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, et al., *Respondents.*

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AS *AMICI CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Interest of the Amici

A. The National Association for the Advancement of Colored People

The National Association for the Advancement of Colored People (NAACP) is the oldest and largest civil rights organization in America, with 500,000 members in 1,800 branches throughout the country. The NAACP appears frequently in this Court representing the interest of blacks and other minorities and often files briefs *amicus curiae* in cases of special importance to Negro Americans.

The case presently before the Court is of particular concern to the NAACP because it involves consideration of the statutory protection which Congress has extended to the minority construction industry. Over the years, the NAACP has expended a large proportion of its resources in attempting to open the nation's construction industry to black workers and contractors. We have often filed suit against construction labor unions and contractors as well as public agencies dispensing funds for public construction projects where blacks and others were excluded from employment opportunities. See: *Volger* v. *McCarty, Inc.*, 407 F.2d 1047 (CA 5, 1969); *Sims* v. *Sheet Metal Workers Local 65*, 489 F.2d 1023 (CA 6, 1973); *Dobbins* v. *IBEW Local 212*, 292 F.Supp. 413 (S.D. Ohio 1968); *Ethridge* v. *Rhodes*, 268 F.Supp. 83 (S.D. Ohio 1967). We have persistently urged Congress and the executive branch to create programs such as the one at issue in order that blacks would finally have opportunities to share in the federal largesse of building construction. Over the last decade, the NAACP has conducted surveys of minority construction concerns and has participated with the Department of Housing and Urban Development in organizing minority firms and obtaining bonding for them so that they could bid on federally financed projects.

The instant case presents a challenge both to the statutory device containing the greatest potential for admitting blacks into the construction industry and to the very authority of Congress to enact such remedial legislation. If the Petitioners are successful in this challenge, blacks and other minorities will once again be relegated to their historic statistical invisibility in the nation's construction industry and the Congress will presumably be obliged to find some alternative means for preventing the public financing of private racial exclusion.

B. The United Auto Workers of America (UAW)

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) represents some 1,500,000 active workers and their families, in the automobile, aerospace, agricultural implement and related industries. Including spouses and children, UAW represents more than 4½ million persons throughout the United States and Canada. The UAW, since its founding days in the mid-30's, has worked diligently against all forms of discrimination and racism and in favor of affirmative action.

The effect of the government program challenged in this case is to encourage the formation and success of minority construction businesses, a development long overdue in our society. One important side-effect of having an increased number of minority-owned contractors is an expanded pool of trained minority craftspersons. The government program in question therefore makes a significant contribution to the UAW's efforts toward increased minority representation among the skilled trades workers it represents.

We believe that affirmance by this Court of the decision below is a necessity for further progress towards minorities obtaining their rightful economic place in our society, both as entrepreneurs and as employees.

Consent of the Parties

With the consent of the parties pursuant to Rule 42 of the Supreme Court Rules, Amici respectfully submit this brief in support of the Respondents.

Summary of Argument

The legislation here in issue, the minority set-aside provision of Public Law 95-28, 42 U.S.C. § 6705(f)(2), is appropriate remedial legislation under the 14th Amendment that does not offend the due process clause of the 5th Amendment. As applied to Negroes, it is constitutional as an exercise of Congressional authority under Section 2 of the 13th Amendment.

The narrowly drawn statute is a Congressional response to a known pattern of discrimination against minorities in the construction contracting industry. Such a pattern has been documented in numerous reports to Congress and other governmental documents available to it. In responding to this well-documented problem, Congress has made a finding that the rights of minorities have been violated and has enacted appropriate remedial legislation, as envisioned by this Court in the opinion of Justice Powell in *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978).

As applied to Negroes the statute is supported by Congress' power, under Section 2 of the 13th Amendment, to legislate to eliminate the badges and incidents of slavery, recognized by this Court in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968). It is consistent with a long history of affirmative action by Congress benefitting the decendants of freedmen, beginning with legislation extending the Freedmen's Bureau and continuing to date.

The set-aside provision is therefore constitutional under Congressional authority derived from both the 13th and 14th Amendments.

ARGUMENT

I.

The Minority Set-Aside Provision of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), Does Not Violate the Due Process Clause of the Fifth Amendment to the United States Constitution.

A. *The Statute Is Constitutional If Supported by Adequate Congressional Findings of Past Discrimination and Appropriate Remedial Intent.*

The decision by Congress to guarantee, *where possible,* a proportion of federally financed construction work to minority contractors has been attacked here as race-based legislation, involving an inherently suspect classification and requiring "strict scrutiny" by this Court. Whether this legislation is to be measured by the "strict scrutiny" standard, as the courts below have done, or whether it may be measured by a somewhat more relaxed standard of review reserved for appropriate remedial legislation, the statute is well within Congressional enactment authority.

In *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978), this Court considered in depth the applicability of the Equal Protection Clause to affirmative action programs. Justice Powell, in the opinion announcing the judgment of the Court, describes as proper precisely the type of legislation involved here.

> "Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected and fashioned remedies deemed appropriate to rectify the discrimination. E.g., *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (CA 3), cert. denied, 404 U.S. 954, 30 L. Ed. 2d 95, 92 F. Cp. 98 (1971); *Associ-*

ated General Contractors of Mass., Inc. v. *Altschuller,* 490 F.2d. 9 (CA 1 1973), cert. denied 416 U.S. 957, 40 L. Ed. 2d 307, 94 S. Ct. 1971 (1974); cf. *Katzenbach* v. *Morgan,* 384 U.S. 641, 16 L.Ed. 2d 824, 86 S. Ct. 1717 (1966)." 438 U.S. at 301-302.

His opinion also noted,

> "Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach* v. *Morgan,* 384 U.S. 641, 16 L. Ed. 2d 824, 86 S. Ct. 1717 (166); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 20 L. Ed. 2d 1189, 88 S. Ct. 2186 (1968). *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 measures.*" 438 U.S. at 302 fn. 41 (Emphasis added).

Four members of this Court would have gone even further, describing "the central meaning of [the *Bakke*] opinions" as:

> "Government may take race into account when it acts not to demean or insult any racial groups but to remedy disadvantages cast on minority by past prejudice, at least when appropriate finding has been made by judicial, legislative or administrative bodies with competence to act in this area." 438 U.S. at 325 (Brennan, White, Marshall and Blackmun, JJ. concurring in part and dissenting in part).[1]

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[1] Though the remaining four members of this court did not reach the constitutional question, having decided the case on statutory grounds. 438 U.S. at 408-412, 421 (Stevens, Stewart, Rehnquist, JJ. and Burger, C.J., concurring in part and dissenting in part).

The minority set-aside provision of the Public Works Employment Act of 1977, 42 U.S.C. Section 6705(f)(2), meets the test of adequate Congressional findings of prior discrimination in the construction industry, as well as being narrowly tailored to achieve its remedial purpose. The legislation, moreover, may be viewed as enacted pursuant to Congressional power under both the Fourteenth and Thirteenth Amendments. It is therefore not in violation of the Equal Protection Clause of the Fourteenth Amendment, as incorporated and made applicable to the federal government by the Due Process Clause of the Fifth Amendment. See, e.g., *Bolling* v. *Sharpe*, 374 U.S. 497, 499 (1954).

B. *The Statute, Its History and Context Reflect That It Was Intended as Remedial Legislation Designated to Correct a Gross Exclusion of Minorities From the Federally Financed Construction Industry.*

The brief legislative history of the statute, placed in its context of years of efforts by the Congress and the executive to bring minorities into the mainstream of federal contracting, amply demonstrates a compelling need for such remedial measures. The operation of the statute which allows flexibility in applying its requirements is well suited to the purpose of the statute. The failure of a variety of measures attempted by the federal establishment in this area over the last decade underscores the virtual lack of viable alternatives to a set-aside guarantee.

The circumstances surrounding the passage of the ten percent set-aside clause of P.L. 95-28, the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), are well described by the courts below in this case. *Fullilove* v. *Kreps*, 443 F. Supp. 253 (S.D.N.Y. 1977), *aff'd.*, 584 F.2d 600 (CA 2, 1978). Because the amendment was urged on the floor of the House during debate on the bill, the brief remarks of the bill's supporters constitute the statute's

limited legislative history. Notwithstanding this truncated legislative history, the courts below are quite correct in ascertaining that Congress intended the amendment to provide minority business enterprises (MBE's) with a guaranteed inclusion in the federal effort to relieve a financially depressed sector of the economy.

The amendment was not proposed or adopted in an information vacuum. Congress had before it extensive prior Congressional testimony and findings concerning the absence of blacks and other minorities from participation in building construction nationally. From 1941 to 1946, the Fair Employment Practice Committee repeatedly investigated and documented the exclusion of black workers from the federally financed, craft union-controlled wartime construction industry.[2] More recently, the U. S. Commission on Civil Rights has reported to Congress and the Executive on the exclusion of minorities from the national construction industry.[3] In its 1975 report to the President and the Congress on minorities and women as government contractors, the Commission documented the failure of several affirmative efforts to bring minority contractors into the mainstream of federally funded projects. See, U.S. Commission on Civil Rights, *Minorities and Women as Government Contractors,* May, 1975.

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[2] See, Hill, H., *Black Labor and The American Legal System,* 235-47 (1977). Prof. Hill points out that during World War II, the government itself entered into a series of closed-shop agreements with construction craft unions having "white only" clauses in their constitutions and by-laws.

[3] In its 1961 Report, the Commission found that a significant proportion of the nation's construction workers were covered by union collective bargaining agreements and that there was a uniform pattern of exclusion of black workers by such craft unions as the Iron Workers, Steamfitters, Plumbers, Electrical Workers, and Sheet Metal Workers. See, United States Commission on Civil Rights, Book 3, *Report on Employment,* 127-131 (1961).

In 1969-1970, the amicus NAACP participated under contract with the Department of Housing and Urban Development in conducting a survey of minority construction firms. See, *A Survey of Minority Construction Contractors,* U. S. Department of Housing and Urban Development, 1971. The survey disclosed that of 870,000 identifiable contracting firms in the U.S. construction industry, less than 8,000 were owned by minority group members and almost 70% of the predominantly black contractors had never performed any government financed work. *Id.* at 1, 8. The HUD survey concluded that, "it would be unrealistic to conclude that racial discrimination is not, overall, a formidable barrier for minority firms in the housing industry. The overt and subtle methods of discrimination can be assumed to be as influential there as elsewhere." *Id.* at 20.

The significance of the 1975 Report to Congress of the U.S. Commission on Civil Rights concerning minorities and women as government contractors is that it constituted both an announcement of the failure of earlier efforts to include these groups, as well as a clear call for additional and more productive measures.[4] See also, *United Steelworkers of America* v. *Weber,* 61 L.Ed.2d 480, 486 fn. 1 (1979) and the authorities cited therein regarding the thoroughly documented history of racial discrimination in the construction industry. By 1977, when Congress was considering a $4 billion expenditure to relieve the severely

[4] In their transmittal letter to the President and the Congress, the members of the Commission wrote: "The three special Federal programs established to assist minority-owned firms have experienced limited success in increasing the number and dollar value of contracts awarded to these firms. . . . The Commission trusts that its findings and recommendations will prove helpful to the executive and legislative branches as they seek to structure programs that will be more responsive to the needs of minority firms and will provide new opportunities for non-minority, female-owned firms." *Report, supra* ii-iii.

depressed construction industry, it had already received a large amount of data through the years showing that blacks and other minorities, whose unemployment rates were geometric progressions of the white unemployment rate, would benefit little if at all unless special inclusive measures were undertaken. This knowledge fully explains why the brief comments of Reps. Mitchell, Conyers and Biaggi and Sen. Brooke in support of the amendment challenged here were undisputed and sufficient to document the purpose of the legislation.

C. *The Statute Meets the Strict Scrutiny Standard, Because It Is Narrowly Drawn to Accomplish the Compelling Legislative Purpose of Redressing Prior to Discrimination.*

In considering the constitutionality of the MBE set-aside amendment, both the Second Circuit below and the Third Circuit in *Constructors Association of Western Pennsylvania* v. *Kreps,* 573 F.2d 811 (1978), applied the traditional standard of review for race-based legislation—that of "strict scrutiny", concluding in both cases that the amendment passes constitutional muster. Under this standard, any legislation or official conduct that draws racial or ethnic distinctions is to be deemed inherently suspect and must be subject to strict scrutiny. *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967). In order to withstand a constitutional attack, the distinction drawn must serve a compelling government purpose and be the least restrictive means of achieving that purpose. *Regents of the University of California* v. *Bakke, supra* (Opinion of Justice Powell). In the courts below, the amendment was correctly found to indeed serve a compelling government interest through a means wholly appropriate to that end.

The basic purpose of the underlying legislation, growing out of and expanding the provisions of Title I of the Local Public Works Capital Development and Investment Act of

1976, P. L. 94-369, 90 Stat. 999-1012 (1976), was to provide massive federal relief to the construction industry. In 1977, with a doubling of the federal funding over the prior year's expenditures, it was known that the benefit of this aid would have little impact on soaring minority unemployment rates without some special inclusive feature. To a significant degree, it was also known that this enormous appropriation was being used to finance the private sector's historic patterns of racial exclusion from construction industry work. It was therefore not only a legitimate and compelling concern of Congress to include the most disadvantaged into the federal largesse, it was also a necessary measure to assist in disentangling the federal government from its role as foremost financier of private racial discrimination.

This Court has repeatedly recognized the special competence of a legislative body in enacting remedial measures involving the conscious use of race or ethnicity where it has been determined that racial exclusion has existed on a widespread basis in the past and would continue to exist without the imposition of affirmative remedial legislation. *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966); *United Jewish Organizations* v. *Carey,* 430 U.S. 144 (1977); *Bakke, supra* at 302, fn. 41; *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).

The MBE set-aside amendment is particularly suited to the purpose of the legislation for it guarantees, *where possible,* that those who need the intended relief the most will receive a fair share of it. A decade of less dramatic affirmative attempts at including blacks and other minorities into the construction industry had simply not worked to an appreciable degree. The legislation permits reasonable exemptions, it allows federal contractors great flexibility in including MBE's into their bidding proposals, it allows

competitive bidding only among contractors who have included MBE's or obtained exemptions, and it does not require or result in the exclusion of any identifiable racial or ethnic group.

The ten percent figure for the minority set-aside is especially reasonable in view of the fact that blacks alone represent a higher percentage of the national population, coverage of other minorities bringing the minority population figure substantially higher. In the absence of a long history of discrimination against minorities in construction contracting, Congress could surely reasonably have concluded that their representation among government contractors would have been well above ten percent. See: *Weber, supra* 61 L.Ed.2d at 486.

Because this legislation was enacted by Congress to redress well-documented, extensive prior racial discrimination, and was narrowly tailored to meet that goal, it comes well within the scope of Congress' enactment power under Section 5 of the Fourteenth Amendment. This compelling purpose withstands even strict equal protection scrutiny. The decision below should therefore be affirmed.

II.

The Minority Set-Aside Provision Is Constitutional as Applied to Negroes as an Exercise of Congress' Power Under Section 2 of the Thirteenth Amendment to Eliminate the Badges and Incidents of Slavery.

A. *Congress Has the Long-Standing Power to Act to Eliminate the Badges and Incidents of Slavery.*

The minority set-aside clause, like any other duly enacted statute, is entitled to a presumption of constitutionality, *South Carolina State Highway Department* v. *Barnwell Bros.,* 303 U.S. 177, 195 (1938). This Court has held that if a constitutional basis can be found to uphold a law, it is "irrelevant whether this reasoning in fact underlay that legislative decision." *Flemming* v. *Nestor,* 363 U.S. 603, 612 *rehearing denied* 364 U.S. 854 (1960). Therefore the courts have a duty to search out a constitutional basis or bases to support Congressional action.

While the set-aside clause as applied to Negroes may find its basis in the "unique obligation" [*Morton* v. *Mancari,* 417 U.S. 535, 555 (1975)] of Congress toward Negroes arising, *inter alia,* out of their treatment under Article I, Sections 2 and 9, and Article IV, Section 2 of the Constitution, the Missouri Compromise and the Fugitive Slave Laws [See Justice Marshall's opinion in *Regents of the University of California* v. *Bakke, supra*], the legislation is clearly authorized under Section 2 of the Thirteenth Amendment. The Freedmen's Bureau legislation and other remedial measures enacted in the post-Civil War period pursuant to the Thirteenth Amendment are clear examples of Congressional action to provide public benefits specifically to Negro Americans where, on account of a history of past exclusion, they are not presently receiving those benefits.

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court held that under Section 2 of the Thirteenth Amendment Congress had power to legislate against the acts of private individuals as well as those of states and to determine what steps were necessary to effectuate the terms of Section 1 of the Amendment. In so doing it stated:

> "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and to translate that determination into effective legislation." P. 440

The minority set-aside, like much of the Reconstruction era legislation, was an exercise of that authority.

B. *Congress Has Enacted Race-Conscious Affirmative Action Legislation as a Means of Eliminating the Badges and Incidents of Slavery.*

One of the most striking examples of legislation designed to fulfill the obligation to eliminate the effects of slavery through affirmative action is that establishing and extending the Freedmen's Bureau in the Civil War and immediate post-Civil War era. The Bureau was established in 1865 pursuant to war powers. The Bureau's legislative history clearly shows that it was intended to benefit newly freed slaves. Congressman Elliot, Chairman of the House Judiciary Committee, which reported S.60, a bill to extend and increase the authority of the bureau stated, in response to a question on the difference between "freedmen" and "refugees":

> "I suppose refugees to be those who are not freedmen; that is to say those who had not been in slavery. Colored refugees may be freedmen or they may not; but refugees may be white; and when the terms 'refugees' and 'freedmen' are used, I suppose the difference

would be that the refugees are white." 71 *Cong. Globe* 516, 39th Cong., 1st Sess.

The reports of the freedmen's bureau indicate that although it did assist "loyal refugees" who were white, its principal concern was with blacks. This led to considerable opposition in Congress to continuation of the Bureau. See, for example, speeches of Senators Guthrie, Saulsbury, Johnson and Davis and Congressman Taylor against S. 60, 71 *Cong. Globe* 336, 362-3, 372-3, 396, 421, 544; 73 *Cong. Globe* 2780, 2362. See also President Johnson's veto messages on the two bills, labelling them class legislation that favored the freedmen over whites. 71 *Cong. Globe* 915-18; 75 *Cong Globe* 3850.

The first attempted extension of the bureau (S. 60), which passed Congress but was successfully vetoed by President Johnson, and the successful one (H.R. 613), 14 Stat. 173, passed in 1866 over his veto, were race specific. Some sections of the extension statute applied to freedmen only. Section 6 confirmed land grants in South Carolina made to "heads of families of the African race." Section 7 authorized disposition of certain lands to persons who had been dispossessed from the land occupied under a war time field order of General Sherman. The only persons who would qualify were Negroes. Congress was aware of this, as Senator Trumbull had referred to a similar provision in S.60, which he authored:

> "Major General Sherman in his order states that certain lands would be set apart for the benefit of freedmen . . . There are some forty or fifty thousand [N]egroes upon those lands." 71 *Cong. Globe* 299, 39th Cong. 1st Sess.

Section 13 of the law provided that the Commissioner of the bureau should cooperate with private benevolent associ-

ations of citizens in the field of education in aid of freedmen by providing buildings to be used for their education.

When legislation was passed to start phasing out the bureau's operation, this educational affirmative action by the federal government was continued by Congress. Under 15 Stat. 83, the bureau was continued but the Secretary of War was authorized and directed to discontinue its general operations in any state that had reestablished its relationship with the United States and whose representatives had been seated in Congress. However, the bureau's educational activities were to be continued until the states had made suitable provision for the education of the children of freedmen, and the Commissioner was authorized to use unexpended funds for the education of freedmen.

Literally thousands of school for blacks were opened and operated with the assistance of the bureau. One observer stated that at the beginning of 1886 there were 4,000 operating with its help. Dyson, W., *Founding of Howard University, Howard University Studies in History #1*, 22 (1921). In November 1867, the Commissioner of the Bureau reported that the assisted schools had reached the most remote counties of each of the Confederate states. He further reported there was at least one college or normal school operating in each of these states for the education of freedmen. Among those assisted were Atlanta, Fisk, Wilberforce and Lincoln Universities and Storer College. Peirce P., *The Freedmen's Bureau,* 77-8 (1971). When the Bureau ceased operations, it turned over 50 buildings to religious and philanthropic organizations in South Carolina alone to be used for the education of the freedmen. Abbott, M., *"The Freedmen's Bureau and Negro Schooling in South Carolina," The South Carolina Historical Magazine,* Vol. LVII, No. 2, 69 (1956). This was pursuant to 15 Stat. 83.

Congress passed other legislation that was of exclusive benefit to blacks in the post-Civil War period. 14 Stat. 367 limited the fees that agents or attorneys could charge "colored soldiers" for assistance in collecting pension benefits and otherwise protected them from being bilked. 15 Stat. 20 appropriated federal funds for the relief of "freedmen and destitute colored people in the District of Columbia." 16 Stat. 8 authorized continuation of "the freedmen's hospitals in Richmond, Virginia; Vicksburg, Mississippi; and in the District of Columbia." This last continued in operation with federal assistance until it was merged, pursuant to legislation passed in 1961, with Howard University, 75 Stat. 542, P.L. 87-262.

Legislation establishing the Freedmen's Bureau and related measures was founded on the Thirteenth rather than the Fourteenth Amendment. It was passed by Congress at a time when the 14th Amendment was two years from ratification, but after the 13th Amendment had been ratified.

The sponsor of H.R. 613, Representative Eliot, noted that the previous Congressional legislation for the bureau had been enacted prior to the adoption of the 13th Amendment and therefore did not apply to those freed by the amendment but only to those previously free or freed by military action. 73 *Cong. Globe* 2772, 39thCong., 1st Sess. The establishment of the bureau was based on the war powers, but its continuation and expansion were based on the 13th Amendment.

Senator Trumbull, the author of S. 60 and Chairman of the Judiciary Committee that had reported out both S. 60 and the 13th Amendment, also was on record that his bill was based on this amendment:

> "I reported from the Judiciary Committee the second section of the constitutional amendment for the very

purpose of conferring upon Congress authority to see that the first section was carried out in good faith, and for none other; and I hold that under the second section Congress will have the authority, when the constitutional amendment is adopted, not only to pass the bill of the Senator from Massachusetts, but a bill that will be much more efficient to protect the freedman in his rights. We may, if deemed advisable, continue the Freedmen's Bureau, clothe it with additional powers, and if necessary back it up with a military force, to see that the rights of the men made free by the first clause of the constitutional amendment are protected." 71 *Cong. Globe* 43, 39th Cong., 1st Sess.

Later in debate he stated:

"I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end. If we believe a Freedmen's Bureau necessary, if we believe an act punishing any man who deprives a colored person of any civil rights on account of his color necessary—if that is one means to secure his freedom, we have the constitutional right to adopt it." 71 *Cong. Globe* 322.

Speaking in opposition to S.60, Senator Stewart acknowledged the basis for the bill:

> "The Senator from Illinois has introduced two bills [S.60 & S.61] . . . under the [13th] constitutional amendment." 71 *Cong. Globe* 298.

Speaking on the bill, Senator Fessenden, although stressing the war power as the bill's constitutional base, noted also the 13th Amendment as supporting it:

> "I might go further, and say that if everything else failed I might even perhaps agree with my friend, the honorable Chairman of the Committee on the Judiciary, that under the second provision of the constitutional amendment, giving power to enforce the previous provision granting the freedom of the [N]egro, we might do all that we judged essential in order to secure him in that liberty the enjoyment of which we have conferred upon him." 71 *Cong. Globe* 366.

Congress, in passing the laws extending the Freedmen's Bureau and otherwise providing for freedmen and their descendants, asserted its authority and intent to act affirmatively under Section 2 of the 13th Amendment to eliminate the badges and the incidents of slavery. The work in the area of affirmative action on behalf of the freedmen begun by the 39th Congress did not end with the termination of Reconstruction. There are at least two examples (now merged) of its continuation to 1979. The first was the continuation of Freedmen's Hospital in the nation's capital. The second is Howard University. That institution was chartered by Congress in 1867. It was assisted in acquiring land and in becoming organized by the Freedmen's Bureau. From that time until the present it has received continuing federal assistance. In its first hundred years, this amounted to $215,204,392.00 in operating and construction funds. Logan R., *Howard University —The First Hundred Years,* App. B, Tables I and II (1969).

Although the university was founded as an integrated institution, the assistance of the Freedmen's Bureau was contingent on Howard's making special provision for the freedmen. This condition is in the deeds transferring title of the buildings built by the bureau to the university. Holt, T., C. Smith-Parker and R. Terborg-Penn, *A Special Mission: The Story of Freedmen's Hospital,* 1862-1962, 11 (1975). Since its very early years it has fulfilled that mission and its student body has been and is predominently black.

In extending assistance to the university and to Freedmen's Hospital through the years, Congress has been aware of the nature of the special consideration given the descendants of freedmen. This was emphasized at the hearings on the bill merging them, passed in the 87th Congress. The then Secretary of the Department of Health, Education and Welfare, Abraham Ribicoff, in testifying before the Congressional Committee considering the bill, stated it was the administration's purpose to assist the university to promote excellence while "keeping its doors open to young people who have been handicapped economically and educationally *by the happenstance of race.*" (Emphasis added.) Hearings, House Committee on Education and Labor, 87th Congress, 1st Sess., on H.R. 6302, 62 (1961). Senator Ribicoff also noted the origins of Freedmen's Hospital and its role in caring for the "Negro war refugees and 'freedmen' who flocked to Washington in the 1860's," and that it was the one freedmen's hospital that was continued by annual Congressional appropriations.

Thus, beginning with the passage of the Freedman's Bureau Act of 1866, there has been a continuous pattern of support by Congress under the 13th Amendment for institutions founded and extended for the purpose of aiding ex-slaves and their descendants to throw off the badges and incidents of slavery.

C. *Congress Has Determined That One of the Badges and/or Incidents of Slavery Is the Limitations Placed on the Right to Contract.*

When Congress passed the Civil Rights Act, R.S. 1777; 16 Stat. 144, it determined that one of the badges and incidents of slavery was the limitation placed on the right of blacks to enter into and enforce contracts. Accordingly it reaffirmed that all citizens should have "the same right to make and enforce contracts . . . as is enjoyed by white citizens" 42 U.S.C. §1981. This Court, in *Runyon* v. *McCrary,* 427 U.S. 160 (1976), upheld Congress' right under the 13th Amendment to legislate to protect the right of blacks to contract, as it had upheld protection of their property rights in *Jones* v. *Mayer, supra.* See extensive discussion of the legislative history in *Jones* v. *Mayer, supra,* 392 U.S. at 422-437, which demonstrates that interference with the rights of blacks to make and enforce contracts was a key purpose behind the enactment of the Thirteenth Amendment and the enactment of Section 1 of the Civil Rights Acts of 1866, the predecessor version of 42 U.S.C. Section 1981.

The legislation herein under attack comes within the heart of the purpose of the Thirteenth Amendment. This statute, like Section 1981, is aimed at remedying historical disadvantages imposed on minorities' right to contract. Once Congress determined that the right to enter into contracts was a right that was abridged by the "peculiar institution" of slavery, it had the power "to translate that determination into effective legislation." *Jones* v. *Mayer, supra,* 392 U.S. at 442.

Effectuating an unrealized objective of the Thirteenth Amendment provides a compelling purpose for this narrowly drawn statutory provision. The decision below must be affirmed because the Thirteenth, as well as the Fourteenth Amendment, supports the legislative enactment.

CONCLUSION

Because the statute is an appropriate exercise of Congressional power under both the Thirteenth and Fourteenth Amendments, it survives any level of equal protection scrutiny. Amici therefore respectfully urge this Court to affirm the decision of the Court below.

Respectfully submitted,

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