Economic Characteristics of Ethnic Minorities Based on the 1970 Census, Vol. II: Asian Americans (1974) (HEW Publ. No. (OS) 75-121).

> It is a proper concept, recognized for example in this committee's bill which sets aside up to 2-1/2 percent for projects requested by Indians or Alaska Native villages. And, the Federal Government, for the last 10 years in programs like SBA's 8(a) set-asides, and the Railroad Revitalization Act's minority resources centers, to name a few, has accepted the set-aside concept as a legitimate tool to insure participation by hitherto excluded or unrepresented groups.
>
> It is an appropriate concept, because minority businesses' 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 minority communities throughout this country.31/

Experience to date in implementing the Public Works Employment Act set-aside provision has shown that it has enabled new minority firms to develop and existing ones to survive, it has provided minority firms with valuable technical and managerial assistance and experience, and it has exposed non-minority prime contractors to a wider range of bidders, including minority firms, for subcontract work.32/

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31. 123 Cong. Rec. S 3910 (daily ed. Mar. 10, 1977).

32. U.S. Gen'l Accounting Office, Minority Firms on Local Public Works Projects--Mixed Results 13-15 (1979). Although not without administrative problems, the set-aside program has resulted in benefits to minority firms.

The effects of the set-aside provision will be felt by minority businesses outside of the construction industry as well. Public works grants include contracts for engineering, landscaping, accounting, guard services, other professional or supervising services, and supplies. Just as minority construction firms can be expected to stimulate the hiring and employment of minority construction workers, they can be also expected to stimulate minority businesses engaged in other secondary and related industries.[33/]

Amicus respectfully submits that the set-aside provision is a constitutionally permissible exercise of Congressional power to enforce the guarantees of the Thirteenth and Fourteenth Amendments and a proper exercise of the spending power. Congress has broad powers both to determine the means by which the intent of the post-Civil War amendments are enforced, Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966), and to set the terms upon which its monetary allotments are conditioned. Lau v. Nichols, 414 U.S. 563, 569 (1974). Certainly, the post-Civil War amendments were not intended to

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33. See 123 Cong. Rec. S 3910 (daily ed. Mar. 10, 1977) (Senator Brooke); Economic Development Admin., Guidelines for 10% Minority Business Participation in Local Public Works Grants (1977).

prohibit measures designed to remedy the effect of the nation's past treatment of racial minorities. The Congress that passed the Thirteenth and Fourteenth Amendments and early civil rights acts is the same Congress that passed the 1866 Freedmen's Bureau Act, which provided many of its benefits and protections only to black freedmen then subject to the Black Codes, University of California Regents v. Bakke, supra, 438 U.S. at 396-98 (Marshall, J.).

The Congressional set-aside provision, like the affirmative action plan in United Steelworkers of America v. Weber, supra, 99 S. Ct. at 2730, was "designed to break down old patterns of racial segregation and hierarchy." The purposes of the set-aside provision mirror those of the Thirteenth and Fourteenth Amendments. The specific inclusion of Asian American business enterprises in the set-aside program was appropriate because the protections of the post-Civil War amendments and the civil rights acts were specifically intended to protect the rights of "Chinese coolie labor" as well as black freedmen, Slaughter House Cases, 83 U.S. 36 (1873), and that "the application of the Amendment to the Chinese race was considered and not overlooked." United States v. Wong Kim Ark, 169 U.S. 649, 697-99 (1898). Again like the affirmative action program permitted in Weber, supra, the

the set-aside provision "does not unnecessarily trammel the interests of the white employees" and contractors, 99 S. Ct. at 2730, since the set-aside was for only 0.25 percent of federal funds expended yearly on construction work in the United States and the burden of being dispreferred was thinly spread among nonminority businesses, comprising 96 percent of the construction industry. Fullilove v. Kreps, 584 F.2d at 607-608. Last, the public works employment set-aside program is "a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." Weber, supra, 99 S. Ct. at 2730.

## CONCLUSION

For the reasons above, the opinion and judgment of the Second Circuit should be affirmed.

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