IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1007

H. EARL FULLILOVE, ET AL.,

Petitioners,

vs.

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 AMICUS CURIAE FOR ALPHA KAPPA ALPHA SORORITY, INC.

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Alpha Kappa Alpha Sorority, Inc., with the consent of all parties, respectfully submits this Brief as Amicus Curiae.

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."

STATUTE INVOLVED.

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U. S. C. Section 6705(f)(2) provides that notwithstanding any other provision of law, and

> "(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 percent of which is owned by minority group members or, in the case of a publicly owned business, at least 51 percent 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."

AUTHORITIES CITED.

Cases.

Contractors Ass'n. v. *Secretary of Labor,* 442 F. 2d 159 (1971).

Dunn v. *Blumstein,* 405 U. S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).

Fullilove v. *Kreps,* 443 F. Supp. 253 (1977).

Fullilove v. *Kreps,* 584 F. 2d 600 (1978).

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San Antonio Independent School v. *Rodriguez,* 411 U. S. 1, 36 L. Ed. 16, 93 S. Ct. 1278 (1973).

Shapiro v. *Thompson,* 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

University of California Regents v. *Bakke*, 438 U. S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978).

Constitution, Statute and Regulations.

United States Constitution, Amendment V.
United States Constitution, Amendment XIV.
Public Works Employment Act of 1977, 42 USC 6705(f)(2).
Regulations of the Secretary of Commerce, 13 CFR.

Miscellaneous.

Debates in United States Congress: 123 Congressional Record, House; and 123 Congressional Record, Senate.
Down the Line, by Rustin.
Equality by Statute, by Berger.
Race Discrimination in American Law, by Stephenson.
Simple Justice, by Kluger.
The Strange Career of Jim Crow, by Woodward.

INTEREST OF THE AMICUS CURIAE.

The Alpha Kappa Alpha Sorority is a national Sorority organized in 1908 in Washington, D. C. for the black women students of Howard University. In its 71 year history it has grown to a national membership today in excess of 25,000 and it has 302 affiliated college chapters and 305 graduate and alumni chapters.

Its constitution provides that its purposes include an obligation ". . . to improve the social stature . . . and to be of service to all mankind". The programs of the Sorority have involved it in the implementation of such objectives. It has established a Foundation for its charitable and educational objectives, and it has been a major financial contributor to civil rights organizations over the years.

In 1965 it became the contractor for a major Job Corp Project in Cleveland, Ohio which is presently funded by an Annual Budget of 3.2 million dollars and which project has served in excess of 12,000 Job Corp trainees.

The Sorority's concern with opening up opportunities for employment for blacks and minorities is deep and abiding; its interest in the economic opportunities available to black and minority enterprises arises from this concern and from its basic dedication to our social stature and to the eradication of impediments thereto.

STATEMENT OF THE CASE.

This case was begun as an action by certain nonminority construction contractors to prevent the Secretary of Commerce from enforcing the requirements of the 1977 Public Works Employment Act that 10% of the amount of each grant by the Secretary under that Act "shall be expended for minority business enterprises". The United States District Court declined to enjoin the enforcement of that requirement of the Act, and stated for the reasons set forth in its decision, that the challenged provisions of the Act were in fact constitutional.

On appeal, the Court of Appeals, in a unanimous decision, affirmed the decision of the District Court, and, after reviewing at length the legislative history of the Act and after measuring the Act's purpose against the Constitutional standards of a compelling state interest and reasonable means, it also concluded that the challenged provisions of the Act were in fact constitutional.

The Contractors then petitioned this Court for a Writ of Certiorari, and this Court has granted that Writ.

The question before this Court is whether, under the circumstances of this case, Congress may provide a requirement that 10% of the grant funds authorized under the Public Works Act "shall be" expended for minority business enterprises as

defined in the Act, or whether such a requirement, because it creates a category that is "race sensitive" must be held to be violative of the requirements of the equal protection of the laws.

It is the position of this Amicus Curiae that the provisions of the challenged Act are indeed proper and are fully reflective of the historic interests of Congress and are fully consonant with the standards which this Court has determined are appropriate to measure the Constitutionality of enactments of Congress, and that the decision of the Court of Appeals should be affirmed in this case.

ARGUMENT.

I.

Introduction.

The minority business "set aside" program is a part of the 1977 Public Works Employment Act, as Section 103(f)(2) (42 U. S. C. 6705(f)(2)). It is also a part of the congeries of legislative enactments by the United States Congress which describe standards and set forth conditions designed to overcome established patterns of discrimination against blacks and other minorities, and to assure their participation in the political educational, employment and economic opportunities within the United States.[1]

It is clear that there has been a major political and social upheaval in our society. Its historic antecedents may be in the moral interdictions of the Constitution as originally enacted. Its growth and emergence, however, has taken strength from the seminal events of the mid 1800's and the equally seminal events of the mid 1900's.[2]

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1. The Court of Appeals in this case identified some of the examples of such Congressional Responses in its footnote No. 7. *Fullilove* v. *Kreps*, 584 F. 2d 600 at 605.

2. The literature that has chronicled the changing interpretations of the 5th and 14th Amendments and the growing reaction

(Footnote continued on next page.)

However historians may choose to analyze the phenomenon, and without regard to the varying opinions as to its cause and its prime movants, the fact of the civil rights awakening can not be gainsaid and the reality of the Congressional and Judicial response to it has been pervasive and awesome.

It would be naive in the extreme to seek to understand any Congressional enactment outside of the context of such a history and of such a reality.[3]

The minority "set aside" program may have been couched in a public works employment context, but to suggest that it is not a cognative part of the recognition by Congress of and Congress' response to an awareness of past discriminations and a methodology for its elimination, would be to relegate reality to a one way mirror of myopia.

Having said all of this, we mean hereby to provide this Court not with the necessary rationale for the resolution of a particular case, but rather to provide the framework for understanding the atmosphere in which specific legislation emerged.

Having said all of this, we recognize that this document is a Brief that speaks to Judges on concrete issues, and that this document must therefore speak in the vocabulary that articulates the decisional process. This is conceded and the remaining sections of this Brief are therefore so addressed.

It is the conclusion of this Brief, however, that the historic context and milieu just provided is indeed the fabric which most accurately should enwrap the ultimate Court decision on this case.

(Footnote continued from preceding page.)

and responses of Congress and State legislatures thereto is extensive: *Simple Justice* by Kluger; *Race Discrimination in American Law*, by Stephenson; *Equality by Statute*, by Berger; *The Strange Career of Jim Crow*, by Woodward and *Down the Line*, by Rustin are but a few examples.

3. Justice Powell in *University of California Regents* v. *Bakke*, 438 U. S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 has underscored the importance of understanding the "background of the problem that Congress was addressing . . ." p. 285.

II.

The Set Aside Program Is Consonant with the Standards This Court Has Posed to Judge Congressional Legislation.

The history of the United States Supreme Court, and indeed generally of all judicial interpretation in the common law mode, has been one in which the Court has assumed the basic responsibility of defining the broad interpretations of the Constitution. It is not now important here to chart the zigzag patterns by which Constitutional interpretation has emerged. And it is not now important to identify the Courts' involvement in recent years as the principal prodder in civil rights, due process, and equal protection matters. What is important for the purposes of this Brief is to recognize that this Court has come to grips with civil rights considerations and this Court has proffered standards by which to measure such words as "due process" and "equal protection of the laws" not only as to private actions and public actions, but also, in the context of this case, public actions as articulated by the legislation of the United States Congress.

Interestingly enough, it is also not necessary in this Brief, to analyze at any great length what the emergent judicial standard has become in testing Congressional enactments that involve carving out particular categories.

The relevant standards are articulated in both the opinion of District Court and in the Court of Appeals in this case, and their recital of the standards seem to have been accepted by the Petitioners in this case. Succinctly, the Court has said that where Congress has used a legislative criterion which is itself race sensitive, it is then the duty of the Court to peruse that criterion in terms of a "strict scrutiny" so as to determine that the objectives to which it is addressed represent a compelling governmental interest.[4] If the Court satisfies itself that this ingredient is present,

4. *Loving* v. *Virginia*, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); *Shapiro* v. *Thompson*, 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

then an additional standard must be met, and that is, that the legislative mechanism itself is the least "intrusive" mechanisms to achieve those objectives.[5]

The reason why this case is now before this Court is not because the Petitioners disagree with the foregoing, but that they disagree with the interpretation of the standards as given by the District Judge and by the Court of Appeals Judges.

It becomes important therefore to evaluate the standards thus recognized by this Court against the detail that is the minority business enterprise set aside program of the 1977 Public Works Employment Act.

It is the argument of this Amicus Brief that the two pronged standard is clearly satisfied by a review of this program.

A. There Is a Compelling State Interest.

As we have suggested, Congress's concern with problems of past and present discrimination is a modern day reality that has emerged from the historic lessons of the civil rights struggles. And Courts have confirmed that such concern is appropriate and "compelling".[6]

Indeed, Petitioner's apparently also concede that such a purpose is "compelling".[7] Petitioner argues, however, that no such purpose was present as to the Public Works Employment Act. Such reasoning ignores the impact of the historic context delineated at the outset of this Brief. Such reasoning posits that each piece of legislation emerges in a pristine state unencumbered by the tone and atmosphere of its times. Such reasoning emasculates reality and builds straw men in a windstorm.

There is more. There are decisions of this Court that indicate that the discernment of legislative purpose must first be made

5. *Dunn* v. *Blumstein*, 405 U. S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).

6. *Contractors Ass'n.* v. *Secretary of Labor*, 442 F. 2d 159 (1971).

7. Brief of Petitioner in this cause, pp 10-11.

by looking at the four corners of the statute itself.[8] The set aside program is included in legislation that provides massive dollars to beef up the construction industry and then says that 10% of each such grant "shall be expended for minority business enterprise". Congress made the legislative determination that the injection of federal funds into construction projects was in the national interest. Congress went on to say that it was appropriate that 10% of each grant must have a minority involvement. Measured against the climate of the times; measured against the various responses Congress has created to the historic fact of past discrimination it seems clear that the "purpose" of Congress related to this admitted "compelling" interest of government.

There is still more! The set aside arose as an Amendment made on the floor by Congressman Mitchell. He spoke to a "fair share" for minorities and to a pattern of "denial" of participation of minorities and to the setting of this mechanism to "get the minority enterprises into our system.[9] Congressman Biaggi talked about the record with respect to opportunities for minority business enterprises as "a sorry one".[10] When the issue came up in the Senate, the dialogue was very brief indeed, but what was said was unambiguous. Senator Brooks cited the statistics of minority business receiving only 1% of Federal Construction dollars.[11]

Both the District Court decision and the Court of Appeals decisions allude not only to the pronouncements of the legislation, but also to governmental documents and reports that were extant at the time of the dialogue.[12]

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8. See the extensive discussion in Note, Development in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). See also *Katzenbach* v. *Morgan*, 384 U. S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966).

9. 123 Cong. Rec. H. pp 1436-1437.

10. 123 Cong. Rec. H. pp 1440.

11. 123 Cong. Rec. S. p 3910.

12. *Fullilove* v. *Kreps*, 443 F. Supp. 253, 258-9; *Fullilove* v. *Kreps*, 584 F. 2d 600, 606.

A Congressional "purpose" that recognized discrimination patterns against minorities in the past and then designs a program to cope therewith, therefore emerges not only from the four corners of the legislation, but also from the verbalization of Congressmen who spoke to the issue and from the background studies and reports that were available on the subject.

B. The Set Aside Program Is a Permissible Legislative Format to Accomplish the Admitted Compelling State Purpose.

The "purpose" identified in the preceding section relates itself to the elimination of past and present discrimination in the construction industry which has kept minorities outside the pale of Public Construction contracting. The set aside procedure is aimed specifically at remedying that evil: it is no longer a question of overcoming subtle techniques at exclusion, this legislation creates an affirmative duty for inclusion. The imprecision of previous government construction contracting practices is replaced by an unambiguous directive. Minorities who had been outside the pale are now required to be inside the pale. The Congressional mechanism is therefore, clearly aimed at its purpose and clearly will result in actual minority participation.

But it is suggested that other mechanisms could have been chosen and that their impact would have been less "intrusive". Programs for joint ventures, or job training, or revisions of bid procedures, or bonding guarantees are some of the alternatives that Petitioner has suggested.

That Congress could have chosen one or more of such mechanisms is obvious. Indeed, Congress has in fact opted for one or more of such responses in other contexts to rectify the malaise of past and present discrimination.[13] In a host of instances,

13. 20 USC 1071 *et seq* is the Higher Education Act, and it provides programs of financial assistance. 15 USC 637 is a part of Small Business Act and it provides programs relating to bid requirements.

various Courts have indeed upheld such mechanisms as proper and appropriate reactions of Congress.[14]

It does not follow, however, that any one or more of such techniques is exclusive, or that any one or more has in fact proven by experience to work and remedy such past and present discriminations. It is certainly clear that no one of such proffered alternatives necessarily will result in a significant participation by minorities. The statistics do not show this to be the case. Anyone familiar with an iota of the education and employment discrimination cases knows that such similar remedies have proven to be mere band-aids. The massive infection of discrimination goes forth unchecked—and significant numbers of minorities continue outside of the mainstream.

* * *

The Constitutional test is not that this Court should substitute its judgment for the Congressional judgment as to how best to meet a problem; it only requires that the means be not unduly burdensome on others. The decision of the Court of Appeals cites the statistics that conclusively show that the set aside burden is minimal:[15]

> ". . . (Since) minority-owned business amount to only 4.3 per cent of the total number of firms in the construction industry, the burden of being dispreferred in .25 per cent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 per cent of the industry . . ."

III.

The Bakke Decision Is Consistent with Upholding the Set Aside Program.

No analysis of what a Court should do in a given "due process" situation where the solution has itself involved a racial category, can be valid today without reference to this Court's

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14. *San Antonio Independent School* v. *Rodriguez*, 411 U. S. 1, 36 L. Ed. 16, 93 S. Ct. 1278 (1973).

15. *Fullilove* v. *Kreps*, 584 F. 2d 600, 608.

recent articulation upon the subject: the 1978 *Bakke* decision.[16] The District Court in this case entered its decision before the *Bakke* decision by this Court, but the Court was fully aware that the decision was pending. The Court of Appeals decision in this case cited from the *Bakke* decision at several points. The Brief of Petitioner and the Brief Amicus Curiae of the Equal Employment Advisory Council filed in support of Petitioner, also cite at length from *Bakke*.

It is the thesis of this Brief that there is nothing in any of the exhaustive *Bakke* opinions that suggest or constrain a conclusion that the set aside program is or should be invalid.

The specific admissions program of the Medical School of the University of California in *Bakke* was deemed to have been unconstitutional, although the fact that race was a determinant of admissions was deemed not to violate the Constitutional tests. *Bakke* continues to tell us that racial classifications are suspect; that they require strict scrutiny; that they must serve a compelling state interest, but that they are not per se invalid, and, indeed are appropriate under particular circumstances.[17]

Bakke therefore, marches along in the parade of consistent pronouncements by this Court as a part of the pellucid historic thrust that was denoted at the opening of this Brief. *Bakke* is another societal expression that says past and present discrimination is wrong: and government may act to remedy that wrong, and that the Constitution permits remedial steps even if they are race conscious, so long as it is clear that the governmental purpose served is vital and compelling, and so long as the mechanisms used relate to that purpose and are not themselves offensive.

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16. *University of California Regents* v. *Bakke*, 438 U. S. 265, 57 L. Ed. 750, 98 S. Ct. 2733 (1978).

17. Justice Powell wrote that "In enjoining petitioner from ever considering the race of an applicant, however, the Courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *University of California Regents* v. *Bakke*, *supra* p. 320.

Bakke did strike down a particular mechanism that the University of California had employed—but it did so only after an analysis thereof on the same standards as are posited to be applicable to this case.

Is the "fault" that required striking down in *Bakke*, the fault in the case at bar? The University had 100 slots for its first year class, but it said that 16 of these slots shall be judged by one standard, and the balance by another standard. The majority of this Court in *Bakke* found this offensive, while at the same time the majority found that race as such may be a valid factor in the determination of all 100 slots.

It is not appropriate here to review the rationale of *Bakke* as such. Suffice it to say that Congress in the case at bar, has made no such dichotomy in the set aside program—all must compete equally for each federal grant. Each grant, however, has to satisfy a host of standard qualifications such as bonding, environmental impact, nondiscrimination in employment, area requirements,[18] etc.—plus one more standard, and that is that it also must have a 10% minority business ownership involvement. Whether this involvement is in the ownership of the prime contractor, or in some or all of the subcontractors, or in some or all of the suppliers is not specified or dictated. The "evil" of the separate classifications and separate testing in *Bakke* is not present in the case at bar.

Petitioner in a litany of quotations from various of the opinions in *Bakke* would invite this Court to believe that on the basis of something that was said in *Bakke*, rather than anything that was done in *Bakke*, there is a contraint on this Court now to invalidate the set aside program. A review of quotations from Justice Powell illustrates the point that such quotations do not accomplish Petitioner's objective.

Justice Powell is quoted as indicating that "racial . . . distinctions are inherently suspect" and Justice Powell cites a my-

18. See the Regulations of the Secretary of Commerce, 13 CFR 305.94 (as to Bonds), 13 CFR 112 and 113 (as to employment discrimination) and 13 CFR 309.18 (as to environmental impact).

riad of examples to support this. This position is, of course, precisely why the District Court in this case and the Court of Appeals in this case devoted significant portions of their analysis just because this proposition is necessarily so.

Justice Powell is quoted as stating that there must be a "judicial, legislative or administrative finding".[19] We have in this Brief already developed at length on the nature of the legislative findings in this case, both implicit and explicit.

Justice Powell is quoted for his conclusion that the classification adopted must be "tailored" to serve the identified compelling governmental interest.[20] We have indicated how the set aside fits snugly and primly the basic objective of a remedy for past and present discrimination.

Finally, Justice Powell is quoted as to his comments that the mechanisms chosen can not "force innocent persons . . . to bear the burdens of redressing grievances not of their making.[21] Just how minuscule the burden of the set side program is on the non-minority contractor was exposed by the articulation of the Court of Appeals in this case and has already been quoted above.

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19. The full quotation is "We have never approved a classification that aids persons perceived as member of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of Constitutional or statutory violations." *University of California Regents* v. *Bakke, supra* p. 307.

20. The full quotation is "When they (Congressional classifications) touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *University of California Regents* v. *Bakke, supra,* p. 299.

21. *University of California Regents* v. *Bakke, supra,* p. 298.

CONCLUSION.

The Minority Business enterprise set aside program became law in an atmosphere of legislative responses to patterns of discrimination past and present against blacks and other minorities. There was little Congressional dialogue as to the program, but this was the Congress that had recognized such patterns of discrimination in the fields of housing, voting rights, health services. employment opportunities, public educational services and had sought to structure programs to respond thereto.

The Minority Business enterprise set aside program is consonant with the judicial standards etched by this Court in its continuing refinement of the Constitutional mandates of due process and equal protection of the laws.

The Minority Business enterprise set aside program is a part of the continuing historic perspective that has emerged from the public concern with discrimination and its remedy. This Amicus Curiae is also part of that public so concerned. It is directed by its precepts, and has shown its dedication through the involvement of its considerable informed human resources and programs that it is deeply committed to the resolution of such patters of discrimination.

This Amicus Curiae respectfully urges this Court to affirm the Minority Business enterprise set aside program because it is a decision that maximizes the political judgment of Congress in its resolution of the realities of discrimination; because it is consonant with the standards for Constitutional interpretation articulated by this Court in its prior decisions; and because it is a reflection of the flow of history toward the obliteration and elimination of the vestiges of discrimination and removal thereof.

Such a decision by this Court would be right therefore, as a matter of political decision; would be right as a matter of judicial development; and would be right for the moral thrust of today's reality and tomorrows vitality.

Respectfully submitted,

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