IN THE

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

AMICUS CURIAE BRIEF FOR THE MINORITY CONTRACTORS ASSISTANCE PROJECT, INC.

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MISCELLANEOUS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 23a)[1] is reported at 584 F.2d 600 (2d Cir. 1978). The opinion of the United States District Court for the Southern District of New York (Werker, J.) (Pet. App. 1a) is reported at 443 F.Supp. 253 (S.D.N.Y.1977).

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[1] "Pet. App." refers to the appendix attached to Petitioners' Petition for Writ of Certiorari filed December 21, 1978.

INTEREST OF THE AMICUS

Although this case is concerned with the validity of a statute directly affecting the interests of minority contractors, no minority contractor or minority organization was a party to this case in the courts below. In contrast, majority contractors and organizations advocating their interests participated in over twenty court tests of the statute in question.[2]

While it is impossible to calculate the effect of this imbalance in the presentation of views and positions, this brief is offered in the hopes that it will help if only slightly to make the presentation of views in this case by private parties somewhat less onesided.

The Minority Contractors Assistance Project, Inc. (MCAP) is a private nonprofit corporation created in 1970 to help minority contractors compete for a more equitable share of the nation's construction industry.

In recognition of the need for a national effort to help increase minority contractor participation in the industry, the Ford Foundation asked the National Urban Coalition to design an assistance program. After a year of research and development, MCAP was created as an autonomous organization directed primarily by respresentatives of minority economic development organizations but with representation also from majority businesses and from organized labor.

Using funds borrowed from five major life insurance companies, MCAP has guaranteed almost $6-million in working capital loans in cities across the nation. During the past two years MCAP has applied computerized systems for bidding and

[2] According to the General Accounting Office study of the implementation of the statute, the Associated General Contractors and/or its local chapters brought 23 of the 27 court actions challenging the statute. Comptroller General's Report to the Congress, Minority Firms on Local Public Works Projects—Mixed Results, CED-79-9, January 16, 1979, p. 35, hereafter referred to as GAO Report.

estimating and for managing and controlling costs and production on minority construction contracts totaling over $50-million.

During that period MCAP also helped minority contractors obtain some $30-million in surety bonding, much of it underwritten by a subsidiary company, MCAP Bonding & Insurance Agency, Inc., which operates under agency agreements with three major national insurance companies.

Operating out of offices in Washington, D.C., Atlanta and Los Angeles, MCAP has provided technical management or financial assistance to over 5,000 minority contractors in every section of the nation. In the process it established working agreements or arrangements with over 20 minority contractor groups and an even larger number of banks and surety agencies.

MCAP frequently conducts workshops and training seminar for contractors on ways to improve their operations, their financial position and their bonding capacity.

Most of the operating funds for this activity has been provided through the Office of Minority Business Enterprise at the Department of Commerce and the Minority Business Resource Center at the Department of Transportation. In addition MCAP works closely with the Small Business Administration's surety bond guarantee program and other public and private programs that impact on minority contractors.

Because of its experience, MCAP on occasion is called upon to testify before various congressional committees on the problems of minority contractors, and is consulted informally by congressmen and members of their staffs.

Thus by virtue of its organizational purpose, the allocation of its resources and its experience and programs, MCAP has an interest in a full and fair consideration of the issues in this case.

A ruling by this court that the statute in question is invalid could have a devastating impact not only upon the prospects of

also upon a host of public and private programs designed to overcome the effects of racial and ethnic discrimination and to help provide jobs and income through minority business development.

SUMMARY OF ARGUMENT

The courts below properly held that the minority business enterprise provision (Section 103 (f) (2), hereafter referred to as the MBE provision, of the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), is not unconstitutional and does not violate Title VI of the Civil Rights Act of 1964. See also decisions in accord by the Third and the Sixth Circuits. *Constructors Association* v. *Kreps,* 573 F.2d (3rd Cir. 1978); *Ohio Contractors Association* v. *Economic Development Administration* ____Fed. 2d____, No. 78-3053 (6th Circuit, July 7, 1979).

The MBE provision comes under the powers conferred upon Congress by the Thirteenth and Fourteenth Amendments, which sets this case apart from the circumstances of the *Bakke* case. *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), 46 U.S.L.W. 4896, 4904. As noted by Mr. Justice Powell in that case, "We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial action." *Regents of the University of California v. Bakke, supra.* 98 S.Ct. at 2755 n. 41. and cases there cited, *Katzenbach v. Morgan,* 384 U.S. 641 (1966) and *Jones v. Alfred H. Mayer,* 392 U.S. 409 (1968).

Notwithstanding the deferance which may be due Congress as a separate branch of government as it acts to "abolish all badges and incidents of slavery," (*Civil Rights cases,* 109 U.S. 3, 20 (1883)), the courts below viewed the racial classification in the LPW provision "suspect" and subjected it to a test of "strict scrutiny," which petitioners agree was the proper standard. Pet. App. 28a; 29a, 30a.

In deciding that "even under the most exacting standard of review the MBE provision passes constitutional muster," the 2nd Circuit Court of Appeals had the full benefit of the opinions of this case in *Bakke, supra*, decided earlier.

This court's subsequent statement that racial classifications are "presumptively invalid and can only be upheld upon an extraordinary justification," in *Personnel Administrator of Massachusetts v. Feeney*, 99 S.Ct. 2282, 2292 (1979) 47 U.S.L.W. 4654, simply restated the rule applied by the court in prior cases cited therein[3] and did not constitute an expanded or revised test. On the contrary the Court's decision in that case upholding an absolute preference granted veterans in state employment supports the decisions of the lower courts.

The construction industry traditionally has provided the stepping stones for entering the American business system. The path has been from craftsman to small entrepreneur to large entrepreneur. For Blacks and some other ethnic minorities, however, the path has been barred by discrimination so pervasive and so persistant as to keep them always at the meager edges of the industry, furnishing the physical labor and competing for the smaller less desirable jobs, usually within the minority community.

This history of discrimination is an established and well-known fact of American life, deeply rooted in the more than 200 years of lawful slavery and nourished through almost another century of state enforced segregation.[4]

In the construction industry, racial discrimination has been especially virulent and resistant to change. For Blacks and other minorities, the first step toward becoming a contractor—mastery of one of the skilled crafts—has been effectively blocked by the concerted efforts of white craftsmen.

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[3] Brown v. Board of Education 347 U.S. 483; McLauglin v. Florida, 379 U.S. 184.

[4] The separate opinion of *Mr. Justice Marshall in Bakke, supra*, provides a concise account of this "well known" history, which included denial of the "opportunity to become. . .engineers. . ."

Long before the era of powerful building trades unions and trade associations with their awesome financial resources, communications outlets and cadres of lobyists, white craftsmen would walk off the job rather then allow a free Negro to practice a skilled craft, and white employers would agree to the demands of the white workers.

The discriminatory attitudes and practices that were developed during the slavery period have continued to the present despite sporadic and sometimes heroic efforts to overcome them. Discriminatory and negative attitudes and action toward minorities in construction have not been confined to majority contractors and labor orgainizations but have influenced minority contractors' ability to secure loans, surety bonds and public contracts.

As will be discussed more fully below, numerous findings on the basis of formal hearings by the courts, congressional committees, and federal and state administrative bodies attest to the difficulties minorities have encountered and continue to encounter in the construction industry. This includes regular hearings on measures and appropriations on programs to assist minority business.

Less formal studies, magazine and newspaper articles, books, television programs, essays and law review articles have chronicled the problems of minorities in the construction industry and contributed to congressional and public awareness of those problems.

The result of such discrimination, past and present, is the continued substantial underrepresentation of minorities in the contract construction industry and in the skilled trades that lead to contracting. These conditions have remained despite the fact that the construction industry has doubled in size during this decade, increasing from $100-billion to over $200-billion in annual gross receipts. They have been relatively impervious to a variety of public and private efforts to counter discrimination.

Minority underrepresentation in the construction industry unquestionably has contributed significantly to disproportionately low income levels. Indeed denial of opportunity in this area is especially frustrating and embittering and has been the subject of urban unrest, demonstrations and disturbances.

The MBE proviso improved the Act's ability to reduce unemployment, which was its major goal. The provision also served the purpose of assuring that minority business would not be almost totally excluded from this public works building program and thus it helped the Act meet the "simple justice" goal enunciated by Senator Humphrey and approved by the Court in *Lau v. Nichols,* 414 U.S. 563 (1974).

Great weight should be given to a House Subcommittee's finding that the lack of minority business participation in the construction industry in particular "could be attributed to a business system that 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." Summary of Activities of the Committee on Small Business, House of Representatives, 94th Congress, 182-83 (November, 1976).

Considering the entire record before Congress additional findings on the linkage between discrimination and the extraordinary problems of minority unemployment and business underrepresentation were unnecessary and would have been redundant. Discrimination may be subtle and usually must be inferred and such problems may call for extraordinary or even race-sensitive solutions regardless of whether there are precise findings as to their exact cause.

The means chosen by Congress to remedy such discrimination were appropriate and the least obtrusive that could have been effective. Further the means were in keeping with the remainder of the Act which was designed for expedited implementation in order to make its benefits quickly felt.

As noted by the courts below, the MBE provision applied only to a small fraction of total construction or total public construction. The effect was to integrate for a limited time and to a limited extent public activity that has been almost exclusively segretated in the past.

ARGUMENT

I. THE MBE PROVISION IS A VALID EXERCISE OF CONGRESSIONAL POWERS UNDER THIRTEENTH AND FIFTEENTH AMENDMENTS TO THE CONSTITUTION.

A. Past Discrimination

Racial discrimination in the construction industry was an integral part of the system of slavery that obtained in America for more than two centuries. In one of the earliest accounts of the development and dynamics of racial hostility in the building trades, Frederick Douglass, the former slave who became an ambassador, described how the antipathy of white craftsmen to the competition of Negro workers caused him to be severely beaten by white apprentices and forced his withdrawal from an apprenticeship program in which he had been enrolled while a slave in Maryland.[5]

The situation was not much better after he escaped to New Bedford, Mass. While there was little objection to his performance of unskilled work, when he tried to practice his craft, he "was told that every white man would leave the ship in her unfinished condition if I struck a blow at my trade upon her." id. pp. 210, 211.

This pattern of discrimination clearly was covered by the remedial powers conferred on Congress by Section 2 of the Thirteenth Amendment and Section 5 of the Fifteenth Amendment.

The continued history of such discrimination also is well documented.

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[5] *The Life and Times of Frederick Douglass*, MacMillan Publishing Co. (1962 edition) pp. 179,180.

Indeed a substantial body of literature has developed on the difficulties encountered by minorities in obtaining equal employment opportunity. Booker T. Washington and W.E.B. DuBois were early commentators, Booker T. Washington "The Negro and The Labor Unions," *Atlantic Monthly* (July, 1913), pp. 756-767; W.E.B. DuBois "The Economic Future of the Negro," *American Association Publications*, 3rd Series (February, 1906) pp. 219-242.

Interest in minority difficulties has continued through the depression to the present. See *The Black Worker*, by Sterling D. Spero and Abram Harris; Columbia University Press, (1931), and *The Negro in Organized Labor*, by Ray Marshall; John Wiley and Sons, Inc. (1965).

It appears to be generally recognized that the building trades are the area where dualism and discrimination have remained the most intractable. Bayard Rustin, recently defending the general record of organized labor with regard to minorities, wrote also of the "terrible racial conflict in the building trades." "The Blacks and the Unions", *Harpers Magazine*, (May, 1971), reprinted in *Down The Line*, Quadrangle Press (1972) pp. 335-349. See also a discussion of the so-called Philadelphia Plan, "Who failed in Philadelphia", by Nick Kotz, first published in the *Washington Post* and reprinted in *Constructor* magazine, January, 1971 issue, and the "Unchecked Power of the Building Trades," *Fortune* magazine, December 1968.

More recently, a General Accounting Office sudy confirmed the continued existence of discrimination among the skilled craft unions, as well as failure of Federal efforts to effect change. *Comptroller General's Report to the Congress*, "Federal Efforts to Increase Minority Opportunities in Skilled Construction Craft Unions have had Little Success." HRD-79-13, March 15, 1979, hereafter referred to as GAO Report on Craft Unions. The study found that "(h)istorically and traditionally" few minorities have worked in the unionized skilled construction crafts for "various reasons, including such discriminatory prac-

tices as nepotism and racial exclusion." The GAO study also found that minorities made little progress in increasing their participation, moving from 7.2 percent in 1972 to 8.4 percent in 1976. The GAO reported that minority union craftsmen earned less than their white counterparts and that minorities usually were forced to complete apprenticeship programs to become journeymen whereas whites became journeymen more easily without apprenticeship training. The study attributed the disparity of earnings and the lack of membership progress to ineffective enforcement and inadequate monitoring by Federal agencies and to racial discrimination.

A study by the Department of Housing and Urban Development, based on in-depth interviews of minority contractors, noted that "with virtually no exception the route to entrepreneurship as a general or specialty contractor begins with entry into a skilled trade." *A Survey of Minority Construction Contractors*, (1971), HUD, hereafter referred to as HUD Survey.

As an example of the "well documented" exclusion of minorities from skilled crafts, the HUD Survey asserted that a June, 1968, Senate report to the Joint Economic Committee "stated plainly that 'except in very marginal circumstances, and in unskilled categories, the contruction labor force (at this point in time) is lily white.' It further stated that 'no programs are under way and no changes are in the works at the present time which will result in a balanced construction labor force with appropriate proportions of minority workers in the years immediately ahead.' "

Minority craftsmen who had succeeded in becoming contractors reported that they encountered racial discrimination in their dealings with surety bonding and Federal contracting officials, according to the HUD Survey. It noted that around 15 percent of the contractors surveyed listed racial discrimination as among the main obstacles to obtaining jobs, and 64 percent advocated legislation against discrimination.

A 1975 report to the Congress by the U.S. Commission on Civil Rights depicts the paltry share of government procurement from minority businesses in the absence of the MBE provision under consideration. Despite Executive Orders and affirmative action programs calling for minority participation, minority firms received at best only 0.7 percent of Federal procurement in 1972 and possibly only 0.5 percent, the Commission found. U.S. Commission on Civil Rights Report, *Minorities and Women as Government Contractors,* May 1975, hereafter referred to as Commission Report.

State and local governments purchased $62.5-billion in goods and services from the private sector in 1972, the Commission Report found, which was $5-billion more than the Federal government purchased and amounted to 5.5 percent of the gross national product. However, only 76 of 137 such jurisdictions responded to the Commission's survey and these reported minority and female-oriented firms combined received less than 0.7 percent of their procurement dollars. Commission Report, *supra*, p. 86.

The report also observed that "a substantial portion of all Federal contracts are awarded through negotiation procedures," rather than by competitive bidding, and noted that almost 60 percent of Department of Defense procurement in fiscal 1972 was through "sole source" contracts. Commission Report, *supra*, p. 18.

Because Federal procurement officials have broad lattitude with regard to evaluating bids and the capabilities of prospective government contractors, the Commission interviewed such officials and found that some openly expressed hostile and negative attitudes toward minorities and toward programs intended to assist them. Commission Report, *supra*, p. 20, 21.

The Commission also found that a Federal minority subcontracting program for direct procurement[6] was intended

[6] 41 C.F.R. 1-1.1310-1; 32 C.F.R. 1-332.1.

to encourage smaller prime contractors to use their "best efforts" to utilize minority subcontractors, and to get larger prime contractors to develop affirmative action plans, but had been ineffective for a variety of reasons. Commission Report, *supra*, p. 79-84.

Affirmative action subcontracting programs under Executive Order 1126 as amended[7] for federally financed construction had not been enforced and neither had there been much enforcement of a circular by the Office of Management and Budget[8] calling for positive steps to ensure use of minority businesses by prime contractors. Commission Report, *supra*, pp. 90-93.

The Commission also evaluated the Small Business Association's 8(a) set-aside program[9] for small businesses owned by "socially or economically disadvantaged" persons and found that, while the program had potential, it had procured for such firms only a "minute fraction" of total Federal procurement.

The Maryland State Advisory Committee to the Civil Rights Commission earlier had held hearings and had issued a report to the Commission on discrimination in the construction industry in that state. *Employment Discrimination in the Construction Industry in Baltimore*, Report of the Maryland State Advisory Committee to the U.S. Commission on Civil Rights, February 1974, hereafter referred to as the Advisory Committee Report.

The Advisory Committee noted that in 1964 it had reported that discrimination in employment "may well be the decisive factor in the tense racial situation in Maryland," and that only

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[7] Executive Order 11246 (Sept. 24, 1965), amended by Executive Order 11375 (Oct. 13, 1967).

[8] Office of Management and Budget Circular A-102, Attachment O, Sec. C (3) (October 1971).

[9] The Small Business Act of 1953, Section 8(a) 15 U.S.C. 637(a), 13 C.F.R. 124.8

"limited gains" had been made since then. Advisory Committee Report, *supra*, p.1. Congressman Parren J. Mitchell of Maryland, who later introduced the MBE provision under review in this case, participated in the Advisory Committee's hearings and advocated the development of an affirmative action plan for Baltimore that would include a provision that "Black contractors should receive 30 percent of Federal and federally-assisted contracts." Advisory Committee Report, p.36.

This long history of discrimination in the construction industry and of ineffective programs to combat it has contributed to the measurable differences in the well being of racial and ethnic groups. See, e.g., *The Social and Economic Status of the Black Population in the United States,* An Historical View, 1790-1978, Current Population Reports Special Studies Series P-23 No. 80, U.S. Department of Commerce, Bureau of the Census. This study charts, among other things, the disparity in unemployment rates (roughly double the white rate) and income levels for the minority population over a period of many years.

Studies noted by the courts below (Pet. App., 38a, note 14) illustrate the underrepresentation of minority firms in the contract construction industry. Thus, according to the Census Bureau's study of the total construction industry in 1972, there were 920,806 firms with revenues totaling $164.4-billion.[10] The Bureau's report on minority business showed 39,875 firms with receipts totaling $1.2-billion, well under one percent of the industry total.[11]

Such disparities in business participation and income by minority businesses which represent 17 percent of the population and on whom a substantial proportion of that population

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[10] U.S. Bureau of the Census, *1972 Census of Construction Industries:* Industries Series, United States Summary-Statistics for Construction.

[11] U.S. Bureau of the Census, 1972 Survey of Minority-Owned Business Enterprises: Minority-Owned Businesses, Table 1 (May 1975).

must rely for employment, income and services, were the subject of numerous hearings by Congressional committees.

Specific findings of discrimination frequently have been made. Thus the House Select Committee on Small Business conducted hearings in 1971 and 1972 and concluded that "the minority businessman does not play a significant role in our economy" due to major problems which, though "economic in nature, are the result of past social standards which linger as characteristics of minorities as a group." p. 3, H. Rept. 92-1615 (Oct. 18, 1972) and H. Rept. 92-1626 (Dec. 21, 1972).

The Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business held hearings in 1975 on minority enterprise and found that such firms realize only .065 percent of business gross receipts and stated that "the presumption must be made that past discriminatory systems have resulted in present economic inequities." p. 2, H. Rept. 94-468 (Sept. 10, 1975).

The House Committee on Small Business later adopted the Subcommittee's findings and in a 1977 report concluded that "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 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 those 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." p. 182, H. Rept. 94-1791 (Jan. 3, 1977).

The Subcommittee on Minority Enterprise and General Oversight of the House Committee on Small Business, after hearings in April, May and June of 1977 found that women generally are precluded from "equitable participation in our economy as business owners" due to sex discrimination, and

that minority women in business have unique problems due to "the double stigma of being both minority and female." pp. 23-25, H. Rept. 95-604 (Sept. 15, 1977).

Congress also has received messages from the President requesting measures to remedy discrimination by aiding minority business enterprise, H. Doc. 92-69, (Oct. 13, 1971); H. Doc. 92-194 (Mar. 20, 1972). Presidential Executive Orders also have been premised on the fact that minorities have been denied opportunities to participate in the business system. See Presidential Executive Order 11518, 35 Fed. Reg. 4939, Mar. 20, 1970, CFR 1966-1970 Compilation, p. 907 and Presidential Executive Order 11625, 36 F. Reg. 19967.

Subsequent to passage of the MBE provision Congress has reiterated its belief that discrimination against minorities should be remedied through Federal procurement contracts. See House-Senate Conference Committee Report, H. Rept. 95-1830, (Jan. 2, 1979); Senate Select Committee on Small Business Report, S. Rept. 96-31, (Mar. 7, 1979).

Executive agency reports, as noted above, frequently have referred to racial and ethnic discrimination as creating a need for minority business development. See, e.g. *Building Minority Enterprise* (1970), the Office of Minority Business Enterprise, Department of Commerce, referring to discrimination by "suppliers, unions and lenders;" and *Minority Enterprise and Expanded Ownership: Blueprint for the 70's* (June, 1971), President's Advisory Council on Minority Business Enterprise which states that "enormous economic inequities, the product of centuries of disregard, discrimination, and institutional racism, still exist . . ." p. 5, and surveys historical reasons for paucity of minority business enterprises and stresses the impact of racial discrimination on Afro-Americans and Americans of Spanish ancestry. pp. 10-18; *Minority Ownership of Small Business: Thirty Case Studies* (1972), Department of Health, Education, and Welfare, which gives actual case histories, including apparent instances of racial discrimination; *Progress Report: The*

Minority Business Enterprise Program 1972 (Oct., 1972), Office of Minority Business Enterprise (OMBE) Department of Commerce, cites "prejudice" and "the chill winds of exclusion" as limiting the entry of minorities into the business system. p. 3; *Limited Success of Federally Financed Minority Businesses in Three Cites* (1973), General Accounting Office, which examines effect of various Federal programs to aid minority businesses and cites "racial discrimination" as one factor that has limited the opportunity for minority ownership of business. p. 5; *Report of the Task Force on Education and Training for Minority Business Enterprise* (Jan., 1974), OMBE, Dept. of Commerce, which notes that "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." p. 17; *Minority Enterprise Progress Report* (Jan., 1976), OMBE, Dept. of Commerce, in which Secretary of Commerce Elliot Richardson stated that "... since minority groups start from behind the power curve because of past discrimination, they deserve whatever extra assistance all of us can give them in order to have a reasonable chance of success;" *Federal Procurement and Contracting Training Manual for Minority Entrepreneurs* (May, 1975), OMBE, Dept. of Commerce notes effects of discrimination on minority business and states that "there has been a severe shortage of potential minority entrepreneurs with general business skills as a result of the minorities' historic exclusion from various sectors of our economy" pp. 38-39.

In addition to the above, there is a considerable body of court findings of racial discrimination in employment, including the construction industry. See, e.g. Pet. App., 16a note 17 and the cases cited therein, and *Steelworkers v. Weber*, 47 U.S.L.W. at 4852 n.1.

Further, there is a substantial volume of relatively recent civil rights legislation enacted by Congress as a result of its findings of persistent racial discrimination in various institutions

and aspects of our national life. See Pet. App., 32a, note 7 for a comprehensive listing.

B. Congressional Purpose

There can be little doubt that Congress added the MBE provision to the Local Public Works Employment Act in an effort to offset the effects of past discrimination, which if left unremedied would have robbed the Act of much of its effectiveness. The statements of the sponsors clearly connect the MBE provision to a record of discrimination so familiar and so odious that the proposed remedy touched off little discussion or debate except as to the mechanics of its application.

Senator Brooke, who was joined by a bipartisan group of eight Senators, in offering his version of the provision spoke of the importance of focusing "on the unemployment experiences of different racial and ethnic groups," which he said normally are double the unemployment rate of white citizens. He said it was "entirely proper, appropriate and necessary" to set aside a "reasonable percentage of the public works job funds to go to qualified minority contractors." Senator Brooke explained that this was necessary because minority businesses "have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive Orders and regulations mandating affirmative action efforts." He also urged "the set-aside concept as a legitimate tool to insure participation by the hitherto excluded or unrepresented groups."

Senator Brooke asserted that this was an "appropriate concept because minority businesses are principally drawn from residents of communities with severe and chronic unemployment," adding that a healthy minority business sector would be required for progress in dealing with these problems. Congressional Record S.3910, March 10, 1977.

Earlier in the House, Congressman Mitchell of Maryland, in introducing The MBE provision said it was intended to provide a "fair share of the action" to minority business and

spoke repeatedly of the "denial" of government contracts to minorities, which he said was evident from the fact that minority firms participated in only about 1 percent of Federal procurement. He also maintained that allowing minorities to do business with the government would eventually allow reduction in Federal spending for survival support programs. Congressional Record H. 1436, 1437, Feb. 24, 1978.

Congressman Conyers urged passage on the grounds that minority contractors "get the works" when they engage in the competitive bidding process. Congressman Biaggi commented that the Nation's record with respect to minority business is "a sorry one". He pointed out that unemployment among minority groups was "running as high as 35 percent, and said that without the provision the legislation was "potentially inequitable to minority business and workers." Congressional Record, H. 1440, Feb. 24, 1977.

Clearly these speakers and those who indicated their agreement with them were addressing compelling national concerns that were caused or aggravated by unequal experience on the basis of race. It was conceded by petitioner that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination" (Pet. App. 29a), and the record clearly supports the conclusion that this was indeed Congress' intent.

C. Means Employed

In fashioning the remedy of mandatory minority participation in the Local Public Works Employment Act, Congress was mindful of the fact that a number of other remedies had been tried but had failed to effect a cure. As this court recently observed in *United Steelworkers v. Weber, supra*, the problem of nonwhite unemployment addressed in the Civil Rights Act of 1964 was still with us in 1978, 47 U.S.L.W. 4854, note 4.

In upholding the validity of a private negotiated plan that reserved for Black workers 50 percent of the openings in a craft

training program, the Court in that case relied in part on the fact that the plan was temporary and that it did not create an absolute bar to white advancement.

The remedy in the present case was even more limited in terms of duration and it permitted white contractors to continue to get a disproportionately large percentage of contracts under the Local Public Works Employment Act. It had no effect at all upon the great mass of Federal procurement. Further the MBE provision did not impose rigid and unduly obstructive standards upon the state and local jurisdications but allowed great flexibility in the implementation of the provision and allowed for waiver of the requirement by the Secretary of Commerce in the areas where capable minority firms were not available.

While hindsight might offer opportunities for a more elaborate remedy, the simplicity and directness of the present mandate was in keeping with the general tenor of the statute, which was intended to provide employment benefits in rapid fashion. See GAO Report, *supra*, p. 37.

GAO's study found a number of positive results from the program and indicated that it had been far more successful than other programs in securing minority contractor participation in Federal procurement. Thus data on SBA's 8(a) procurement program indicated that only $459-million in construction contracts had been channelled to minority firms over a 12-year period, as compared to $634-million during the short period of the local Public Works Employment Act. GAO Report, p.9.

GAO also found that 90 percent of the majority prime contractors conceded that the work performed by minority firms was acceptable, but only 30 percent of the white contractors were willing to consider using the minority contractors on future jobs and give them the opportunity to submit bids. The GAO Report thus confirms both the necessity for and the wisdom of the mandatory MBE provision.

Congress acted in conformity with the Court's ruling in *Lau v. Nichols, supra,* that "simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any way which encourages, entrenches, subsidizes, or results in racial discrimination."

II. CONCLUSION

For the reasons set forth above, the Minority Constractors Assistance Project, Inc., respectfully submits that the Decision of the Second Circuit Court of Appeals be affirmed.

Dated: Washington, D.C.
October 9, 1979

Respectfully submitted,

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