IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1007

H. EARL FULLILOVE, et al., *Petitioners,*

v.

JUANITA KREPS, Secretary of Commerce, et al., *Respondents.*

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

AUTHORITIES CITED

Cases: Page

AUTHORITIES CITED—Continued

AUTHORITIES CITED—Continued

AUTHORITIES CITED—Continued

AUTHORITIES CITED—Continued

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H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERALD N. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DEVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIRCONDITIONING CO., INC.,

Petitioners,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC"), 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."

STATUTES INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) contains the following minimum 10% minority business set-aside requirement:

> "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 Ne-

groes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

INTEREST OF THE *AMICUS CURIAE*

This case presents a question of major importance to federal grantees and contractors throughout the United States, including EEAC members, who are subject to a number of federal minority business assistance programs and their affirmative action and minority business subcontracting requirements.[1] At issue is whether a statutory scheme designed to remedy an underrepresentation of minority owned and operated businesses in certain segments of the economy by requiring that a percentage of federal funds expended be reserved exclusively for certain minority group members is constitutional where there has been no determination, legislative or otherwise, of past

[1] Such programs include Executive Order No. 11458, 34 Fed. Reg. 4937 (1969), as amended by Executive Order No. 11625, 36 Fed. Reg. 19962 (1971) ("E.O. 11625"), which requires that Federal executive agencies develop plans and programs to encourage minority business enterprise; Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ["4R Act"], and its implementing regulations [49 C.F.R. Part 265], which prohibit discrimination on the basis of race, color, national origin or sex in the participation in, or benefits of, any program funded by the 4R Act, and requires the Federal Railroad Administration and its recipients to take affirmative action to assist minority-owned businesses in the programs set up by that Act; and Section 8(d) of the Small Business Act, 67 Stat. 232, 15 U.S.C. § 631, as amended by Pub. L. No. 95-507, 92 Stat. 1757 (1978), which requires recipients of federal contracts exceeding one million dollars for construction and $500,000 for other purposes to develop and have approved subcontracting plans for small and "socially and economically disadvantaged" businesses.

discrimination, other than a possible finding of generally low minority business representation.

Initially, we wish to note that there exists a strong commitment among EEAC members to promote the goal of equal opportunity for women and minorities. Many EEAC members are members of organizations designed to promote minority purchasing; engage in vendor and buying education; identify minority vendors and establish vendor information exchanges. EEAC members are dedicated to equal opportunity and have evidenced that conviction in a variety of programs and activities. EEAC strongly supports the concepts of equal employment opportunity and affirmative action, but has serious concerns about the constitutional authority of the Congress to compel the adoption of rigid racially-based quotas.

Organizationally, EEAC is concerned primarily with equal employment opportunity ("EEO") laws and policies and typically confines its activities to this area.[2] However, because both judicial and adminis-

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[2] EEAC is a nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity. Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as *Amicus Curiae* in a number of other recent cases raising important equal employment issues. See, e.g., *United Steelworkers of America, AFL-CIO-CLC*

trative bodies (including the court below)[3] have relied increasingly upon the use of affirmative action programs in EEO-related regulations and cases to justify minority business set-asides, the need to clarify conceptual relationships between these two areas has grown accordingly. Indeed, because the Court is reviewing a statute which may well require the articulation of constitutional standards for evaluating government-sanctioned racial and ethnic preference programs solely on the basis of underrepresentation, its decision could have far-reaching consequences for governmental affirmative action programs that require employers to rectify an underrepresentation of minorities in their workforces. With these concerns in mind, we submit this brief in order to explicate the constitutional problems raised by the minority business set-aside legislation reviewed herein, not

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v. *Brian F. Weber*, 47 U.S.L.W. 4851 (U.S. June 27, 1979); *Great American Federal Savings Association, et al.* v. *Novotny*, 47 U.S.L.W. 4681 (U.S. June 11, 1979); *The Regents of the University of California* v. *Allan Bakke*, 438 U.S. 265 (1978); *County of Los Angeles* v. *Van Davis*, 47 U.S.L.W. 4317 (U.S. March 27, 1979); *Furnco Construction Corporation* v. *Waters*, 46 U.S.L.W. 4966 (1978); *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); *United Air Lines* v. *Evans*, 431 U.S. 553 (1977).

[3] 584 F.2d 600, 607-609. *See also* "Participation by Minority Business Enterprise in Contracts and Programs Funded by the Department of Transportation," Notice of Proposed Rulemaking, 44 Fed. Reg. 28928, 28931 (May 17, 1979).

Similar parallels have occurred between equal employment and equal educational opportunity issues. See *The Regents of the University of California* v. *Allan Bakke*, 438 U.S. 265 (1978).

only in the context of federal assistance and procurement law, but in the area of EEO law as well.

THE FACTS AND DECISION BELOW

The petitioners are several associations of contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work. They sought declaratory and injunctive relief to prevent the Secretary of Commerce as program administrator from enforcing the minority business set-aside provision of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2). That section mandates 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." A minority business enterprise is defined as "a business at least 50 per centum of which is owned by minority group members. . . ." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." 584 F.2d at 601.

The district court denied their petition and dismissed the complaint, holding that the provision was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry. In doing so, the court summarized the history of the MBE requirement. The set-aside amendment, it was noted, was part of an act which extended the provisions of Title I of the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999-

1012 (1976), under which Congress appropriated two billion dollars to stimulate the national economy and the sagging construction industry by providing direct grants to state and local governments for the construction of public facilities which would immediately create a substantial number of jobs. From an additional authorization of four billion dollars for construction projects, Congress subsequently appropriated two billion dollars under a "Round Two" of the Local Public Works Program. The minority business enterprise (MBE) set-aside requirement was incorporated into Round Two as the result of an amendment introduced on the floor of the House of Representatives by Congressman Parren Mitchell of Maryland.

Because the MBE requirement distinguishes among various business enterprises on the basis of race—an inherently "suspect" classification—the court applied "rigid scrutiny" to determine whether there was a compelling government purpose for the classification, and whether the means chosen to effectuate the purpose was the least intrusive alternative. First evaluating whether a compelling interest for the racial classification existed, the court cited several statements by the amendment's sponsor and supporters to the effect that minority businesses are underrepresented in public contract awards. It conceded that "It is true that these statements do not expressly attribute the difficulties encountered by minority business enterprises to prior racial discrimination," but noted that "but whatever ambiguity is present is easily resolved when the available empirical data is examined." 443 F. Supp. 253, 258. The court proceeded to quote from: (1) an unrelated report on

minority business opportunities by the Commerce Department concerning the "historic exclusion" of minority entrepreneurs from the mainstream economy; and (2) an unrelated report concerning the preclusion of minority businesses, particularly in the construction industry, prepared during the previous Congressional session by the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise. *Id.* at 258-259. The court thereupon concluded that in enacting the MBE requirement, Congress had sought to remedy prior racial discrimination, and thus had satisfied the compelling government interest test.

With respect to whether the MBE set-aside constituted the least intrusive means to accomplish increased utilization of MBEs, the court conceded that "[a]ny reduction in the percentage of minority business participation required under the Act would, of course, result in reduced channeling of funds to the detriment of nonminority businesses and therefore less discriminatory impact." *Id.* at 262. (Citation omitted). However, after discussing what it considered to be the ineffectiveness of the Section 8(a) program of the Small Business Administration (see pp. 27-32, *infra*), and after weighing different definitional or percentage formulas for hypothetical MBE set-asides, the court concluded that the existing MBE set-aside requirement "cannot be considered unreasonable in view of the consistent failure of less intrusive attempts to nurture the growth of minority enterprises." *Id.*[4]

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[4] The district court also considered, and then rejected, the petitioners' claim that the MBE set-aside conflicted with the

On appeal, the Second Circuit Court of Appeals affirmed the judgment of the district court, finding that "even under the most exacting standard of review the [minority business set-aside] provision passes constitutional muster." 584 F.2d 600, 603. The Second Circuit agreed with the district court that specific findings of past discrimination to justify the set-aside were unnecessary. Citing *Katzenbach* v. *Morgan*, 384 U.S. 641, 656 (1966), the court declared that it is " 'enough that [the court] perceive a basis upon which Congress might predicate a judgment that the MBE amendment would remedy past discrimination against minority construction businesses." 584 F.2d at 604-605. While admitting that explicit findings of past discrimination do not appear in the relevant committee reports, the Second Circuit found the record "not entirely silent," and held that the finding of past discrimination on the basis of the floor statements and unrelated administrative and legislative reports adumbrated in the district court opinion were sufficient to justify the set-aside. 584 F.2d at 605-607.

In evaluating the equitable limitations placed upon fashioning remedies for past discrimination, the Second Circuit looked to its previous decisions in the equal employment opportunity area. The court noted that the effects of "reverse discrimination" as a remedy should not be concentrated upon a small ascertainable group of non-minority persons. *EEOC*

Civil Rights Acts of 1866 and 1964, 42 U.S.C. §§ 1981, 1983 and 1985; 42 U.S.C. §§ 2000d and 2000e *et seq.* (1970). Although the same statutory challenge apparently was raised before the Second Circuit (Cert. Pet. 13), the decision of the Court of Appeals makes no reference to it.

v. *Local 638, Sheet Metal Workers*, 532 F.2d 821, 828 (2d Cir. 1976); *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). Finding that the MBE set-aside extended to only .25 percent of the funds expended yearly on construction work in the United States, the Second Circuit concluded that because "nonminority businesses have benefited in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competing for this relatively small amount of business for the short time that the program has to run." 584 F.2d at 608.

SUMMARY OF ARGUMENT

The Second Circuit's determination that the minimum 10% MBE set-aside in the Public Works Employment Act of 1977 is not unconstitutional is incorrect for two reasons: (1) the racially-based set-aside is unaccompanied by specific legislative findings of prior discriminatory acts, *Regents of the University of California* v. *Allan Bakke*, 438 U.S. 265 (1978); and (2) assuming the existence of a compelling government interest, the Second Circuit failed to conduct adequately the constitutionally-mandated inquiry whether the set-aside, being an extreme form of relief, was necessary and the least discriminatory means available to accomplish the legislative objective, *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Dunn* v. *Blumstein*, 405 U.S. 330, 342-343 (1972). Had it done so, it should have reached a contrary result. *Cf. Associated General Contractors of Calif., et al.* v. *Secretary of Commerce*, 441 F.Supp. 955 (C.D. Cal. 1977), *judgment vacated and remanded*, 46 U.S.L.W.

3892 (U.S. July 3, 1978), *original judgment reinstated in full*, 459 F. Supp. 766 (C.D. Cal. 1978), *juris. statement pending*, Nos. 78-1107, etc.

I

Citing *Regents of the University of California* v. *Bakke*, *supra*, the Second Circuit properly determined initially that the minimum 10% MBE amendment "is permissible only if it is a remedy for past discrimination." 584 F.2d at 603. Moreover, the *Amicus* agrees with the government that, in accordance with *Bakke*, "[d]ifferences in the congressional findings supporting any new minority business enterprise provisions and in the degree and kind of the minority preference may make a significant difference in the constitutional analysis. . . ." (Memo for the Sec. of Commerce Opposing Cert. at 11). What the Second Circuit's decision fails to illustrate, and what the government cannot afterwards substantiate, is the existence of *any* legislative findings of past discrimination at all. Instead, the Second Circuit itself inferred such past discrimination only on the basis of the provision's self-evident purpose in assisting minority contractors. Although this analysis explains the amendment's goal, it does not enhance the underlying justification for its pursuit. When the Second Circuit did search for legislative findings of evidence of past discrimination, it found little reference to it during floor debate and none in the committee reports; yet, paradoxically, the court interpreted the lack of findings itself as proof that past discrimination existed.[5] This hardly qualifies as a

[5] Because the minimum 10% MBE amendment was introduced on the House floor, the Court found absence of its dis-

valid Congressional exercise of its "special competence to make findings with respect to the effects of identified past discrimination." *Regents of the University of California* v. *Bakke*, 438 U.S. at 302 n.41 (Powell, J.). In fact, on this record, there are no findings that MBEs have been denied the same right to contract with federal grantees as nonminority businesses. Thus, no compelling government interest has been established to justify the highly suspect action Congress herein has undertaken.

II

Even assuming that the requisite findings were made, moreover, the Second Circuit failed to engage in the constitutionally-mandated inquiry whether the set-aside entailed the least discriminatory alternative to achieving a valid legislative purpose. Without investigating in any way whether Congress could have used less intrusive means, the court determined that because the set-aside comprised a small fraction of the funds expended yearly on construction work, it represented a "minimal frustration" to nonminority contractors, and thus was constitutional. 584 F.2d at 607-608. The Court thereby overlooked the *nature* of set-asides, as opposed to their quantitative impact. In so doing, no acknowledgement was made that set-asides, *in and of themselves*, constitute an extreme remedy and ordinarily should be used only as a last

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cussion in committee reports "not surprising." 584 F.2d at 605. "Furthermore," the Court added, "the lack of extended discussion [on the House floor] clearly indicates the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry." *Id.* at n.10.

resort, even when imposed by courts enforcing remedial civil rights statutes, *Lewis* v. *Tobacco Workers, Local 203*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3455 (U.S. Jan. 9, 1979). *Kirkland* v. *New York State Dept. of Correctional Services, supra; Ostapowicz* v. *Johnson Bronze Co.*, 541 F.2d 394 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977); *Dawson, et al.* v. *Pastrick, et al. and East Chicago Firefighters Ass'n*, —— F.2d ——, 19 EPD ¶ 9270 (7th Cir. May 31, 1979).

Had the Second Circuit conducted such an inquiry, it would have found, as did the district court in *Associated General Contractors of California* v. *Secretary of Commerce, supra*, 459 F. Supp. 766, that less intrusive means of promoting employment of minority group contractors existed than the "10% racial quota" and thus, as in *Bakke*, the amendment was not a "necessary" means to promote a legitimate, substantial interest. *Id.* at 780-781.

III

In sum, "simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which . . . results in racial discrimination." *Lau* v. *Nichols*, 414 U.S. 563 (1974), quoting 110 Cong. Rec. 6543 (1968). Without legislative findings of MBE exclusion from federal assistance-related contracting opportunities, *cf. United Steelworkers of America* v. *Weber*, 47 U.S.L.W. 4851, 4852, n.1 (1979), the minimum 10% MBE set-aside fails to withstand scrutiny, for it clearly establishes racial eligibility for a portion of federal grant funds

even though no past act of discrimination is remedied thereby. In *Washington* v. *Davis*, 426 U.S. 229 (1976), this Court professed difficulty in understanding how a racially neutral application for employment —there an aptitude test—could violate equal protection guarantees "simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." 426 U.S. at 245. Similarly, the *Amicus* submits that where Congress enacts a federal program in which a portion of the contract dollars to be spent is strictly reserved for certain minority group members on the basis only of underrepresentation, such a statute inevitably violates the equal protection guarantees inherent in the Due Process Clause of the Fifth Amendment.

ARGUMENT

I. IN THE ABSENCE OF FINDINGS OF PAST DISCRIMINATION, A RACIALLY-BASED SET-ASIDE FOR MINORITY BUSINESS PARTICIPATION IN PUBLIC WORKS PROGRAMS IS WITHOUT A COMPELLING GOVERNMENT INTEREST, AND THUS IS UNCONSTITUTIONAL.

A. Congress did not articulate specific legislative findings of prior discriminatory acts to justify a racially-based set-aside.

1. *The Legislative history*

As the Second Circuit noted (see n.5 *supra*), the minimum 10% MBE amendment was not introduced until the Public Works Bill of which it is a part was being considered on the floor of the House of Representatives, and thus, there is no relevant discussion of the proposal in the committee reports. Although there was some brief debate of the amendment on the

House and Senate floors, it is obvious upon examination of the legislative record that Congress was not seeking to remedy any specific acts of past discrimination.

The amendment was introduced on the floor of the House of Representatives by Representative Parren Mitchell (D-Md.) ("Mitchell amendment") on February 24, 1977. In his opening statement, Rep. Mitchell flatly declared that the purpose of the amendment "is to provide that those who are in minority businesses get a fair share of the action from this public works legislation." 123 Cong. Rec. H 1436 (daily ed. Feb. 24, 1977). This purpose had as its *underlying justification* a statistic proferred by Rep. Mitchell that even with pre-existing government programs designed to assist minority businesses, they received annually only one percent of all government contracts. *Id.* at H 1436-37. Declaring his amendment "the only sensible way for us to begin to develop a viable economic system for minorities," the Congressman spent the greater portion of his remarks responding to anticipated objections to the proposal, namely, that set-asides are not legitimate; that the competitive bid process would suffer; and that the set-aside would cause contract award delays. In response to these potential arguments, he asserted, in turn, that the SBA Section 8(a) program (see pp. 27-32, *infra*) as well as state programs in his state and others proved that set-asides were legitimate; that minority businesses just getting started generally cannot compete against established companies; and that lists of minority companies are available so that no delay will be caused in attempting to locate them. *Id.* No reference was made to any instances of discrimination

against minority contractors by either nonminority contractors or government agencies.[6]

In support of the Mitchell amendment, Rep. John Conyers (D.-Mich.) complained that "minority contractors and businessmen who are trying to enter in on the bidding process . . . get the 'works' almost every time." The reason for this, he explained, is that:

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[6] Congressman Mitchell's opening statement was followed by several colloquys between Rep. Mitchell and other members of Congress. They may be summarized as follows:

Rep. Abraham Kazen (D.-Tex.) asked whether the Mitchell amendment would be mandatory and, if so, whether it would apply to those rural areas where minority businesses were nonexistent. Rep. Mitchell responded, in effect, that the Secretary [of Commerce] would have discretionary authority to make adjustments to the requirement. *Id.* at H 1437.

Rep. Robert Roe (D.-N.J.), acting upon Rep. Kazen's expressed concern, then introduced an amendment to the proposal which articulated the discretionary authority the Secretary would have in imposing the minimum ten percent requirement on grantees. The amendment was accepted by Rep. Mitchell. *Id.* at H 1438.

Rep. William Harsha (R.-Ohio) sought clarification of Rep. Roe's amendment to the Mitchell amendment, and upon receiving assurances that discretion would be exercised, did not pursue the matter further. *Id.* at 1439.

Rep. Don H. Clausen (R.-Cal.) asked whether the Mitchell amendment was necessary since Rep. Mitchell had indicated previously that his home state was making good progress in developing minority business opportunities. Rep. Mitchell acknowledged the progress being made in his own state, but declared, in effect, that the problem of underutilization was national in scope and therefore required a national response. *Id.* at 1439-40.

> "The bidding process is one whose intricacies defy the imaginations of most of us here. The sad fact of the matter is that minority enterprises usually lose out, and subsequently end up in a congressional office or some other unlikely place complaining bitterly. Not all of them come to the offices of members of the congressional Black Caucus either, because many other Members have had the same dismaying experience of trying to give solace to small businessmen who through no fault of their own simply have not been able to get their foot in the door." *Id.* at H 1440.

Rep. Conyers then proceeded to agree that the Mitchell amendment should not apply to those districts that did not have minority enterprises. *Id.* at H 1440.

Rep. Donald Pease (D.-Ohio) then inquired whether the Mitchell amendment would interfere with state competitive bidding requirements, whether minority businesses would receive contracts even when they were not the low bidders, and whether the minority requirement would cause delay in the implementation of the public works program. Rep. Roe did not answer directly any of the proferred questions, but simply reiterated the basic requirement of the Mitchell amendment. *Id.*

Finally, Rep. Mario Biaggi (D.-N.Y.) made a statement in support of the Mitchell amendment, as amended. Finding that the amendment's objective is "to guarantee to minority business enterprise that they too will benefit from the passage of this legislation," Rep. Biaggi concluded House debate on the Mitchell amendment by discussing general socio-

economic statistics. He indicated that the rate of minority group unemployment and MBE dissolution was high and that the percentage of Federal procurement contracts for MBEs was low. The set-aside requirement was justified, according to Rep. Biaggi, because it would go "a long way" in promoting economic "equality" and "parity." *Id.*

The amendment, as amended, was then adopted.

On March 10, 1977, Senator Edward Brooke (R.-Mass.) introduced a minimum 10% MBE provision in the Senate. Its language basically conformed to the Mitchell amendment.[7] Senator Brooke stressed that the provision would relieve the chronic unemployment in minority communities, because minority companies draw their work forces primarily from such areas. He too pointed out that the set-aside concept had been used in the past, namely, in the SBA's Section 8(a) program, and in the Railroad Revitalization Act's minority resources centers. In response to a question from Sen. John Durkin (D.-N.H.), Senator Brooke explained that the minority business provision would not require states with insignificant minority populations and businesses to go out of state to find minority businesses. The amendment was then approved. 123 Cong. Rec. S 3909-10 (daily ed. March 10, 1977).

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[7] Senator Brooke's version contained an additional separate clause concerning areas with insignificant minority populations. The House-Senate Conference, however, adopted the House version. HOUSE CONF. REP. No. 230, 95th Cong., 1st Sess. 11 (1977).

2. Constitutional implications of the legislative history.

The pivotal facts that emerge from the congressional debate on the minimum 10% MBE amendment, together with their accompanying constitutional consequences, can be summarized by evaluating in turn what was and was not expressed by Congress:

(1) Some members of Congress (Mitchell, Conyers, Biaggi) articulated indisputably their concern that minority businesses were not receiving an adequate share of the federal procurement dollar. They declared, in effect, that MBEs were underutilized, and thus they sought by way of the minimum 10% MBE provision to correct this underutilization. Were this the only purpose that could be extracted from the debates, i.e., to assure a specified percentage of federal procurement participation of a particular group merely because of its racial or ethnic origin, "such a preferential purpose must be rejected not as insubstantial but as facially invalid." *Regents of the University of California* v. *Bakke*, 438 U.S. at 307 (Powell, J.). As Justice Powell declared, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* (Citations omitted.) [8]

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[8] In the equal employment opportunity area, it should be noted, this Court has repeatedly indicated that where past discrimination by a specific employer has not been shown to have been a factor contributing to a racial imbalance between an employer's workforce and the workforce in the appropriate labor market, preferential hiring of minorities to cure the imbalance cannot be *required*. *United Steelworkers of America, AFL-CIO-CLC* v. *Brian F. Weber*, 47 U.S.L.W. at 4855; *Cf. Dayton* v. *Brinkman*, 47 U.S.L.W. 7944 (U.S. June 26,

There should appear little doubt, however, that these same members of Congress had as an underlying purpose an intent to correct what they saw as inequities in the federally-related procurement process. By concentrating exclusively upon gross numbers to illustrate their point, they apparently sought to establish that minority businesses *generally* were not receiving an adequate share of the federal assistance contract dollar. They further implied that the root cause of this inadequacy stemmed from a lack of sophistication (*e.g.*, Conyers at Cong. Rec. H 1440, *supra*) in dealing with the "intricacies" of the federal procurement process—a sophistication presumptively enjoyed by well-established companies, the overwhelming majority of which are owned and operated primarily by "nonminority persons." Although such a purpose might under the circumstances be characterized as "benign," the hidden inequities inherent in preferences perceived as "benign," [9] as

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1979). As stated in *Furnco Construction Corp.* v. *Waters*, 46 U.S.L.W. 4966, 4970 (1978) the obligation imposed upon employers is to provide "an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce." See also *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. 424, 430 (1971) ("In short, the Act does not *command* that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.") (Emphasis added.)

[9] As Justice Powell stated in *Bakke*:

> There are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of particular groups in order to advance the

well as the constitutional difficulties in denying equal protection challenges where the "amorphous concept" of remedying "societal discrimination" is the goal are well known. *Regents of the University of California* v. *Bakke*, 438 U.S. at 307. In sum, such generalities would not meet the compelling government interest required of racial classification, for this Court has "never approved a [governmental] classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory

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group's general interest. See *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 172-173 (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 343 (DOUGLAS, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

438 U.S. at 298. *Cf. Swann, et al.* v. *Charlotte-Mecklenburg Board of Education, et al.*, 402 U.S. 1, 16 (1971) ("To [prescribe a ratio of Negro to white students reflecting the proportion for the district as a whole] as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.") (Emphasis added.) *Accord, Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974). *See also Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417 (1977); 47 U.S.L.W. 4944 (U.S. June 26, 1979).

violations." *Id.* at 307, citing *Teamsters* v. *United States*, 431 U.S. 324, 367-376 (1977); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 155-156; *South Carolina* v. *Katzenbach*, 383 U.S. 308 (1966). To the contrary, under the circumstances here, only where there has been exercised "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 measures." 98 S. Ct. at 302 n.41, would such racial classifications withstand scrutiny. This leads us to one final observation, and its constitutional consequences.

(2) We have at this point *exhausted* the legislative history of the minimum 10% MBE amendment. No "detailed legislative consideration of the various indicia of previous constitutional or statutory violations" [10] exists. Yet, this complete lack of any explicit findings of past discrimination was determined by the Second Circuit not to be fatal to the legislation's constitutionality, but merely "troublesome." 584 F.2d at 605. The Second Circuit found that Rep. Conyers' statements referred to past discrimination, and that this "finding" was buttressed by such discrete authorities as a Commerce Department Handbook on minority business opportunities and an unrelated House report from the previous Congressional session. *Id.* at 606. Even these authorities, however, are so seriously compromised by generalities concerning "historical exclusion" that evidence of *past discrimination*, as opposed to under-participation, still do not appear "on the record," even in the text of the dis-

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[10] 438 U.S. at 302 n.41, citing *South Carolina* v. *Katzenbach*, *supra*.

trict and circuit court opinions below.[11] Except for a possible finding of underrepresentation, when Congress enacted the legislation, it did not *in fact* find, even in a solely conclusory manner, that minority businesses had been *excluded* from procurement opportunities.

B. The set-aside program has been enforced inflexibly with a view toward neither detecting discriminatory acts nor formulating appropriate remedies.

In *Regents of the University of California* v. *Bakke*, *supra*, Justice Powell indicated approval of legislative schemes where "there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations . . . (citation omitted), *and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies.* See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 103 (1976)." 438 U.S. at 302 n.41 (emphasis added). Similarly, Justice Brennan declared that the court opinions in *Bakke* stood

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[11] Neither of the extraneous sources cited by the Second Circuit (and, in the first instance, by the district court) contain anything other than conclusory statements. Thus, the Commerce Department Handbook's conclusion that "the severe shortage of potential minority entrepreneurs with general business skills is a result of their historical *exclusion* from the mainstream economy" (emphasis added) is found to constitute an "ample basis" for Congress to conclude the same. 584 F.2d at 606. Likewise, the House report cited refers to a "business system which has traditionally excluded measurable minority participation" without so much as a hint of specificity, except in that it finds minority business participation particularly low in the construction industry. *Id.*

for "the central meaning" that "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantage cast on minorities by past racial prejudice, *at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.*" *Id.* at 325. (Emphasis added.) Implicit in the Court's language is the need, mandated by law, not only to articulate the wrongs to be remedied, but to carefully fashion remedies *as they are required.* The rigidity of the minority business set-aside here reviewed, however, is reflected not only in the total lack of legislative findings to support its enactment, but in the inflexible manner in which it has been enforced.

As indicated earlier in this brief, the set-aside amendment was amended once during floor consideration in the House to give the Secretary of Commerce discretion in the application of the provision. Such discretion supposedly would be used in rural areas with insignificant minority populations, or as a vehicle for accommodating conflicting state or local public contract laws. Whatever discretion the Secretary could reasonbly be said to enjoy under the provision, however, certainly has not been reflected in subsequent administrative guidelines. In the "Guidelines for 10% Minority Business Participation in LPW Grants" ("Guidelines"), the Secretary of Commerce declared that the Economic Development Administration (EDA) of the Commerce Department would "enforce the 10% MBE participation requirement strictly" (Guidelines at 1), and that "a Grantee situated in an area where the minority population is very small may apply for a waiver before requesting

bids on its project or projects if it can show that there are *no* relevant, available, qualified minority business enterprises which could reasonably be expected to furnish services or supply materials for the project." *Id.* at 15 (emphasis added).[12] With respect to potential conflicts with state or local public contract laws, the guidelines have been equally inflexible:

> "Some state or local laws involving bidding procedures or other matters may make fulfillment of the 10% MBE requirement difficult for some Grantees. *It is the responsibility of each Grantee to find ways of achieving 10% MBE participation regardless of such laws.* If qualified, *bona fide* MBEs are available, *EDA will not grant a waiver of the 10% MBE requirement because of difficulties caused by state or local law.*" Guidelines, at 14 (emphasis added).

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[12] The difficulty of obtaining a waiver from the minimum 10% MBE requirement is illustrated again later in the guidelines:

> Only the Grantee can request a waiver. Ordinarily a waiver request will be considered only after the Grantee and its prime contractors have taken every feasible action to achieve at least 10% MBE participation. For example, if the Grantee or its prime contractors have taken all feasible steps to locate relevant MBE's and have requested all available qualified MBE's to participate as contractors, subcontractors or suppliers and not enough MBE's can or will participate to reach the 10% MBE participation goal, a waiver request detailing the efforts of the Grantee and its prime contractor may be necessary in order for the project to proceed. Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful.

Guidelines for 10% Minority Business Participation in LPW Grants, at 14-15.

As the Comptroller General has indicated, "[a]lthough EDA was granted broad discretion in implementing the provision, it elected to enforce it stringently by not granting early waivers." "Minority Firms On Local Public Works Projects—Mixed Results," COMP. GEN. REP. CED-79-9 at 38 (Jan. 16, 1979). One result has been that two district courts were compelled to find the minimum 10% MBE provision unconstitutional as applied within their districts. See *Wright Farms Construction, Inc.* v. *Kreps*, 444 F. Supp. 1023 (D. Vt. 1977), and *Montana Contractors Association* v. *Secretary of Commerce*, 460 F. Supp. 1174 (D. Mont. 1979), appeal dismissed, 47 U.S.L.W. 3810 (U.S. June 19, 1979). *See also Associated General Contractors of California* v. *Secretary of Commerce, supra* (MBE provision unconstitutional on its face). Although, as the Government notes (Memo. of Sec. of Commerce in Opposition, at 8 n.3), other courts were not disturbed by the program's inflexibility, it cannot be gainsaid that the minimum 10% MBE provision was enacted with a degree of rigidity that administrators subsequently determined to be nearly absolute.

The administration of the minimum 10% MBE provision thus reinforces the conclusion that the racially-based set-aside was not enacted to remedy findings of specific past discrimination, but rather was understood as a vehicle for distributing government funds to achieve a degree of racial balance in the participation of various businesses. But since racial classifications are "presumptively invalid," "regardless of purported motivation," and can be upheld "only upon an extraordinary justification," *Personnel Administrator of Mass., et al.* v. *Helen B.*

Feeney, 47 U.S.L.W. 4650, 4654 (U.S. June 5, 1979), the *Amicus* submits that the legislative history of the MBE provision, being devoid of specificity, falls short of achieving this unequivocally high standard, and thus exposes a constitutionally fatal flaw in the MBE provision's enactment.

C. The absence of a compelling government interest to support the imposition of a rigid, racially-based set-aside is further evidenced by the nature of other minority business assistance programs.

The government argues that the minimum 10% MBE provision is one among a number of statutes "designed to eliminate discrimination from federally funded programs and from particular areas of the economy or other spheres of activity in which the federal government has a substantial interest." (Jurisdictional Statement of U.S. at 19.) Although the Government then cites a number of economic assistance and civil rights statutes, it fails to indicate that none of these other statutes includes a rigid racially-based set-aside to be enforced without consideration to remedying past acts of discrimination.

Likewise, the Government has argued that the Small Business Act's Section 8(a) program, which "has been upheld on several occasions" (Juris. Statement of U.S. at 20-21), further supports the use of racially-based set-asides. The Section 8(a) program, it should be noted, has been invoked by several courts [including the district court below, 443 F. Supp. at 260] to uphold the legislation here challenged, and sponsors of the legislation in both the House and Senate did in fact rely upon the legitimacy of the Section 8(a) program as precedent [123 Cong. Rec.

at 1437 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell) and 123 Cong. Rec. at 3910 (daily ed. March 10, 1977) (remarks of Sen. Brooke)]. Because of this heavy reliance on Section 8(a) of the Small Business Act, the *Amicus* herein urges the Court to consider the following brief analysis of the Section 8(a) program, which, we submit, demonstrates that it does not constitute precedent for the legislation here challenged, but, to the contrary, raises further questions about its constitutionality.[13]

Unlike the legislation challenged here, Section 8(a) of the Small Business Act, 67 Stat. 232, 15 U.S.C. §§ 631-647, on its face has never defined eligibility for federal assistance in strictly racial or ethnic terms. Until its amendment in 1978, which created a statutory standard, eligibility under the Section 8(a) program was defined by administrative regulation in terms of social and economic deprivation, and used certain racial and ethnic classifications to illustrate likely beneficiaries.[14] According to a report

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[13] Both Congress and the courts have cited other minority business assistance programs, among them the executive order program under OMBE (E.O. 11625, *supra* note 1) and the Department of Transportation minority business program (see *supra* note 1). These and other programs like them are sufficiently dissimilar from the legislation here challenged to merit attention only in a latter section of this brief, Part II, which indicates the less intrusive alternatives Congress has at its disposal for remedying the underutilization of MBEs.

[14] The Small Business Administration had defined the business concerns eligible for this program as follows:

> "An applicant concern must be owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive posi-

by a Section 8(a) review board, however, less than 4% of 8(a) companies in the then current portfolio were owned by persons not within the racial and ethnic categories stated specifically in the regulations.[15]

The constitutionality of the Section 8(a) program has been challenged primarily on the grounds that, as administered, it favors applicants from certain racial and ethnic groups, and thus violates the equal protection rights of nonminority contractors. These challenges have yet to resolve the issue conclusively. In *Kleen-Rite Janitorial Services, Inc.* v. *Laird*, unreported, No. 71-1968 (D. Mass., Sept. 21, 1971), the court held that competitive bidding is not required under Section 8(a) and that the program does not violate the Fifth Amendment because the class of persons eligible is not defined racially but by social or economic disadvantage. This important distinction was indicated again unequivocally in *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 334 F. Supp. 194 (S.D. Fla. 1971), *rev'd*, 477 F.2d 696, *reh'g denied*, 478 F.2d 1403 (5th Cir.), *cert. denied*, 415 U.S.

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tion in the economy because of *social or economic disadvantage*. Such disadvantage may arise from cultural, social, chronic economic circumstances or background, or other similar cause. Such persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, Oriental-Americans, Eskimos, and Aleuts. Vietnam-era service in the Armed Forces may be a contributing factor in establishing social or economic disadvantage." 13 C.F.R. Part 124.8-1(c) (1977) (emphasis added).

[15] See "Report and Recommendations on the Section 8(a) Program for A. Vernon Weaver, Administrator SBA" at 23 (§ 8(a) Review Board, January 31, 1978).

914 (1973), where the constitutionality of the program was left in doubt precisely because of its racial impact.[16]

Contrary to the implications in the Government's brief, as well as statements by Members of Congress and the opinions of some lower courts, cases such as *Ray Baillie* and *Kleen-Rite* reflect uncertainty over the program's legality. Indeed, such cases could indicate that Section 8(a) may be constitutionally permissible only when read as permitting all disadvantaged persons to apply for its benefits on an equal basis. In defending the program, commentators have taken care to note that the term "disadvantaged" should be considered a colorblind criterion for purposes of legal justification.[17]

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[16] In *Ray Baillie*, a small business engaged in refuse hauling challenged the private placement of subcontracts for refuse disposal by the Administrator of the Small Business Administration and the Secretary of the Air Force. Although the district court's decision that subcontracts under Section 8(a) could not be awarded noncompetitively was overturned on appeal, the constitutional issue was not addressed by the appellate court because plaintiffs were found to lack standing, 477 F.2d at 709. The district court specifically found, however, that the Section 8(a) program was violative of equal protection of the laws because "the primary criterion for eligibility is race, color, or ethnic origin," and the [p]laintiffs have been excluded from consideration because of their race." 334 F. Supp. at 202.

[17] That the Section 8(a) could be so justified would rest upon a finding that it did not in fact incorporate a racial or ethnic test:

> ". . . there is broad authority in the Economic Opportunity Act of 1964 for agencies of the Government—the Small Business Administration particularly—to use their

It should be noted as well that the 1978 amendments to the Small Business Act, Pub. L. No. 95-507, 92 Stat. 1757 (1978) ("the Act"), maintained the program's emphasis on disadvantaged status. Eligibility for the program was for the first time statutorily defined in terms of "socially and economically disadvantaged individuals." Whereas Congress made a finding that socially disadvantaged individuals "include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities" (the Act, § 201), it nevertheless defined social disadvantage generally as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." The Act, § 202.

The *Amicus* submits that whatever the legality of the Section 8(a) program, or other minority business programs described below, the legislation challenged here enjoys *none* of the potentially legitimizing characteristics of other programs. Unlike the Small Business Act, the legislation contains rigid set-aside requirements based exclusively upon racial and ethnic considerations. Moreover, as shown below, when the

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> related programs in a way to compliment and advance the purposes of this Act—helping the disadvantaged. This category often includes, but is *not* restricted to, Black Americans, American Indian, Spanish Americans, Oriental Americans, Eskimo and Aleuts. It *is not limited to any particular racial group.*"

Knebel, *Legal Basis for SBA's Minority Enterprise Program*, 30 FED. B.J. 271, 276 (1971) (emphasis added); *Cf.* Comment, *Minority Construction Contractors*, 12 HARV. C.R.-C.L. L. REV. 693, 701-15 (1977).

minimum 10% MBE provision is compared with other MBE assistance programs, not only is the inflexibility of the challenged legislation exposed as unique, but evidence clearly emerges that other, less intrusive means of achieving equal procurement opportunity in federal assistance programs do exist.

II. IN ENACTING THE MINIMUM 10% MBE SET-ASIDE PROVISION, CONGRESS FAILED TO DETERMINE ADEQUATELY WHETHER LESS INTRUSIVE MEANS EXISTED TO ACCOMPLISH ANY OF ITS STATED OR "PERCEIVED" OBJECTIVES.

Accepting *arguendo* the notion that Congressional intent to remedy past acts of discrimination could be gleaned from the scarce and, where it exists, vague legislative history available, the constitutional question still remains whether Congress has chosen the least discriminatory means of accomplishing its objective. *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 16-17 (1973); *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Dunn* v. *Blumstein*, 405 U.S. 330, 342-43 (1972). Without engaging in this inquiry formally, the Second Circuit determined that judicial approval of the Labor Department's affirmative action "Home Town" plans legitimized the racial preference program here, and that because the MBE provision had such a relatively small (.25%) impact upon total annual construction expenditures in the United States, the MBE provision satisfied the equitable limitations placed upon the imposition of racial quotas by the Second Circuit previously. 584 F.2d at 600, 607-608. In both respects, however, the *Amicus* submits that the authorities cited are inapposite to the circumstances presented here.

The "Home Town" plans, as they were approved in cases such as *Associated General Contractors* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), and *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 954 (1971), were expressly addressed to remedying proven egregious and long-standing exclusion of minorities by various construction unions. Thus, in his opinion in *Bakke*, *supra*, Justice Powell cited the "Home Town" cases with approval as good examples of an "administrative body charged with the responsibility of mak[ing] determinations of past discrimination by the industries affected, and fashion[ing] remedies deemed appropriate to rectify the discrimination." 438 U.S. at 301. These cases were disapproved by Justice Powell as precedent for the University of California to implement racial and ethnic "set-asides" in its medical school class based only on statistical disparities in minority representation and without a finding of past discrimination. Similar to *Bakke*, *supra*, the record here lacks specific findings of prior discriminatory acts in the granting and awarding of contracts.

Nor do other Second Circuit decisions cited by the Court below as upholding quotas in the equal employment opportunity area support its conclusion here. In fact, in those cases the Second Circuit has shown strong reluctance to impose preferential treatment for minorities. In *Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), that court approved temporary racial hiring quotas for the city's police department, but disapproved promotion quotas because

"[t]he impact of the quota upon [incumbent whites] would be harsh and can only exacerbate rather than diminish racial tensions." Moreover, the hiring quota was approved "somewhat gingerly" even though the city had persisted in using an archaic employment test, failed to seek minority recruits, and the quota was well below the minority population of the city and, presumably, did not suggest the concept of parity hiring. The court, indeed, found that "the most crucial consideration . . . is that this is *not a private employer* and *not simply an exercise in providing minorities with equal opportunity employment.*" 482 F.2d at 1341 (Emphasis added.)

In *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976), the court criticized racial quotas as "repugnant to the basic concepts of a democratic society" and observed that the Second Circuit had approved quotas only where there was a clear-cut pattern of long-continued and egregious racial discrimination and the absence of a showing of "identifiable reverse discrimination." 520 F.2d at 427. The *Bridgeport Guardians* distinction between hiring quotas and promotion quotas was echoed in *Kirkland*, and repeated in *Chance* v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *mod. on other grounds*, 534 F.2d 1007 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).

Finally, in *EEOC* v. *Local 638*, 532 F.2d 821 (2d Cir. 1976), the court interpreted its own *Kirkland* decision as having promulgated *two-fold requirements* for the imposition of temporary quotas of all

kinds: *a clear cut pattern of long-continued and egregious racial discrimination, and the dispersal of the effects of "reverse discrimination" among a group of non-minority persons who are not "identifiable."*

Considering its previously enunciated policies, one would anticipate that the Second Circuit in this case would have vigorously explored whether Congress did not have less intrusive means than a rigid racial preference program to achieve its objective. Had it done so, it would have reached the same conclusion as the district court in *AGC of California* v. *Secretary of Commerce, supra,* that alternative means did exist:

> "In this case . . . this Court has previously found, and continues to believe that means of promoting employment of minority group contractors less intrusive than the 10% racial quota enacted by Congress existed. As pointed out in the Court's original decision, the MBE provision does not limit itself to businesses which have previously experienced a prescribed level of income or unemployment. In addition, Congress has never demonstrated that affirmative action plans in this industry are not feasible. Furthermore, the 2-15% MBE provision in the most recent bills introduced in Congress, while still maintaining a quota system, may indeed be less intrusive than the original strict 10% quota system." 459 F. Supp. at 780-81.

There is more than mere speculation involved in the California district court's findings. In fact, the government has undertaken a program to encourage the development of minority business enterprises

without using rigid quotas. Under Executive Order No. 11458, 34 Fed. Reg. 4937 (1969), as amended by Executive Order No. 11625, 36 Fed. Reg. 19962 (1971), there was established within the Department of Commerce the Office of Minority Business Enterprises (OMBE). Under this order, OMBE is authorized to provide financial assistance to public and private organizations that render management and technical assistance to MBEs. Significant OMBE programs have included Business Development Organizations (BDOs); Minority Business and Trade Associations (MB & TAs); Business Resource Centers (BRCs); Private Resource Programs (PRPs); Contracted Support Services (CSSs); and State Offices of Minority Business Enterprise (State MBEs). OMBE also participates in other activities supporting minority enterprises, including the Interagency Council for Minority Business Enterprise and the MESBIC program (Minority Enterprise Small Business Investment Companies).

Moreover, even where Congress has sought to promote MBE opportunities in direct federal procurement with the use of goals, it has not required a specific percentage of MBE participation, but instead has explicitly chosen *flexible* programs. For example, Congress recently enacted a law, Pub. L. No. 95-507, 92 Stat. 1757 (1978) (the "Act"), which, in effect, mandates affirmative action in government procurement. Part of the new legislation amends Section 8(d) of the Small Business Act to require, generally, that the apparent successful or apparent low bidder on large federal contracts [18] submit, before award of

[18] The threshold figures stated in the Act are $1,000,000 for contracts for construction of any public facility and $500,000 for all other contracts.

contract, a subcontracting plan setting forth "percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned or controlled by *socially or economically disadvantaged individuals*." (Emphasis added.) The Act, § 211. The prime contractor also must describe the efforts it will take to assure that such companies have an "equitable opportunity" to compete for subcontracts. *Id.* In avoiding a rigid percentage requirement, the Act plainly contemplates the development of flexible goals.

The California district court's reference to a flexible 2-15% minority set-aside and 10% nationwide target, proposed in a Round III to the Public Works Act, raises yet another, less intrusive alternative. Although the proposed legislation was not enacted, see Daily Labor Report No. 204, at A-4 (BNA Oct. 20, 1978), it was found sufficiently attractive by the Comptroller General to win his endorsement as a program *preferable* to the minimum 10% MBE set-aside in the 1977 Act. After criticizing several aspects of the 1977 Act's administration, the Comptroller General concluded that:

> ". . . a minority provision or policy should be designed so that the social and economic benefits can be increased and at the same time, many of the problems discussed in this report can be reduced or eliminated. To meet a goal of 10 percent participation, flexible percentages should be established based on the availability of minority firms. The legitimacy of minority firms should be certified before receiving contracts as part of meeting a minority requirement. Only a supplier's commission or markup on sales should be counted toward the minority goal. Exceptions

> could be made for suppliers who manufacture their product such as a concrete pipemaker. Also, Federal funds should be released gradually so that assistance provided to minority firms is extended over a longer period to better prepare such firms to become competitive within the construction industry." "Minority Firms on Local Public Works Projects—Mixed Results," *supra*, at 41.

In his recommendation to Congress, the Comptroller General urged that minority provisions "use a flexible percentage for applying the minority requirement based on the availability of minority firms and/or percentage of minority population in certain areas measured against an overall goal." *Id.*, at 42.

In sum, alternatives to a minimum 10% MBE setaside do exist, and regardless of their own legal merits, either on their face or as applied, those reviewed above contain various degrees of flexibility and thus perforce represent less objectionable methods to increased utilization of MBEs than the rigidly-fashioned legislation here reviewed.

It should be noted, at this point, that this brief has discussed less restrictive alternatives to the minimum MBE amendment in more depth than either that which can be found in the relevant legislative debates, or that which can be found in the opinion of the court below. Yet, it is not the petitioner who has the burden of showing that a less restrictive alternative exists. On the contrary, it is the government which must prove that there are no less restric-

tive means. See *Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065, 1122 (1969).[19]

Moreover, although this Court has declared that "the Constitution does not require the state to choose ineffectual means to achieve its aims," *Stores* v. *Brown*, 415 U.S. 724, 736 (1974), it has not made "equal effectiveness" the standard by which presumptively invalid classifications may be upheld. Thus, for example, in *Carrington* v. *Rash*, 380 U.S. 89 (1965), this Court invalidated the denial of the right to vote enjoyed by armed forces personnel who moved to the state, on the basis that more precise tests were available to determine bona fide residency. However, "[i]t is obvious," as one commentator noted, "that *some* additional administrative costs would be incurred by replacing the presumption with the more precise tests." (emphasis in original) Note, *A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 876 n.379 (1978). *See also Vlandis* v. *Kline*, 412 U.S. 441 (1973) (statutory irrebuttable presumption that certain applicants for in-state tuition at a university were nonresidents found constitutionally infirm, because a more refined test of residence was practicable). Consequently, the vague expression of a member of Congress that a previous, unrelated MBE

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[19] The *Amicus* acknowledges that "a party cannot reasonably be asked to anticipate and refute every possible challenge to its position." Note, *A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 881 (1978). But even "if the government is asked only to disprove plausible alternatives proffered by the plaintiff or the court, burden of proof will have been reasonably allocated in cases where an important personal interest is significantly infringed or where the classification is almost prima facie unfair." *Id.*

assistance program had not achieved sufficiently high MBE participation in federal procurement (see statements of Rep. Mitchell, summarized *supra*) hardly illustrates a legislative review of plausible alternatives and, in any event, does not justify resort to a set-aside procedure that, as illustrated by the review of equal employment opportunity case law, constitutes such an extreme form of relief.

III. PRINCIPLES ESTABLISHED UNDER EEO LAW SUPPORT THE CONCLUSION THAT THE IMPOSITION OF SET-ASIDES MAY BE INVOKED ONLY AS A LAST RESORT, AND THAT WITHOUT ANY FINDINGS OF PAST ACTS OF DISCRIMINATION, THEY MUST NOT BE INVOKED AT ALL.

As this Court has indicated on a number of occasions, where equitable considerations are involved, "the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); and *The Regents of the University of California* v. *Bakke*, 438 U.S. at 300-01 (1978). This limitation is most apparent in the manner in which the courts have addressed quota remedies in the EEO area. The opinion below merely pays lip service to these equitable limitations upon racial preferences, with the consequence that its uncritical analysis leads to a result plainly at odds with the overwhelming weight of judicial precedent.

The general approach of most courts to the imposition of quotas under Title VII has been one of circumspection bordering on hostility. The Fourth Circuit, for example, has indicated that ". . . § 703

(j) [of Title VII] forbids court ordered preferential treatment designed solely to achieve a racial balance, as well as the formulation of liability based merely on the lack of racial balance." *Lewis* v. *Tobacco Workers*, 577 F.2d 1135, 1141 (4th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3455 (U.S. Jan. 9, 1979).[20]

As indicated in Part II of this brief, *supra*, until the Second Circuit issued its opinion below, it had established a long precedent for approaching quotas similarly with a jaundiced eye. Other circuit courts also have declared unequivocally that quota relief should be reserved for particularly egregious discriminatory practices that have been properly established on the record. *See, e.g., Ostapowicz* v. *Johnson Bronze Co.*, 541 F.2d 394 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977) ("Quotas are an extreme form of relief and, while this Court has declined to disapprove their use in narrow and carefully limited situations [citations omitted], certainly that remedy has not been greeted with enthusiasm"); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977) ("[T]he necessity for preferential treatment should be carefully scrutinized and . . . such relief should be

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[20] *Cf., Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978). *See also, Crockett* v. *Green*, 388 F. Supp. 912, 921 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976) "[R]atio hiring or quota relief is an unusual and extraordinary remedy and does not automatically follow from the finding of any kind of discrimination . . . [It] is appropriate . . . [where] . . . it appears to be the *only* possible means to provide relief for racial discrimination." (Emphasis added.); *Dawson* v. *Pastrick, supra*, 19 EPD at 760 (preferential relief is an "extraordinary" remedy "of last resort".).

required only when there is compelling need for it."); *NAACP* v. *Allen*, 493 F.2d 614, 621 (5th Cir. 1974) (The quota "is a form of relief which should be reserved for those situations in which less restrictive means have failed or in which the chancellor could reasonably foresee that they would fail.") These decisions, among others, establish that EEO-related statutes provide no basis for fashioning a remedy based upon background underrepresentation statistics not directly related to past acts of discrimination. *See, e.g., Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 ("Title VII imposes no requirement that a workforce mirror the general population"); *cf. Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974) (§ 1981).

In addition, as we indicated previously during discussion of the "Home Town" Plan cases (*see, e.g. Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra*), there is no basis for assuming that the Constitution, as opposed to EEO statutory law, looks any more favorably upon such an extreme remedy invoked without at least the correction of specific discriminatory acts as the explicit objective. Those cases, it will be recalled, involved constitutional and other challenges to the implementation of Presidential Executive Order No. 11246 (30 Fed. Reg. 12319 (1965)), as amended by Executive Order No. 11375 (32 Fed. Reg. 14302 (1967)), and 43 Fed. Reg. 46501 (1978) (E.O. 11246), which requires that all nonexempt government contracts and subcontracts include an equal opportunity clause pursuant to which the contractor or subcontractor undertakes not to discriminate on the basis of race, color, religion, sex or national origin

and also to take affirmative action to ensure that applicants and employees are treated "without regard" to those factors (Sec. 202(1)). Although the courts in those cases approved minority group employment goals under E.O. 11246[21] where underutilization had been shown, they did so expressly in cases with proven egregious and long-standing exclusion of minorities by various construction unions. See 442 F.2d 159, 163, 173. The "Home Town" Plan cases thus indicate that statistical imbalances, standing alone, are an insufficient basis by which Government can legitimately indulge in racial classifications.

One factor that distinguishes the "Home Town" Plan cases from this case, of course, is that they concerned the constitutionality of an executive order, whereas this case concerns the lawfullness of a statute. However, this distinction only makes the limitation upon this particular racially based set-aside

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[21] Under regulations promulgated pursuant to E.O. 11246, federal contractors are required to undertake a written workforce analysis and develop a written affirmative action compliance program for each of their establishments. If a contractor's "utilization" of available minorities or women is numerically deficient, it must develop "goals and timetables" to overcome the underutilization in any particular job group. Revised Order No. 4, 43 Fed. Reg. 49249, *et seq.*, Part 60-2. Although Government officials have stated that, unlike Title VII, the statistical imbalances that trigger these affirmative action requirements need not be connected to any showing of past or present discrimination (*see, e.g. Hearings on S. 2115, etc., Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92nd Cong. 1st Sess. 77, 78 (1971); Nash, *Affirmative Action Under Executive Order 11246*, 46 N.Y.U. L. REV. 225, 229-30 (1971)), the legality of this proposition has never been definitively established.

program more evident. By addressing on its merits the equal protection challenge in a case such as *Contractors Association of Eastern Pennsylvania* v. *Secretary of Commerce*, 442 F.2d at 176-77, the Third Circuit was indicating that the implementation of racial preferential programs via an executive order is subject to the constitutional limitations upon government action. If an executive order is subject to such limitations, a statute would not enjoy a lesser restriction, particularly where both the executive order and the MBE statute relate to racial preferences in the context of federal assistance programs.

Accordingly, unless the minimum MBE participation plan here was undertaken *voluntarily* between private parties, *United Steelworkers of America* v. *Brian F. Weber, et al.*, 47 U.S.L.W. 4851 (U.S. June 27, 1979), there is no basis for finding, as the Second Circuit did, that EEO-related law provides support for approving government compelled racially-based set-asides that are unaccompanied by findings of past acts of discrimination. And since the minimum 10% MBE set-aside reviewed here is a legislative scheme, it is, of course, the antithesis of the voluntary preferential plan described by the *Weber* majority.

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the judgment of the Second Circuit should be reversed with instructions that the order of the district court be vacated and that petitioners be granted appropriate relief.

Respectfully submitted,

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